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Introduction

Kristen Clarke
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Welcome to this special edition of the *Department of Justice Journal of Federal Law and Practice (DOJ Journal)* focused on issues in criminal civil rights prosecutions. This edition is particularly important to me personally—as a junior attorney, I worked as a prosecutor in the Criminal Section of the Civil Rights Division, investigating and prosecuting the kinds of cases described in the following articles. From my time handling these matters, I know how important and challenging it is to prosecute these cases. I also know how rewarding the successful prosecution of these cases can be. These crimes are particularly suited to federal redress because, left unchecked, they undermine the very core of the rights and liberties guaranteed by the Constitution and civil rights laws.

The articles in this special series are designed for staff in U.S. Attorneys' Offices (USAO), including Assistant U.S. Attorneys (AUSAs) serving as civil rights coordinators for their districts. These articles will help such AUSAs analyze when it is possible to bring a civil rights prosecution. These articles are also designed to encourage U.S. Attorneys and civil rights coordinators to establish a robust civil rights practice and to conduct outreach to those communities in their districts most affected by civil rights crimes. Subject matter experts in the Criminal Section of the Civil Rights Division stand ready to assist you, whether you seek advice about setting up a specialized civil rights practice or request help analyzing cases.

This is the second civil-rights themed edition of the *DOJ Journal*. In January, a special edition covered civil remedies for civil rights violations. I encourage AUSAs to review the articles in that edition of the *DOJ Journal* even if their dockets consist exclusively of criminal matters. There may well be times when ongoing civil rights problems in their communities are better addressed through civil remedies or when civil remedies can complement criminal prosecution. For example, you may learn of troubling incidents of police misconduct in your district but conclude, after investigation, that you could not prove beyond a reasonable doubt that any individual police officer willfully violated an individual's civil rights. Likewise, there may be times when an excessive force prosecution *is* possible, but you

conclude that the problem goes far deeper than one individual officer's misconduct. In such cases, a pattern-or-practice investigation may be the better vehicle to assess and resolve these systemic concerns. Similarly, there may be bias-based incidents in your community that do not rise to the level of prosecutable hate crimes but do constitute unlawful discrimination that can be redressed through civil remedies. These incidents could include, for example, bullying or harassment inside schools, a hostile work environment gone unchecked by an employer, or a bias-driven effort to block construction of a house of worship. Specialists in the civil sections of the Civil Rights Division can assist you in determining whether civil remedies are appropriate and can help you pursue such remedies.

Collaboration between criminal and civil enforcement components of the Department is a high priority for the Attorney General and Department leadership, and that includes the referral of civil rights matters. In May 2021, Attorney General Garland issued a memorandum (AG Memorandum) announcing steps the Department would take to immediately improve the Department's Efforts to Combat Hate Crimes and Hate Incidents.¹ The Memorandum called on USAOs to designate points of contact for both civil and criminal civil rights "[t]o ensure that the Department is fully utilizing all of its tools, authorities, and expertise—across civil and criminal law."²

Outreach is key to effective civil rights enforcement and prevention. USAOs are nationwide leaders in violent crime reduction, advancing the rule of law and promoting the fair administration of justice. This includes efforts to combat hate crimes, law enforcement misconduct, and human trafficking. To effectively reduce crime at the local level, it's important to garner community buy-in. That means building relationships with community leaders and residents, listening to their description of their community's needs and priorities, and then effectively communicating how USAOs and other Department efforts can address those issues and help to increase public safety.

This edition of the *DOJ Journal* includes two articles *by* AUSAs and *for* AUSAs about setting up a successful civil rights practice generally and, specifically, setting up a practice related to human trafficking cases. The edition also covers four kinds of prosecutions that fall

¹ Memorandum from the Att'y Gen. on Improving the Department's Efforts to Combat Hate Crimes and Hate Incidents to Dep't Just. Emp. (May 27, 2021).

² *Id.*

within the expertise of the Criminal Section of the Civil Rights Division: (1) hate crimes; (2) color of law offenses; (3) human trafficking, involuntary servitude, and slavery; and (4) Freedom of Access to Clinic Entrances Act violations (FACE).

Hate crimes, law enforcement misconduct, and human trafficking offenses form the backbone of the Civil Rights Division's criminal docket. These crimes require proof of different elements and demand different strategic approaches, but they have much in common: They all have historic roots in the crucible of violence committed against Black communities and other racial minorities following the Civil War and in legislation drafted in response to deter such violence.

Not long after the Civil War ended, white supremacist groups like the Ku Klux Klan formed to terrorize newly freed people of color. Although any African American might be victimized based on nothing more than the color of his skin, these violent extremists particularly targeted newly emancipated individuals determined to exercise their core citizenship rights, including the right to vote or hold political office. The purpose of the violence was to keep state and local governments in the control of white office holders.³ It was not uncommon for white state and local law enforcement officers to join the Klan in this effort, creating relationships that would last for over a century.⁴

Meanwhile, plantations, factories, railroads, mines, and other industries needed cheap labor. State governments soon recognized that the Thirteenth Amendment's prohibition of slavery and

³ This sentiment is perhaps best illustrated by a cartoon by Thomas Nast. Thomas Nash, *This Is A White Man's Government*, HARPER'S WEEKLY, Sept. 5, 1868, at 568.

⁴ The most well-known example of this relationship occurred in the Mississippi Burning case, detailed in *United States v. Price*, in which Deputy Sheriff Cecil Price and Klansmen from Neshoba and Meridian, Mississippi, conspired to kill civil rights workers participating in Freedom Summer. *United States v. Price*, 383 U.S. 787, 792 (1966). For an early example, during the Colfax massacre, Confederate veterans and other white supremacists slaughtered African Americans to protect the rights of white, fusionist candidates to hold office. See John Montoya, *Defying Congressional Intent: Justices Miller and Bradley Alter the Course of Reconstruction*, 10 COLUM. J. RACE & L. 82, 109 (2020).

involuntary servitude did not apply to those convicted of a crime.⁵ Thus, state governments enacted a multitude of new laws, criminalizing petty offenses (such as vagrancy and theft of valueless items) that were enforced almost exclusively against formerly enslaved people.⁶ The police officers and sheriffs' deputies who enforced these laws often did so based on little or no evidence, understanding that Black witnesses could not testify in a court of law to dispute their allegations.⁷ Law enforcement officers even received financial incentives to arrest individuals whose labor could be exploited.⁸ Those convicted were then supplied to industries (either directly or by allowing an individual in need of labor to pay off the fine of a convict and to essentially enslave that convict until the "debt" was paid off). This link between law enforcement and human trafficking continued far into the 20th century. At the same time, new forms of human trafficking evolved, often targeting people of color and other marginalized or vulnerable people to exploit their labor.

During Reconstruction, Congress enacted legislation to prevent Klan violence,⁹ peonage,¹⁰ and misconduct by persons acting under color of law.¹¹ These laws provided the foundation for our modern-day civil rights laws.

Sadly, more than 150 years after the Civil War ended, there continues to be a need for vigorous enforcement of civil rights laws. Inequality in policing persists, and unarmed people of color are too often the victims of police violence. Cries for racial justice, particularly

⁵ *Free Laborers, Unions and Convict Labor, Slavery by Another Name*, PBS, <https://www.pbs.org/tpt/slavery-by-another-name/themes/labor-types/>; Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 908 (2019); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1490 (2019).

⁶ See Pope, *supra* note 5, at 1490.

⁷ DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2009).

⁸ *Id.*

⁹ See Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 141 (1870) (codified as amended at 18 U.S.C. § 241).

¹⁰ See Anti-Peonage Act of 1867, ch. 187, 14 Stat. 546 (1867) (codified at 42 U.S.C. § 1994 and 18 U.S.C. § 1581).

¹¹ See Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (1866) (codified as amended at 18 U.S.C. § 242).

in the wake of the death of George Floyd, have focused on the problems of unconstitutional policing and bias—both overt and unconscious—that exists in some of our nation’s law enforcement agencies.

Articles in this edition discuss ways of investigating and, where appropriate, prosecuting those law enforcement officers who purposefully use excessive force. Although this is the policing issue that has received the most attention over the past year, the unconstitutional use of force is not the only basis for prosecuting law enforcement officers. This edition also contains articles addressing the prosecution of predatory officers who abuse their positions of trust to sexually assault individuals in their custody. In addition, an article in this edition discusses the increasing problem of law enforcement retaliation against those who say things perceived as being disrespectful to the police or to those who attempt to document police misconduct. Other articles discuss the possibility of prosecuting officers who willfully refuse to obtain medical attention for sick or injured individuals in their custody.

Similarly, hate crimes continue to plague America. In fact, the latest hate crime statistics illustrate that the problem has increased over the past decade. FBI statistics show that there were 7,759 reported hate crimes in the United States last year—the most in 12 years.¹² While African Americans remain the most frequent victims of hate crimes, during the pandemic, individuals of Asian descent have been increasingly targeted for acts of violence. Hate crime defendants continue to attack and threaten people because of their religious beliefs, particularly targeting synagogues, mosques, and historically Black churches for acts of violence. And although there has been great progress recently in recognizing the civil rights of LGBTQI+ individuals, gay, lesbian, and transgender individuals continue to be the subject of assaults and threats. Some hate crimes are intersectional crimes in which victims are targeted because of more than one characteristic. For example, victims may be targeted for being both gay and Black or for being both female and Asian.

In response to this increasing threat, the Department has taken some important steps to prevent and punish hate crimes. The FBI has

¹² *Hate Crime Statistics*, DEP’T OF JUST., <https://www.justice.gov/hatecrimes/hate-crime-statistics> (last visited Mar. 3, 2022).

elevated hate crimes and criminal civil rights violations to the highest level national threat priority. In his May 2020 directive, Attorney General Garland appointed a Department Anti-Hate Coordinator and tasked the Chief of the Criminal Section of the Department's Civil Rights Division with facilitating the expedited review of hate crimes. The Division has also appointed an attorney to review crimes against members of the Asian American and Pacific Islander community and to participate in outreach to that community. This special edition of the *DOJ Journal* includes an article on that outreach effort.

Other articles in this edition discuss the challenges of prosecuting anti-LGBTQI+ hate crimes, threats, cold cases, and hate crimes that also constitute acts of domestic violence extremism. Articles also discuss how, given widespread use of modern technology, it is important to gather cyber evidence.

The AG Memorandum also directed USAOs to engage in community outreach, including creating district-wide alliances against hate.¹³ The Civil Rights Division and the Executive Office for U.S. Attorneys are developing an online toolkit for USAOs, which will include a customizable community outreach presentation, as well as information about grants to assist state, local, and tribal law enforcement agencies combat hate crimes and increase reporting of hate crimes and incidents. Information about these resources and the outreach presentation is described in an article on Department resources for combating hate crimes.

Slavery and involuntary servitude still exist in the form of forced labor, sex trafficking, and similar offenses. Human trafficking preys on some of the most vulnerable members of our society. It is a crime of exploitation that deprives victims of their rights, freedom, and dignity. For this reason, I encourage every USAO to set up a strong anti-human trafficking program. An article in this series, written by two AUSAs experienced in human trafficking prosecutions, provides guidance on how USAOs can do just that. An article in the series also discusses the U.S.-Mexico Bilateral Human Trafficking Enforcement Initiative, an initiative led by the Criminal Section's Human Trafficking Prosecution Unit (HTPU) in collaboration with the Department of Homeland Security. The Initiative streamlines

¹³ Memorandum from the Att'y Gen., *supra* note 1; Press Release, Att'y Gen., Statement from Att'y Gen. Merrick B. Garland on the COVID-19 Hate Crimes Act (May 20, 2021).

coordination between U.S. and Mexican anti-trafficking authorities to advance bilateral investigations and prosecutions of transnational trafficking enterprises operating across the U.S.-Mexico border. Human trafficking points of contact can call on HTPU to provide expertise, guidance, and support in coordinating transnational and multi-district prosecutions, as well as others requiring the involvement of multiple federal agencies.

Although human trafficking has its roots in the overt violence and other forms of control that once were hallmarks of state-sanctioned chattel slavery, traffickers increasingly use nonviolent forms of coercion, and today's modern anti-trafficking statutes prohibit a wide range of coercive means, both physical and nonphysical. Thus, another article in our series highlights how to investigate and prosecute more subtle forms of coercion. Trafficking victims frequently suffer years of abuse and isolation, often by people they once trusted to help them. It may be difficult for law enforcement to earn the trust of such victims. That is why a successful human trafficking prosecution requires a victim-centered approach, which is discussed in another one of the included articles. Another article in this series discusses the mandate to seek restitution for victims of trafficking and provides guidance on how to do so.

Finally, enforcement of the FACE Act, which guarantees access to clinics providing reproductive healthcare, is particularly important now given certain anti-*Roe* legal and advocacy efforts underway in parts of the country. An article in this series discusses how to successfully prosecute a FACE Act case, including necessary collaborations between federal partners.

In sum, I hope that the articles in this series are useful to you. It is a sad truth that vigorous enforcement of civil rights continues to be necessary to preserve the civil rights and civil liberties of all Americans. I look forward to collaborating with each and every one of you in this important work.

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A Framework for Effective Civil Rights Enforcement

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I. Introduction

Hate crimes and police misconduct have devastated and divided communities across the country in recent years.¹ While each community is unique, the response when these incidents occur is often the same: a request that the Department of Justice (Department) intervene to enforce the criminal civil rights statutes passed by Congress to protect constitutional rights. As a result of recent laws and policy changes, federal prosecutors are better positioned than ever to prepare for those requests.²

¹ See *Hate Crime Statistics*, DEP'T OF JUST., <https://www.justice.gov/hatecrimes/hate-crime-statistics> (last visited Feb. 23, 2022) [hereafter *FBI 2020 Statistics*]; Michael Balsamo, *Hate Crimes in U.S. Reach Highest Level in More than a Decade*, AP NEWS (Nov. 16, 2020), <https://apnews.com/article/hate-crimes-rise-FBI-data-ebbcadca8458aba96575da905650120d> (last visited Dec. 14, 2021); *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> (last visited Feb. 23, 2022).

² *'The Heart of What We Do': Hate Crimes and Civil Rights Elevated to Top Threat Priority*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/news/stories/hate-crimes-and-civil-rights-elevated-to-top-national-threat-priority-063021> (last visited Feb. 23, 2022); COVID-19 Hate Crimes Act, Pub. L. No. 117-13, § 937, 135 Stat. 265 (2021).

II. The first steps to creating a civil rights practice

A U.S. Attorney's Office (USAO) can prepare itself to effectively serve its communities with two simple steps: (1) identify the concerns in your jurisdiction; and (2) develop a framework for a federal response when one of those incidents occur.

A. Identify the concerns in you jurisdiction

FBI data is a great place to start identifying the concerns in your jurisdiction.³ You can use this data to determine whether reported hate incidents have increased or decreased over the previous 10 years. Additionally, your jurisdiction and local partners will likely have records of the number of prosecutions and convictions of civil rights-related crimes in the communities.⁴ Further, when gathering this information, it is important to identify the communities targeted in your jurisdiction so that you can include those communities in future outreach.

This data will only tell part of the story, however, because these crimes disproportionately affect marginalized communities who are historically distrustful of law enforcement and often reluctant to report crimes.⁵ Getting the full picture of the concerns of your community may require rethinking your approach to engaging with historically marginalized communities. It also merits taking a proactive approach to identifying potential civil rights offenses that may have been overlooked previously. Further, it will require developing or deepening relationships with community groups who have relationships with members of your communities and individual law enforcement agencies, whose officers may someday be the subject of a civil rights investigation. Finally, weekly or bi-weekly searches of local and national media, advocacy group websites, and social media are a simple but effective way to identify and track civil rights incidents in your jurisdiction. This process will allow you to identify

³ *FBI 2020 Statistics*, *supra* note 1; *see also* Balsamo, *supra* note 1.

⁴ *See Hate Crimes: State Specific Information*, DEP'T OF JUST. <https://www.justice.gov/hatecrimes/state-specific-information> (updated Apr. 23, 2021).

⁵ MADELINE MASSUCCI & LYNN LANGTON, HATE CRIME VICTIMIZATION, 2004–2015 (2017) (concluding that approximately 54% of hate crime victimizations were not reported to police between 2011 and 2015).

and address the everyday civil rights concerns in your jurisdiction so that you have credibility when a high-profile civil rights incident occurs in your district.

B. A framework for planning

Now that you have identified the communities within your jurisdiction who can provide information about potential civil rights offenses, you need to (1) identify the stakeholders within those communities; and (2) listen to their concerns.

1. Identify the stakeholders in your jurisdiction

Determining who is involved in civil rights-related work in your jurisdiction will help you identify the stakeholders. First, look to nonprofit groups that work on behalf of historically marginalized communities. Often, national nonprofit groups will have local chapters and members with whom you can connect directly. Similarly, your jurisdiction likely will have local non-profits that may provide a different perspective on issues unique to your jurisdiction.⁶

Next, look to the plaintiff's bar and criminal defense attorneys in your jurisdiction, as they could play a critical role in identifying civil rights concerns. Victims of civil rights violations may not report these incidents to law enforcement but may, instead, pass the information on to an attorney in the jurisdiction. For example, if an inmate was beaten or sexually assaulted while in custody, the first person she may tell is her defense attorney or a civil lawyer retained to represent her once she is released from custody. These stakeholders can help identify potential civil rights offenses about which you might otherwise not know.

Finally, identify the state, local, and tribal law enforcement stakeholders in your jurisdiction who will often be the first-line responders to civil rights incidents in your communities. These stakeholders, including law enforcement agencies and prosecutors, will often be an invaluable resource for you in developing your civil rights program. Further, the civil Assistant U.S. Attorneys (AUSAs)

⁶ A good place to start for identifying groups in your particular area is the Department's Community Relations Service (CRS). The CRS website maintains resources for how to identify and effectively build relationships with local stakeholders. *Community Relations Service: Resource Center*, DEP'T OF JUST., <https://www.justice.gov/crs/crs-resource-center> (last visited Feb. 23, 2022).

working on civil rights matters are likely doing their own outreach and have their own network of referrals for learning about possible civil rights violations. Similarly, the FBI may be doing outreach, so it is important to make sure your efforts are coordinated.

2. Listen to the stakeholders

Now that you have identified your stakeholders, the next step is to listen to their concerns. This step requires (1) identifying their concerns; and (2) identifying their goals for addressing those concerns. Some of these concerns may be based on recent incidents or on what they perceive to be long-standing institutional problems. For example, one stakeholder may represent members of a religious community who have recently experienced hate incidents at their house of worship. They may request that local and federal law enforcement investigate these incidents as hate crimes. Or, you may have a stakeholder who represents members of the transgender community who have been misgendered in police reports describing attacks against them. That stakeholder may request a meeting to address this problem. While each of these scenarios is different, the underlying concerns highlight that stakeholders often have common goals and areas of concern. Here, they include: (1) defining the appropriate law enforcement response; (2) requesting law enforcement demonstrate sensitivity to marginalized communities; and (3) expressing the need for transparency in law enforcement decision-making. Identifying commonalities among the various stakeholders' concerns will allow you to develop a clearer picture of the needs of your jurisdiction and how you can best address them.

III. Establishing an effective civil rights enforcement program

Having worked hard to develop contacts with the relevant stakeholders, when a high-profile civil rights incident occurs, all eyes will turn to the Department to ask a simple question: How will the Department of Justice respond? An effective civil rights program will respond to this persistent and recurring question with varying and changing answers tailored to the circumstances.⁷ Building trust and

⁷ An effective response will often require consideration of both civil and criminal enforcement actions. This article is focused on criminal civil rights enforcement. The January 2022 issue of this journal contains additional

responding effectively depends, not on a “one-size-fits all” solution, but on open channels of communication.

A. Regular communication with stakeholders

Ongoing communication with state, local, and tribal law enforcement agencies in your jurisdiction will be vital when addressing civil rights incidents in your community. These conversations should, ideally, include career prosecutors and law enforcement partners, as well as elected or appointed officials to ensure continuity across administrations.

First, it is critical that federal and state partners understand the other’s jurisdiction to investigate and prosecute civil rights violations. In some cases, one jurisdiction may be better suited to prosecute a civil rights incident. For example, Colorado’s bias-motivated statute does not cover crimes motivated by sex, but some federal hate crime statutes do.⁸ Colorado has a broad bias-motivated harassment statute that does not require an interstate nexus, while federal prosecution for a true threat requires a nexus to interstate commerce or a federally protected interest.⁹

Next, federal and state partners should be aware of the penalties for their respective statutory civil rights violations, including statutory maximums, mandatory minimums, and whether a state has parole or other mechanisms that, as a practical matter, shorten any formal judgment. For example, some state sentencing regimes feature mechanisms for parole or “good time” credit that can drastically affect

information about civil enforcement options, including pattern-or-practice investigations. *Civil Rights Part I: Civil Issues*, 70 DOJ J. FED. L. & PRAC., no. 1, 2022.

⁸ Compare COLO. REV. STAT. § 18-9-121 (2021) (prohibiting certain unlawful acts motivated by another’s race, color, religion, ancestry, national origin, physical or mental disability, or sexual orientation), with 18 U.S.C. § 249 (2021) (prohibiting certain unlawful acts on many of those same bases, but also gender and gender identity).

⁹ Compare COLO. REV. STAT. § 18-9-111 (2021) (prohibiting certain forms of harassment and providing for increased penalties for harassment motivated by animus towards certain groups), with 18 U.S.C. § 245 (1996) (prohibiting true threats in some circumstances involving specific enumerated rights), 18 U.S.C. § 247 (2018) (prohibiting true threats against houses of worship where the threat has an effect on interstate commerce), and 18 U.S.C. § 2261A (2020) (prohibiting cyberstalking carried out over facilities of interstate commerce).

the practical effect of a criminal sentence, while federal sentencing has fewer variables. In Colorado, for example, the sentence in the judgment is automatically reduced by 50 percent and is further reduced by good-time credit and the opportunity for parole.¹⁰ As a result, depending on the circumstances, an offender may ultimately serve only about one-third of the announced sentence. By contrast, there is no parole in the federal system, and good-time credit amounts to a maximum reduction of approximately 15%.¹¹

Maintaining ongoing communication with non-governmental civil rights organizations and coalitions that have direct contact with members of their communities is essential to a successful federal civil rights practice. On May 27, 2021, the Attorney General recognized that USAOs must proactively engage with their communities and commit to ongoing relationships at all levels of law enforcement “so that collaborative relationships exist between agencies before they are called upon to address tragic acts of hate.”¹² Such “alliances against hate . . . could serve as focal points within communities to deepen partnerships between law enforcement agencies and the communities they serve.”¹³ Ideally an alliance will include a mix of community groups and law enforcement partners. For example, the Colorado U.S. Attorney’s Office works with the FBI, the Department of Homeland Security and other law enforcement entities to put on local “Protecting Houses of Worship” events providing personnel from diverse faith institutions with information about how they can protect their communities from violence.¹⁴ In addition, the Denver FBI developed a program called Colorado Courage that aims to “reduc[e] hate crimes and civil rights violations.”¹⁵ Colorado Courage includes members of “law enforcement [and] faith- and affinity-based communities throughout Colorado, many of whom have been historically subjected

¹⁰ See COLO. REV. STAT. §§ 17-22.5-403(1), 17-22.5-405(1).

¹¹ See 18 U.S.C. § 3624.

¹² Memorandum from the Attorney General on Improving the Dep’t Efforts to Combat Hate Crimes and Hate Incidents (May 27, 2021).

¹³ *Id.*

¹⁴ An event resource guide prepared by the U.S. Attorney’s Office for the District of Colorado is available through the Homeland Security Digital Library. See *Homeland Security Digital Library*, <https://www.hsdl.org> (last visited Feb. 23, 2022).

¹⁵ Press Release, FBI Denver, FBI Denver Initiative Promotes Civil Rights Engagement Through Community Outreach, (June 3, 2021).

to targeted violence.”¹⁶ The frequency of meetings will depend on the needs of each jurisdiction, but meeting at least once a month will ensure an effective response to dynamic local conditions and events. A typical agenda for each meeting will include updates from each group about its needs, recent incidents of concern, and where appropriate, a discussion of recent enforcement efforts.

B. Federal partnerships

Intake at the federal level should go beyond the notification requirements to the Civil Rights Division set out in the Justice Manual.¹⁷ Increasingly, the response to federal civil rights offenses requires dedicated efforts to build relationships with multiple components. Federal prosecutors across the country should develop good working relationships with Main Justice components to enable collaboration on civil rights matters. Further, a civil rights coordinator in a district should have a good working relationship with that district’s counterterrorism AUSA(s) (who, in turn, will provide guidance on any relevant national security statutes and protocols while working with the National Security Division), agents on any local joint terrorism task force, agents on the FBI’s civil rights squad, and officials at the Office of Justice Programs,¹⁸ Community Oriented Police Services,¹⁹ and the Community Relations Service.²⁰

¹⁶ *Id.*

¹⁷ Justice Manual 8-3.140 requires a U.S. Attorney’s Office to “provide written notification to the Civil Rights Division of the intention to seek an indictment or to file a felony information. This notification should occur at least 10 business days before the indictment will be presented to the grand jury” and “should be accompanied by a copy of the proposed indictment and a prosecutive memorandum.” JUSTICE MANUAL 8-3.140.

¹⁸ *See Off. of Just. Programs*, DEP’T OF JUST., <https://www.ojp.gov> (last visited Feb. 23, 2022).

¹⁹ *See About the COPS Office*, DEP’T OF JUST., <https://cops.usdoj.gov/aboutcops> (last visited Feb. 23, 2022).

²⁰ *See Community Relations Service*, DEP’T OF JUST., <https://www.justice.gov/crs> (last visited Feb. 23, 2022).

C. Developing protocols for coordination on civil rights incidents

Broad alliances between federal, state, local, and tribal partners are critical to an effective civil rights program. Standing alone, however, they are not enough. Sometimes, accounts of a civil rights incident will be privately reported to a law enforcement entity in a context that requires traditional and appropriate measures of law enforcement secrecy designed to protect victims, witnesses, and cooperators. This is true because, broadly speaking, the major federal hate crime statutes are triggered by violent acts, uses of dangerous weapons, and true threats that are almost always already prohibited, as a general matter, by the laws of a given state. It is also true because in most states, but not all, the conduct will be covered by a state hate crime statute.²¹

Similarly, an incident involving an officer's unreasonable use of force may implicate traditional state statutes prohibiting murder, aggravated assault, kidnapping, or other generally applicable criminal laws. It will also likely implicate the federal civil rights statute at 18 U.S.C. § 242.²² Depending on the facts, it may implicate federal obstruction statutes, such as 18 U.S.C. § 1519,²³ that have no clear state analog. The result can be a fragmented intake system that depends on the independent information-gathering networks of each law enforcement entity, that entity's preparedness to identify an incident as civil rights-related, and in some cases, the happenstance of which entity first receives a report from a victim or witness.

The first step to creating effective protocols for coordination on civil rights violations is to use the networks discussed in section II to convene a meeting to discuss a uniform investigative protocol for identifying civil rights incidents. The purpose of the meeting would be to obtain an agreement or understanding between each participating law enforcement entity to share reports of civil rights incidents and to create a definition of civil rights incidents that will uniformly be adopted by each participating entity. This definition will necessarily

²¹ See *Laws and Policies*, DEP'T OF JUST., <https://www.justice.gov/hatecrimes/laws-and-policies> (last visited Feb. 23, 2022); *ADL Hate Crime Map*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/adl-hate-crime-map>.

²² 18 U.S.C. § 242.

²³ 18 U.S.C. § 1519.

cast a wide net for review by trained officers and prosecutors, who can help ensure that incidents implicating civil rights are categorized appropriately as criminal or civil violations.

The second step is to establish a process to distribute reports of civil rights incidents to ensure that all partners are notified of a possible civil rights incident as quickly as possible. Each member should identify a centralized phone number, email, or other intake mechanism for each member or law enforcement entity to receive reports of possible civil rights incidents. This can be as simple as an email list serve, updated regularly with the contact information of each office's civil rights coordinator.

The third step is to evaluate the reported facts under the law. Executing this step requires a meeting between the responding federal agency, an attorney from the Criminal Section of the Civil Rights Division, the civil rights coordinator (or other assigned AUSA) in the relevant USAO, and the relevant local/state investigators and prosecutor's office. At this meeting, the assembled group should (1) determine the best way to share investigative resources; (2) determine how best to coordinate witness interviews; (3) evaluate, in real time, the best forum for the eventual prosecution of any incident that meets the elements of applicable state and federal civil rights statutes; and (4) evaluate, in real time, any advantages to engaging in "global" state/federal plea discussions involving resolution of both state and federal criminal liability, either consecutively or concurrently. Further, it is also important that federal prosecutors manage expectations with respect to the sharing of information and the timeline of a federal investigation

An early meeting between the relevant local/state and federal prosecutors is critical because the resulting civil rights investigation will likely be parallel federal and state investigations raising practical, ethical, and legal concerns.²⁴ For example, are the victims and witnesses more comfortable speaking with federal law enforcement than state or local authorities? Can and should witnesses be interviewed at the same time? If not, who should take the lead?

²⁴ See Memorandum from the Attorney General on Coordination of Parallel Crim., Civ., Regulatory, and Admin. Proc. (June 30, 2012). A best practice in any case involving parallel proceedings is to draft a parallel proceedings memorandum that provides clear guidance to the investigating team on how to properly proceed.

Does your jurisdiction have double jeopardy laws in place that limit a state prosecutor's authority? How will the respective prosecuting offices handle discovery? To answer these questions, federal prosecutors should familiarize themselves with the federal discovery obligations that may apply if a court determines that state authorities are part of the federal "prosecution team."²⁵ Similarly, federal prosecutors should make sure they thoroughly understand the Department's *Petite* policy, as well as the underlying caselaw governing the appropriate scope of state and federal coordination.²⁶

Additional considerations should be made regarding officer-involved shootings. Many states have statutes describing the mechanism by which the relevant state actors will respond. For example, Colorado law requires that each police department, sheriff's office, and district attorney develop a protocol for a multi-agency team that will review officer-involved shootings.²⁷ Even if there is no statute, many jurisdictions have clear protocols for determining who will conduct the relevant investigation and how it will be evaluated.²⁸ An effective civil rights response will understand these mechanisms and seek out local cooperation in reporting incidents to federal authorities so that they can be independently evaluated under federal law.²⁹

²⁵ See generally *United States v. Risha*, 445 F.3d 298 (3d Cir. 2006) (articulating three-part test for determining when material possessed by state agents may be constructively possessed by federal prosecutors); JUSTICE MANUAL 9-5.002.

²⁶ The Department's policy on dual and successive prosecutions, also known as the *Petite* Policy, is set forth in the Justice Manual. JUSTICE MANUAL 9-2.031.

²⁷ COLO. REV. STAT. 16-2.5-301 (2021). Other states have similar statutes. See, e.g., WIS. STAT. § 175.47 (2015).

²⁸ For example, the District Attorney's Office in San Diego conducts case evaluation briefings that involve the local U.S. Attorney's Office, the Civil Rights Division, the FBI, and the relevant local investigating agency. *Officer Involved Shootings: Frequently Asked Questions*, SAN DIEGO CNTY. DIST. ATT'Y, <https://www.sdcda.org/office/officer-involved-shootings> (last visited Dec. 15, 2021).

²⁹ The Department of Justice's Office of Community Oriented Policing Services maintains resources and references describing common practices. See, e.g., COMMUNITY ORIENTED POLICING SERVICES, DEP'T OF JUST., OFFICER-INVOLVED SHOOTINGS: A GUIDE FOR LAW ENFORCEMENT LEADERS (2016), <https://cops.usdoj.gov/RIC/Publications/cops-p350-pub.pdf>.

Finally, the fact that the Department ultimately declines a case for criminal prosecution should not be the end of the matter. Federal prosecutors must determine whether a referral to state, local, or tribal authorities is appropriate and coordinate with those agencies accordingly.³⁰ Further, each office should have a system in place for ongoing consultation and referrals to a civil AUSAs for evaluation of a cause of action under the civil enforcement statutes.³¹

IV. Conclusion

An effective civil rights program is an effective community engagement program. Successful collaboration with governmental and non-governmental community partners will lead to thorough investigations of civil rights incidents. Those investigations will lead to still more collaboration and prosecutions in a reinforcing cycle that will build the trust and goodwill that are necessary to create the space for difficult decisions in the midst of high-profile civil rights incidents.

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³⁰ Memorandum from the Deputy Attorney General on Ensuring Appropriate Coordination with State, Local, and Tribal Law Enforcement Authorities (Oct. 1, 2021).

³¹ Michael Goldberger et al., *Building a Civil Rights Practice for Civil Enforcement in a United States Attorney's Office*, 70 DOJ J. FED. L. & PRAC., no. 1, 2022, at 69.

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Prosecuting Color-of-Law Civil Rights Violations: A Legal Overview

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I. Introduction

In our constitutional democracy, government officials must exercise the power of their positions within the constraints imposed by law, and when they do not—when they abuse their authority by willfully depriving people of their constitutional rights—they may be charged with criminal offenses. This article discusses the two primary statutes that criminalize the actions of governmental officials who abuse their authority to deprive their fellow citizens of their constitutional rights: conspiracy against rights, 18 U.S.C. § 241, and deprivation of rights under color of law, 18 U.S.C. § 242.

Congress enacted these Reconstruction-era statutes under its authority to enforce the protections of the Fourteenth Amendment.¹ The statutes are unique in that, unlike most criminal laws, they do not penalize specific conduct listed in the statute but, instead, make it a crime to willfully violate individual rights guaranteed elsewhere, either in the U.S. Constitution or in other federal laws. The scope of the conduct covered by the statutes is, therefore, in one respect, quite broad. This broad authority to prosecute any number of constitutional violations is, however, narrowed by the requirement that the government prove that the defendant specifically intended to violate the right at issue and that the right at issue be one the law has made “specific and definite.”²

This article provides an overview of these two statutes, the essential elements of each, and some of the constitutional deprivations that federal prosecutors most frequently charge as violations.

¹ See *United States v. Price*, 383 U.S. 787, 789, 800–06 (1966); *Screws v. United States*, 325 U.S. 91, 98 (1945) (discussing legislative history of predecessor statute to section 242).

² *Screws*, 325 U.S. at 105.

II. 18 U.S.C. § 242: deprivation of rights under color of law

A. Overview

To prove a violation of section 242, the government must establish that the defendant acted (1) under color of law; (2) willfully; and (3) to deprive the victim of a constitutionally or federally protected right.³ Proof beyond a reasonable doubt of these three elements establishes a misdemeanor violation of section 242; to establish a felony violation, the government must prove a fourth element: That the offense resulted in bodily injury to the victim; involved “the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire” to commit the offense; involved kidnapping or aggravated sexual assault or an attempt to commit either of those offenses; or resulted in death.⁴

B. Color of law

A person who acts with the authority of the government acts under “color of law.”⁵ Federal,⁶ state, territorial,⁷ and local government officials and employees act “under color of law” when they use (or abuse) power derived from their official positions. Courts examine a variety of factors to determine whether a person acted under color of law in a particular situation, including whether the official was on

³ 18 U.S.C. § 242; *see* *United States v. Lanier*, 520 U.S. 259, 264 (1997).

⁴ 18 U.S.C. § 242.

⁵ *Screws*, 325 U.S. at 111 (“Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it.”); *United States v. Classic*, 313 U.S. 299, 326 (1941) (“Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of state law.’”).

⁶ *Screws*, 325 U.S. at 97 n.2 (“[F]ederal as well as state officials would run afoul of [18 U.S.C. § 242] since it speaks of ‘any law, statute, ordinance, regulation, or custom.’”).

⁷ *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 582–83 (1976) (explaining that “[t]he evident aim” of adding the word “territory” to the precursor of 42 U.S.C. § 1983 “was to insure that all persons residing in the Territories not be denied, by persons acting under color of territorial law, rights guaranteed them by the Constitution and laws of the United States”).

duty, wore a uniform, displayed a badge, identified herself using an official title, used government-issued equipment, or took actions or issued commands only an official could take or give.⁸ Government officials, such as police officers, will nearly always be found to be acting under color of law when they are on duty and in uniform. But it is possible for a person to act under color of law while off duty, just as it is possible for a person to act in a private capacity while on duty.⁹ For example, a police officer who makes an arrest while working a private security detail and invokes her position as a police officer may act under color of law even if she is off duty. Likewise, an on duty officer who commits domestic assault using his personal weapon and not invoking his status as an officer may not.¹⁰ Police and corrections officers are the most frequent defendants in section 242 prosecutions, but the United States has successfully prosecuted many other categories of defendants—including judges, prosecutors, probation officers, doctors, and hospital aides—under this law.¹¹

⁸ See *United States v. House*, 684 F.3d 1173, 1202–03 (11th Cir. 2012); *Jocks v. Tavernier*, 316 F.3d 128, 134 (2d Cir. 2003); *United States v. Christian*, 342 F.3d 744, 751–52 (7th Cir. 2003); *Pickrel v. City of Springfield*, 45 F.3d 1115, 1118 (7th Cir. 1995); *United States v. Tarpley*, 945 F.2d 806, 809 (5th Cir. 1991); *Revene v. Charles Cnty. Comm’rs*, 882 F.2d 870, 872 (4th Cir. 1989).

⁹ See *Christian*, 342 F.3d at 751 (“We have stated that a police officer may be acting under color of law even though the officer is off duty at the time of the deprivation of rights. Deciding whether a police officer acted under color of state law should turn largely on the nature of the specific acts the police officer performed, rather than on merely whether he was actively assigned at the moment to the performance of police duties.”) (internal citations and quotation marks omitted).

¹⁰ *Tarpley*, 945 F.2d at 809 (explaining that “individuals pursuing private aims *and* not acting by virtue of state authority are not acting under color of law purely because they are state officers” (emphasis added)); *Revene*, 882 F.2d at 872–73 (explaining that even where there is a “lack of the outward indicia suggestive of state authority—such as being on duty, wearing a uniform, or driving a patrol car . . . the nature of the act performed is controlling”).

¹¹ *United States v. Lanier*, 520 U.S. 259, 261 (1997); *United States v. Peterson*, 887 F.3d 343, 346 (8th Cir. 2018); *United States v. Dise*, 763 F.2d 586, 588, 592 (3d Cir. 1985); Plea Agreement, *United States v. Yates*, No. 20-cr-00075 (S.D. W.Va. Sept. 17, 2020), ECF No. 48; *Pilati v. United States*,

Private persons can also act under color of law when they act jointly with state officials or when the state has delegated a traditional governmental function to them, such as the extradition or supervision of prisoners.¹² For example, in *United States v. Price*, one of the leading federal color of law prosecutions, the government brought section 241 and 242 charges against 18 white supremacists—3 who worked as law enforcement officers and 15 who did not. The case involved the murder of three young civil rights advocates—James Chaney, Andrew Goodman, and Michael Schwerner—who were working to register Black voters in Mississippi during Freedom Summer in 1964. The district court initially dismissed the charges against the non-law enforcement defendants. The Supreme Court held that, because those defendants had acted jointly with the law enforcement defendants to commit the murders, the private defendants could be charged as having acted under color of law.¹³

C. Deprivation of a right

As noted above, section 242 is unique among criminal statutes because it does not describe the specific conduct it criminalizes. Instead, the statute’s deprivation-of-a-right element incorporates any right “made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.”¹⁴ In

Nos. 12-cv-08012, 07-cr-00082, 2016 WL 4083245, at *9 (N.D. Ala. Mar. 23, 2016).

¹² *United States v. Price*, 383 U.S. 787, 794 (1966) (“Private persons, jointly engaged with state officials in the prohibited action, are acting ‘under color’ of law for purposes of the statute. To act ‘under color’ of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.”); *West v. Atkins*, 487 U.S. 42, 54, 56 (1988) (holding that a private doctor operating under a contract with the state to treat inmates was acting under color of law when performing his duties); *Smith v. Cochran*, 339 F.3d 1205, 1215–16 (10th Cir. 2003) (“[P]ersons to whom the state delegates its penological functions, which include the custody and supervision of prisoners, can be held liable for violations of the Eighth Amendment.”).

¹³ *Price*, 383 U.S. at 794–96.

¹⁴ *Screws*, 325 U.S. at 104; see also *Lanier*, 520 U.S. at 265 (explaining that “in lieu of describing the specific conduct it forbids, [section 242’s] general terms incorporate constitutional law by reference”). The “decisions interpreting” the Constitution include civil lawsuits brought under 42 U.S.C. § 1983 because the constitutional rights underlying section 242 and section

other words, if the Constitution or federal law creates an affirmative right, a government official's willful violation of that right constitutes a violation of section 242. Accordingly, the list of rights protected by section 242 is quite long and includes, among many other rights, the Fourth Amendment right to be free from unreasonable searches and seizures, which includes the rights to be free from unreasonable force and false arrest; the Eighth Amendment right to be free from cruel and unusual punishment, which includes the right to be free from excessive force amounting to punishment; the Fourteenth Amendment right to due process, which includes, among other things, the right of a defendant not to have false evidence knowingly presented against him; the right to bodily integrity, which includes the right to be free from an unwanted sexual assault; and the right not to be deprived of property without due process of law. This single statute thus allows the government to prosecute a wide range of unconstitutional conduct, although, as one might expect, the elements a prosecutor must prove in a particular case change significantly depending on the specific deprivation of right charged.

Defendants may be prosecuted for willfully violating any of these federally guaranteed rights if they have "fair warning" that their conduct is unlawful.¹⁵ The "fair warning" doctrine—rooted in due process—acknowledges that it would be unfair to prosecute a defendant for conduct that has not already been established to be illegal. Accordingly, the fair warning standard for a criminal defendant is equivalent to the standard used to determine whether a civil defendant is entitled to qualified immunity: whether the right has been clearly established by law.¹⁶

Below is a brief overview of the constitutional deprivations most frequently charged as section 242 violations. Additional articles in this series provide a more in-depth discussion of some of these charges.

1983 are identical. *See, e.g.*, *Lugar v. Edmondson Oil Co., Inc.* 457 U.S. 922, 929 n.13 (1982) (characterizing section 242 as the "criminal counterpart" of section 1983); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 613 (8th Cir. 1980) ("[W]illful deprivations of constitutional rights under color of state law are punishable under [section] 242, the criminal analog of section 1983.").

¹⁵ *Lanier*, 520 U.S. at 265–67.

¹⁶ *Id.* at 269–71.

1. Excessive force

The use of excessive force by law enforcement officers is the most commonly charged section 242 violation. The precise constitutional right a law enforcement officer violates by using excessive force—and thus the legal standard that applies—depends on the custodial status of the victim.¹⁷ For example, the Fourth Amendment’s prohibition against unreasonable seizures protects arrestees from the use of objectively unreasonable force by police officers during an arrest, while the Eighth Amendment’s prohibition against cruel and unusual punishment protects a convicted prisoner against the use of excessive force by prison officers.¹⁸ And when a person acting under color of law uses objectively unreasonable force against a victim who is in custody but has *not* been convicted of a crime (such as a pretrial detainee or a person committed to a state mental health institution), the use of force violates the Due Process Clause.

Regardless of a victim’s status (arrestee, a pretrial detainee, or a convicted inmate), any officer who witnesses a use of excessive force (or some other constitutional violation) and willfully fails to intervene to stop that violation can be charged, along with the officers using the force (or committing the violation), with a section 242 violation.¹⁹ For further discussion of excessive force and failure to protect claims, please see *The Upside Down World of Excessive Force Prosecutions*.²⁰

¹⁷ See *Graham v. Connor*, 490 U.S. 386, 393–95 (1989).

¹⁸ The protections of the amendments discussed below are applied to the states through the Fourteenth Amendment. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 337 & n.1 (1995) (explaining the incorporation doctrine generally and noting First Amendment’s applicability to the states); *Tuilaepa v. California*, 512 U.S. 967, 969–70 (1994) (Eighth Amendment); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (Fourth Amendment).

¹⁹ See *Bunkley v. City of Detroit*, 902 F.3d 552, 565 (6th Cir. 2018); *Nance v. Sammis*, 586 F.3d 604, 611 (8th Cir. 2009); see also *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989) (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety. . . . [An] affirmative duty to protect arises. . . .”).

²⁰ Bobbi Bernstein, *The Upside Down World of Excessive Force Prosecutions*, 70 DOJ J. FED. L. & PRAC., no. 2, 2022, at 35.

2. Deliberate indifference

Law enforcement officers can also be charged with deliberate indifference to the constitutional rights of a person in their custody. Deliberate indifference can take multiple forms. Officers may violate the rights of a person in custody by intentionally ignoring serious medical needs; the dangers other officers or prisoners pose (including their acts of physical and sexual violence); unhygienic or inhumane living conditions; or the dangers or infliction of pain the extended use of restraints or other devices pose.²¹ For additional discussion of deliberate indifference, please see *Prosecuting the Denial of Medical Care Based on a Claim of Deliberate Indifference*.²²

3. Sexual assault

Sexual assault by a person acting under color of law can be charged as a section 242 violation under one of three constitutional provisions: When the assault occurs in the context of an arrest, it violates either the Fourth Amendment right to be free from unreasonable seizure²³ or the Fourteenth Amendment right to bodily integrity (which is a right that courts have recognized is protected by the Due Process Clause);²⁴ when the assault occurs against a convicted prisoner, it violates the Eighth Amendment;²⁵ and when it occurs outside of those two contexts, it violates the due process right to bodily integrity.²⁶

²¹ *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (Eighth Amendment imposes duty on prison officials to “provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates’”) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984)); *Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (handcuffing a prisoner to a hitching post in the hot sun for seven hours to punish him was an “unnecessary and wanton infliction of pain” that violated the Eighth Amendment) (internal quotation marks omitted).

²² Christine M. Siscaretti, *Prosecuting the Denial of medical Care Based on a Claim of Deliberate Indifference*, 70 DOJ J. FED. L. & PRAC., no. 2, 2022, at 71.

²³ *Fontana v. Haskin*, 262 F.3d 871, 881 (9th Cir. 2001).

²⁴ For additional discussion about variation among the circuits on this issue, please see Fara Gold, *2022 Update: Prosecuting Sexual Misconduct by Government Actors*, 70 DOJ J. FED. L. & PRAC., no. 2, 2022, at 49.

²⁵ *Smith v. Cochran*, 339 F.3d 1205, 1212 (10th Cir. 2003).

²⁶ *Rogers v. City of Little Rock*, 152 F.3d 790, 793–96 (8th Cir. 1998).

Pretextual or gratuitous searches of persons for the purpose of sexually humiliating them or for the sexual gratification of the subject may also be charged as unreasonable searches under the Fourth Amendment.²⁷ For additional discussion of the prosecution of sexual assault under color of law, please see *2022 Update: Prosecuting Sexual Misconduct by Government Actors*.²⁸

4. Additional deprivations of rights

There are, of course, any number of additional constitutional deprivations that can be charged as section 242 violations. These include the deprivation of a victim's First Amendment rights, which occurs, for example, when a police officer retaliates against citizens who observe or record police activity, join protests, or criticize the police.²⁹ For additional discussion of the prosecution of criminal violations of the First Amendment, please see *Prosecuting First Amendment Retaliation*.³⁰ Theft by a person acting under color of law may constitute an unreasonable seizure of property in violation of the Fourth Amendment or a deprivation of property without due process of law in violation of the Fourteenth Amendment.³¹ False arrest and malicious prosecution both may be prosecuted as Fourth Amendment violations.³² Planting and fabricating evidence, giving false testimony, and the deliberate failure to provide exculpatory evidence to prosecutors may constitute due process violations when they result in

²⁷ See, e.g., *Sims v. Labowitz*, 885 F.3d 254, 260–62 (4th Cir. 2018).

²⁸ Gold, *supra* note 24.

²⁹ See, e.g., *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (First Amendment “prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech”) (internal quotation marks omitted); *Toole v. City of Atlanta*, 798 F. App'x 381, 383–88 (11th Cir. 2019) (not precedential) (First Amendment protects the right to join protests against and film police conduct); *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) (First Amendment protects the right to record government officials “in the discharge of their duties in a public space”).

³⁰ Christopher J. Perras, *Prosecuting First Amendment Retaliation*, 70 DOJ J. FED. L. & PRAC., no. 2, 2022, at 97.

³¹ *Soldal v. Cook Cnty.*, 506 U.S. 56, 61–62, 72 (1992); *United States v. Runnels*, 93 F.3d 390, 393 (7th Cir. 1996).

³² See *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (malicious prosecution); *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 98–101 (1st Cir. 2013) (same); *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1312 (10th Cir. 2002) (false arrest).

a deprivation of the victim's liberty.³³ Frequently, these constitutional violations do not result in bodily injury, involve the use of a dangerous weapon, or otherwise involve conduct that makes the section 242 violation a felony and will, thus, result in misdemeanors punishable by a maximum sentence of a year's imprisonment.³⁴

D. Willfulness

To establish a section 242 violation, the government must also prove that the defendant acted "willfully." This level of intent—one of the highest in the law—requires proof that the defendant acted with the specific intent to deprive a person of a constitutional right.³⁵ The defendant is not required to know the particular constitutional provision that the conduct violated or to "have been thinking in constitutional terms,"³⁶ but he must have "acted with knowledge that [the] conduct was unlawful."³⁷ As the Seventh Circuit explained in the context of a police officer charged with violating section 242 for using unreasonable force, this means that, to act willfully, a defendant must "[know that the] force [i]s not reasonable and use[] it anyway."³⁸

³³ *Dominguez v. Hendley*, 545 F.3d 585, 590 (7th Cir. 2008) (exculpatory evidence); *Stemler v. City of Florence*, 126 F.3d 856, 872 (6th Cir. 1997) (planting evidence); *Schneider v. Estelle*, 552 F.2d 593, 595 (5th Cir. 1977) (false testimony).

³⁴ 18 U.S.C. § 242.

³⁵ *Screws v. United States*, 325 U.S. 91, 104 (1945). (Unlike certain financial crimes, willfulness as used in section 242 does not require the defendant both to be familiar with the law at issue *and* specifically intend to commit the crime); *see also* *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (recognizing "willful" as a "word of many meanings . . . influenced by its context" and noting that courts consistently read "willful" in the context of 31 U.S.C. § 5322, which sets forth criminal penalties for willful violations of various financial reporting requirements, as requiring "both knowledge of the reporting requirement *and* a specific intent to commit the crime" (citations omitted)); *Cheek v. United States*, 498 U.S. 192, 201 (1991) (requiring a defendant to be aware of the legal duty imposed by the specific provision of the tax code he was charged with violating before he could "willfully" violate it).

³⁶ *Screws*, 325 U.S. at 106; *United States v. Walsh*, 194 F.3d 37, 52–53 (2d Cir. 1999).

³⁷ *Bryan v. United States*, 524 U.S. 184, 191–92, 196 (1998).

³⁸ *United States v. Proano*, 912 F.3d 431, 442 (7th Cir. 2019).

It is this willfulness requirement that the Supreme Court has held saves section 242 from being unconstitutionally vague. The defendant in *Screws v. United States* argued that section 242 was unconstitutional because the deprivations of rights the statute criminalized—such as a denial of due process—were fluid concepts open to judicial interpretation, and thus, a defendant should not be punished for actions he took in good faith.³⁹ The Supreme Court reasoned that, to act willfully or “in open defiance or in reckless disregard of a constitutional requirement,” the defendant must, by definition, know of the existence of that right.⁴⁰ The willfulness requirement therefore ensures that defendants have fair warning that their conduct was a crime.

In the context of law enforcement use of excessive force, prosecutors frequently establish willfulness by offering evidence of a defendant’s statements during or after the use of force; evidence that the defendant acted inconsistently with department policies or training; testimony from other, similarly situated officers who did not observe a need for force; evidence that the defendant’s use of force far exceeded that needed to counter a potential threat; and evidence, admissible under Federal Rule of Evidence 404(b), that the defendant acted similarly on prior occasions. Methods for investigating and proving willfulness are discussed in greater detail throughout this issue.

E. Additional elements for proof of a felony

Proof of these first three elements—color of law, deprivation of a right, and willfulness—establishes a misdemeanor offense. A violation of section 242 becomes a felony punishable by a maximum of 10 years’ imprisonment if “bodily injury results from” the offense or if the offense includes “the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire.”⁴¹ When a violation of section 242 results in a victim’s death or the offense includes “kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill,” the offense is punishable by up to life imprisonment or, where otherwise consistent with federal law,⁴² the death penalty.⁴³ Sometimes, conduct

³⁹ *Screws*, 325 U.S. at 104–05.

⁴⁰ *Id.* at 105.

⁴¹ 18 U.S.C. § 242.

⁴² *See generally* 18 U.S.C. § 3591; *Coker v. Georgia*, 433 U.S. 584 (1977).

⁴³ 18 U.S.C. § 242.

that forms the basis of a single section 242 charge implicates multiple felony enhancement elements. In such cases, multiple felony elements may be charged in the alternative; the jury must then unanimously agree on which elements have been proven.⁴⁴

“Bodily injury” means a “cut, abrasion, bruise, burn, or disfigurement;” “physical pain;” or “any other injury to the body, no matter how temporary.”⁴⁵ For both the bodily injury and death elements, the statute uses the language “if bodily injury [or death] *results from* the acts committed in violation of this section.”⁴⁶ Based on this language, the government need not prove that the defendant *intended* to cause the victim’s bodily injury or death.⁴⁷ Recent Supreme Court precedent has clarified, however, that the offense must be a “but for” cause of the victim’s injury or death, meaning that the government must prove that, but for the defendant’s unlawful conduct, the victim would not have been injured or have died.⁴⁸ To be a “but for” cause, the defendant’s actions do not have to be the *sole* cause of the victim’s death or injury. The offense conduct can combine with other factors, so long as those other factors alone would not have caused the death or injury.⁴⁹

For further discussion of the dangerous weapon, kidnapping, and aggravated sexual assault elements in the context of law enforcement sexual assault investigations, see *2022 Update: Prosecuting Sexual Misconduct by Government Actors*.⁵⁰

⁴⁴ Richardson v. United States, 526 U.S. 813, 817 (1999).

⁴⁵ See, e.g., United States v. Perry, 401 F. App’x 56, 65 (6th Cir. 2010) (not precedential); United States v. DiSantis, 565 F.3d 354, 362 (7th Cir. 2009); United States v. Perkins, 470 F.3d 150, 161 (4th Cir. 2006); United States v. Gonzalez, 436 F.3d 560, 575 (5th Cir. 2006); United States v. Bailey, 405 F.3d 102, 111 (1st Cir. 2005); United States v. Myers, 972 F.2d 1566, 1572 (11th Cir. 1992); see also 18 U.S.C. §§ 831(f)(5), 1365(h)(4), 1515(a)(5), 1864(d)(2).

⁴⁶ 18 U.S.C. § 242 (emphasis added).

⁴⁷ United States v. Marler, 756 F.2d 206, 216 (1st Cir. 1985); United States v. Guillette, 547 F.2d 743, 749 (2d Cir. 1976).

⁴⁸ Burrage v. United States, 571 U.S. 204, 211, 216 (2014).

⁴⁹ Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1739 (2020); United States v. Meyers, 965 F.3d 933, 937–38 (8th Cir. 2020); United States v. Feldman, 936 F.3d 1288, 1312–15 (11th Cir. 2019).

⁵⁰ Gold, *supra* note 24.

III. 18 U.S.C. § 241: civil rights conspiracy

Section 241, like section 242, is a Reconstruction Era civil rights statute. The same rights that serve as a basis for a section 242 prosecution may form the basis of a civil rights conspiracy charge under section 241. A civil rights conspiracy prosecution resembles a prosecution under the general criminal conspiracy statute⁵¹ in that the government must prove the existence of the conspiracy and the defendant's membership in it. Unlike section 371 and other conspiracy statutes, section 241 does not require an agreement to violate a criminal statute. Rather, section 241 requires proof that the defendants conspired to violate *a right established by the Constitution or federal law*.⁵² Additionally, unlike section 371, section 241 does not require proof of an overt act.⁵³

Although section 241 does not contain the terms “color of law” or an explicit willfulness requirement, both of these elements have been read into the conspiracy statute.⁵⁴ As noted above with respect to section 242, the willfulness requirement saves the statute from being unconstitutionally vague.⁵⁵ And, where the right at issue is guaranteed only against improper state action (such as the First Amendment guarantee that no *state* shall infringe on the freedom of speech), the defendant must act under color of law to violate the Constitution and, thus, commit a crime.⁵⁶ Unlike section 242, section 241 has no misdemeanor option; any violation of the civil rights conspiracy statute is a felony, even without proof of bodily injury, use

⁵¹ 18 U.S.C. § 371.

⁵² *United States v. Price*, 383 U.S. 787, 800 (1966); *United States v. Kozminski*, 487 U.S. 931, 940–41 (1988).

⁵³ *See, e.g.*, *United States v. Colvin*, 353 F.3d 569, 576 (7th Cir. 2003); *United States v. Whitney*, 229 F.3d 1296, 1301 (10th Cir. 2000).

⁵⁴ Section 241 can also be used to prosecute private individuals for conspiring to violate rights protected from interference by private—rather than state—actors. These rights commonly include those associated with housing, the enjoyment of public accommodations, voting, traveling, and attending school. Section 241 charges can, therefore, be an effective tool in many bias-motivated crime prosecutions. *See* Barbara Kay Bosserman & Angela M. Miller, *Prosecuting Federal Hate Crimes*, 70 DOJ J. FED. L. & PRAC., no. 2, 2022, at 129.

⁵⁵ *Anderson v. United States*, 417 U.S. 211, 223 (1974); *Price*, 383 U.S. at 806 n.20.

⁵⁶ *See, e.g.*, *United States v. Causey*, 185 F.3d 407, 413 (5th Cir. 1999).

of a dangerous weapon, or other elements that render section 242 a felony.⁵⁷

IV. Conclusion

The federal civil rights statutes discussed in this article are tools to protect the vulnerable, who would otherwise have little recourse to seek justice; after all, the perpetrators in these cases exercise the power of the state, and when the police—or other government officials—abuse that power, the people subjected to that abuse may feel they have nowhere to turn. Although these cases can be legally complex and challenging to prove, vindicating the rights of such victims is a rewarding endeavor, and the Criminal Section of the Civil Rights Division is available to share in the work. For questions or assistance, please contact the Civil Rights Division’s Criminal Section and ask to speak to the Deputy Chief who supervises the prosecution of civil rights crimes in your district.

About the Author

Samantha Trepel serves as a Special Litigation Counsel for the Criminal Section of the Civil Rights Division, where she prosecutes bias-motivated crimes and deprivations of right under color of law, with a primary focus on law enforcement misconduct cases. Before joining the Criminal Section, she served as a Trial Attorney in the Special Litigation Section of the Civil Rights Division, enforcing civil rights statutes with an emphasis on discriminatory policing and excessive force by law enforcement agencies. She is also an Adjunct Professor of Law at George Mason University’s Antonin Scalia Law School.

⁵⁷ 18 U.S.C. § 241.

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The Upside Down World of Excessive Force Prosecutions

*Bobbi Bernstein
Deputy Chief, Criminal Section
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- *A man with a record of petty theft reports to the FBI that a sheriff's deputy broke his door down, stormed into his home without a warrant, threatened to kill him, and pistol-whipped him in the face. But the three officers from the scene all deny the allegation.*
- *A convicted inmate in prison claims that officers escorted him to an empty hallway and brutally beat him. But every officer present in that hallway reports that the prisoner physically fought with them and then, while being restrained, struggled and hit his head on a windowsill and then on the floor.*
- *Five inmates report that prison guards handcuffed them behind their backs, forced them to kneel on the ground in a row, and then approached them, one-by-one, holding open each inmate's eyelids and dispersing oleoresin capsicum (OC) spray directly into their eyes. But the officers who were present report that this never happened.*

There are several important things that all these scenarios have in common. First, the people who claim to have been victimized are people whom many prosecutors and investigators have been conditioned (sometimes for very good reasons) to disbelieve. Second, the people alleged to have engaged in wrongdoing, and who flatly deny that it occurred, are people whom prosecutors and investigators have been conditioned (sometimes for very good reasons) to *believe*. And these two things lead to a very important third: All these scenarios may appear, at first blush, to warrant easy declinations from investigators or prosecutors.

But there is another set of characteristics that these scenarios also have in common: All three of these situations led to successful prosecutions under 18 U.S.C. § 242, the primary federal criminal civil

rights statute used to prosecute willful official misconduct.¹ And in all three of these examples, as in so many other cases successfully prosecuted under section 242, the alleged perpetrators—law enforcement officials who abused their governmental authority to deprive others of their constitutionally protected rights—acted with confidence that their wrongdoing would never be uncovered, that the victims wouldn’t dare complain, and that if they did, nobody would believe them over sworn officers.

* * *

- *A video shows numerous officers surrounding an arrestee, who is on his hands and knees in the street. Clearly depicted are four officers who kick the man and beat him with batons over and over as the man crumples to the ground and tries to protect himself from the blows.*
- *Surveillance video in a prison captures a corrections supervisor standing in a sallyport, intently watching as a shirtless officer who works under her command repeatedly beats an inmate who previously threw feces on the officer’s shirt. The supervisor stands less than 10 feet away, watching and taking no action to intervene, as the shirtless officer punches and kicks the inmate over and over and over.*

These scenarios have two important things in common: First, they involve videos that clearly depict civil rights violations (both excessive force by officers and failure to protect from excessive force by other officers); and second, they both resulted in acquittals at trial.

So why are these scenarios so upside down? How did the first three matters go from easy declination to successful prosecution? And how did the last two matters go from seemingly slam-dunk cases to not guilty verdicts?

In a world where there are honorable law enforcement officers who risk their lives every day to protect their communities and where there are arrestees and inmates who may have personal and financial incentives to concoct allegations of misconduct, how can a prosecutor or investigator separate the false claims from the true examples of abusive exercise of official power? Even when an act of official

¹ For a legal primer on prosecutions under 18 U.S.C. § 242, see Samantha Trepel, *Prosecuting Color of Law Civil Rights Violations: A Legal Overview*, 70 DOJ J. FED. L. & PRAC., no. 2, 2022, at 21.

misconduct has been identified, how is it possible to prove that violation beyond a reasonable doubt when the victims are often compromised and the subjects are law enforcement officers?

These questions have no easy answers, but the purpose of this article is to offer my personal thoughts on them, based on more than 25 years of investigating, prosecuting, and supervising the prosecution of these cases. Although there are countless different types of official misconduct—burglary rings run by police officers; prison officers running “fight clubs”; judges, probation officers, police, and jailers sexually assaulting victims they encounter on the job, this article focuses on just two of these areas: the use of excessive force by those acting under color of law and the failure, by those acting under color of law, to protect others from excessive force.

My short answer to these difficult questions is that the best way to identify prosecutable excessive force cases and develop winning investigative strategies is to train ourselves to view the world upside down: be open to the possibility that hardened criminals are telling the truth (while maintaining a healthy dose of skepticism, of course); be open to the possibility that officers—even those who appear to be completely squared away—might be lying; recognize that investigative steps that would normally seem like obvious steps toward learning the truth might not, in these cases, lead to the truth at all; recognize that, even a case that seems “easy”—say, because there is a clear video showing an officer abusing an arrestee—is never, ever going to be easy; and recognize in advance, and prepare for the fact, that our audience at trial (our judges and jurors) may also be getting introduced to concepts that seem upside down.

Despite the challenges of working in an upside down world (or perhaps *because of* those challenges), these cases are, in my view, among the most rewarding that federal investigators and prosecutors can pursue. When done successfully, they bring vindication to individuals who never thought they would be believed; they support our honest law enforcement partners by weeding out criminals in their ranks; and in some cases, they have the power to restore the faith of entire communities in our legal system.

In the first scenario described in the lead-in to this article—in which the defendant broke into the victim’s home and pistol-whipped him in the face—the defendant was a small-town supervisory officer who had, for years, terrorized certain pockets of the community he ostensibly served. And because he *was* the law in the town, even law-abiding

citizens who witnessed his abuses felt that they had no recourse. Following the defendant's conviction at trial, these witnesses expressed relief that a man who had brought so much torment to their lives had been brought to justice, and members of the community—including a local police chief—called to thank the federal team for removing a menace from their streets.

Through this article, I share my thoughts on some of the challenges of identifying prosecutable cases in the first place and in developing efficient and effective investigative plans.

I. The challenge of identifying prosecutable cases

The first hurdle to recognizing prosecutable cases is often a lack of acceptance about the existence and the extent of the problem of excessive force. To some people, police misconduct seems as ubiquitous as the air they breathe. But even as more and more cases come to light through the widespread use of bodycam videos and the ubiquitous presence of cellphones, many people—including many federal prosecutors and investigators whose day-to-day lives involve regular dealings with outstanding law enforcement professionals and untrustworthy criminals—consider police misconduct a rare phenomenon that involves only “a few bad apples.” Just based on my time as a prosecutor in the Criminal Section of the Civil Rights Division (Section), I feel confident that excessive force is not “rare”; prosecutors in the Section working with our FBI and U.S. Attorney's Office partners across the country have prosecuted all manner of these cases against police and corrections officers for beating arrestees and inmates in retaliation for verbal disrespect; against police and corrections officers for using tasers, batons, or pepper spray for sport; against corrections officers for setting up inmates to be beaten by other inmates; and against police officers for shooting arrestees out of anger or frustration rather than out of necessity. These cases have involved officers from big cities and small towns, from large police departments and tiny municipal operations, and from all regions of the country.

In my view, the second hurdle to correctly analyzing the merit of excessive force cases is often an ingrained assumption (sometimes conscious, sometimes subconscious) that a majority of law enforcement officers in any given case will tell the truth. This assumption can cause investigators and prosecutors to underestimate

the merit of many cases and to overestimate the merit of others. In cases where a not-so-credible victim has alleged that a seemingly credible officer used excessive force, and the officer's denial has been backed by other officers, a trusting investigator or prosecutor may assume that no wrongdoing occurred. At times, these cases will be declined, even where additional digging might have revealed a video or similar compelling evidence that could have either corroborated or disproved the allegation. And cutting in the opposite direction, the assumption that officers will testify truthfully at trial can lead investigators and prosecutors to forgo necessary investigation in cases where strong evidence—such as a clear video—makes a case seem “easy.”

A consciously skeptical eye can alleviate both problems. This skepticism is necessary because, in cases of excessive force, often just about everyone involved has powerful incentives and pressures to hedge, exaggerate, or flat-out lie: The inmate- or arrestee-victims may want to file a civil suit, may want to gain sympathy or advantage in their own criminal cases, or may have a vendetta against law enforcement; and the officers understand that the cost of admitting having used excessive force, or for reporting a fellow officer for having done so, can be astronomical.

Viewing every aspect of these cases closely and skeptically can lead to the discovery of a very particular kind of evidence that is often the key to proving a case: law enforcement corroboration for the allegation of excessive force. Generally, prosecutors need law enforcement corroboration in every excessive force case, even in one that appears “easy.” First, we often need law enforcement corroboration to know for sure that the allegation is true; when the victim may not be inherently credible, corroboration from an officer can give much needed assurance that the case has merit and warrants federal resources. Second, we need law enforcement corroboration to prove our elements beyond a reasonable doubt. And finally, we need it to help explain to a jury why the jury should care. At a trial where a credibility challenged victim (for example, one who has prior convictions or pending criminal charges for conduct that led to the encounter that resulted in a use of force) testifies for the prosecution, and a slew of officers testify for the defense, a jury may nullify even if the evidence, viewed objectively, establishes a violation beyond a reasonable doubt.

Even in “easy” cases where the excessive force is caught on video, the difference between conviction and acquittal is often the presence

of law enforcement witnesses who can testify for the prosecution that what the video *appears* to show is actually what happened and that the officer witnesses knew, when it happened, that it was wrong. Without that law enforcement corroboration, officer witnesses are likely to appear at trial for the defense and testify that the video is misleading; that the victim’s conduct was threatening to the defendant-officer from a perspective not captured on the video; and that, if the witness-officers had been in the defendant-officer’s shoes, they would have made the same decision to use force. That type of testimony is difficult, if not impossible, to overcome at trial, even with a video.²

For these reasons, law enforcement corroboration is usually necessary to prove even the most direct-seeming cases of excessive force. But law enforcement corroboration is also extremely difficult to come by.

II. Pressures against cooperation

In my experience, officers who have provided law enforcement corroboration in these cases have rarely come forward voluntarily. Often, they went to great lengths *not* to be involved in the case and, ultimately, cooperated with great reluctance and fear. Understanding the immense pressure that can bear down on an officer *not* to tell the truth when the truth can ruin a fellow officer’s career (or worse) can help a prosecutor or investigator recognize the signs of potential merit in a case and fashion a winning investigative and trial strategy.

Officers who testify for the government in civil rights cases often describe having to overcome an intense pressure to loyally support their fellow officers, regardless of the circumstances. That loyalty among officers—like the loyalty among those in the military—is often seen as an admirable quality because officers (like soldiers) sometimes have to trust one another with their lives in dangerous situations. But some officers have explained that this same quality can give rise to an us versus them mentality between officers and the communities they serve, such that it becomes almost unthinkable to take the side of an “other” over a colleague. I’ve spoken to officers who have pleaded guilty to official misconduct who have described this us versus them mentality as having caused them, over time, to become desensitized to excessive force, and I’ve spoken to officers who have admitted to lying

² Two words: Rodney King.

for colleagues, who described these same pressures leaving them feeling that they had few good options.

Here is how one officer explained it to me years ago: If an officer betrays the code of loyalty by blowing the whistle on another officer's wrongdoing, he risks social isolation, professional destruction, intimidation, retaliation, or worse.³ Thus, in a situation where an officer witnesses a colleague using excessive force, even if the officer is uncomfortable with the colleague's actions, the officer is more likely to respond *unofficially*—for example, by pulling the colleague aside and expressing concern—than officially, by reporting the colleague through formal avenues. Officers making that choice might feel that they have done the right thing for the right reason. But because officers are generally required to document truthfully any use of force they witness, a decision to handle the colleague's wrongdoing unofficially, rather than officially, often requires the concerned officer either to shade a report or to refrain from writing one that is required.

If the arrestee then makes a complaint and internal affairs opens an investigation, the concerned officer must either deny his colleague's use of force or admit to a procedural violation that could cost him his own job. So he tells what feels in the moment like a harmless or even helpful white lie. But if the matter doesn't go away, and if criminal investigators turn up later to question officers about the incident, he must either triple down on the lie or admit serious wrongdoing of his own. By the time *federal* investigators and prosecutors get involved, this officer—who by now has falsified a report, lied to internal affairs, and committed his own crime by lying to criminal investigators—can't correct the record without paying an enormous personal price. So, there is almost unthinkable pressure on even *this* officer—one who was deeply disturbed by the use of force—to deny the truth. For others who participated in or encouraged the force, who have been desensitized to excessive force, or who face their own liability for failing to intervene and stop the abuse, the self-preservation motive is even stronger.

These same powerful pressures can also cause officers—even those who are normally by the book—to fail to intervene when they witness

³ At several points in this article, I use the gendered pronoun “he” for the sake of grammatical simplicity and because the majority of officers involved in our excessive force cases have been male. The issue of excessive force, however, is by no means gender specific, and in some cases, subjects, cooperating officers, or both may be female or nonbinary.

excessive force by others. Officers over the years have explained to me that stepping in to stop excessive force is often viewed as tantamount to publicly calling out a fellow officer and can bring about the same consequences as officially reporting a colleague. Thus, an officer might choose, in the moment, to stand back and not intervene or to walk away. But thereafter, having failed to stop an incident of excessive force, the witness-officer has yet another powerful incentive to conceal the wrongdoing, because federal courts have recognized that officers have a constitutional duty to intervene when they witness force that they know is excessive and they have the time and opportunity to intervene.⁴

Being aware of these forces can help an investigator or prosecutor develop an empathetic approach to witnesses that can help with both recognizing potential merit in a case file and developing a productive investigative plan.

III. Developing an investigation

The forces that can discourage officers from telling the truth help explain why the investigation of an excessive force incident can feel upside down to investigators and prosecutors.

In a stick-up robbery where the witnesses are a victim and four bystanders, an investigator attempting to determine what happened would normally start by interviewing the five eyewitnesses; if those witnesses provided consistent accounts, the investigator would be confident that she has the truth.

But in an excessive force case where an officer is accused of beating an arrestee in front of five other officers, those officer eyewitnesses might turn out to be the *least* likely people to provide an accurate account of what happened.

And sticking with the robbery analogy, if an investigator knew, from the start, that neither the victim nor the bystanders could be presumed to tell the truth (for example, because they all belong to the

⁴ This is the constitutional provision at issue in the second video scenario in the lead-in to this article, involving a supervisory officer who intently watched her subordinate beating a handcuffed inmate and did nothing to intervene.

Although the constitutional duty to intervene applies to *any* officer, regardless of rank, prosecutors can (and usually do) exercise discretion to charge only supervisory officials who fail to intervene in abuses by subordinate officers.

same family and all stand to benefit from an insurance payout) the investigator might question whether the reported robbery even occurred in the first place.

For this reason, in my view, the most efficient and effective excessive force investigations focus on three steps: first, figuring out whether the allegation is likely to be true; (if so, then,) second, structuring an investigation to maximize the chance of getting an officer to come clean; and third, using that law enforcement corroboration to prove the elements. This investigative path is often counterintuitive because it doesn't involve any presumption that eyewitnesses will provide the truth (initially, at least).

A. Step one: Determining if the allegation is likely to be true

Because many allegations of excessive force are *not* true, it's not practical to turn over every investigative stone whenever an allegation is made. Accordingly, it's important to be able to efficiently triage allegations and figure out which ones are likely to be true. This step often requires analyzing the available evidence skeptically, looking for things that are out of place.

Sometimes, it's clear from the start that an allegation has at least *potential* merit, such as when an incident is caught on video or when a case begins with law enforcement corroboration where an officer comes forward to report the wrongdoing. But in the other cases, the search for potential merit requires a skeptical review of the case file to figure out if there are any "red flags" that might signal that the alleged wrongdoing actually occurred.

Even in a case where every officer denies that excessive force occurred, there might be powerful indicators in the case file that the officers' story is amiss. In the upside down world of excessive force cases, often, the very best early evidence is a lie: When one or more officers provide information that is verifiably false, that lie can be one of the best indicators that a victim's allegation might be true. For example, when a victim suffers a serious, documented injury, and an incident report mentions no injury or refers to the injury as a "scrape" or a "contusion," that misrepresentation is a red flag that something might have occurred that the officers are trying to hide. Similarly, when a victim's injuries (or a video or any other evidence) suggest that *something* happened to a victim, but there are no reports submitted at

all, the lack of reports can be a red flag signaling a desire to bury an incident.

Often, the red flag suggesting that excessive force occurred is even more subtle. Sometimes, it's just one small fact in a file that gives an allegation of wrongdoing a ring of truth. In my years working these cases, these small hints of potential merit have included such things as multiple officers submitting identical reports, containing similar grammatical errors or misspellings (suggesting that the officers colluded on their account); multiple officers submitting nearly identical accounts, and one officer submitting no report at all (suggesting that the officer who didn't submit a report was uncomfortable writing the false story others agreed on); one officer present for an incident telling her supervisor, after that incident, that she no longer wanted to work with the other officers involved (suggesting that the officer requesting a transfer was uncomfortable with what she saw the others do); or one officer mixing up an important detail of a story that was otherwise consistent with the account of the other officers (indicating that the officer tripped up while trying to corroborate the false story of fellow officers).

The red flag signaling potential merit has also sometimes come in the form of a small fact included in an alleged victim's account that has the ring of truth and points to possible corroborating evidence. Even though an arrestee or inmate might have plenty of reasons to lie (and every such account should thus be viewed with skepticism), certain details provide no benefit to the victim and, therefore, are less likely than others to be made up. For example, a victim, in recounting the abuse he suffered, might mention that, during a beating by one officer, a second officer put a hand on the beater's shoulder and said, "that's enough." This small fact is credible because it provides no advantage to the victim. And if this small fact is true, it means there is at least one officer out there who witnessed, and was bothered by, the use of force. Similarly, a victim reporting that, after the incident, he noticed two of the involved officers arguing might signal that one officer was upset about some aspect of what happened, and a victim reporting that he noticed a group of officers exiting a supervisor's office together might signal that the officers got together afterward to discuss what to put in the reports.

All of these "red flags," and others like them, have given investigators and prosecutors reason to believe that an allegation might have merit and warrant additional investigation. The same red

flags also often suggest how an investigation might be structured to maximize the chance of obtaining law enforcement corroboration.

B. Step two: Maximizing the chance of law enforcement corroboration

In the upside down world of excessive force cases, the most productive investigation rarely focuses on trying to directly prove the incident of force. Rather, because the viability of the case likely turns on the ability to obtain law enforcement corroboration, an effective investigation generally focuses on maximizing the chance of obtaining that specific type of evidence.

In deciding where to search for law enforcement corroboration, an investigator or prosecutor can look to the red flag that provided reason to believe the allegation in the first place. Keeping in mind that the officer most likely to give up the truth might be the one with the least skin in the game (such as an officer from another department); the one with the most empathy for the victim (such as one who genuinely feels bad about what happened); or the one with the *most* skin in the game (such as someone who has been caught dead-to-rights in a false statement for which he could be prosecuted), the investigator should determine, based on the facts of the particular case, who is most likely to break from an agreed-upon false story and admit what happened.

Once an investigator or prosecutor identifies the officer most likely to be forthcoming, investigative steps can focus on increasing the chances of convincing that officer to tell the truth. In some cases, that might simply involve identifying and tracking down the officer who was bothered by the use of force, acknowledging the pressures on her, and giving her a chance to come clean. Other times, it means gathering the evidence to prove that an officer has lied to solidify the case against that officer in the same way a narcotics investigator might build a case against a street dealer to get to the truth about a supplier. This might mean that the investigation focuses not on directly proving that an excessive use of force occurred, but rather on proving some smaller aspect of the case, such as a victim's injury or that a certain officer who was not mentioned in the reports was in fact present for an arrest.

Similarly, the second scenario in the lead-in to this article involved an inmate-victim who was beaten by multiple officers in a prison hallway. The victim in that case recounted to investigators that he was surrounded by officers who placed him against a wall and

demanded that he put his hands behind his back so he could be cuffed. The victim refused to comply until the officers turned on a video camera that was in the hallway but not being used; he was afraid, he told the officers, that as soon as he cuffed up, he would be beaten. According to the victim, he made eye contact with one of the officers, who verbally reassured him that, if he gave up his hands for cuffing, everything would be okay. The victim then put his hands behind his back, and he was immediately thrown to the floor by the other officers and beaten so badly that he needed to be airlifted to a hospital. The small reference in the victim's lengthy account to the officer who reassured him suggested the possibility of law enforcement corroboration because it suggested that there was at least one officer in the hallway who did not expect the beating to happen and who might feel guilty about having convinced the inmate to comply with commands. That officer ended up being a key witness at trial; he had not come forward with the truth on his own, but when tracked down by investigators and asked specifically about that moment, he admitted that he had in fact convinced the victim to comply and that he did feel guilty because of what happened afterward.

Further, as so often happens in these cases, once the first officer gave a truthful account of what happened, the information he provided led to corroboration from other officers who had witnessed the force.

C. Step three: Using law enforcement corroboration to prove the elements

Once an investigator or prosecutor has determined that an allegation is likely true and has identified a path to law enforcement corroboration, he or she should keep in mind the elements that the prosecution will need to prove at trial: that the defendant acted under color of law, deprived the victim of a constitutional right, and acted willfully (and, for a felony, that the offense resulted in bodily injury, involved a dangerous weapon, or involved another felony factor). Accordingly, the investigation must establish not only who did what to whom, but also that the subject-officer's use of force was excessive (which often requires analysis from the perspective of a reasonable

officer standing in the subject's shoes)⁵ and that the use of force was willful. For both of these elements, law enforcement corroboration plays a key role: Officers from the scene can testify that they saw no need for the force the defendant used (and can serve as stand-ins for the hypothetical "reasonable officer" whose perspective often establishes the constitutional violation); and similarly, the officers can help establish willfulness by testifying that they, like other officers in their department, were trained on the rules regarding the use of force and therefore knew that the force used was wrong.

The first video scenario in this article—the one with officers using batons to beat a man lying on the ground—was based on the 1991 Los Angeles Police Department beating of Rodney King. The State of California's prosecution notoriously ended in acquittals for all four defendants, which then led to rioting in the streets of Los Angeles.⁶ Two of those officers were later convicted in federal court in a civil rights case in which a principal difference from the state case was that the federal prosecution team obtained cooperation from bystander officers whose testimonies corroborated the video evidence.

In that case, and in countless others in the 30 years since then, law enforcement corroboration has been the key to proving the elements in criminal civil rights cases (and has often been the key to obtaining guilty pleas). In the third scenario in the lead-in to this article—in which officers lined up handcuffed inmates, placed them on their knees, and then dispersed OC spray directly into their eyes—the prosecution team developed proof that one officer had lied and the officer, when confronted with that proof, ultimately came clean. His admission that the OC spraying occurred, that he knew it was wrong, and that he and the other officers had been trained that this type of force was unacceptable, led other officers to follow suit and plead guilty. Eventually, all the defendants pleaded guilty without a trial.

⁵ See Trepel, *supra* note 1, for more detail regarding the elements of, and a discussion of the legal standards for, excessive force charges in various contexts.

⁶ See Anjali Sastry Krbechek & Karen Bates, *When LA Erupted in Anger: A Look Back At the Rodney King Riots*, NPR (Apr. 26, 2017), <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots>.

IV. Conclusion

My primary advice to investigators and prosecutors interested in working excessive force cases is to be prepared to view the world upside down and to craft counterintuitive investigations. Doing that and reviewing every case file with a hefty dose of skepticism and a sober appreciation for the pressures on our law enforcement witnesses will lead to the recognition of cracks in stories that previously appeared solid. And once that happens, the investigator or prosecutor will be on the way to successfully prosecuting some of the most challenging and rewarding cases we can work.

About the Author

Bobbi Bernstein has been a prosecutor in the Criminal Section since 1996 and a Deputy Chief since 2003. In her years as a civil rights prosecutor, she and her Assistant U.S. Attorney partners have worked with FBI agents around the country on numerous, significant civil rights investigations, including, among others the prosecution of two deputy sheriffs who murdered a newly elected sheriff in Georgia on orders from the sitting Sheriff, the prosecution of Latino gang members who murdered African American men in their Los Angeles neighborhood, the prosecution of New Orleans police officers who shot and killed civilians after Hurricane Katrina and then framed an innocent man to cover up their crimes, and the prosecution of a self-avowed white supremacist who murdered a Filipino postal worker and shot several Jewish children in Los Angeles. Ms. Bernstein teaches investigative and trial skills and has received numerous awards for her trial work, including two Attorney General's Awards for Exceptional Service and an Attorney General's Award for Distinguished Service, the International Association of Chiefs of Police Award for Civil Rights, and the Women in Federal Law Enforcement's Top Prosecutor Award.

2022 Update: Prosecuting Sexual Misconduct by Government Actors

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I. Introduction

Two women housed in the same cell in a small jail in Arizona each report that, when they were transported to that jail during separate transports, their private prisoner transport officer sexually assaulted them at gunpoint.¹ A woman in Tennessee reports that, after she was arrested for drug possession, her arresting officer, instead of transporting her directly to the county jail, first drove to a secluded parking lot and raped her.² A woman in New Mexico reports that, during an office visit with her probation officer, that probation officer groped her breasts and demanded naked photos of her.³

In each of those examples, the subject officers were successfully prosecuted for violating 18 U.S.C. § 242 because, when government actors, including those contracted to do government work, engage in sexual misconduct, they violate the constitutional rights of their victims,⁴ just as government actors do when they use excessive force. But unlike excessive force cases that may be captured on video or witnessed by fellow officers or civilians, sexual assaults often occur in secluded locations with no one to bear witness, like the remote dirt roads where the private prisoner transport officer drove his victims, the desolate church parking lot where the arresting officer in Tennessee took his victim, or the otherwise empty office where the probation officer in New Mexico groped his victim.

¹ See Superseding Indictment at 3–5, *United States v. Kindley*, No. 17-cr-267 (E.D. Ark. Jan. 8, 2019), ECF No. 31.

² Plea Agreement at 3, *United States v. Logan*, No. 19-cr-125 (E.D. Tenn. Sept. 4, 2019), ECF No. 2.

³ Plea Agreement at 3–4, *United States v. Chavez*, No. 12-cr-3290 (D.N.M. Sept. 3, 2013), ECF No. 87 [hereinafter *Chavez* Plea Agreement].

⁴ *United States v. Lanier*, 520 U.S. 259 (1997).

Subjects expect to get away with their crimes precisely because of the isolated manner in which their sexual assaults are committed. They also assume that no one will believe their victims because they view their own societal status as superior to that of their victims—be it because of a victim’s criminal history, addiction, or as was true in the examples above, because their victims were women.

To that point, although anyone can be a victim of sexual misconduct, as evidenced by section 242 prosecutions throughout the past decade, men are more often the victims of physical assaults by law enforcement and other government actors, whereas women, including transgender women, are more often the victims of sexual assault. It is, therefore, incumbent upon federal investigators and prosecutors to recognize when sexual misconduct falls within the jurisdiction of section 242 and investigate and, where appropriate, charge such violations with applicable statutory enhancements. Otherwise, we may not only fail to hold accountable those who have committed this type of particularly egregious conduct, but we may also disproportionately fail to vindicate the constitutional rights of women.

To ensure that those rights are appropriately vindicated, we must guard against the two most common reasons for inappropriate declinations of sexual misconduct allegations: one, the misconception that, because these crimes happen in seclusion, they cannot be proven; and two, the failure to recognize the continuum of sexual misconduct that section 242 covers, as well as the wide array of actors subject to prosecution under it.

With that in mind, this article has five objectives: first, it will discuss initial considerations when opening a section 242 sexual misconduct investigation, including applicable Federal Rules of Evidence.⁵ Second, it will provide a comprehensive description of who acts under color of law, what conduct constitutes a constitutional deprivation, and how to establish lack of consent for the purpose of proving a constitutional deprivation. Third, it will provide a legal update about a circuit split regarding the definition of “force” and

⁵ This article supplements a 2018 article from this journal that addressed effectively investigating and prosecuting sexual misconduct committed by law enforcement and included a comprehensive discussion of applicable law, the nuances of the statutory enhancements of 18 U.S.C. § 242, and evidentiary rules. See Fara Gold, *Investigating and Prosecuting Law Enforcement Sexual Misconduct Cases*, 66 DOJ J. Fed. L. & Prac., no. 1, 2018, at 77.

“fear” when proving the aggravated sexual abuse statutory enhancement. Fourth, it will address the Sentencing Guidelines and the effect of the victim’s account on sentencing calculations as a means to lessen sentencing disparities between sexual assaults and physical assaults in section 242 prosecutions.⁶ Fifth, it will discuss the practical impact of developing strong federal and state partnerships, as well as the overlap of civil jurisdiction, to most effectively ensure public safety and provide additional relief for victims.

II. Initial considerations when commencing a sexual misconduct investigation

Proving a violation of section 242 where sexual misconduct is the underlying constitutional deprivation is nuanced and, sometimes, counterintuitive. Most notably, as discussed in more detail below, actual consent is a defense, and absent an enumerated felony enhancement, most sexual assaults committed in violation of section 242 (before the enactment of 18 U.S.C. § 250)—even coerced vaginal penetration—can be charged only as misdemeanors.⁷ Therefore, to properly charge sexual misconduct as a felony, carefully considering the applicability of the enhancements is essential.

An investigation should not be automatically closed or a case declined just because there is no apparent physical evidence or eyewitness testimony. Corroboration of the victim’s account can be

⁶ On March 16, 2022, 18 U.S.C. § 250 (Civil Rights Offenses Involving Sexual Misconduct) was signed into law. That statute, in making all sexual assaults felonies, brings parity to the sentencing structure for violations of 18 U.S.C. § 242 involving sexual assault. The discussion that follows applies to sexual assaults that occurred before the enactment of 18 U.S.C. § 250. For those sexual assaults that occurred after, prosecutors are encouraged to charge violations of 18 U.S.C. § 242 in conjunction with the applicable subsection of 18 U.S.C. § 250.

⁷ The elements of a misdemeanor violation of 18 U.S.C. § 242 are (1) actions taken under color of law; (2) deprivation of a constitutional or federally protected right; and (3) willfulness. To prove a felony violation, there are various applicable statutory enhancements. The most common statutory enhancement in sexual misconduct cases are: that the act resulted in bodily injury or included the use or threatened use of a dangerous weapon (subject to up to 10 years in prison); or that the act included kidnapping or aggravated sexual abuse, or attempts thereof (subject to up to life in prison).

established in other ways. Most significant are the defendant's prior conduct and the victim's prior consistent statements. To the former point, Federal Rule of Evidence 413 permits the admission of other acts of sexual assault as propensity evidence, a rarity in criminal prosecutions.⁸ And Rule 404(b) permits the admission of similar fact evidence to show, for example, pattern, motive, and intent.⁹ To the latter point, Rule 801(d)(1)(B) permits the admission of the victim's prior consistent statements as non-hearsay to rebut a defense of improper motive or recent fabrication,¹⁰ which is almost always the defense in law enforcement sexual misconduct cases.

Because sex offenders rarely get caught the first time, and because victims often disclose their sexual assaults well before the advent of a federal investigation, those three rules of evidence—413, 404(b), and 801(d)(1)(B)—are crucial to building a case. A purpose-driven, victim-centered investigation that focuses on corroborating the victim's account and minimizing unfair impeachment by using those rules will make for a stronger case by increasing the likelihood of vindicating the victim's constitutional rights and securing a guilty plea or getting a conviction at trial.

Applying those principles is why even though the allegations against the private prisoner transport officer, mentioned above, began with two women housed together in the same cell in a jail in Arizona and little else, the investigation uncovered 18 women whom he victimized in just a five-year period.¹¹ After a jury convicted him, he was sentenced to two concurrent life sentences plus a consecutive five-year sentence.¹² Likewise, the investigation of the arresting officer in Tennessee uncovered that he sexually assaulted at least four women, one of whom previously reported him, but because the authorities did not believe her on account of her custody status, that officer was not held accountable until his most recent victim came forward. Upon entering a guilty plea, that officer was sentenced to 20 years in prison.¹³ And the probation officer in New Mexico who groped a probationer, he also lied to federal agents when he denied ever

⁸ See FED. R. EVID. 413(a).

⁹ See FED. R. EVID. 404(b)(2).

¹⁰ See FED. R. EVID. 801(d)(1)(B).

¹¹ See United States' Notice of Intent to Use Other Acts Evidence Pursuant to Rules 413 and 404(b) at 63–66, *Kindley*, No. 17-cr-267, ECF No. 35.

¹² Judgment, *Kindley*, No. 17-cr-267, ECF No. 177.

¹³ Judgment, *Logan*, No. 19-cr-125, ECF No. 34.

engaging in sexual misconduct with any probationer during his career.¹⁴ Because that investigation uncovered five other women with whom he engaged in similar misconduct, and whose accounts would have been admissible pursuant to Rule 413 despite being outside the statute of limitations, he entered a guilty plea and was sentenced to 18 months in prison.¹⁵

Keeping in mind this guidance will ensure that allegations of sexual misconduct by government actors are not declined too quickly nor charges brought too soon, thereby increasing the likelihood of a successful prosecution.

III. Color of law and the constitutional deprivation: considering all the possibilities

A. Acting under color of law: the “obvious” and the “less obvious”

The threshold question in proving a section 242 violation is “Who is considered to be acting under color of law?” To act under “color of law” means to use government-sanctioned authority to facilitate one’s conduct, regardless of whether on or off duty.¹⁶ There are those government actors that fall into the “obvious” category, such as police officers, probation officers, corrections officers, and other prison employees. But there are also those who fall into the “less obvious” category, like judges and other public officials, tribal officers,¹⁷ private prisoner transport officers, private prison employees,¹⁸ state employees like teachers and athletic trainers,¹⁹ medical professionals

¹⁴ *Chavez* Plea Agreement, *supra* note 3, at 3–4.

¹⁵ See United States’ Sentencing Memorandum at 2, *Chavez*, No. 12-cr-3290, ECF No. 104; Judgment, *Chavez*, No. 12-cr-3290, ECF No. 111.

¹⁶ See *United States v. Classic*, 313 U.S. 299, 326 (1941); *Screws v. United States*, 325 U.S. 91, 111 (1945).

¹⁷ See, e.g., *United States v. Davis*, 855 F. App’x 362 (9th Cir. 2021) (affirming conviction of tribal officer for violating 18 U.S.C. §§ 242, 1153, 2244(b), and 1519 by sexually assaulting an arrestee and destroying evidence).

¹⁸ See, e.g., *Gwynn v. TransCor Am., Inc.*, 26 F. Supp. 2d 1256, 1265–66 (D. Colo. 1998) (privately contracted transport officer acted under color of law when he sexually assaulted an inmate in his custody).

¹⁹ See, e.g., *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 297 (2001) (state university is “undoubtedly [a] state actor”);

or staff assigned to work at shelters that contract with the Department of Health and Human Services to house unaccompanied children, as well as others who have government-contracted employment.²⁰ Additionally, just as Bureau of Prisons corrections officers act under color of law, so do other federal employees, like agents with the Department of Homeland Security or employees of the Department of Veterans Affairs.²¹

B. Constitutional deprivation: the “obvious” and the “less obvious”

Just as there is the “obvious” and the “less obvious” for color of law, the same is true for the continuum of sexual misconduct that may constitute a constitutional deprivation. Sexual assaults, including forced or coerced penetration, groping, and unwanted sexual acts and sexual contact, as defined under 18 U.S.C. §§ 2246(2) and (3), respectively, are all more obvious forms of sexual misconduct that trigger constitutional protections when perpetrated by government actors. But other examples of sexual misconduct, while still amounting to a constitutional deprivation, may be less obvious. For example, unnecessarily watching a probationer give a urine sample,²²

Jennings v. Univ. of N.C., 482 F.3d 686, 701 (4th Cir. 2007) (en banc) (crediting evidence that defendant acted “in his capacity as a coach” at state university was evidence that defendant was a state actor); Hayut v. SUNY, 352 F.3d 733, 744 (2d Cir. 2003) (“We think it clear that a professor employed at a state university is a state actor.”); Krynicky v. Univ. of Pittsburgh, 742 F.2d 94, 99 (3d Cir. 1984) (“[A]ctions of the University are actions taken under color of state law for purposes of section 1983.”); Popat v. Levy, 328 F. Supp. 3d 106, 127 (W.D.N.Y. 2018) (“[A] professor employed at a state university is a state actor.” (citation omitted)); Watson v. Richmond Univ. Med. Ctr., 412 F. Supp. 3d 147, 165 (E.D.N.Y. 2017) (“[S]tate employment is generally sufficient to render a defendant a state actor under section 1983.” (internal citation omitted));

²⁰ See, e.g., West v. Atkins, 487 U.S. 42, 54 (1988) (finding that a physician who was under contract with a state prison hospital to provide medical services to inmates acted under color of law); Jury Instructions, *Kindley*, No. 17-cr-267, ECF No. 123 [hereinafter *Kindley* Jury Instructions].

²¹ See, e.g., United States v. Yates, No. 20-cr-75 (S.D.W. Va. Mar. 22, 2021) (Veterans Affairs doctor convicted of multiple counts of section 242 for sexually assaulting patients under the pretext of medical exams).

²² See Sepulveda v. Ramirez, 967 F.2d 1413, 1416 (9th Cir. 1992) (noting that the right to bodily privacy is a clearly established right and holding that a

gratuitously watching an inmate shower or change clothes,²³ or escorting a homeowner to the bathroom and watching her urinate during the execution of a search warrant may all be constitutional violations.²⁴ The conduct, whether it be in the “obvious” or “less obvious” categories, need not be repetitive or occur skin to skin to rise to the level of a constitutional deprivation.²⁵

Additionally, it is not necessarily obvious which constitutional right is being violated when such conduct occurs. When an officer physically assaults an arrestee or detainee, the Fourth Amendment applies.²⁶ When, however, that same officer sexually assaults an arrestee (or anyone else for that matter, other than those serving prison sentences),²⁷ in most circuits, the Due Process Clause of the

male parole officer violated a female parolee’s right to privacy when he observed her give a urine sample).

²³ See *Vazquez v. County of Kern*, 949 F.3d 1153, 1162–63 (9th Cir. 2020) (holding officer’s conduct, if proven, would violate right to bodily integrity where officer referred to female ward as “babe,” told her she had a “big butt,” touched her face and shoulders without her consent, told her he had seen her in the shower, told her that she should leave her boyfriend and “find someone better like him,” told her that he had a sexual dream about her, and told her “to get close to him...to the point where he had opened his knees and [she] was right in the middle of him, and he told [her] that he wanted his dream to come true” (internal citations omitted)).

²⁴ See *Ioane v. Hodges*, 939 F.3d 945, 954–56 (9th Cir. 2018) (holding Fourth Amendment right to bodily privacy was implicated when, during lawful execution of a search warrant at her home, an agent escorted plaintiff into the bathroom and monitored her while she relieved herself).

²⁵ See *Crawford v. Cuomo*, 796 F.3d 252, 257 (2d Cir. 2015) (“A corrections officer’s intentional contact with an inmate’s genitalia or other intimate area, which serves no penological purpose and is undertaken with the intent to gratify the officer’s sexual desire or to humiliate the inmate, violates the Eighth Amendment,” and it need not occur more than one time.); *Hayes v. Dahlke*, 976 F.3d 259, 265, 275 (2d Cir. 2020) (finding inmate alleged sufficient facts to survive summary judgment challenge where pat frisk, lasting five to eight minutes, was always through his clothing, and where officer pressed his genitals up against the inmate’s back, ran his hand down the inmate’s back to his buttocks, and around his waist, lifting up his testicles).

²⁶ *Graham v. Connor*, 490 U.S. 386, 394 (1989).

²⁷ See, e.g., *Bearchild v. Cobban*, 947 F.3d 1130, 1144 (9th Cir. 2020) (holding sexual assault of prisoner by corrections officer violates Eighth Amendment’s prohibition against cruel and unusual punishment).

Fourteenth Amendment applies.²⁸ That may be counterintuitive because a sexual assault during an arrest seems like a per se unreasonable seizure. While the Ninth Circuit, for example, takes that view,²⁹ most other circuits do not. In fact, those circuits distinguish between a sexual assault of an arrestee as a Fourteenth Amendment violation³⁰ and a gratuitous search of that same arrestee as a Fourth Amendment violation.³¹ It is, therefore, advisable to check circuit law to ensure that the indictment charges the correct constitutional violation, particularly when the victim is an arrestee.

C. Proving the constitutional deprivation: lack of consent and no legitimate purpose

In practice, the evidence needed to prove a sexual assault is the same evidence needed to prove a constitutional deprivation, and likewise, will be the same regardless of which constitutional right is implicated. The jury instructions will also define the constitutional rights similarly, regardless of the right implicated. That is because the ultimate inquiry to prove the constitutional deprivation is whether the victim consented and, if the victim did not, whether the offender acted with a legitimate government purpose.³²

²⁸ See, e.g., *Rogers v. City of Little Rock*, 152 F.3d 790, 797 (8th Cir. 1998) (sexual assault by police officer violates the victim's substantive due process right to bodily integrity); see also *Jones v. Wellham*, 104 F.3d 620, 628 (4th Cir.1997); *Guillot v. Castro*, No. 17-6117, 2018 WL 3475294, at *7 (E.D. La. July 19, 2018) (citing *Rogers* and noting that "a number of circuit courts have found due process violations when state actors have inflicted sexual abuse on individuals" (citation omitted)).

²⁹ See *Fontana v. Haskin*, 262 F.3d 871, 878–80 (9th Cir. 2001) (applying the Fourth Amendment to sexual assault during the course of an arrest).

³⁰ See *Rogers*, 152 F.3d at 796 (referring to sexual assault by police officer) ("This case is not about excessive force, but rather about nonconsensual violation of intimate bodily integrity which is protected by substantive due process . . . The violation here is different in nature from one that can be analyzed under the fourth amendment reasonableness standard.").

³¹ See *United States v. Morris*, 494 F. App'x 574, 580–81 (6th Cir. 2012) (evaluating officer's sexual assault of an arrestee under the Fourteenth Amendment and officer's strip search of another arrestee under the Fourth Amendment).

³² Compare *Kindley* Jury Instructions, *supra* note 20, at 11, 19 (jury instructions for Fourteenth Amendment violation: "[T]o be unlawful, it must have been unauthorized and without the consent of [the victim]. You must

To be sure, however, there is no legitimate purpose for sexual assault, and the issue of a legitimate government purpose will only arise as a defense in the context of such conduct as gratuitous searches and medical exams. Simply put, a constitutional deprivation hinges on the victim's consent; that is, whether the victim made a voluntary decision as to what they wanted to do with their body.³³ A thorough interview is the key to that determination. The interview often reveals that, because of the offender's physical size, authority over the victim, access to a weapon, the remote location where the encounter occurred, the fact that the offender threatened the victim in some manner, or a host of other factors, the victim believed they had no choice but to submit. Submission, acquiescence, acceding to, being coerced, or "giving in" is not consent. Likewise, a victim may say that they were "forced to consent" or "didn't say no." Just because a victim did not use the word "no" during the assault or uses the word "consent" to describe coercive conduct does not mean that a constitutional violation did not occur. The Supreme Court's definition of consent is particularly instructive. "Consent that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse."³⁴

If, on the other hand, an individual chooses to engage in sexual conduct and does so freely and voluntarily, then there is no constitutional violation.³⁵ This may arise, for example, when a victim

decide whether this alleged conduct occurred and, if so, whether it occurred freely and voluntarily or whether it was against [the victim's] will."), *with* Final Jury Instructions at 22, *United States v. Davis*, No. 19-cr-8008 (D. Ariz. Oct. 16, 2019), ECF No. 114 (jury instructions for Fourth Amendment violation: "The Constitution forbids intrusions on bodily integrity or bodily privacy that serve no objectively reasonable law enforcement purpose . . . [f]or any of these acts to be unlawful . . . the act must have been objectively unreasonable and done without [the victim's] free and voluntary consent.").

³³ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (recognizing the right to engage in sexual activity based on "full and mutual consent").

³⁴ *Florida v. Bostick*, 501 U.S. 429, 438 (1991) (internal quotation omitted).

³⁵ In the prison context, however, due to the inherently coercive nature of the prison system, "there is no consensus in the federal courts on whether, or to what extent, consent is a defense to [a section 1983] Eighth Amendment claim based on sexual contact with a prisoner." *Graham v. Sheriff of Logan Cnty.*, 741 F.3d 1118, 1125 (10th Cir. 2013); see also *Wood v. Beauclair*, 692

voluntarily chooses to engage in sexual conduct in exchange for a benefit, like getting out of a lawful arrest or obtaining extra privileges in prison. Importantly, though, getting a benefit for engaging in sexual conduct does not necessarily convert an otherwise involuntary act into a voluntary, consensual one. That benefit may be the offender’s attempt at a hush payment to keep the victim from reporting him.³⁶ The ultimate question, therefore, is not what the victim received after the conduct was completed, but rather, whether the victim voluntarily chose to engage in the conduct in the first place.

IV. Defining aggravated sexual abuse: a circuit split

Section 242 of Title 18 treats all acts of misconduct as misdemeanors, including both physical and sexual misconduct, unless one or more of the enumerated felony statutory enhancements is applicable. This is true whether the misconduct is an unreasonable use of force, like an unjustifiable shove (that does not result in pain) or a sexual assault, like coerced sexual intercourse.

For a violation of section 242 to be a felony, there must be evidence to sustain one of the enumerated statutory enhancements, or evidence to support charging a violation of 18 U.S.C. § 250 in conjunction with a section 242 violation, for those offense occurring after March 16, 2022.³⁷ One such enhancement is the aggravated sexual abuse enhancement. Plainly stated, if the underlying constitutional

F.3d 1041, 1048–49 (9th Cir. 2012) (establishing rebuttable presumption that a prisoner cannot consent); *Freitas v. Ault*, 109 F.3d 1335, 1338–39 (8th Cir. 1997) (recognizing consent is a defense); *Hall v. Beavin*, 202 F.3d 268, 1999 WL 1045694, at *1 (6th Cir.1999) (unpublished decision) (finding no merit to plaintiff’s Eighth Amendment claim where the “evidence establishe[d] that [plaintiff] voluntarily engaged in a sexual relationship with [defendant]”); *Fisher v. Goord*, 981 F. Supp. 140, 174 (W.D.N.Y. 1997) (“[C]onsensual sexual interactions between a correction officer and an inmate . . . do not constitute cruel and unusual punishment under the Eighth Amendment.”).

³⁶ See, e.g., *Hale v. Boyle Cnty.*, 18 F.4th 845, 855 (6th Cir. 2021) (“[Officer] provided [inmate] with sunshine, detours, cigarettes, sodas, and his mobile number. Each of these gifts, favors, and privileges is indicative of coercion.”); *Brown v. Flowers*, 974 F.3d 1178, 1185 (10th Cir. 2020) (acknowledging that a gift of cigarettes to an inmate could be evidence of coercion).

³⁷ For a comprehensive discussion of the applicability of these enhancements to sexual misconduct allegations, see Gold, *supra* note 5.

deprivation—that is, the sexual assault itself—meets the definition of aggravated sexual abuse, then the enhancement applies, the maximum penalty increases from one year in prison to life in prison, and there is no statute of limitations.³⁸

The aggravated sexual abuse enhancement is defined “by reference to the federal aggravated sexual abuse statute, 18 U.S.C. § 2241, excluding its jurisdictional requirements.”³⁹ As a preliminary matter, to meet the aggravated sexual abuse enhancement, and as required under the definition of section 2241, the underlying constitutional deprivation must include a “sexual act,” as defined in 18 U.S.C. § 2246(2). Generally, a “sexual act” is either some form of oral sex or penetration (however slight).⁴⁰ “Sexual contact,” like groping or unwanted touching, as defined in 18 U.S.C. § 2246(3), is insufficient to establish the enhancement, and the inquiry for the enhancement stops.⁴¹

In most cases where there is a sexual act, the aggravated sexual abuse enhancement is established in one of two ways, as defined by section 2241(a), either: “(1) by using force against that other person; or (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping.”⁴²

To date, there is a circuit split as to the meaning of “force” and “threat” as used in 18 U.S.C. § 2241(a). The Eighth Circuit defines force as, “the use of a threat of harm sufficient to coerce or compel submission by the alleged victim. Force can also be implied from a disparity in size and coercive power between the defendant and the alleged victim.”⁴³ The Tenth Circuit Court of Appeals has similarly held that, “force may be inferred by such facts as disparity in size between victim and assailant, or disparity in coercive power.”⁴⁴

³⁸ 18 U.S.C. §§ 242, 3281 (“An indictment for any offense punishable by death may be found at any time without limitation.”); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding death penalty for rape is unconstitutional).

³⁹ *United States v. Shaw*, 891 F.3d 441, 447 (3d Cir. 2018).

⁴⁰ 18 U.S.C. § 2246(2).

⁴¹ *See* 18 U.S.C. § 2246(3).

⁴² 18 U.S.C. § 2241(a).

⁴³ EIGHTH CIR. MODEL JURY INSTRUCTIONS § 6.18.242 (JUD. COMM. ON MODEL JURY INSTRUCTIONS 2021).

⁴⁴ *United States v. Holly*, 488 F.3d 1298, 1302 (10th Cir. 2007); *see also* *United States v. Reyes Pena*, 216 F.3d 1204, 1211 (10th Cir. 2000) (holding force may be inferred from a disparity in size or power).

In 2018, however, the Seventh and Third Circuits struck down aggravated sexual abuse instructions that permitted the jury to infer “force” from a disparity in size and power or find that aggravated sexual abuse was established via a generalized fear of harm.⁴⁵ Instead, both circuits held that “force” meant that the defendant “actually” forced the victim, and that the fear required to sustain the aggravated sexual abuse enhancement had to be the heightened fear of “death, serious bodily injury, or kidnapping.”⁴⁶ In so holding, the Third Circuit did a legislative and statutory analysis of 18 U.S.C. § 2241, comparing it to 18 U.S.C. § 2242, the less stringent federal sexual abuse statute.⁴⁷ It concluded that force “may be satisfied by a showing of ... the use of such physical force as is sufficient to overcome, restrain, or injure a person.”⁴⁸

Therefore, although other circuits have a broader definition of aggravated sexual abuse, given what appears to be a trend toward narrowing the standard, it may be more prudent to use the Third Circuit’s language in jury instructions. Disparities in power and size are factors better suited for the jury’s consideration of the underlying constitutional deprivation of bodily integrity, that is, lack of consent, rather than whether the conduct meets the aggravated sexual abuse enhancement.

That said, the aggravated sexual abuse enhancement does not require brute violence, and it is not uncommon for government actors and, more particularly, law enforcement officers to use “such physical force as is sufficient to overcome, restrain, or injure a person,”⁴⁹ in order to effectuate a sexual assault. For example, the enhancement is met where the defendant holds the victim in place to gain submission (be it over the hood of a vehicle or against the wall), is physically

⁴⁵ See *Cates v. United States*, 882 F.3d 731 (7th Cir. 2018) (reversing conviction of a police officer who sexually assaulted a woman, citing error in the jury instruction for aggravated sexual abuse); *Shaw*, 891 F.3d at 441 (upholding corrections officer’s conviction for sexually assaulting an inmate, but concluding that aggravated sexual abuse instruction about size disparity and fear was problematic); see also Eighth Cir. Model Jury Instructions § 6.18.242, *supra* note 43.

⁴⁶ *Shaw*, 891 F.3d at 448 (citing *Cates*, 882 F.3d at 737) (quoting 18 U.S.C. § 2241(a)(2)).

⁴⁷ See *id.* at 448–49.

⁴⁸ *Id.* at 449 (quoting *United States v. Lauck*, 905 F.2d 15, 17 (2d Cir. 1990)).

⁴⁹ *Id.*

forceful throughout the misconduct, or otherwise puts the victim in fear of being brutally beaten or killed if they do not comply. This further underscores the necessity of a detailed, thorough, trauma-informed interview to ensure that the violation is properly charged—be it a misdemeanor or, when the aggravated sexual abuse enhancement can be proven, a felony with a statutory maximum of life in prison.

V. Statutory sentencing disparities and the significance of the victim’s account on the Sentencing Guidelines

As noted above, before the enactment of 18 U.S.C. § 250, absent one or more of the enumerated felony enhancements under section 242, many sexual assaults were misdemeanors. This is in large part because section 242 is not a per se sex offense statute.⁵⁰ As a result, its sentencing structure fails to account for the gravity and nature of sexual assaults, underscoring the significance of section 250. For sexual assaults occurring before the enactment of section 25, 18 U.S.C. § 242 neither penalizes such conduct commensurate with physical assaults committed under color of law⁵¹ nor penalize sexual assaults commensurate with other sexual assaults within federal jurisdiction.⁵² Therefore, many incidents of sexual assault carry a low maximum penalty.

⁵⁰ See *United States v. Icker*, 13 F.4th 321, 327–38 (3d Cir. 2021) (finding that defendant police officer convicted for sexually assaulting multiple women (without the aggravated sexual abuse enhancement) could not be subjected to registration requirements under SORNA because section 242 is not a “criminal offense that has an element involving a sexual act or sexual contact with another”).

⁵¹ See Fara Gold, *Investigating and Prosecuting Sexual Misconduct Committed by Law Enforcement: Federal Criminal Jurisdiction*, ABA CRIM. JUST. MAG., Jan. 2021 (While some sexual assaults do result in pain and injury, the vast majority do not, especially when considering the full panoply of sexual misconduct covered by 18 U.S.C. § 242. This results in disparate sentencing schemes between serious sexual assault cases and relatively minor physical assault cases.)

⁵² See 18 U.S.C. § 2242 (Sexual Abuse); 18 U.S.C. § 2244 (Abusive Sexual Contact).

For example, consider an officer who, before March 16, 2022, pulled over a woman for speeding, and the woman submitted to sexual acts because of the officer's size or authority or just out of fear of general physical harm. As described in the previous section, because the woman's fear does not rise to the level of death, serious bodily injury, or kidnapping, and because that officer wielded his authority as a weapon as opposed to physically forcing the woman, the aggravated sexual abuse enhancement does not apply, and that officer, therefore, committed a misdemeanor. If, however, that officer committed the same sexual assault on federal land—whether he was an officer or a civilian—and the victim submitted out of fear of physical harm, he would be subject to a maximum of life in prison under 18 U.S.C. § 2242.

Similarly, the following examples constitute misdemeanor violations of section 242 for offenses that occurred before section 250 was enacted: a probation officer coerces a probationer to submit to vaginal intercourse under a false threat of a probation violation; a state prison corrections officer coerces an inmate into submission due to his size or authority; a prisoner transport officer rapes an inmate during transport, and although too terrified to try to resist, the victim only articulates a generalized fear of physical harm; a doctor or athletic coach at a state university fondles students under the pretext of treating them; or a detective threatens a domestic violence victim with removal of her children if she does not submit and have sex with him. To put a finer point on it, all of the foregoing examples of egregious abuses of authority were misdemeanors with a maximum penalty of one year in custody, significantly less than the ten-year maximum penalty facing an officer if he engages in excessive force, resulting in bodily injury.⁵³

Although the sentencing structure of section 242 does not account for the scope or gravity of sexual assault, the United States Sentencing Guidelines (U.S.S.G.) do, even without the enactment of section 250.⁵⁴ Guideline § 2H1.1 governs violations of section 242, and

⁵³ Conduct resulting in bodily injury is punishable up to 10 years in prison. *See* 18 U.S.C. § 242; *see also* *United States v. Myers*, 972 F.2d 1566, 1572–73 (11th Cir. 1992) (defining bodily injury to include “any injury to the body, no matter how temporary,” and any burn or abrasion, bruise, or just physical pain).

⁵⁴ *See generally* U.S. SENTENCING GUIDELINES MANUAL (U.S. SENT'G COMM'N 2021) [hereinafter U.S.S.G.].

that guideline cross-references to the guideline that governs the underlying offense.⁵⁵ Therefore, for most section 242 violations involving sexual assault, there is a cross-reference to the underlying offense of either sexual abuse or abusive sexual contact, governed by U.S.S.G. §§ 2A3.1 (Criminal Sexual Abuse) or 2A3.4 (Abusive Sexual Contact), respectively.

That means that, even if the conduct is a misdemeanor, if it involves either penetration or oral sex and otherwise meets the definition of sexual abuse under section 2242, then, at minimum, the advisory Guidelines range is 188–235 months in prison.⁵⁶ That is because the Guideline for Criminal Sexual Abuse begins with a base offense level of 30,⁵⁷ and six levels are added because the defendant acted under color of law.⁵⁸ Similarly, if the conduct involves groping or unwanted touching and meets the definition of abusive sexual contact under 18 U.S.C. § 2244, then, at minimum, the advisory Guidelines range is 27–33 months in prison. That is because the Guideline for Abusive Sexual Contact begins with a base offense level of 12⁵⁹ and then adds six levels because the defendant acted under color of law.⁶⁰

For incidents involving groping or unwanted touching, if the victim articulates generalized fear of physical harm or the kind of fear or physical force required for the aggravated sexual abuse enhancement, the base offense level increases to either 16 or 20, respectively.⁶¹ Therefore, for offenses before March 16, 2022, even though those additional details from the victim may not be enough to establish a statutory enhancement and convert a misdemeanor into a felony under section 242, they may substantially increase the defendant’s advisory Guidelines range.⁶² If that increase raises the advisory range

⁵⁵ U.S.S.G. § 2H1.1(a)(1).

⁵⁶ *See, e.g.*, *United States v. Lucas*, 157 F.3d 998, 1003 (5th Cir. 1998) (applying U.S.S.G. § 2A3.1 where the underlying violation of 18 U.S.C. § 242 is a misdemeanor).

⁵⁷ U.S.S.G. § 2A3.1(a)(2).

⁵⁸ U.S.S.G. § 2H1.1(b)(1)(B).

⁵⁹ U.S.S.G. § 2A3.4(a)(3).

⁶⁰ U.S.S.G. § 2H1.1(b)(1)(B).

⁶¹ U.S.S.G. § 2A3.4(a).

⁶² *Davis*, 855 F. App’x at 364 (finding no error in applying additional four levels to defendant’s offense level pursuant to U.S.S.G. § 2A3.4(a)(2) for “confining the victim in the back of his police car, commenting to the victim

above the statutory maximum, the court should stack the counts when imposing a sentence in accordance with U.S.S.G. § 5G1.1, which essentially makes the statutory maximum the recommended sentence.⁶³ This somewhat makes up for the fact that the crime itself is only a misdemeanor.⁶⁴

Moreover, if the defendant sexually assaulted a victim multiple times, or if the defendant sexually assaulted more than one victim, those crimes can be charged separately and do not “group” under the Sentencing Guidelines.⁶⁵ The advisory sentencing range increases with additional criminal acts.⁶⁶

This again highlights both the significance of locating additional victims and the significance of the victim’s account itself, not only on making informed charging decisions, but also in ensuring that the Sentencing Guidelines calculations reflect the gravity of the defendant’s conduct.

VI. Working with state partners and civil enforcement counterparts

A. Strong federal and state partnerships

Coordinating with state or local investigators and prosecutors can help inform how best to investigate these allegations, and if the evidence permits, help determine in which jurisdiction to bring

about the size of her breasts, and photographing the victim's exposed breasts, [because that conduct] caused the victim to experience fear”).

⁶³ U.S.S.G. § 5G1.1(a) (“Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.”).

⁶⁴ *See, e.g., United States v. Peterson*, 887 F.3d 343, 349 (8th Cir. 2018) (probation officer’s sentence of nine years in prison was substantively reasonable where all counts ran consecutive after defendant was convicted of four misdemeanor violations of 18 U.S.C. § 242 involving sexual assault and one count of 18 U.S.C. § 1001).

⁶⁵ *See* U.S.S.G. § 3D1.2 (offenses calculated under § 2H1.1 are excluded from grouping closely related counts).

⁶⁶ U.S.S.G. § 3D1.4 cmt. background (although the increase in offense level is generally capped at five levels, a “departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than 5 Units”).

charges.⁶⁷ There are statutory advantages and evidentiary rules that may favor one jurisdiction over another. For example, Federal Rule of Evidence 413, which permits evidence of other sexual assaults to establish propensity, favors federal prosecution if there is no analogous state rule. Section 242 statutory enhancements, their available penalties, and statute of limitations may also favor federal jurisdiction. On the other hand, if a state has a strict liability statute where consent is not a defense, that state's jurisdiction may be more favorable.⁶⁸ Such statutory violations are easier to prove and often spare the victim from being retraumatized by testifying in a sexual assault trial.

With that in mind, one of the biggest advantages of the federal system, contrary to many state systems—and one that should not be overlooked—is that victims are neither required to testify before the grand jury to secure an indictment nor required to testify at a preliminary hearing to establish probable cause. Any prosecutor who has tried a sexual assault case where the victim has testified previously knows well how challenging it can be to work with the transcript of that prior testimony. Even the most honest person providing their best, then-existing memory of an event will rarely say the same thing twice in exactly same way. Such transcripts are fodder for unfair impeachment. It is inadvisable to make a victim testify unnecessarily before the grand jury—and in the federal system, it is never necessary and, therefore, can be avoided.

The most effective results from state and federal partnerships are global resolutions. While state and federal prosecutors generally should not proceed on parallel tracks toward trial, a global plea agreement with concurrent sentences can provide preferable outcomes to all parties involved. This is particularly true when a state may have jurisdiction over other sex crimes committed by the defendant that are beyond the reach of the federal government. For example, in *United States v. Garcia*, a sex crimes detective with the Las Cruces Police Department entered a guilty plea in federal court for violating section

⁶⁷ For more information, see AEquitas, *State, Meet Federal: Prosecuting Law Enforcement Involved Sexual Violence*, YOUTUBE (June 14, 2021), <https://perma.cc/24GV-R7D6>.

⁶⁸ See, e.g., O.C.G.A. § 16-6-5.1 (Improper sexual contact); N.Y. Penal Law § 130.05 (Sex offenses; lack of consent).

242 by sexually assaulting a student intern during a ride along.⁶⁹ As part of plea negotiations, he also agreed to enter a guilty plea to state charges related to sexual abuse of his own children and receive a concurrent sentence.⁷⁰

Federal prosecution can also provide redress where state or local prosecution might not be an effective alternative. For instance, tribal officials are not subject to state law, but they are subject to federal law. The penalties for violating federal law may offer a better outcome for victims on reservations who may otherwise hesitate to report a tribal officer to the tribal authorities. Additionally, federal prosecution may be the only viable option when the evidence may not precisely establish the county or local jurisdiction in which a crime occurred. Federal districts are geographically larger, encompassing many local jurisdictions and, therefore, may result in venue being more readily provable. These sorts of local jurisdictional or venue issues specifically arise when a prison transport officer sexually assaults an inmate at some point during a transport across county or state lines. For example, in the case of the private prisoner transport officer mentioned above, one of his victims was not able to identify the county she was in when the transport officer sexually assaulted her. She was, however, able to give a more general description about the area of the country she was in. Cell-site or other location data and other evidence established the larger federal district where the sexual assault occurred.

B. Other federal civil rights enforcement options

In addition to section 242, incidents of sexual misconduct may implicate the jurisdiction of other federal criminal civil rights statutes discussed in this issue of the *Journal of Federal Law and Practice*, be it an offender who sexually assaults a victim as part of a bias-motivated crime in violation of 18 U.S.C. § 249 or a landlord who targets tenants because of a protected characteristic and forces them to submit to sex acts under threat of eviction in violation of 42 U.S.C. § 3631, the criminal portion of the Fair Housing Act. Potential violations of these statutes warrant the same investigative steps as any other sexual misconduct violation and require the same

⁶⁹ See Plea Agreement, *United States v. Garcia*, No. 14-cr-1251 (D.N.M. Apr. 17, 2014), ECF No. 6.

⁷⁰ *Id.*

considerations for proving lack of consent and the aggravated sexual abuse enhancement.

Just as there are federal civil rights criminal statutes available to prosecute sexual misconduct, there are also federal civil rights civil statutes available to provide redress through civil enforcement. Several of the civil enforcement sections within the Civil Rights Division have enforcement authority over those statutes, as do local U.S. Attorney's Offices. That jurisdiction can overlap with federal criminal jurisdiction, providing additional relief for victims and resulting in positive institutional shifts. To that end, when an employee of a public school or university engages in sexual misconduct against students, potentially in violation of section 242, the Civil Rights Division's Educational Opportunities Section and the Federal Coordination and Compliance Section can also enforce Title IX of the Education Amendments of 1972, if the school in question receives federal financial assistance. The Educational Opportunities Section can also enforce Title IV of the Civil Rights Act of 1964 when sexual misconduct occurs at a public school.⁷¹ Similarly, when a state or local government employer engages in sexual misconduct against its employees, potentially in violation of section 242, the Civil Rights Division's Employment Litigation Section may also have jurisdiction under Title VII of the Civil Rights Act of 1964, which prohibits workplace discrimination based on sex, among other protected bases.⁷²

Additionally, if a sexual misconduct investigation against a corrections officer, other local government facility employee, or a police officer reveals a potential pattern at their respective agencies of engaging in widespread sexual misconduct or deliberately mishandling of sexual misconduct allegations, the Civil Rights Division's Special Litigation Section has authority to investigate under the Civil Rights of Institutionalized Persons Act and 34 U.S.C. § 12601. Finally, where a landlord, property manager, maintenance worker, or someone else with control over a house is sexually assaulting tenants in violation of 42 U.S.C. § 3631, the Division's Housing and Civil Enforcement Section may have civil enforcement

⁷¹ See Tiffany Cummins Nick, *Protecting Students with Disabilities from Sexual Harassment in Education: Title IX and More*, 70 DOJ J. FED. L. & PRAC., no. 1, 2022, at 217.

⁷² See Shayna Bloom, Jennifer Swedish, & Julia Quinn, *The Employment Litigation Section's Sexual Harassment in the Workplace Initiative and How to Get Involved*, 70 DOJ J. FED. L. & PRAC., no. 1, 2022, at 199.

authority pursuant to the pattern-or-practice provision of the Fair Housing Act, 42 U.S.C. 3614(a).⁷³

Even if the sexual misconduct alleged does not rise to the level of a federal crime, it may still fall within the jurisdiction of the aforementioned statutes. Victims would be well-served if federal prosecutors worked with their civil enforcement counterparts to determine if civil enforcement is warranted. Such cooperation can lead to more widespread accountability for those who commit sexual misconduct and more robust vindication of constitutional and federally protected rights.

About the Author

Fara Gold serves as a Special Litigation Counsel and Senior Sex Crimes Counsel for the Criminal Section of the Civil Rights Division, where she has developed national expertise in prosecuting sexual misconduct committed by government actors. Before joining the Department in 2009, Fara served as an Assistant State Attorney for nearly six years in Broward County, Florida, where she specialized in prosecuting sex crimes and child abuse cases.

Fara received the Attorney General's Award for Exceptional Service in 2014 and the Attorney General's Award for Outstanding Contributions by a New Employee in 2012. She also received the FBI Director's Award for Distinguished Service in Assisting Victims of Crime in 2021, the Assistant Attorney General's Award for Distinguished Service in 2020, and the Assistant Attorney General's Special Commendation Award for Outstanding Service in 2014 and 2011.

Fara is the author of: *Investigating and Prosecuting Sexual Misconduct Committed by Law Enforcement: Federal Jurisdiction*, ABA Criminal Justice Magazine, Winter Issue 2021, (January 2021) and *Investigating and Prosecuting Law Enforcement Sexual Misconduct Cases*, 66 DOJ J. Fed. L. & Prac., no. 1, 2018, at 77

⁷³ See Erin Meehan Richmond & Michael Campion, *Sexual Harassment in Housing: Working with Local Prosecutors in Sexual Harassment Matters*, 70 DOJ J. FED. L. & PRAC., no. 1, 2022, at 237.

Prosecuting the Denial of Medical Care Based on a Claim of Deliberate Indifference

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I. Introduction

Soon after she was booked into jail, N.H. told officers she needed the medication she had been prescribed for a rare blood disorder, warning them, “I will die if I don’t have it in a week.”¹ For days, officers watched as N.H. became obviously sick, with symptoms that included dizziness, difficulty breathing, vomiting, and bleeding. N.H. begged officers to help her and told them the name of the doctor who had diagnosed and treated her disorder, as well as the pharmacy where she received her medication. Despite knowing about N.H.’s diagnosis and seeing her worsening condition, officers failed to get her medication, or take her to a hospital, or even call her doctor. Early one morning, officers found the 19-year-old woman lying alone and unresponsive on the concrete floor of an isolation cell. After 10 days in custody without medical care, N.H. died, just as she had warned officers she would.

Initially, N.H.’s death appeared to be the inexplicable tragedy of a young life cut short. But a painstaking investigation revealed that her death was more than a tragedy, and it was far from inexplicable. N.H. died because jail officials intentionally denied her necessary medical care while she was in their custody and control. Their decisions were a crime—the crime of deprivation of rights under color of law in violation of 18 U.S.C. § 242. Ultimately, four officers were convicted for their roles in N.H.’s death.²

¹ Day 3 Trial Transcript, *United States v. Dominick*, No. 15-cr-289 (E.D. La. Mar. 11, 2021), ECF No. 902.

² In *United States v. Dominick*, No. 15-cr-289, 2016 WL 1408558 (E.D. La. Apr. 11, 2016), defendants Andre Dominick and Timothy Williams each pleaded guilty to depriving the victim of medical care for her serious medical need and causing her death in violation of 18 U.S.C. § 242. Defendants Lisa

The case against those involved in N.H.'s death was one of only a handful of federal criminal civil rights cases brought against officials in recent years based on deliberate indifference to an inmate's serious medical needs. But, sadly, N.H.'s death in custody was not a rarity. The Department of Justice's Bureau of Justice Statistics's latest available research indicates that, on average, approximately 1,000 inmates died in custody each year between 2006 and 2016.³ Various illnesses typically accounted for approximately half of deaths in custody, while suicides comprised almost a third.⁴

Of course, deaths and injuries in custody may result from natural causes, not any wrongdoing. Custodial death or injuries may also result from mistakes or negligence. Such incidents can and should be addressed through administrative or civil remedies. A government official's intentional choice to deny necessary medical care to an individual with a serious medical need, however, is prosecutable under 18 U.S.C. § 242. How do investigators and prosecutors distinguish between officials who act mistakenly or negligently and officials who intentionally withhold or delay medical care from an inmate and, thus, should be held criminally liable for causing the suffering and even death of a person entrusted to their care, custody, and control?

This article seeks to give investigators and prosecutors the knowledge they need to identify criminally actionable cases of deliberate indifference based on a denial of medical care, as well as the tools they need to successfully pursue these difficult cases. Part II discusses the applicable caselaw, which is evolving rapidly in the wake of the Supreme Court's decision in *Kingsley v. Hendrickson*.⁵ Part III gives practical tips for screening potential matters and ensuring successful investigations and prosecutions.

II. Legal overview

Jail or prison officials' deliberate indifference to substantial risks of serious harm to people in their custody violates the Constitution. When an official goes even further, not only acting with deliberate

Vaccarella and Debra Becnel each pleaded guilty to obstruction charges in connection with the investigation into N.H.'s death.

³ See DEP'T OF JUST., MORTALITY IN LOCAL JAILS, 2000–2016—STATISTICAL TABLES 1 (2020), <https://www.bjs.gov/content/pub/pdf/mlj0016st.pdf>.

⁴ *Id.* at 10.

⁵ 576 U.S. 389 (2015).

indifference but also acting willfully, knowing that he or she is doing something illegal, then the official may be subject to prosecution under federal civil rights statutes. This article focuses on deliberate indifference cases that involve the denial of necessary care for serious medical needs. The same legal standard applies, however, to deliberate indifference to substantial risks of other types of serious harm, such as the risk of physical or sexual assault by other inmates or officers; risk of exposure to unsanitary conditions, like a buildup of feces in a jail cell; or the failure to provide basic needs, such as food or water.

The basic premise underlying the deliberate indifference theory of prosecution is “that when the State takes a person into its custody and holds [that person] against his [or her] will, the Constitution imposes upon it a corresponding duty to assume some responsibility for [the person’s] safety and general well-being.”⁶ The underlying rationale is simple:

[W]hen the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him [or her] unable to care for himself [or herself], and at the same time fails to provide for his [or her] basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.⁷

The duty arises not only for individuals in law enforcement custody but also to people being held in mental institutions, state-run nursing facilities, and similar institutions in which people are unable to care for themselves.⁸ Significantly, the duty does not exist unless the risk

⁶ *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989); *see also Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (“When a person is institutionalized—and wholly dependent on the State . . . a duty to provide certain services and care does exist”).

⁷ *DeShaney*, 489 U.S. at 200; *see also Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976); *Youngberg*, 457 U.S. at 315–16.

⁸ *Charles v. Orange Cnty.*, 925 F.3d 73, 82 (2d Cir. 2019) (noting that “[t]he Supreme Court . . . extended the protections for prisoners established in *Estelle* to civil detainees under the Due Process Clause of the Fourteenth Amendment, reasoning that persons in civil detention deserve at least as much protection as those who are criminally incarcerated”) (citing

of harm is objectively serious. There is no constitutional duty for the state to protect individuals in custody from minor bumps, bruises, or discomfort.

This article concentrates on deliberate indifference cases that occur in custodial facilities, which is the most common fact pattern. An official's duty to not be deliberately indifferent to the needs of a person in her custody begins, however, well before the booking process, and as a result, violations can occur in other settings. For example, in *United States v. Gonzalez*, in the Southern District of Texas, deportation officers were charged with being deliberately indifferent to the serious medical needs of an arrestee based on their conduct after an arrest.⁹ In that case, during a house raid, the officers took down the victim with such force that they broke his neck and paralyzed him. The officers did not obtain medical attention for the victim. Instead, they claimed that the victim was "faking" his injuries, and they dragged him, handcuffed, out of the house, across the yard, and into a van to drive him to a local jail for processing. En route, officers gave the victim a "screen test"—an unofficial maneuver in which the driver slams on the brake and causes a handcuffed detainee to lurch forward and hit his face against a screen. The victim's condition made him unable to take any actions to brace himself against injury. The officers failed to request medical help for the victim at the processing site, despite the presence of a nurse. Instead, the officers dragged the victim on to a bus, where they taunted him and sprayed him with mace to see if he would "budge." The victim did not move, even to wipe his eyes, a natural movement for anyone who has had mace sprayed in their eye. Even then, the officers did not take the victim to the hospital. Instead, they drove him, lying unsecured on the bus floor, to another jail three hours away. Upon their arrival, the jail nurse saw the victim's condition and refused to take custody of him. Only then was the victim taken to a hospital. The victim died 11 months later from his injuries. Evidence at trial indicated that he had been in agony from the time of his injury until the time he finally received medical attention. The Fifth Circuit held that the evidence

Youngberg, 457 U.S. at 321–22; *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)).

⁹ 436 F.3d 560, 567–68 (5th Cir. 2006), *abrogation recognized by* *United States v. Garcia-Martines*, 624 F. App'x 874 (5th Cir. 2015) (not precedential).

was sufficient to support the officers' convictions for being deliberately indifferent to the victim's serious medical needs.¹⁰

A deliberate indifference charge, in addition to being a stand-alone charge in cases involving the denial of medical care or a risk of exposure to certain serious conditions, can also be a useful and complementary tool in use-of-force cases. For example, in *United States v. Hickman*,¹¹ in the Eastern District of Kentucky, the defendant correctional officers violently beat an inmate without justification. They then left the inmate in his cell, lying motionless and bleeding from an open head wound, without rendering or requesting any medical aid because they did not want to get in trouble for having caused the inmate's injuries. Four hours later, another jail employee discovered the inmate's lifeless body and summoned paramedics to transport him to a hospital, where he was pronounced dead. The two officers were charged with, and convicted of, a violation of section 242 for their use of excessive force, as well as an additional section 242 deliberate indifference count for their denial of medical care to the obviously injured inmate.

In addition to giving rise to an important charge in its own right, the officers' deliberate indifference to the inmate's serious medical needs also demonstrated their consciousness of guilt with respect to the underlying beating and, therefore, offered powerful evidence that the defendants acted willfully in using excessive force. In use-of-force cases, a deliberate indifference charge can also be brought against officers who do not participate in the use of force but watch or otherwise know about it and intentionally fail to get necessary medical care for a victim's serious medical needs.

A. The elements of 18 U.S.C. § 242

To prove a misdemeanor violation of 18 U.S.C. § 242, the government must prove the following elements beyond a reasonable doubt: that the defendant (1) acted under color of law; (2) deprived the victim of a right secured or protected by the Constitution or laws of the United States; and (3) acted willfully.¹² For the offense to be a felony, the government must also prove (4) that the defendant's

¹⁰ *Id.* at 574–75.

¹¹ *United States v. Hickman*, No. 15-cr-42 (E.D. KY. Feb. 23, 2018).

¹² The elements of 18 U.S.C. § 242 are discussed in detail in Samantha Trepel, *Prosecuting Civil Rights Violations: A Legal Overview*, 70 DOJ J. FED. L. & PRAC., no. 2, 2022, at 21.

actions resulted in bodily injury to the victim; that the defendant used or attempted to use a dangerous weapon, explosives, or fire; that the defendant's actions resulted in death; or that the defendant's "acts include[d] kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill."¹³

Regarding the first element, establishing that the defendant acted under color of law, is typically straightforward in cases involving law enforcement officers or correctional officials working in a correctional facility. While novel legal issues regarding color of law may arise in some section 242 prosecutions, the color of law element will rarely be the determinative factor in the decision to prosecute or decline a deliberate indifference case.

When a jail or prison official denies or delays getting inmates medical care—whether for physical or mental health issues—the second element, the right at issue, is the inmate's right to be free from the official's deliberate indifference. The constitutional sources of that right, as well as the applicable standards, are discussed below.

As Bobbi Bernstein discusses in detail in her article, *The Upside Down World of Excessive Force Prosecutions*, proving the third element—willfulness—is difficult in all section 242 cases.¹⁴ This difficulty arises, in part, from the sympathy potential jurors often feel for the challenges law enforcement officers routinely encounter and from the fact that some of the conduct at issue in a section 242 case may not be unequivocally criminal.

In addition to these considerations, there is yet another complexity particular to section 242 cases based on a deliberate indifference theory where the criminal violation is often rooted, not in a defendant's actions, but rather, in his or her inactions. Often, when a defendant commits a crime by taking an affirmative action, we can infer a defendant's willfulness from the very action he chose to take. For example, we can infer that a defendant willfully used unreasonable force by punching a victim because he made a fist and

¹³ See 18 U.S.C. § 242; *United States v. Lanier*, 520 U.S. 259, 264 (1997) (citing *Screws v. United States*, 325 U.S. 91 (1945)). Keep in mind that, because a death-resulting section 242 case is a potential capital crime, the Department's Capital Case Unit needs to approve a recommendation to seek (or not seek) the death penalty before an indictment is presented.

¹⁴ Bobbi Bernstein, *The Upside Down World of Excessive Force Prosecutions*, 70 DOJ J. FED. L. & PRAC., no. 2, 2022, at 35.

aimed it at the victim's face. It may be difficult, however, to make the same type of inferences about a defendant's intentions based on his *lack* of action. As discussed in detail below, more will be needed to prove willfulness in these cases.

Finally, proving the felony enhancements common in deliberate indifference cases will often be straightforward. Felony deliberate indifference violations will most commonly involve bodily injury or death. To prove bodily injury, the government must prove that the victim suffered some degree of injury to the body, no matter how slight or temporary, because of the defendants' unlawful conduct. Bodily injury includes any physical injury, however slight, including (A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of a function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary.¹⁵ The government does not need to prove that the defendant intended for the victim to suffer injury or die. Rather, the government must prove that the injury or death was a foreseeable, but-for result of the defendant's willful deprivation of the victim's right to be free from the defendant's deliberate indifference.¹⁶

¹⁵ See *United States v. Myers*, 972 F.2d 1566, 1572–73 (11th Cir. 1992) (citing the definitions of “bodily injury” in statutes throughout Title 18 and finding no error in court’s instruction that “bodily injury means any injury to the body, no matter how temporary,” including “any burn or abrasion,” bruise, or just “physical pain.”); accord *United States v. Gonzalez*, 436 F.3d 560, 575 (5th Cir. 2006), *abrogated by* *United States v. Garcia-Martines*, 624 F. App’x 874 (5th Cir. 2015) (not precedential); *United States v. Bailey*, 405 F.3d 102, 111 (1st Cir. 2005).

¹⁶ See *Burrage v. United States*, 571 U.S. 204, 211–13 (2014) (holding that the phrase “results from” requires proof that the harm occurred because of the defendant’s unlawful conduct) (internal quotation marks omitted); *United States v. Martinez*, 588 F.3d 301, 318 (6th Cir. 2009) (holding that a defendant’s action “results” in the victim’s death if the death was “foreseeable and naturally result[ed] from one’s criminal conduct” and does not require intent) (internal quotations and citation omitted); *United States v. Marler*, 756 F.2d 206, 216 (1st Cir. 1985) (holding that, in a section 242 case in which death results, the government need not prove that the defendant intended the victim’s death) (citing *United States v. Hayes*, 589 F.2d 811, 821 (5th Cir. 1983)), *cert. denied*, 444 U.S. 847.

B. The constitutional right at issue: A victim’s right to be free from an official’s deliberate indifference

Proving the deprivation of a right is central to any section 242 case.¹⁷ When jail or prison officials deny or delay getting inmates medical care—whether for physical or mental health issues—the right at issue is the inmate’s right to be free from the officer’s deliberate indifference.¹⁸

¹⁷ Section 242 itself does not establish any substantive rights. Instead, section 242 empowers the government to prosecute the deprivation of rights that have already been “made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.” *Screws v. United States*, 325 U.S. 91, 104 (1945); *see also* *United States v. Lanier*, 520 U.S. 259, 265 (1997) (stating, in describing 18 U.S.C. §§ 241, 242, that “in lieu of describing the specific conduct it forbids, each statute’s general terms incorporate constitutional law by reference”).

¹⁸ *See* *Wilson v. Seiter*, 501 U.S. 294, 294 (1991) (holding that “[t]he ‘deliberate indifference’ standard applied in *Estelle* . . . to claims involving medical care applies generally to prisoner challenges to conditions of confinement”); *Estelle*, 429 U.S. at 104 (holding that the government has an obligation to provide medical care for those whom it is punishing by incarceration, and noting that “(i)t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself”) (internal quotations omitted); *Perry v. Sims*, 990 F.3d 505, 511 (7th Cir. 2021) (holding that prison officials violate the prohibition on cruel and unusual punishment if they act with deliberate indifference to a prisoner’s serious medical condition); *Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 667 (9th Cir. 2021) (holding that individuals in state custody have a constitutional right to adequate medical treatment) (citations omitted); *Smith v. Allbaugh*, 987 F.3d 905, 910 (10th Cir. 2021) (noting that there is a constitutional right to be free from “deliberate indifference to an inmate’s serious medical need” (quoting *Mata v. Saiz*, 427 F.3d 745, 749 (10th Cir. 2005))); *Abernathy v. Anderson*, 984 F.3d 1, 6 (1st Cir. 2020) (holding that “[i]t is well established that ‘deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment’”) (internal citations omitted, quoting *Estelle*, 429 U.S. at 97, 104); *Dooley v. Wetzell*, 957 F.3d 366, 374 (3d Cir. 2020) (noting that “[p]rison officials violate an inmate’s Eighth Amendment rights when they are deliberately indifferent to an inmate’s serious medical need”); *Bonilla ex rel. Est. of Bonilla v. Orange Cnty., Tex.*, 982 F.3d 298, 304 (5th Cir. 2020) (finding that “the Fourteenth Amendment protects pretrial detainees’ right to medical care and to protection from

The specific constitutional basis of an inmate’s right to be free from a law enforcement officer’s deliberate indifference—and thus the applicable standard for determining when a deprivation of that right occurs—depends on the victim’s status: The right of convicted persons to be free from deliberate indifference is protected by the Eighth Amendment’s prohibition against cruel and unusual punishment, whereas the same right for pretrial detainees—which includes those who have been arrested but have not been booked into a custodial facility yet—is governed by the Due Process Clause of the Fifth Amendment (for those in federal custody) or Fourteenth Amendment (for those in state custody). The rights of individuals held in immigration detention, mental health institutions, and other state-run institutions that house individuals other than convicted inmates

known suicidal tendencies”) (internal quotations and citations omitted); *Troutman v. Louisville Metro Dep’t of Corr.*, 979 F.3d 472, 482 (6th Cir. 2020) (noting that, while the basis for a claim of deliberate indifference to the serious medical needs of convicted prisoners arises under the Eighth Amendment’s prohibition of cruel and unusual punishment, for pretrial detainees, the right to medical treatment attaches through the Fourteenth Amendment’s Due Process Clause, which affords pretrial detainees rights analogous to those of prisoners) (internal quotation and citations omitted); *Ivey v. Audrain Cnty., Mo.*, 968 F.3d 845, 848 (8th Cir. 2020) (finding that “prison officials violate the Due Process Clause of the Fourteenth Amendment when they show deliberate indifference to a pretrial detainee’s objectively serious medical needs”); *Hoffer v. Sec’y, Fla. Dep’t of Corr.*, 973 F.3d 1263, 1270 (11th Cir. 2020) (holding that “[f]ederal and state governments . . . have a constitutional obligation to provide minimally adequate medical care to those whom they . . . punish[] with incarceration”); *Charles v. Orange Cnty.*, 925 F.3d 73, 82, 85 (2d Cir. 2019) (reaffirming the principle “that the state has a constitutional obligation to provide medical care to persons” it incarcerates and holding that discharge planning, including interim medications and referrals, is part of required in-custody medical care); *Gordon v. Schilling*, 937 F.3d 348, 356 (4th Cir. 2019) (finding it “beyond debate that a ‘prison official’s deliberate indifference to an inmate’s serious medical needs constitutes cruel and unusual punishment under the Eighth Amendment”) (internal quotations and citations omitted). Any official may be prosecuted for their deliberate indifference to an inmate’s serious medical needs, including prison doctors who unreasonably respond (or fail to respond) to the inmate’s needs and prison guards who intentionally deny or delay access to medical care or intentionally interfere with a prescribed treatment. *See Estelle*, 429 U.S. at 104.

are also governed by the Fourteenth and Fifth Amendments. While these standards have many similarities, the law is not precisely identical, and there are differences among the circuits in how the law has developed.

1. Cases involving convicted inmates: The Eighth Amendment deliberate indifference standard

In claims that involve convicted inmates—and thus arise under the Eighth Amendment—proving deliberate indifference is a two-step process. First, the government must prove that the inmate was exposed to an objectively serious risk of harm. In cases involving medical needs, this means proving that the inmate’s medical condition is one that has been diagnosed by a medical professional or that is so serious that even a layperson would recognize that care is required.¹⁹ Prosecutors from the Civil Rights Division’s Criminal Section and U.S. Attorney’s Offices have brought deliberate indifference cases involving a variety of serious medical needs. In addition to the above-described cases—*Dominick*, where correctional officers failed to provide N.H. with medication for her blood clotting disorder, and *Hickman*, where officers failed to get treatment for the victim’s open head wound—deliberate indifference cases have been brought when an officer failed to provide insulin to a diabetic inmate²⁰ and where a sergeant failed to obtain medical assistance for an inmate who had ingested laundry detergent.²¹

¹⁹ See e.g., *Perry*, 990 F.3d at 511–12; *Patel v. Lanier Cnty.*, 969 F.3d 1173, 1188 (11th Cir. 2020); *Kitchen v. Dallas Cnty., Tex.*, 759 F.3d 468, 482 (5th Cir. 2014) *abrogated by* *Cardona v. Taylor*, 828 F. App’x 198 (5th Cir. 2020) (not precedential); *Zentmyer v. Kendall Cnty.*, 220 F.3d 805, 810 (7th Cir. 2000); *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999); *Moore v. Jackson*, 123 F.3d 1082, 1086 (8th Cir. 1997). The definition of “serious medical needs” encompasses an inmate’s suicidal tendency. See, e.g., *Jacobs v. West Feliciana Sheriff’s Dep’t*, 228 F.3d 388, 394–95 (5th Cir. 2000); *Yellow Horse v. Pennington Cnty.*, 225 F.3d 923, 927 (8th Cir. 2000); *Turbin ex rel. Est. of Novack v. Cnty. of Wood*, 226 F.3d 525, 529 (7th Cir. 2000); *Barrie v. Grand Cnty.*, 119 F.3d 862, 866 (10th Cir. 1997); *Williams v. Lee Cnty., Ala.*, 78 F.3d 491, 492 (11th Cir. 1996).

²⁰ Indictment at 1, *United States v. Barnes*, No. 16-cr-185 (W.D. Okla. 2017), ECF No. 1.

²¹ Complaint at 2, *United States v. Pendergrass*, No. 14-cr-00329 (S.D.N.Y. 2015), ECF No. 1.

If the government proves that the inmate was exposed to a risk of serious harm, then it must satisfy the second step in the analysis: Proving that the defendant acted (or failed to act) with deliberate indifference.²² This second, subjective step, in turn, requires its own two-part analysis. A defendant acts with deliberate indifference only if (1) she actually knew the inmate faced a substantial risk of serious harm and (2) disregarded the risk by failing to take reasonable measures to abate it.²³

In deciding whether the defendant actually knew that the inmate faced a substantial risk of serious harm, a jury may consider any evidence, including any evidence indicating whether the defendants had an opportunity to hear the inmate's complaints, complaints that others made on the inmate's behalf, or both; whether the defendants had an opportunity to observe the inmate's symptoms; and whether any symptoms the inmate had were obviously serious. A jury may conclude that a defendant knew of a substantial risk of serious harm from the very fact that the risk was obvious.²⁴

A defendant may argue that, although the substantial risk of serious harm was obvious, he or she was not actually subjectively aware of

²² See *Farmer v. Brennan*, 511 U.S. 825, 834, 836–37 (1994); *Patel v. Lanier Cnty.*, 969 F.3d 1173, 1188 (11th Cir. 2020); *Troutman*, 979 F.3d at 483; *Garza v. City of Donna*, 922 F.3d 626, 634–35 (5th Cir. 2019), *cert. den.* 140 S. Ct. 651; *Miranda v. Cnty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (noting, while discussing the impact of *Kingsley* on Fourteenth Amendment claims, the Eighth Amendment deliberate indifference claims have an objective and subjective component).

²³ See, e.g., *Perry*, 990 F.3d at 511 (finding that “[l]iability arises only where an official has knowledge of a substantial risk of harm stemming from a serious medical condition and fails to take reasonable measures to mitigate the risk”); *Troutman*, 979 F.3d at 483 (noting that, “[u]nder the subjective standard, ‘an inmate must show both that an official knew of her serious medical need and that, despite this knowledge, the official disregarded or responded unreasonably to that need’”) (internal quotations and citations omitted); *Kitchen*, 759 F.3d at 482 (finding that “[t]o be actionable, the detention officers’ conduct must demonstrate subjective awareness of a substantial risk of serious harm and a failure to take reasonable measures to abate this risk”).

²⁴ *Farmer*, 511 U.S. at 842 (“Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.”); *Hinojosa v. Livingston*, 807 F.3d 657, 665 (5th Cir. 2015) (same).

the risk because its obviousness escaped him or her. If a jury believes this defense, it must acquit the defendant. The jury, however, should be instructed that the defendant may not escape liability because she refused to verify underlying facts that she strongly suspected to be true or declined to confirm inferences of risk that she strongly suspected to exist.²⁵ Valuable evidence proving that a defendant knew that an inmate faced a substantial risk of serious harm can include: video surveillance of the officers interacting with the victim; defendants' log entries noting their observations of the victim's symptoms and complaints; defendants' receipt and review of medical request forms; and comments, complaints, and even jokes defendants made about the victim's plight.

For a jury to find that the defendant acted (or failed to act) with deliberate indifference, the government must prove beyond a reasonable doubt that the defendant refused to treat the inmate, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly demonstrate a wanton disregard for his serious medical need.²⁶ Mere negligence is insufficient to prove deliberate indifference. Thus, for example, officials who take a defendant to a prison medical facility have not violated the Constitution simply because medical staff then failed to properly diagnose the inmate's condition. The government, however, does not have to prove that a defendant intended to inflict harm on the inmate to prove that a defendant was deliberately indifferent to the inmate's medical needs. A conviction is possible even if the defendant sincerely hoped that the harm would somehow not occur.

²⁵ *Farmer*, 511 U.S. at 843, n.8 (noting that “obviousness of a risk is not conclusive and a prison official may show that the obvious escaped him” but that the prison official “would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist”).

²⁶ *Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006) (citing *Domino v. Texas Dep't of Crim. Just.*, 239 F.3d 752, 753–56 (5th Cir. 2001)) (finding that a jail psychiatrist—who, hours before an inmate's suicide denied the inmate's request for sleeping pills because of the inmate's apprehension about being moved to general population and was told by the inmate that he “can be suicidal”—was not deliberately indifferent to the inmate's serious medical needs).

2. The deliberate indifference due process standard applying to cases involving pretrial detainees and persons confined in other state-run institutions

The right of pretrial detainees and persons confined in other state-run institutions to be free from officials' deliberate indifference is rooted in the Due Process Clause of the Fifth Amendment (for those in federal custody) or the Fourteenth Amendment (for those in state custody). Circuit courts have routinely acknowledged that pretrial detainees are theoretically entitled to greater constitutional protections than convicted prisoners. Until 2015, however, there was no meaningful distinction in practice between the two standards. Every circuit applied the Eighth Amendment's "deliberate indifference" standard, created to analyze claims of convicted inmates, when evaluating pretrial detainees' deliberate indifference claims as well—that is, until the Supreme Court's decision in *Kingsley v. Hendrickson*.²⁷

²⁷ 576 U.S. 389. For a survey of pre-*Kingsley* caselaw, see, e.g. *Young v. Dist. of Columbia*, 107 F. Supp. 3d 69, 77 (D.C. Cir. 2015) (holding that "the Eighth Amendment standard for cruel and unusual punishment may be applied to custody of a pretrial detainee—even though such detainees have not been convicted of a crime and may not be subjected to punishment in any manner—since the conditions of confinement are comparable"); *Glass v. Franklin Cnty., KY*, No. 19-cv-00051, 2020 WL 3086602, at *2 (E.D. KY June 10, 2020) (quoting *Harbin v. City of Detroit*, 147 F. App'x 566, 570 (6th Cir. 2005) (not precedential) (holding "[t]o succeed on an action for deliberate indifference to medical needs, plaintiffs have been required to show: (1) an objectively substantial risk of serious harm, and (2) that the jail or county officials were 'subjectively aware of the risk'")); *Burrell v. Hampshire Cnty.*, 307 F.3d *1, *7 (1st Cir. 2002) (holding, in a case evaluating a prisoner's right to be free from officers' deliberate indifference to a risk of violence at the hands of other prisoners that "[p]retrial detainees are protected under the Fourteenth Amendment Due Process Clause rather than the Eighth Amendment; however, the standard to be applied is the same as that used in Eighth Amendment cases"); *Mayoral v. Sheahan*, 245 F.3d 934, 938 (7th Cir. 2001) (stating that, in determining whether an officer was deliberately indifferent to an inmate's safety, there is "little practical difference" between Fourteenth and Eighth Amendment deliberate indifference standards); *Brown v. Harris*, 240 F.3d 383, 388 (4th Cir. 2001) (in evaluating allegations of deliberate indifference to a suicidal inmate's medical needs, finding no need to resolve whether inmate was a pretrial detainee or a convicted

Kingsley involved a use-of-force claim brought under 42 U.S.C. § 1983. The Supreme Court considered whether, to succeed on his excessive force claim, a pretrial detainee was required to show that the officers subjectively intended to use excessive force or only that the officers' use of that force was objectively unreasonable.²⁸ Distinguishing between Eighth and Fourteenth Amendment claims, the Court held that "the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one."²⁹

prisoner because standard in either case was the same); *Jacobs v. West Feliciana Sheriff's Dep't*, 228 F.3d 388, 393 (5th Cir. 2000) (reiterating "the State owes the same duty under the Due Process Clause and the Eighth Amendment to provide both pretrial detainees and convicted inmates with basic human needs, including medical care and protection from harm, during their confinement") (quoting *Hare v. City of Cornith, Miss.*, 74 F.3d 633, 650 (5th Cir. 1996)); *Taylor v. Adams*, 221 F.3d 1254, 1257 n.3 (11th Cir. 2000) (holding claims of indifference to serious medical needs are "analyzed in identical fashion regardless of whether they arise under the Due Process Clause or the Cruel and Unusual Punishment Clause"); *Lopez v. LeMaster*, 172 F.3d 756, 759, n.2 (10th Cir. 1999) (holding analysis of pretrial detainee's Fourteenth Amendment deliberate indifference claim "identical" to that applied to Eighth Amendment claim); *Perkins v. Grimes*, 161 F.3d 1127, 1129–30 (8th Cir. 1998) (holding, in deliberate indifference context, that "pretrial detainees are entitled to at least as much protection as a convicted inmate" and applying Eighth Amendment analysis to a Fourteenth Amendment claim); *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998) (holding, in deliberate indifference context, that Fourteenth Amendment claims by pretrial detainees "are comparable" to Eighth Amendment claims by convicted prisoners, and as a result, applying the same standard); *Reynolds v. Wagner*, 128 F.3d 166, 173 (3d Cir. 1997) (holding, in case involving denial of medical care, that "[t]he Eighth Amendment applies to sentenced prisoners, but the Due Process Clause of the Fourteenth Amendment operates to provide similar protection for pre-trial detainees"); *Weyant v. Okst*, 101 F.3d 845, 856 (2d Cir. 1996) (holding pretrial detainee's right not to be treated with deliberate indifference was at least as great as convicted prisoner's Eighth Amendment right and applying Eighth Amendment analysis).

²⁸ *Kingsley*, 576 U.S. at 391.

²⁹ *Id.* at 396–97, 401. This caselaw has typically evolved in the context of civil suits brought under 42 U.S.C. § 1983 and *Bivens*, which are the civil counterparts to section 242. See *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 929 n.13 (1982) (characterizing section 242 as the "criminal counterpart" of 42 U.S.C. § 1983); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600,

Kingsley involved a claim of excessive force, not deliberate indifference. Since *Kingsley*, however, the circuit courts have split on whether its holding also applies to deliberate indifference claims brought by pretrial detainees. The Fifth, Eighth, Tenth, and Eleventh Circuits have held that *Kingsley*'s objective standard does not apply to deliberate indifference claims.³⁰ These circuits continue to use the test established for convicted inmates under the Eighth Amendment to analyze claims that pretrial detainees were denied the right to be free from deliberate indifference.

662 (1979) (White J., concurring) (noting that, apart from differences in the nature of the remedy, sections 1983 and 242 “are commensurate”); *Fletcher v. Schwartz*, 745 F. App’x 71, 76 (10th Cir. 2018) (not precedential) (recognizing 42 U.S.C. § 1983 as the civil analogue of section 242); *United States v. Brown*, 871 F.3d 532, 537 (7th Cir. 2017) (calling section 1983 “the civil analogue” of section 242); *United States v. Johnstone*, 107 F.3d 200, 206 (3d Cir. 1997) (finding no difference between a civil and criminal case regarding the relevant constitutional standard); *United States v. Reese*, 2 F.3d 870, 884 (9th Cir. 1993) (recognizing 42 U.S.C. § 1983 as an authoritative source of rights which may underlie section 242 prosecutions); *United States v. Cobb*, 905 F.2d 784, 788 n.6. (4th Cir. 1990) (holding that section 242 is “criminal analog” of 42 U.S.C. § 1983, that Congress intended statutes to apply similarly in similar situations, and that civil precedents are equally persuasive in criminal context).

³⁰ See *Strain v. Regalado*, 977 F.3d 984, 990–91 (10th Cir. 2020) (declining to extend *Kingsley* to Fourteenth Amendment deliberate indifference claims because, among other reasons, the nature of a deliberate indifference claim infers a subjective component); *Patel v. Lanier Cnty. Ga.*, 969 F.3d 1173, 1188 (11th Cir. 2020) (noting—after extensive discussion of the impact of *Kingsley* on inmate’s Fourteenth Amendment excessive force claim—that the basic standards governing a Fourteenth Amendment deliberate indifference claim were identical to those under the Eighth); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Nam Dang by & through Vina Dang v. Sheriff, Seminole Cnty. Fla.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (confining *Kingsley* to the excessive force context and holding that deliberate indifference cases brought under the Fourteenth and Eighth Amendments should be evaluated under the same standard of care); *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419, n.4 (5th Cir. 2017) (noting that while the Ninth Circuit has applied an objective standard post-*Kingsley* to the claims of deliberate indifference asserted by pretrial detainees, the Fifth Circuit has continued to rely on pre-*Kingsley* law and to apply a subjective standard post-*Kingsley*, and that the panel was thus “bound by our rule of orderliness” to do the same).

The Second, Seventh, and Ninth Circuits have held that *Kingsley* does apply to deliberate indifference claims.³¹ Other courts have recognized the debate over whether to expand the Court’s holding in *Kingsley* to the deliberate indifference context even while declining to rule on the issue.³²

In circuits that have declined to extend *Kingsley* to pretrial detainees’ deliberate indifference claims, the Eighth Amendment standard applies in the context of pretrial detainees and persons confined in other state-run institutions. Circuits that have extended *Kingsley*, however, will apply an objective only standard, like the one below that the Ninth Circuit articulated.

In light of the uncertainty in this rapidly developing area of law, and in the absence of controlling law, prosecutors may consider instructing the jury on the more stringent Eighth Amendment standard. Proving the more stringent standard may help ensure that a conviction will stand on appeal. Further, as a practical matter, regardless of which deliberate indifference standard applies in any particular circuit, the government still needs to prove that the defendant acted willfully—and, as discussed below, the best evidence of the defendant’s willfulness will be what she knew about the inmate’s serious medical need.³³

³¹ See *Miranda v. Cnty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (joining the Second and Ninth Circuits in concluding that “medical-care claims brought by pretrial detainees under the Fourteenth Amendment are subject only to the objective unreasonableness inquiry” while acknowledging that the Fifth, Eighth, and Eleventh Circuits have confined *Kingsley* to the excessive force context); *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1124–25 (9th Cir. 2018).

³² See *Bowles v. Bourbon Cnty., Ky.*, No. 21-5012, 2021 WL 3028128 (6th Cir. 2021) (noting that, “[a]s a circuit, we have not squarely resolved whether the objective-unreasonableness test of *Kingsley* extends to claims by pretrial detainees of constitutionally inadequate medical care”); *Mays v. Sprinkle*, 992 F.3d 295, 301 (4th Cir. 2021) (noting, in a Fourteenth Amendment deliberate indifference case, that “[w]e had not decided whether *Kingsley*’s excessive-force-claim rationale extended to deliberate-indifference claims by the time [the victim] died. And we still have not”).

³³ See *Strain*, 977 F.3d at 993 (discussing the importance of the subjective component to the intent requirement inherent in a deliberate indifference claim).

3. The objective only Fourteenth Amendment deliberate indifference standard

In *Castro v. County of Los Angeles*, the Ninth Circuit clearly laid out the elements of a pretrial detainee’s post-*Kingsley* Fourteenth Amendment objectively reasonable-only deliberate indifference case against an officer.³⁴ Under this standard, first, the government must prove that the defendant made an intentional decision regarding the conditions under which the plaintiff was confined. Second, the government must prove that those conditions put the plaintiff at substantial risk of suffering serious harm. Third, the government must prove that “the defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious.”³⁵ Regarding this element, the Ninth Circuit held that the defendant’s conduct must be objectively unreasonable, a determination that must be made based on the facts and circumstances of each case.³⁶ Finally, the government must prove that, by not taking such measures, the defendant caused the victim’s injuries.³⁷

III. Tips for identifying and investigating cases of deliberate indifference based on denial of medical care

Sifting through a potentially voluminous file to determine if a tragic death is prosecutable crime—and to distinguish between officers who can be held criminally liable and those who cannot—can be a daunting task. The successful investigation and prosecution of these difficult cases typically will require a different, broader perspective than other criminal investigations. The following are some tips to help investigators and prosecutors identify potentially prosecutable cases and to successfully handle them.

³⁴ 833 F.3d 1060, 1071 (9th Cir. 2016).

³⁵ *Id.*

³⁶ *Id.* (citing *Kingsley*, 135 S. Ct. at 2473 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

³⁷ *Id.*

A. Deliberate indifference: a broader perspective

First, as investigators and prosecutors look for potential evidence, they should assume they are working with a much longer timeline and a much bigger crime scene. Many crimes are discrete incidents. A narcotics sale, for example, often occurs within seconds or minutes with little advance planning. Accordingly, the universe of potential witnesses and evidence typically will be limited to the short period around the sale and its physical location.

In contrast, a deliberate indifference claim based on the denial of medical care may unfold slowly over a longer period. A person who is denied their daily medication for diabetes, a blood disorder, or a heart condition, for example, may slowly decline over hours, days, or even weeks—all while repeatedly and constantly being deprived of necessary treatment—before ultimately succumbing. Therefore, if an inmate died in an isolation cell because of being denied medication, the crime likely began much earlier—perhaps two weeks prior, when the inmate first informed officers at intake that she needed medication for a serious illness. Under such circumstances, evidence of the crime of deliberate indifference may exist in records from the inmate’s booking process, when she informed officers of a serious medical need; on the medical officer’s desk, where the inmate’s written sick calls were sitting; in log books, where other officers noted the inmate’s medical complaints or uneaten meals; or in video footage of her declining physical appearance throughout the course of her entire incarceration. Assuming a longer timeline and casting a wider net for evidence from the beginning of the investigation will ensure that prosecutors and agents have the opportunity to gather important evidence before it is lost. Keep in mind that surveillance video is particularly vulnerable to being lost, because most facilities’ surveillance systems automatically overwrite video after some period, typically around 30 days.

1. Focus on willfulness

Next, as they review the evidence, investigators and prosecutors should focus on willfulness in the early stages to determine whether the case is prosecutable. In a denial of medical care case, as discussed above, the most difficult element to prove, typically, will be that the defendant acted willfully. It is not enough to show that a defendant acted negligently. As discussed above, the element of willfulness is particularly hard to prove in a deliberate indifference case because the

government is often asserting that the defendant should be held accountable for *failing* to act—the essence of a claim based on the denial of medical care. Determining whether the evidence establishes willfulness, particularly where a defendant may have literally done nothing, will often be the key to determining whether the case is prosecutable.

To prove willfulness, it is crucial to find evidence proving, among other things, that the defendants knew that they had a duty to provide medical care for an inmate with a serious medical need. Correctional officers typically learn about inmates' constitutional rights in the basic training programs that states often require they take. Prosecutors and investigators should obtain not just officers' training certificates, but the underlying curricula for their courses, which may show that the officers had been taught what to do in particular medical emergencies or how to address issues such as malingering.³⁸ Prosecutors should interview the subjects' trainers and review the contents of any annual refresher trainings subjects are required to take.

The facility's own internal policies and procedures (and the extent to which a defendant-officer deviated from them) are, potentially, another important source of evidence of willfulness evidence. Often, these policies and procedures clearly establish the rights of inmates to medical care and detail how medical emergencies should be handled. Many facilities also require officers to sign a form acknowledging that they have read and will abide by these policies and procedures.

It can also be helpful to investigate how officers and their facilities have responded to similar medical situations in the past and to consider how those past experiences demonstrate the officers' willfulness in the present situation. For example, suppose a prosecutor is investigating an incident in which an inmate, who was withdrawing from heroin, died after vomiting blood for several days and begging officers for medical help, to no avail. If there is evidence

³⁸ Defendants will often claim, as a defense, that they thought the victim was malingering, a common occurrence in jails and prisons. A defendant's training can be critical to undermining this defense, as trainers commonly advise correctional officers that they need to take all medical complaints seriously and let a medical professional make the determination about the validity of an inmate's medical complaint. Evidence that other witnesses also observed the victim and believed their medical needs will also help undercut this potential defense.

that the officers received training that heroin withdrawal can be a serious medical need, that they knew the inmate was suffering from heroin withdrawal, and that the officers failed to provide any medical care for the inmate, there may be a road to establishing a claim of deliberate indifference.

Suppose, however, the prosecutor then learns that, before this inmate's death, these same officers had, on multiple previous occasions, taken inmates suffering from heroin withdrawal to the local hospital only to be told by medical professionals that the officers should stop doing so because there was nothing that could be done medically for these inmates. Under those circumstances, the same evidence would be insufficient to establish that the officers acted willfully when they failed to render medical help to the victim. The case is likely not prosecutable.

Document every possible interaction between the subjects and the victim to establish the extent of the subjects' knowledge of the victim's medical needs. Evidence that the defendants knew about the victim's serious medical needs can be crucial to establishing a defendant's willfulness. The more a defendant knew about a victim's medical issues, and the more opportunities the defendant had to learn about and observe the victim's symptoms, the more likely it is that the defendant's failure to act was the result of a willful decision instead of mere negligence or oversight.

In addition, keep in mind that many incidents under investigation will have occurred in facilities where many officers are working at the same time, and a significant proportion of those officers may have had some contact with the victim. Breaking down every opportunity each officer had to observe the inmate, help the inmate, or both will help distinguish between each officer's level of culpability.

Gather as much evidence about every simple, reasonable step the defendant officers *could have* taken to help the victim and every opportunity he or she had to take those steps. Correctional officers do not need to be doctors, and they do not need to heal the victim. They simply need to take some reasonable step to abate the substantial risk of harm to the victim—and often, correctional officers are assigned to routine tasks designed to do just that, from conducting head counts to maintaining logs for inmates on medical or suicide watch. Accordingly, prosecutors should document and highlight every single step that the defendants could have taken and every opportunity she had to take that step, from bringing the victim to a phone to call her

doctor or her family to alerting a supervisor to the situation to calling 911 for an ambulance. The more steps the defendant could have taken, the less sympathy the jury will feel for the expectations placed on the defendant, particularly because an inmate is completely dependent on the officers to get medical care.

2. Other considerations in denial of medical care investigations

Working fast can be critical. Gathering evidence and observations as early as possible is, of course, an ideal plan in any criminal investigation. Acting early, however, may be critical to the success of a deliberate indifference prosecution because some of the most compelling evidence may not be the types of things that people are likely to remember for long.

Details about exciting or shocking events, such as a beating or a shooting, are likely to stick in people's minds. A witness may well remember seeing a law enforcement officer holding a smoking gun. Smoking guns, however, whether literal or figurative, are unlikely to factor into deliberate indifference cases based on denial of medical care. People are likely to recall that an inmate died in prison, but they may quickly forget small details like the victim asking them how to fill out a sick call to request medical attention on her very first day in jail—and these seemingly small details, when put together, could be critical in painting the overall picture that proves officials acted with deliberate indifference.

For example, in the days following N.H.'s death, her fellow inmates were able to recount small details, including the name of the victim's doctors, a passing joke one defendant-officer made about her condition, and how often she asked the same officers for her medication. Soon after N.H. died, witnesses were still able to recall N.H.'s deep, ragged breathing as she gasped for air and how they could hear it through the vents and down the hallway. They remembered the color and texture of the bodily fluids that poured out of the victim's body and the way an officer mocked her as she lay dying in the isolation cell. One inmate recalled using her headphones to listen to music because it was too painful to listen to N.H.'s suffering while being powerless to help. On its own, each of these details may have been insignificant, insufficient, or tragic. Together, they created a compelling and prosecutable case.

In deliberate indifference cases, prosecutors should consider capturing as many of these details as possible by locking in witnesses' memories in painstaking detail, ideally by having them testify in the grand jury. If testifying is not an option, consider having the witness give a recorded statement or a long interview, memorialized in a detailed interview report or recording.

Do not overlook the potential value of inmate and civilian witnesses. Prosecutors and agents who have handled civil rights matters know that most police misconduct investigations center around the goal of obtaining law enforcement cooperation. Indeed, an officer who breaks through the "blue wall of silence" in a standard excessive force case to testify against his fellow officers will nearly always be a compelling witness, one who can explain what happened through the lens of the reasonable officer's experience and training—and whose cooperation often makes the difference in the decision to prosecute the matter or decline it.

Law enforcement cooperation is still valuable in a case of deliberate indifference to an inmate's serious medical needs, and inmate and civilian witnesses can provide information that can be used to identify and secure a law enforcement cooperator. In addition, more so than in other types of section 242 violations, civilian and inmate witnesses in a denial of medical care case have value independent of their potential ability to procure law enforcement cooperators. That is because the government must present evidence that the victim had a serious medical need and that the defendant failed to take reasonable steps to abate that need, not from the perspective of the reasonable *officer*, but from the perspective of the reasonable *person*. Specifically, the government must prove that the victim had a serious medical need that has been diagnosed by a medical professional or that is so obvious that even a layperson would recognize it. In these cases, an officer defendant will likely try to argue that he simply did not realize that the victim needed medical attention because he lacked the necessary medical knowledge to understand and that it is unfair to hold him to the same standard as a doctor. Having a doctor testify about the intricacies of an inmate's diagnosed condition, while important to proving the inmate's serious medical need, could run the risk of simultaneously fueling this defense. Under these circumstances, the testimony of non-medical witnesses who recognized a serious medical need, such as officers who tried to get help or questioned whether an ambulance should be called, can be particularly helpful.

Here, the testimony of inmates, some of whom may have addiction issues or lack an advanced education, can be particularly powerful and compelling precisely because of those characteristics. One of N.H.'s fellow inmates provided such a moment at trial. When a defense attorney confronted her on cross-examination with an interview report the agent had written, the witness testified that she could not read the report that the defense attorney put in front of her but further testified that, despite not being able to read, she still knew enough to know N.H. was sick and needed medical help. Her testimony was important evidence of the obviousness of N.H.'s serious medical need, and it significantly undermined the defendant officers' defense that they lacked the training and education necessary to identify that need.

Inmate witnesses will, of course, likely come with certain baggage that can undermine their credibility, and their testimony typically will need to be corroborated. The lack of privacy in custody, however, increases the chances of finding corroborating evidence that can boost the credibility of inmate witnesses. For example, prosecutors and agents can listen to an inmate witness's jail calls to see if she spoke about the victim's medical needs contemporaneously, locate sick calls she wrote on behalf of the victim, or obtain surveillance footage of the inmate witness attempting to get help for the victim. Of course, because of their life experiences, potential inmate witnesses may not easily trust the government officials, and they may not be used to speaking with or being believed by government officials. As a result, prosecutors and agents may need to invest some time in building a rapport with an inmate witness before he is willing to share information.

In addition to interviewing inmate witnesses, look for potentially neutral civilian witnesses, such as an EMT who responded to the facility, who can offer an objective assessment of the medical needs and condition of the victim. Such witnesses may be able to recount incidents of subjects' suspicious behavior. They may also have admissions from subjects that can be used to establish willfulness. Finally, they may offer testimony that corroborates accounts from inmate witnesses/victims and refutes accounts by subjects. Having a neutral, objective EMT who says the inmates are telling the truth and the defendants are not can be critical in a deliberate indifference case and, potentially, may be a substitute for law enforcement corroboration. At a minimum, this type of corroboration can be used to

try to leverage the truth from otherwise uncooperative officer witnesses. One place to identify civilian witnesses who had contact with inmates, the victim, the defendants, or a combination of these parties, could be the jail's surveillance video or the visitor logs.

Finally, in deliberate indifference investigations, pay special attention to a subject's potentially obstructive conduct that seems designed to cover up the incident, such as evidence that a subject destroyed video or text message evidence, filed a report falsely claiming he had no contact with the victim, or intentionally omitted information about the victim from jail logs. Obstructive conduct could be powerful evidence of consciousness of guilt or could be used as leverage against that subject to get them to cooperate. Of course, it could also lead to additional charges. Statutes that may be particularly useful in deliberate indifference cases include 18 U.S.C. §§ 4 (Misprision of a Felony), 1001 (False Statements); 1512 (Tampering with a Witness), and 1519 (False Report). The last two statutes can be particularly effective tools because they each carry maximum sentences of 20 years.

IV. Conclusion

When the state takes custody of an individual, it renders that person completely dependent on its officials for even the most basic human needs, including medical care for serious issues. After all, a person in state custody cannot pick up the phone to call 911, go to a pharmacy to pick up his or her medication, or check out for the day to see a doctor. A person in custody with a serious medical need is completely at the mercy of state officials, and when such officials intentionally deprive that person of necessary care, the needless suffering that results is particularly tragic and compelling. These cases can be difficult to investigate and can present some unique challenges, even among criminal civil rights cases. With an understanding of the applicable legal standards and the use of the tools and perspective outlined above, however, prosecutors can hold perpetrators accountable.

About the Author

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Prosecuting First Amendment Retaliation

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I. Introduction

Contempt-of-cop—a play on the phrase “contempt of court”—occurs when a person does something to draw the ire of a law enforcement officer—argues with him, records his actions, protests police misconduct, files a complaint against him, etc.—and the officer retaliates by abusing his power in some way: using excessive force, arresting the person without probable cause, and/or charging the person with a pretextual offense.¹ In such cases, the person is said to have committed the imaginary offense of contempt-of-cop.

Contempt-of-cop is not a real crime, but it is a real phenomenon. Examples abound on YouTube, like this exchange between a citizen and a Miami Beach Police Officer:

Citizen: “You have a great day too, sir.”

Officer: “Trust me, I will.”

Citizen: “God bless you.”

Officer: “You know what? Fuck it, let’s throw your ass in jail.”²

Or this interaction between a citizen and a Victorville Sheriff’s Deputy:

Deputy: “You know what man? I’m about getting tired of you and you’re about to go to jail just so you know.”

¹ See *Velazquez v. City of Long Beach*, 793 F.3d 1010, 1022 (9th Cir. 2015) (explaining that the “offense of ‘contempt of cop’” occurs when “officers charge resisting arrest or failure to obey or other minimal procedural offenses simply to punish or exact retribution on disrespectful or non-submissive individuals”) (quoting Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1451 n.50 (2009)).

² Albert Valdes, *Miami Beach Cop loses it when I say “God Bless You,”* YOUTUBE, at 0:10 (Oct. 27, 2014), <https://www.youtube.com/watch?v=dbWEtGV3xvg>.

Citizen: “What am I going to jail for?”

Deputy: “I’ll create something. You understand? You’ll go to jail.”³

While contempt-of-cop is not a crime, an officer’s abuse of power to punish a person for contempt-of-cop can be. Depending on the officer’s retaliatory conduct, it could violate a host of distinct Fourth Amendment rights—the right to be free from unreasonable force, the right to be free from false arrest, and the right to be free from malicious prosecution—and, if undertaken willfully, may be prosecutable as a Fourth Amendment violation under a federal civil rights statute, 18 U.S.C. § 242. Fourth Amendment violations are the most common type of constitutional violation prosecuted under section 242, but they are not the only type of constitutional violation implicated by contempt-of-cop retaliation.

When a law enforcement officer retaliates against a person for engaging in First Amendment protected activities, like the ones listed above, that officer has violated the First Amendment.⁴ And if the violation is willful, that officer may be prosecuted, pursuant to section 242, under a First Amendment retaliation theory.

This article sets forth the elements of a First Amendment retaliation violation and provides examples of successful section 242 prosecutions arising out of First Amendment retaliation. The article then examines situations in which it may or may not make sense to bring a First Amendment retaliation charge. The article goes on to share charging considerations and concludes by examining the consequences of contempt-of-cop retaliation and encouraging federal prosecutors to

³ Police Brutality Matters, *The Perfect Example for ‘Contempt of Cop’*, YOUTUBE, at 1:24 (May 11, 2021), <https://www.youtube.com/watch?v=SN8VPybbvqc&t=36s>.

⁴ See *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (“As a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech.” (internal quotation marks and citation omitted)); *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (“Official reprisal for protected speech offends the Constitution because it threatens to inhibit exercise of the protected right, and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out.” (cleaned up)); *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998) (“[T]he First Amendment bars retaliation for protected speech.”).

consider bringing a First Amendment retaliation charge in appropriate cases.

II. Elements of a First Amendment retaliation violation

To establish a violation of section 242, the prosecution must prove, in this context, that an official acting under color of law willfully deprived a person of a constitutional right.⁵

There are a host of constitutional rights implicated in contempt-of-cop retaliation cases, but the focus of this article is on the prophylactic right protecting the substantive freedoms of speech, press, and association, and the right to petition for redress of grievances: the right to be free from retaliation based on the exercise of First Amendment freedoms. In most jurisdictions and contexts, demonstrating First Amendment retaliation requires proof of three elements: (1) that the victim was engaged in a First Amendment protected activity; (2) that a government actor took an adverse action against the victim that would “chill a person of ordinary firmness from continuing” in the activity; and (3) that the adverse action would not have occurred but for the retaliatory motive.⁶ This test is commonly referred to as the “same-decision” test or the *Mt. Healthy* standard, named for *Mt. Healthy v. Doyle*,⁷ the Supreme Court case in which it was articulated.

More recently, the Supreme Court has held that civil plaintiffs suing for damages based on retaliatory arrests or prosecutions in violation of the First Amendment must, in most cases, prove a fourth element: the

⁵ See 18 U.S.C. § 242.

⁶ See *Anders v. Cuevas*, 984 F.3d 1166, 1175 (6th Cir. 2021); *Douglas v. Reeves*, 964 F.3d 643, 646 (7th Cir. 2020); *Martin v. Duffy*, 977 F.3d 294, 299–300 (4th Cir. 2020); *Conard v. Pa. State Police*, 902 F.3d 178, 183 (3d Cir. 2018); *Requena v. Roberts*, 893 F.3d 1195, 1211 (10th Cir. 2018); *O’Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016).

⁷ See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Keep in mind that *Mt. Healthy*’s burden-shifting framework in the civil context—once the plaintiff establishes a *prima facie* case of retaliation, the burden shifts to the defendant to show that he would have taken the same action regardless of the plaintiff’s speech—does not carry over to the criminal context because the Constitution requires prosecutors to prove each element of a criminal offense “beyond a reasonable doubt.” See *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019).

absence of probable cause to support the arrest or prosecution.⁸ Since that additional requirement was imposed in the civil context, and since arguably it is not an element of a First Amendment violation, rather just a requirement for recovery of civil damages,⁹ it is unlikely that prosecutors will be required to prove the absence of probable cause to prevail on section 242 violations predicated on retaliatory arrests or prosecutions. But this area of the law is unsettled—there have been no section 242 retaliatory arrest prosecutions initiated since *Nieves*—so this is an issue you should be prepared to litigate.

The following sections explore each of the elements of a First Amendment retaliation violation and provide examples of section 242 prosecutions predicated on different types of underlying conduct.

A. Activities protected by the First Amendment

The First Amendment protected activities that most frequently prompt retaliation from law enforcement officers are speech criticizing law enforcement, recording law enforcement activities, and protesting and reporting law enforcement misconduct.

1. Speech critical of law enforcement

At the core of the First Amendment is speech critical of government officials, including law enforcement officers. The United States has a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹⁰

⁸ See *Hartman v. Moore*, 547 U.S. 250, 265–66 (2006) (retaliatory prosecution); *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019) (retaliatory arrest).

⁹ *Nieves*, 139 S. Ct. at 1730–31 (Gorsuch, J., concurring in part and dissenting in part) (“[P]robable cause can’t erase a First Amendment violation, the question becomes whether its presence at least forecloses a civil claim for damages as a statutory matter under § 1983.”) (pointing out that it wouldn’t make sense for probable cause “to defeat a First Amendment retaliatory arrest claim” because “[t]he point of *this* kind of claim isn’t to guard against officers who *lack* lawful authority to make an arrest,” it is “to guard against officers who *abuse* their authority by making an otherwise lawful arrest for an unconstitutional *reason*”).

¹⁰ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); see also *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987) (“The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is

Keep in mind, however, that not all speech directed at law enforcement officers, regardless of its content, is protected by the First Amendment. Several categories of speech directed at law enforcement officers fall outside the scope of First Amendment protection, including: (1) true threats, which are “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group”;¹¹ (2) fighting words, words that “by their very utterance inflict injury or tend to incite an immediate breach of the peace”;¹² and (3) obscene speech, a category of speech that has eluded precise definition but, well, you know it when you hear it.¹³

An example of a case in which a law enforcement officer retaliated against a person for engaging in protected speech is *United States v. Corder*,¹⁴ which arose out of a parking dispute. Bullitt County, Kentucky, Sheriff’s Deputy Matthew Corder parked his patrol car in D.B.’s parking space.¹⁵ When D.B. asked Deputy Corder to move and Deputy Corder refused, D.B. walked back inside his house and, on the way, told Deputy Corder to “fuck off.”¹⁶ Incensed, Deputy Corder barged inside D.B.’s home without a warrant, shot him twice with a taser, handcuffed him, and placed him under arrest for “disorderly conduct” and “fleeing and evading.”¹⁷ Then, Deputy Corder taunted D.B., making clear what this was all about: “Next time you tell a

one of the principal characteristics by which we distinguish a free nation from a police state.”); *Thurairajah v. City of Fort Smith*, 925 F.3d 979, 985 (8th Cir. 2019) (“Criticism of law enforcement officers, even with profanity, is protected speech.”).

¹¹ *Virginia v. Black*, 538 U.S. 343, 359 (2003); *see also* *Elonis v. United States*, 575 U.S. 723 (2015).

¹² *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *see also* *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2046–47 (2021).

¹³ *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within th[e] shorthand description [of obscenity]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).

¹⁴ *See* *United States v. Corder*, No. 15-cr-141 (W.D. Ky. Oct. 20, 2016).

¹⁵ *United States v. Corder*, 724 Fed. App’x. 394, 397 (6th Cir. 2018).

¹⁶ *Id.*

¹⁷ *Id.* at 397–98.

police officer to fuck off, you might want to think about it.”¹⁸ D.B. had plenty of time to think about it; he spent the next two weeks in jail for crimes he didn’t commit.¹⁹ Ultimately, Deputy Corder was charged with several section 242 violations arising out of this incident, was convicted after a jury trial, and was sentenced to 27 months in federal prison.²⁰

2. Right to record the police

The First Amendment does not include a provision specifically protecting the right to record the police—an activity that was not contemplated or even possible at the time of the founders—but that right has been recognized as a corollary of the freedom of the press because it serves an analogous function: increasing “the stock of information from which members of the public may draw.”²¹ “The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within [First Amendment] principles,” one court reasoned, because “[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the ‘free discussion of governmental affairs.’”²² For that reason, every federal court of appeals to consider the issue has held that the First Amendment protects the right to record law enforcement officers.²³

¹⁸ Brief for United States as Appellee at 7, *United States v. Corder*, 724 Fed. App’x. 394, 397 (6th Cir. 2018) (not precedential) (No. 16-6592), ECF No. 29.

¹⁹ *Corder*, 724 F. App’x at 398.

²⁰ Press Release, Dep’t of Just., Former Bullitt County, Kentucky, Deputy Sheriff Matthew Corder Sentenced To 27 Months In Prison For Civil Rights Violations (Oct. 17, 2016).

²¹ *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978); *see also* *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017) (“[U]nder the First Amendment’s right of access to information the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas.”).

²² *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

²³ *See Glik*, 655 F.3d 78; *Fields*, 862 F.3d 353; *Turner v. Lieutenant Driver*, 848 F.3d 678, 690 (5th Cir. 2017); *Chestnut v. Wallace*, 947 F.3d 1085, 1090–91 (8th Cir. 2020); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 600–01 (7th Cir. 2012); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Askins v. Dep’t of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018).

The right to record the police is not restricted to professional journalists; anyone with a cell phone may invoke it.²⁴ Which is important because some of the most significant police misconduct cases in our nation’s history—Rodney King, Walter Scott, George Floyd—relied on video recordings captured by civilian bystanders.

The right to record law enforcement is not absolute; like most First Amendment rights, it is “subject to reasonable time, place, and manner restrictions.”²⁵ For example, a person recording the police generally may not trespass onto private property to do so, and a person recording the police engaging in official functions may not do things to obstruct those functions. Which is to say that people recording the police generally must follow the same rules as everyone else.²⁶

Because the right to record the police had not been clearly established in most jurisdictions until recently, there have been no section 242 prosecutions predicated on a violation of that right. But there are plenty of cases in the civil context. Take, for example, *Glik v. Cunniffe*, a case in which a man (Glik) walking through Boston Common happened upon an arrest in progress.²⁷ Concerned that officers were using excessive force, Glik took out his cellphone and began recording, whereupon an officer told him, “I think you have taken enough pictures,” arrested him for violating the Massachusetts wiretap statute, and confiscated his cell phone.²⁸ The First Circuit held that “Glik’s exercise of his First Amendment rights fell well within the bounds of the Constitution’s protections.” The Court

²⁴ *Glik*, 655 F.3d at 83 (“It is of no significance that the present case . . . involves a private individual, and not a reporter, gathering information about public officials. The First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public’s right of access to information is coextensive with that of the press.”).

²⁵ *Id.* at 84 (“To be sure, the right to film is not without limitations. It may be subject to reasonable time, place, and manner restrictions.”); *Smith*, 212 F.3d at 1333 (“[W]e agree with the Smiths that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct.”).

²⁶ *Cf.* *Branzburg v. Hayes*, 408 U.S. 665, 684–85 (1972) (“Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded[.]”).

²⁷ *Glik*, 655 F.3d at 79.

²⁸ *Id.* at 79–80.

explained that Glik filmed the incident from a comfortable distance, that he “neither spoke to nor molested [the police] in any way,” and that the setting of the incident, the Boston Common, was “the oldest city park in the United States and the apotheosis of a public forum.”²⁹

3. Right to protest

The right to protest, enumerated in the First Amendment as “the right of the people peaceably to assemble,”³⁰ holds a sacred place in American jurisprudence. As the Supreme Court recognized, “our constitutional command of free speech and assembly is basic and fundamental and encompasses peaceful social protest, so important to the preservation of the freedoms treasured in a democratic society.”³¹

The right to protest, like the right to record police, is subject to reasonable time, place, and manner restrictions.³² But while the logistics of a protest are subject to reasonable government regulations, its content generally is not.³³

An example of a case in which law enforcement officers retaliated against peaceful protestors is *United States v. Boone*. In that case, a group of St. Louis police officers were dispatched to the scene of a protest, where a group of people were protesting the recent acquittal of a white police officer who had fatally shot a Black man.³⁴ On the way to the protest, several of the officers texted each other things like, “let’s whoop some ass” and “it’s gonna be a lot of fun beating the hell out of these shitheads once the sun goes down and nobody can tell us apart!!!!”³⁵ When they arrived at the protest, officers used excessive force against several protestors, including a Black undercover police

²⁹ *Id.* at 84.

³⁰ U.S. CONST. amend. I.

³¹ *Cox v. Louisiana*, 379 U.S. 559, 574 (1965).

³² *Id.* (“[T]he right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations.”).

³³ *See Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

³⁴ Indictment at 1, *United States v. Boone*, No. 18-cr-975 (E.D. Mo. Nov. 29, 2018).

³⁵ *Id.* at 2–3.

officer who later testified that his own colleagues beat him “like Rodney King.”³⁶ Afterwards, the officers texted each other things like “it’s still a blast beating people” and “Did everyone see the protesters getting FUCKED UP in the galleria???? That was awesome!”³⁷ Former St. Louis police officers Dustin Boone and Randy Hays were charged with section 242 offenses arising out of this incident³⁸ and were convicted after pleading guilty (Hays) and a jury trial (Boone). Hays was sentenced to 52 months of imprisonment, and Boone was sentenced to 12 months and one day of imprisonment.³⁹

4. Right to report official misconduct

The right to report official misconduct derives from the final clause of the First Amendment, which protects “the right of the people . . . to petition the Government for a redress of grievances.”⁴⁰ “In colonial America, the right of citizens to petition their assemblies was an affirmative, remedial right which required governmental hearing and response.”⁴¹ Over time, as courts and government agencies replaced legislatures as the primary fora for adjudicating disputes, the right to petition for redress of grievances has been construed to encompass “the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.”⁴² Over time, reporting police misconduct—whether through a lawsuit,

³⁶ *Deliberations Begin Against 3 Officers Charged in Beating*, U.S. NEWS (Mar. 26, 2021), <https://www.usnews.com/news/best-states/missouri/articles/2021-03-26/deliberations-begin-against-3-officers-charged-in-beating>.

³⁷ *Id.* at 3–4.

³⁸ The U.S. Attorney’s Office for the Eastern District of Missouri elected to charge both officers with section 242 violations predicated on the officers’ use of excessive force rather than on their First Amendment retaliation, but that appears to have been a strategic choice; the record discloses no obstacle preventing prosecutors from charging violations of both constitutional rights.

³⁹ Press Release, Dep’t of Just., Judge sentences former St. Louis Metropolitan Police officer for civil rights violation (Nov. 22, 2021).

⁴⁰ U.S. CONST. amend. I.

⁴¹ Stephen A. Higginson, *A Short History of the Right To Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 142 (1986).

⁴² *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011).

complaint, or other procedural mechanism—has become recognized as a protected First Amendment activity under the Petition Clause.⁴³

The First Amendment right to report official misconduct does not protect the knowing filing of frivolous complaints for the purpose of harassment.⁴⁴ But good-faith efforts to report police misconduct, founded or not, are generally protected by the First Amendment.

An example of a case in which a law enforcement officer retaliated against a person for attempting to file a complaint is *United States v. Dukes*. In that case, J.L. called the police to report Sergeant William Dukes for misconduct: J.L. alleged that Sergeant Dukes had been rude and rough with him during a traffic stop.⁴⁵ Sergeant Dukes himself answered the phone and threatened to arrest J.L. if J.L. called back to report him.⁴⁶ Undeterred, J.L. called the police a second time (as well as the sheriff's office and the Kentucky State Police).⁴⁷ When Sergeant Dukes found out, he drove to J.L.'s home in the middle of the night, barged in without a warrant, sprayed him with pepper spray,

⁴³ See *Gable v. Lewis*, 201 F.3d 769, 771 (6th Cir. 2000) (“[S]ubmission of complaints and criticisms to nonlegislative and nonjudicial public agencies like a police department constitutes petitioning activity protected by the petition clause.”); *Boxer X v. Harris*, 437 F.3d 1107, 1112 (11th Cir. 2006) (“First Amendment rights to free speech and to petition the government for a redress of grievances are violated when a prisoner is punished for filing a grievance concerning the conditions of his imprisonment.”); *Bridges v. Gilbert*, 557 F.3d 541, 554–55 (7th Cir. 2009) (“Nothing in the First Amendment itself suggests that the right to petition for redress of grievances only attaches when the petitioning takes a specific form.”) (quoting *Pearson v. Welborn*, 471 F.3d 732, 741 (7th Cir. 2006)).

⁴⁴ See *McDonald v. Smith*, 472 U.S. 479, 484 (1985) (emphasizing that the right to petition is not “absolute,” and listing, as examples of petitioning activity not protected by the First Amendment, “baseless litigation” as well as petitions that contain “intentional and reckless falsehoods”); *Tarpley v. Keistler*, 188 F.3d 788, 794 (7th Cir. 1999) (“[T]here are situations in which the right to petition can be stretched too far. So-called ‘sham’ petitions—‘situations in which persons use the governmental process[,] as opposed to the outcome of that process,’ to directly harm or harass another party—are not protected by the First Amendment’s right to petition.” (internal citation omitted)).

⁴⁵ *United States v. Dukes*, 779 F. App’x. 332, 333 (6th Cir. 2019) (not precedential).

⁴⁶ *Id.*

⁴⁷ *Id.*

tased him, beat him with a baton and his fists, placed him under arrest, and charged him with several crimes, including a charge of property damage based on the allegation that blood-spatter from J.L.'s broken nose had ruined Sergeant Dukes's police uniform.⁴⁸ All charges against J.L. were dismissed. Not so for Sergeant Dukes, who was charged with several section 242 violations arising out of this incident, convicted after a jury trial, and sentenced to 42 months of imprisonment.⁴⁹ As the Sixth Circuit put it in affirming his conviction, "the string of horrors Officer William Dukes Jr. paraded on [J.L.] after a simple traffic stop has no place in our society."⁵⁰

B. Chilling adverse actions

Each of the three most common types of adverse actions undertaken by law enforcement officers to retaliate against First Amendment protected activities was present in the *Dukes* case: excessive force, false arrest, and malicious prosecution. Courts have held, as a matter of law, that each of those adverse actions is sufficiently serious to chill a person of ordinary firmness from engaging in First Amendment protected activities.⁵¹ So in most First Amendment retaliation prosecutions, this element should be straightforward to establish.

C. Causal nexus between protected activity and adverse action

The biggest obstacle to proving a First Amendment retaliation violation is establishing a causal nexus between the First Amendment protected activity and the adverse action. There are two main challenges to overcome.

The first challenge is the high standard of proof. As the Supreme Court instructed in *Nieves*,

⁴⁸ *Id.* at 334.

⁴⁹ *Id.*

⁵⁰ *Id.* at 333.

⁵¹ See *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 127 (D.C. Cir. 1977) (Bazelon, C.J., statement respecting denial of rehearing en banc) ("Illegal arrests and excessive force may deter peaceful and law-abiding citizens from exercising their first amendment rights . . ."); *Thurairajah v. City of Fort Smith*, 925 F.3d 979, 985 (8th Cir. 2019) ("[T]here can be little doubt that being arrested for exercising the right to free speech would chill a person of ordinary firmness from exercising that right in the future.").

[i]t is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury. Specifically, it must be a but-for cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.⁵²

Proving a negative is hard enough when dealing with concrete facts; it is harder still when dealing with abstract concepts like motive. Which is not to say that it can't be done, just that you'll need to tailor your investigation to develop proof of motive. How do you do that? Look for evidence of pre-offense premeditation or post-offense bragging. Evaluate the temporal proximity between the speech and the adverse action. Investigate whether the officer has a history of similar misconduct. Find out how the officer treated similarly situated individuals. Proving a causal nexus is challenging but doable.⁵³

The second challenge is disproving that the officer was acting in good faith. Since law enforcement officers have the qualified authority to use force, make arrests, and in some jurisdictions, bring criminal charges, they have a built-in excuse for their adverse actions: “I was just doing my job.” If the officer used force, he'll likely argue that it was reasonable under the circumstances. If the officer made an arrest or brought a criminal charge, he'll likely argue that it was supported by probable cause. How do you rebut that an officer was acting in good faith? One way is to develop strong proof of retaliatory motive; after all, it is harder for a police officer to claim that he used reasonable force against a protestor when you have a text from that officer reading, “it's gonna be a lot of fun beating the hell out of these shitheads once the sun goes down and nobody can tell us apart!!!!”⁵⁴ Another way is to examine whether the officer followed or violated his department policies or training; it is harder for a police officer to maintain that he did the right thing when there's proof that he was specifically trained *not* to do that very thing. Maybe the most

⁵² *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019).

⁵³ *See Peterson v. Kopp*, 754 F.3d 594, 603 (8th Cir. 2014) (finding that a reasonable jury could conclude that the officer did not “pepper spray[] Peterson as a reasonable reaction to an escalating situation” but, rather, did so to retaliate against Peterson for asking for his badge number, noting that the officer deployed pepper spray moments after Peterson asked for his badge number and did not pepper-spray other individuals who were engaging in similar behavior but did not ask for the officer's badge number).

⁵⁴ Indictment at 3, *Boone*, No. 18-cr-975.

compelling way to rebut a good-faith claim is through the testimony of a fellow officer that what the defendant-officer did was wrong. Keep in mind, though, that most police officers won't raise their hands to volunteer to report their fellow officers; it'll be your job, during the investigation, to get them to come clean.

III. Why bring a First Amendment retaliation charge?

Why complicate your case by adding a First Amendment retaliation charge to an otherwise straightforward Fourth Amendment excessive force or false arrest case?

Sometimes there are good reasons *not* to do so. If the victim's speech is truly stomach-turning—think Westboro Baptist's chants of "Thank God For Dead Soldiers" outside of a fallen soldier's funeral⁵⁵—or arguably does not qualify as protected speech, you may choose to keep the jury's focus on the officer's retaliatory conduct and not on the speech that prompted it. Similarly, if the officer's actions were motivated by a mixture of protected conduct, such as filming the police, and unprotected conduct, such as arguably threatening statements, or if the causal nexus between the speech and adverse action is too attenuated, the proverbial juice may not be worth the squeeze. But there are also circumstances in which it makes good sense to add a section 242 charge predicated on a First Amendment violation.

One situation is when the retaliatory conduct is egregious and has a chilling effect but arguably does not amount to an "unreasonable seizure" in violation of the Fourth Amendment. Some retaliatory conduct may not amount to a seizure, which the Supreme Court defined recently as "[t]he application of physical force to the body of a person with intent to restrain."⁵⁶ If an officer were to retaliate against a civilian without seizing him—that is, without using physical force or without intending to restrain—a First Amendment retaliation claim would be viable, despite the absence of a Fourth Amendment violation, because "[t]he retaliatory conduct itself need not be a constitutional violation; the violation is acting in retaliation for 'the

⁵⁵ Snyder v. Phelps, 562 U.S. 443, 448 (2011).

⁵⁶ Torres v. Madrid, 141 S. Ct. 989, 994 (2021).

exercise of a constitutionally protected right.”⁵⁷ One could also imagine a situation in which an officer seized a person in retaliation for protected speech, but it is arguable whether the officer’s use of force was objectively unreasonable under the circumstances. In such a case, a First Amendment retaliation claim would, in theory, remain viable even if the Fourth Amendment claim were borderline because “it is well established that an act taken in retaliation for the exercise of a constitutionally protected right is actionable. . .even if the act, when taken for a different reason, would have been proper.”⁵⁸

Another situation in which you may want to explore bringing a First Amendment charge is when an officer retaliates against a person by arresting him for a pretextual offense in violation of the Fourth Amendment but either does not use excessive force or uses excessive force under circumstances making that excessive force difficult to prove.⁵⁹ In such cases, a First Amendment retaliation charge may be the strongest available charge. False arrest violations are even harder to prove than First Amendment violations because they always require proving the absence of probable cause,⁶⁰ a challenge in our current day and age when “criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something.”⁶¹ The existence of probable cause to arrest for some crime, even a crime not contemplated by the officer at the time of arrest, is a complete defense to a false arrest charge,⁶² but arguably, it does not defeat a First Amendment

⁵⁷ *Spencer v. Jackson Cnty.*, 738 F.3d 907, 911 (8th Cir. 2013) (internal citation and quotation marks omitted).

⁵⁸ *Izen v. Catalina*, 382 F.3d 566, 572, n.7 (5th Cir. 2004) (collecting cases) (internal quotation marks omitted).

⁵⁹ The *Dukes* case is a good example of the latter. Sergeant Dukes attacked D.L. in the middle of the night in D.L.’s home. There were no witnesses to the assault, and because the lights were off, body camera footage did not capture the incident very clearly.

⁶⁰ See *Crocker v. Beatty*, 995 F.3d 1232, 1243 (11th Cir. 2021) (“The existence of probable cause bars a Fourth Amendment false-arrest claim.”).

⁶¹ *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part).

⁶² *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (“[A]n arresting officer’s state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.” (citations omitted)).

retaliatory arrest charge. Just as “a detention based on race, *even one otherwise authorized by law*, violates the Fourteenth Amendment’s Equal Protection Clause,”⁶³ arguably so too does an arrest in retaliation for the exercise of free speech, even if supported by probable cause, violate the First Amendment.⁶⁴ Accordingly, a First Amendment charge may be worth considering in a retaliatory arrest case motivated by the victim’s protected speech.

Yet another situation in which you may want to explore bringing a First Amendment charge is where the most significant harm was not the adverse action but the deliberate silencing or chilling of important and core protected speech. One could imagine a case in which an officer harasses a journalist critical of the police by searching and arresting him over and over again without cause. Or a case in which the police repeatedly tear-gas peaceful protestors to make them suffer. In cases like that, you may want the jury’s focus on the greater harm—the chilling effect on free speech—rather than on a journalist’s booking photo or a protestor’s tears.

IV. Charging considerations

If you’re ready to charge a section 242 violation under a First Amendment retaliation theory, there are four considerations to keep in mind before presenting an indictment.

First, because an officer’s single act of retaliation may violate multiple constitutional rights at once, or the same constitutional right in multiple different ways, you should be mindful of potential multiplicity and duplicity challenges to your indictment. Multiplicity occurs when an indictment charges a single offense in separate counts; duplicity occurs when an indictment combines two or more distinct crimes into one count. An indictment is not multiplicitous if it includes two separate section 242 counts predicated on the same act as long as that act violated two distinct constitutional rights.⁶⁵ For

⁶³ *Nieves*, 139 S. Ct. at 1731 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

⁶⁴ *See id.* at 1727; *see also* *Brewer v. Town of Eagle*, No. 20-cv-1820, 2021 WL 3473243, at *7 (E.D. Wis. Aug. 6, 2021) (declining to dismiss plaintiff’s retaliatory arrest claim, despite the presence of probable cause, citing “evidence that Plaintiffs were treated differently because of their exercise of free speech, even if Defendants had probable cause to pursue enforcement of municipal codes”).

⁶⁵ *See United States v. Rentz*, 777 F.3d 1105, 1106–15 (10th Cir. 2015) (en banc).

example, an officer's retaliatory use of unreasonable force against a peaceful protestor would violate two distinct constitutional rights—the First Amendment right to be free from retaliation based on protected speech and the Fourth Amendment right to be free from excessive force—and, thus, could be properly charged in separate counts. An indictment is duplicitous, however, if it charges distinct constitutional violations in a single count, as each violation affords a separate basis for criminal liability. For that reason, it would be wise to separate distinct constitutional violations into separate counts or to request a unanimity instruction, to avoid creating an issue on appeal.

Second, keep in mind that structuring your indictment to avoid a duplicity challenge may create the perception that you're overcharging the defendant-officer. Imagine a case in which a civilian, standing on his front porch, directed crude (but constitutionally protected) speech at an officer and then walked inside of his house. If the officer barged inside the man's home, tased him without justification, and arrested him, then he has arguably committed four separate constitutional violations within a span of a few seconds: a First Amendment violation for retaliating against protected speech and three Fourth Amendment violations—one for warrantless entry into the home, one for false arrest, and one for excessive force. This sounds like a law school hypothetical, but it is not; it is what happened in *United States v. Corder*.⁶⁶ When you're making final charging decisions in a case like *Corder*, where an officer's single act violates multiple constitutional rights at once or the same constitutional right in different ways, you'll need to balance the desire to capture the full extent of the defendant's offense conduct with the need to avoid the perception that you're overcharging the defendant.⁶⁷ Think, what is the gravamen of the wrong, and what do you plan to argue to the jury?

Third, remember that any section 242 charge, including one predicated on First Amendment retaliation, is a misdemeanor unless at least one of the felony enhancements applies: most commonly, that bodily injury resulted from the offense conduct or that such conduct involved the use, attempted use, or threatened use of a dangerous

⁶⁶ See *Corder*, 724 F. App'x. 394.

⁶⁷ Keep in mind that convictions on multiple counts predicated on the same "act or transaction" will likely be grouped together for sentencing purposes and will not result in a higher Guideline range. See U.S. SENT'G GUIDELINES MANUAL § 3D1.2 (U.S. SENT'G COMM'N 2021).

weapon. One or more felony enhancements are almost always implicated by an excessive force violation since uses of force almost always result in physical pain,⁶⁸ at a minimum, and frequently involve the use of dangerous weapons, such as tasers, batons, or shod feet. Malicious prosecution violations, by contrast, are almost always misdemeanors since the offense conduct—charging a person with a crime he or she did not commit—does not directly result in bodily injury or involve the use of a dangerous weapon. False arrest violations fall somewhere in the middle: arresting a person for a crime he did not commit does not necessarily result in bodily injury or involve the use of a dangerous weapon, but if force was used to effect the arrest, then one or both of those felony enhancements may be implicated. For example, in *Corder*, the defendant-officer was charged with (and convicted of) a felony section 242 violation predicated on his false arrest of the victim because he used a dangerous weapon (a taser) to effect the arrest, and the arrest resulted in bodily injury (taser burns).⁶⁹

Finally, before charging a section 242 violation under a First Amendment retaliation theory, make sure that the specific right at issue was clearly established in your circuit at the time of the officer's conduct. While the doctrine of qualified immunity does not apply in the criminal context, the analogous fair-warning doctrine does. As the Supreme Court has explained,

[b]efore criminal liability may be imposed for violation of any penal law, due process requires fair warning. . . of what the law intends. The touchstone is whether the statute, either standing alone or as construed by the courts, made it reasonably clear at the time of the charged conduct that the conduct was criminal.⁷⁰

This means that an officer may not be charged with a section 242 violation unless, at the time of his conduct, the law clearly established that his conduct violated the specific constitutional right at issue. For more traditional types of First Amendment protected activities, such as freedom of speech and protest, this is generally not an issue. But for

⁶⁸ The legal definition of bodily injury includes physical pain, by itself, without any corresponding physical injury. 18 U.S.C. § 831(f)(5).

⁶⁹ *Corder*, 724 F. App'x. at 398.

⁷⁰ *United States v. Lanier*, 520 U.S. 259, 259 (1997) (internal quotation marks and citation omitted).

rights that have been recognized more recently, such as the right to record the police and the right to report police misconduct, you will need to do legal research to make sure that your indictment is on solid legal footing.

If all this sounds daunting, do not despair: if you're preparing to charge a section 242 violation under a First Amendment retaliation theory, call the Criminal Section of the Civil Rights Division. We'd be happy to workshop your case.

V. Conclusion

First Amendment retaliation may seem trivial when compared to other kinds of police misconduct, but it can have serious and lasting consequences. Victims of contempt-of-cop arrests go to jail, and if they can't afford bail, they stay there for weeks or even months. And that's just the arrest. When there's no video of what happened, and it's just their word against the officers', they can be convicted of crimes they didn't commit. Those convictions have consequences. For many people, a conviction means they're out of a job and may have trouble obtaining a new one. If that conviction is a felony, they may lose important constitutional rights, like the right to vote or own a gun. And if they're not from this country, that conviction may cause them to be deported—all for engaging in activities that are “essential to the very existence of a democracy.”⁷¹

The repercussions of First Amendment retaliation can reverberate far beyond the individual victim. First Amendment retaliation, if not addressed, can have a chilling effect on the exercise of fundamental constitutional rights: if people are assaulted or arrested for engaging in First Amendment protected activities, they and other members of the community might think twice about engaging in those activities. Which means that misconduct might not be brought to light by protestors or citizen journalists and that officers engaging in retaliation might *not* think twice about doing it again.

All of which is to say that First Amendment retaliation is a serious issue warranting a serious response. Sometimes discipline or retraining is sufficient. But in some cases, the retaliation is so malicious, and the effects of that retaliation so severe, that criminal prosecution is warranted. In such cases, consider charging a section 242 violation under a First Amendment retaliation theory.

⁷¹ *Dennis v. United States*, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting).

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Fifth Amendment Issues in Prosecuting Public Employees

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When a law enforcement officer's misconduct rises to the level of a willful violation of the Constitution, the government may prosecute that officer for violating criminal civil rights laws. Other articles in this series discuss legal and strategic issues related to such color of law prosecutions. When investigating these important cases, prosecutors should bear in mind that some statements law enforcement officers (and other public employees) make may be protected by the Fifth Amendment because they are made under the threat of termination from a government position. This set of frequently asked questions (and answers) is designed to help prosecutors identify when statements may have been compelled by threat of job loss (and therefore are protected by the Fifth Amendment) and take steps to ensure that they do not improperly use such statements against the public employees who made them.

Below are some commonly asked questions and answers about the Fifth Amendment as it applies to the prosecution of law enforcement officers and other public employees.

I. How does the Fifth Amendment apply to statements of public employees?

The Fifth Amendment says that no one “shall be compelled in any criminal case to be a witness against himself.”¹ If the government compels a person to make an incriminating statement, that statement

¹ U.S. CONST. amend. V, cl. 3.

cannot be used in a criminal proceeding against the person who made it.²

Certain forms of coercion, such as pointing a gun at someone to get them to make a statement, constitute compulsion to speak. Similarly, threatening to penalize someone by firing them for remaining silent constitutes compulsion.³ The *Garrity* rule, named for Supreme Court case *Garrity v. New Jersey*, explains that the threat to terminate someone from public employment for refusing to make a statement constitutes legal compulsion.⁴ If public employees are told that they will lose their jobs (and thus their means of supporting themselves) if they remain silent and refuse to provide a statement, then their subsequent statement is deemed compelled and therefore inadmissible against them in a criminal case.

Law enforcement agencies (and other governmental entities) have a legitimate administrative interest in questioning employees about possible misconduct.⁵ Such investigations could be thwarted if public employees could simply assert their right to remain silent and thereby refuse to answer their employers' questions. Thus, agencies may, consistent with the Constitution, fire employees for refusing to answer questions posed during internal investigations, so long as the employees are assured that their statements will never thereafter be used against them in a criminal proceeding.⁶ So, if the employee is

² *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *see also* *United States v. Proano*, 912 F.3d 431, 437 (7th Cir. 2019) (“*Garrity* held that when a public official must choose between cooperating in an internal investigation or losing his job, the statements he makes during the investigation are compelled, and, as such, they cannot later be used against the official in a criminal trial.”).

³ *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977).

⁴ *Garrity v. New Jersey*, 385 U.S. 493, 497–98 (1967).

⁵ *Aguilera v. Baca*, 510 F.3d 1161, 1171 (9th Cir. 2007) (noting that in *Garrity* and its progeny the Supreme Court was careful “to preserve the right of a public employer to appropriately question an employee about matters relating to the employee’s possible misconduct while on duty”).

⁶ *See Cunningham*, 431 U.S. at 806 (“Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity.”); *Homoky v. Ogden*, 816 F.3d 448, 452 (7th Cir. 2016) (“[A] public employee may be compelled to answer questions in a formal or informal proceeding investigating allegations of misconduct, even if the answers are incriminating, so long as the state does not use the

threatened with job loss for refusing to answer questions, answers made in response to those questions may not (absent a waiver) be used against her in a subsequent criminal prosecution.⁷

II. Are all statements by a public employee accused of misconduct covered by the Fifth Amendment?

No. If a public employee is asked a question and answers it, the answer is not presumed to be compelled. In fact, the general rule is that individuals must affirmatively invoke their Fifth Amendment right to remain silent if they want the protection afforded by the Fifth Amendment.⁸ If a law enforcement agency's internal affairs department (or a supervisor with authority to fire an employee) asks questions that the employee *voluntarily* answers, the statements may be used in subsequent criminal prosecutions.⁹

Garrity applies only if the public employee is threatened with job loss (or a similarly severe sanction) based on the employee's refusal to answer questions—in other words, it applies when the employer threatens termination because the employee asserts the right to remain silent or to deter the employee from asserting the right.

statements in any subsequent criminal proceeding.”); *Hill v. Johnson*, 160 F.3d 469, 471 (8th Cir. 1998) (“As long as a public employer does not demand that the public employee relinquish the employee's constitutional immunity from prosecution, however, the employee can be required to either testify about performance of official duties or to forfeit employment.”).

⁷ *Moody v. Michigan Gaming Control Bd.*, 871 F.3d 420, 430 (6th Cir. 2017) (“The Supreme Court has made clear that if a state wishes to punish an employee for invoking that right [to remain silent], States must offer to the witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity.”) (cleaned up).

⁸ *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984).

⁹ *Chavez v. Robinson*, No. 18-36083, 2021 WL 4075369, at *7 (9th Cir. Sept. 8, 2021) (explaining that the Fifth Amendment is inapposite when “a person does not invoke the privilege against self-incrimination and any pressure to make incriminating statements does not rise to the level of compulsion”); *United States v. Vangates*, 287 F.3d 1315, 1324 (11th Cir. 2002) (finding statements were not compelled when employee was never ordered to make a statement or told she could be fired for refusing to make a statement, and when no policy or regulation required that she surrender her Fifth Amendment rights).

Threats to fire an employee for *misconduct* do not implicate *Garrity*, even if the employee is put in the uncomfortable position of having to decide whether to remain silent and let evidence stand unrefuted or to make a statement and risk self-incrimination.¹⁰

Garrity compulsion may be direct and obvious, such as when an internal affairs investigator explicitly tells a law enforcement officer (or other public employee), before an interview, that refusal to answer questions may result in termination. Agency rules or regulations may similarly clearly provide that an employee may be terminated for failing to cooperate with internal investigations. Likewise, a *lack* of compulsion may be obvious, such as where an employee is specifically told that he has the right to remain silent and that he will suffer no consequences for exercising that right or where an agency regulation prohibits compelled statements.

In many cases, however, warnings are ambiguous, policies are confusing, a defendant may argue that coercion was *implied* by particular circumstances, or a combination of these. If the question is litigated, courts will generally determine that a statement was compelled only if the employee had a subjective belief that refusing to answer a question would result in termination, and that belief was objectively reasonable under all the facts and circumstances.¹¹

¹⁰ *Baxter v. Palmigiano*, 425 U.S. 308, 317–18 (1976) (holding, in prison disciplinary decision, that “this case is very different from the circumstances . . . in the *Garrity-Lefkowitz* decisions, where refusal to submit to interrogation and to waive e [sic] Fifth Amendment privilege, standing alone and without regard to the other evidence, resulted in loss of employment or opportunity to contract with the State”); *Hoover v. Knight*, 678 F.2d 578, 580–81 (5th Cir. 1982) (quoting *Baxter*, 425 U.S. at 318) (citing *Garrity v. New Jersey*, 385 U.S. 493 (1967)); *Diebold v. Civ. Serv. Comm’n of St. Louis Cnty.*, 611 F.2d 697, 700 (8th Cir. 1979) (explaining that as long as the employee “is not faced with the decision to surrender either his job or his constitutional privilege against self-incrimination, his predicament, no matter how undesirable, does not raise constitutional questions”).

¹¹ *Vangates*, 287 F.3d at 1322.

III. How can prosecutors ensure they don't infringe on Fifth Amendment rights?

Where a defendant has provided a compelled statement that cannot be used against him, a filter team is an invaluable tool in protecting the defendant's Fifth Amendment rights.¹² Although the defendant has a right not to have his compelled statement used against him, he does not have the right for his statement to be shielded from a prosecutor's review. In other words, a prosecutor's mere exposure to a compelled statement, standing alone, is insufficient to violate the defendant's Fifth Amendment rights.¹³ However, the easiest way for a prosecutor to prove that the government did not *use* a compelled statement against the defendant is to make sure that nobody on the prosecution team is even exposed to the statement. Thus, to avoid

¹² *In re Grand Jury Subpoena* Dated Aug. 14, 2019, 964 F.3d 768, 772 (8th Cir. 2020) (noting that the government has a strong incentive to “employ what it calls a ‘*Garrity* screening team’ to remove compelled statements of the target of the federal investigation, including investigative fruits of those statements, before the subpoenaed material is given to the grand jury or to the prosecution team.”); *United States v. Proano*, 912 F.3d 431, 437 (7th Cir. 2019) (upholding government's filter team practice); *In re Grand Jury Subpoena*, 75 F.3d 446, 448 (9th Cir. 1996) (noting that review of a statement by personnel not involved in the prosecution is an established procedure “to protect against any improper use”); *In re Grand Jury Subpoenas* Dated Dec. 7 & 8, Issued to Bob Stover, Chief of Albuquerque Police Dep't, 40 F.3d 1096, 1103 (10th Cir. 1994) [hereinafter *Stover*] (discussing the government's filter team process with approval).

¹³ *United States v. Daniels*, 281 F.3d 168, 182 (5th Cir. 2002); *see also* *United States v. Cozzi*, 613 F.3d 725, 729 (7th Cir. 2010) (“[T]he mere tangential influence that privileged information may have on the prosecutor's thought process in preparing for trial is not an impermissible ‘use’ of that information.”) (quoting *United States v. Velasco*, 953 F.2d 1467, 1474 (7th Cir. 1992)); *Gwillim v. City of San Jose*, 929 F.2d 465, 468 (9th Cir. 1991) (“The law of this circuit is clear that a prosecutor's access to immunized testimony is not a violation of the privilege.”); *United States v. Serrano*, 870 F.2d 1, 17 (1st Cir. 1989) (rejecting argument that purpose of immunity is “automatically frustrated by the government's mere exposure to immunized testimony”); *United States v. Mariani*, 851 F.2d 595, 600 (2d Cir. 1988) (rejecting argument that prosecution is foreclosed because “immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial”).

litigation risks, it can be very helpful to use a filter team to screen any such statements from the prosecution team.¹⁴ If a prosecutor does not even see a statement, then, *ipso facto*, she cannot use that statement in an investigation or prosecution.

IV. What is fruit of a *Garrity*-compelled statement?

The prosecution is barred from using not only the compelled statement, but also any “fruit” of that statement. The “fruit” of a compelled statement includes any information wholly derived from the statement. Filter teams should identify fruit from the compelled statement and keep that fruit from the prosecution team to ensure that the team does not use it.¹⁵ Fruit may be found in summaries of compelled statements or in questions asked (or investigative steps taken) by individuals who are familiar with the compelled statement.

Keep in mind, though, that if there is a non-compelled, independent source for the information, that information is not wholly derived from

¹⁴ See *United States v. Byrd*, 765 F.2d 1524, 1532 n.11 (11th Cir. 1985) (“[I]t would be unwise to permit an attorney familiar with the immunized testimony to participate in the trial or preparation of the case.”).

¹⁵ *Sher v. U.S. Dep’t of Veterans Affs.*, 488 F.3d 489, 502 (1st Cir. 2007) (holding that employee’s compelled statements and its fruits would be inadmissible in subsequent criminal prosecution); *Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773, 778 (4th Cir. 1995) (“Of course, if the state had attempted to make direct or derivative use of the officers’ statements against them, *Garrity*’s self-executing immunity would have immediately attached.”); *Stover*, 40 F.3d at 1102 (citing *Garrity* for the proposition that “the Constitution is violated only when the compelled statement, or the fruit of that statement, is used against the officer in a subsequent criminal proceeding”); *Gilbert v. Nix*, 990 F.2d 1044, 1046 (8th Cir. 1993) (“We agree with the district court that, even if any criminal charges are instituted, the statements given in response to the questions and the fruits thereof would be suppressed under *Garrity v. New Jersey*”); *Confederation of Police v. Conlisk*, 489 F.2d 891, 894 (7th Cir. 1973) (“Public employees do not have an absolute constitutional right to refuse to account for their official actions and still keep their jobs; their right, conferred by the Fifth Amendment itself, as construed in *Garrity*, is simply that neither what they say under such compulsion nor its fruits can be used against them in subsequent prosecution.”) (quoting *Uniformed Sanitation Men Ass’n, Inc. v. Comm’r of Sanitation*, 426 F.2d 619, 627 (2d Cir. 1970)).

the compelled statement and, therefore, is not a fruit of the statement. For example, the information may exist in the subject's separate voluntary statements, in statements of other witnesses, or in video or photographic evidence. If so, the prosecution team may use the information from the independent source, even if that information is the same as the information contained in the compelled statement.

V. Should prosecutors have a filter team screen a subject's personnel records and prior internal investigations for *Garrity*?

Yes, personnel records and prior internal investigations should be screened by a filter team. The *Garrity* privilege not only applies to the subject's compelled statements in the *current* investigation, but also to the subject's compelled statements in prior investigations. It is a good practice to provide your filter team with all internal investigations.

VI. Can prosecutors avoid obtaining *Garrity*-compelled statements and, thus, avoid the need for a filter team?

It is recommended that the government, through a filter team, obtain and review all compelled statements. While it may, at first blush, seem easier (and perhaps even safer) to simply avoid taking possession of compelled statements, such an approach can actually result in the very harm the prosecution is trying to avoid. Because the prosecution is required to abstain from using not only the compelled statement, but also its fruit, and because the fruit can sometimes be identified only through reference to the compelled statement, not obtaining the compelled statement could prevent the prosecution from identifying (and, therefore, avoiding the use of) any fruit.

Consider the following scenario: An officer accused of using excessive force during an arrest tells internal affairs investigators during a clearly compelled interview that he used force because the victim taunted him. But in each of his *voluntary* statements, the officer denied having used any force at all (maintaining, instead, that the victim tripped and fell). The victim alleged that the officer used force but never mentioned anything about having taunted the officer. No other witness or evidence mentioned anything about any taunting having occurred.

Imagine then that the use of force leads to a civil suit. The civil plaintiff's attorney subpoenas the internal affairs file (which does not violate the subject's rights because the *Garrity* right is limited to ensuring that the compelled statement is not used in a *criminal* prosecution; it may be—and often is—used in a civil investigation). The plaintiff's attorney, after reading the file, conducts depositions in which she asks eyewitnesses if the victim ever taunted the officer. By asking witnesses about taunting, which she only knows to ask about because she has read the compelled statement, the civil attorney has created a slew of documents (the deposition transcripts) that are rife with fruits.

If the prosecution took the approach of sealing off the compelled statement, without having a filter team review the statement and then scan the other material for fruits, prosecutors would obtain and read the depositions of all the non-subject witnesses. Of course, without having read the compelled statement, the prosecutor would have no way of knowing that all the questions and answers about taunting were fruits of a *Garrity* statement. So, the prosecutor would proceed with her case, “using” those depositions and possibly tainting the entire prosecution.

Thus, a defendant's rights (and the government's case) are often best protected through robust efforts to acquire documents coupled with the use of a trained filter team.

VII. What does it mean to “use” a *Garrity*-compelled statement?

If a defendant's statement is compelled within the meaning of *Garrity*, then—absent a waiver—neither that statement nor its fruit can be used in the investigation or prosecution.¹⁶ *Garrity*-protected information may not be used directly as part of the government's case-in-chief, and it also may not be used to “build a case” against the defendant.¹⁷

¹⁶ See *Kastigar v. United States*, 406 U.S. 441, 448–49 (1972).

¹⁷ *United States v. Montoya*, 45 F.3d 1286, 1292 (9th Cir. 1995). Courts have found constitutional violations if the prosecution team used *Garrity* material when “focusing the investigation, deciding to initiate the prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.” *United States v.*

VIII. Do prosecutors need to screen a witness's compelled statements for *Garrity*?

The Fifth Amendment is only implicated by the use of a person's *own* compelled statement in a criminal prosecution. Thus, the only compelled statements a prosecutor needs to worry about are those made by *subjects* of the federal investigation. The first step, then, is to identify to the filter team which officers are being considered subjects of the investigation. Then, once a filter team has screened the entire file for compelled statements by those subjects, as well as all fruit of those statements, the prosecution team can (and probably *should*) review the compelled statements of any officers who are *not* subjects but merely witnesses in the federal case. These statements can provide immensely helpful evidence and do not implicate the Fifth Amendment. If, during the investigation, a person who is initially considered a subject (and whose compelled statement thus has been screened out of the prosecutor's file) is determined to no longer be a subject, the prosecution team may have the filter team produce to the prosecution team that witness's previously screened statement.

IX. Does the Fifth Amendment allow use of a *Garrity*-compelled statement in any kind of prosecution?

Yes. A *Garrity*-compelled statement may be used to prosecute a law enforcement officer (or other public employee) for obstruction of justice if the employee lied or otherwise obstructed justice during the compelled interview.¹⁸ The Fifth Amendment does not provide a

Danielson, 325 F.3d 1054, 1072 (9th Cir. 2003) (quoting *United States v. Crowson*, 828 F.2d 1427, 1430 (9th Cir. 1987).

¹⁸ *McKinley v. City of Mansfield*, 404 F.3d 418, 427 (6th Cir. 2005) ("*Garrity* does not preclude use of such statements in prosecutions for the independent crimes of obstructing the public employer's investigation or making false statements during it."); *United States v. Veal*, 153 F.3d 1233, 1243 (11th Cir. 1998) ("An accused may not abuse *Garrity* by committing a crime involving false statements and thereafter rely on *Garrity* to provide a safe haven by foreclosing any subsequent use of such statements in a prosecution for perjury, false statements, or obstruction of justice."), *overruled on other grounds by* *Fowler v. United States*, 563 U.S. 668, 676 (2011); *United States*

license to make false statements.¹⁹ Courts have recognized that individuals who have been given formal immunity before testifying may be prosecuted for perjury if they make false statements under oath. Courts have likewise recognized that public employees may be prosecuted for obstructing justice if they lie after being compelled to make a statement under threat of job loss.²⁰ Thus, prosecutors may, in a separate prosecution for obstruction, make direct use of a *Garrity*-compelled statement.

X. The news media is airing or publishing information about my case. Is there anything prosecutors should do differently?

If the filter team concludes that the subject made a *Garrity*-compelled statement, fruit of that statement (or any prior *Garrity* statement) could make its way into the media. This could happen in a multitude of ways: The internal affairs investigator may have shared the compelled statement with an administrator who then used it to write a press release that contained the tainted information or, maybe, to be transparent, a department released its internal investigation online. If there are indications that a subject made a compelled statement, or if you do not yet know, think about putting a media protocol in place at the outset. The media protocol should involve using the filter team to screen all news articles and other media to remove any information that could be derived from a compelled statement before the prosecution team reviews those articles.

v. White, 887 F.2d 267, 274 (D.C. Cir. 1989) (noting that government employee who lied “cannot now avail himself of the fifth amendment”).

¹⁹ United States v. Wong, 431 U.S. 174, 178 (1977) (“[T]he Fifth Amendment privilege does not condone perjury. It grants a privilege to remain silent without risking contempt, but it does not endow the person who testifies with a license to commit perjury.”) (citations omitted).

²⁰ See *McKinley*, 404 F.3d at 427; *Veal*, 153 F.3d at 1243; *White*, 887 F.2d at 274.

XI. I have been assigned to be a filter attorney, but I do not know the first thing about managing a *Garrity* screen. Are there any resources out there to help me?

If you have further questions or comments, please contact the Criminal Section of the Civil Rights Division and ask for the *Garrity* supervisor.

About the Authors

Lauren Posten is an Attorney Advisor in the Criminal Section of the Civil Rights Division specializing in *Garrity* and privilege law. Since 2016, Ms. Posten has served as the supervisor of the Criminal Section's *Garrity* Unit, where she provides trainings on *Garrity* issues, supervises privilege screenings, provides advice to Department attorneys on *Garrity* issues, conducts exposure investigations, and provides *Garrity* discovery.

Ms. Posten joined the Civil Rights Division in 2012 as a contract Investigator for the Criminal Section. She received her J.D. from Lewis and Clark Law School in Portland, Oregon, in 2011.

Barbara Kay Bosserman has served as the Deputy Chief of the Cold Case Unit of the Criminal Section of the Civil Rights Division since April 2017; in this capacity, she works on implementation of the Emmett Till Reauthorization Act. She has served as Senior Legal Counsel of the Criminal Section since October 2008. Ms. Bosserman also has expertise in legal issues arising in color of law cases. Since 2018, she has provided legal advice to the supervisor of the Criminal Section's *Garrity* Unit and has provided trainings on *Garrity* issues.

Ms. Bosserman joined the Civil Rights Division in May of 2000. She was detailed to New Orleans, Louisiana, for nine months in 2007, working as an Assistant United States Attorney for the Eastern District of Louisiana. Before joining the Department, Ms. Bosserman worked as a staff attorney for the Fifth Circuit Court of Appeals; as a Legal Services Attorney in Saginaw, Michigan; and as a law clerk in federal district court in the Western District of Michigan. She received her J.D. from The George Washington University in 1991.

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Prosecuting Federal Hate Crimes

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I. Introduction

The Hate Crime Statistics Act refers to hate crimes as “crimes that manifest evidence of prejudice based on race, gender and gender identity, religion, disability, sexual orientation, or ethnicity.”¹ Hate crimes are particularly pernicious because they victimize entire communities of people who share the targeted characteristic. Thus, hate crimes not only rob victims and their families of their sense of safety and security, but they also frighten similarly situated individuals, making them feel unsafe in their own homes, jobs, and neighborhoods. This effect is often intentional. Many defendants commit hate crimes for the very purpose of intimidating an entire community or class of people.

Most hate crimes are prosecuted at the state level. Hate crime laws differ from state to state. Sometimes, a state law does not define a particular offense as a hate crime. Other times, a state hate crime law may not provide full redress for a criminal offense. Thus, Assistant U.S. Attorneys (AUSAs) are urged to consider whether federal prosecution may be warranted. This article is meant to assist in this task by describing federal hate crime laws, defining their elements, and discussing jurisdictional limitations on hate crime prosecutions.

II. Federal hate crime statutes

There are four substantive federal statutes that prohibit hate crimes: 18 U.S.C. § 249 (The Hate Crime Prevention Act); 42 U.S.C. § 3631 (the criminal provision of the Fair Housing Act); 18 U.S.C. § 245(b)(2) (Federally Protected Activities); and 18 U.S.C. § 247 (Damage to Religious Property; Obstruction of Persons in the Free Exercise of Religious Beliefs). These statutes differ in the kinds of violent conduct

¹ 34 U.S.C. § 41305(b)(1).

they proscribe, the types of bias motivations they reach, and the jurisdictional elements they include.

Common to these statutes is that, to secure a conviction, the government must prove that the defendant committed the act prohibited by the statute “because of” the characteristic at issue, be it race, color, religion, national origin, gender, disability, sexual orientation, or gender identity.² This motive is not—strictly speaking—a “bias” motivation. The government need not prove that the defendant “hated” or had animus towards people with the identified characteristic. A defendant can act “because of” a characteristic on a particular occasion without being universally biased against individuals with that characteristic. To prove the requisite motive, the government must prove only that the characteristic caused the prohibited criminal act. In other words, the government must prove that the assault or threat would not have happened *but for* the fact that some person had—or was perceived to have—that characteristic.³ That said, because most hate crimes *are* committed by people motivated by hatred, animus, or bias, this article will use the terms “hate crimes,” “bias,” and “bias motivation” as a convenient shorthand.

A. 18 U.S.C. § 249: Hate Crimes Prevention Act

The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (HCPA)⁴ is the most commonly charged federal hate crime. Prosecutors should consider using the HCPA to prosecute any bias-motivated crime in which the defendant caused bodily injury to a victim.

The HCPA, by its plain text, covers more categories of bias than any other federal hate crime statute, which makes it a valuable tool for prosecutors. The HCPA, however, also has limitations. Most notably, the statute does not apply to *threats*, so cases involving threats alone—even those involving particularly virulent, symbolic threats like cross burnings—must be prosecuted using other federal hate crime statutes

² See 18 U.S.C. §§ 247, 245(b)(2), 249; 42 U.S.C. § 3631.

³ See *Burrage v. United States*, 571 U.S. 204 (2014) (holding that the phrase death “results from” a drug sale required “actual causality” and stressing that this usually “requires proof that the harm would not have occurred in the absence of—that is, but for—the defendant’s conduct,” and then comparing the term “but for” in the drug statute to the term “because of” in civil rights laws (cleaned up)). See also *United States v. Miller*, 767 F.3d 585, 591–92 (6th Cir. 2014) (holding jury instruction that did not instruct on “but for” causality was improper in a federal hate crime case).

⁴ Pub L. No. 111-84, 123 Stat. 2835 (2009).

(or using general federal threat statutes). In addition, as explained more fully below, the statute requires proof, in many instances, of a link to interstate or foreign commerce, which may not exist in every factual scenario.

No prosecution may be undertaken in an HCPA case without certification from the Attorney General or an authorized designee that (A) “the [s]tate [in which the conduct occurred] does not have jurisdiction” to prosecute it; (B) “the [s]tate [in which the conduct occurred] has requested that the Federal Government assume jurisdiction;” (C) “the verdict or sentence obtained pursuant to [s]tate charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence;” or (D) “a prosecution by the United States is in the public interest and necessary to secure substantial justice.”⁵ The Attorney General’s certification authority has been delegated to the Assistant Attorney General for Civil Rights.⁶ Prosecutors must obtain certification *before* any charges are filed. The Criminal Section of the Civil Rights Division can assist AUSAs in obtaining certification and should be notified early to facilitate the certification process.

1. Common legal issues among the three HCPA substantive subsections

The HCPA has three main substantive provisions, each of which was enacted using a different source of congressional power and covers different (but overlapping) bias motivations. The most convenient (albeit somewhat imprecise) way to think of the three provisions is that one covers *racial* hate crimes, one covers *non-racial* hate crimes, and one covers all types of hate crimes that *occur on federal land*.

Despite the differences between the three substantive subsections of the HCPA, there are commonalities as well. First, all three require proof that the defendant willfully caused bodily injury to another person or attempted to cause bodily injury using a firearm, fire, explosive device, incendiary device, or other dangerous weapon. “Bodily injury” is defined to include minor injuries such as scrapes, bruises, and physical pain,⁷ but it does not include solely emotional or psychological injury.⁸

⁵ 18 U.S.C. § 249(b)(1).

⁶ 28 C.F.R. § 0.50(n).

⁷ 18 U.S.C. § 1365(h)(4).

⁸ 18 U.S.C. § 249(c)(1).

An attempt to cause bodily injury committed *without* a dangerous weapon is not prosecutable under the HCPA. For example, if a defendant swings at a victim with his bare fists and misses, the HCPA is not implicated, even if the defendant is clearly motivated by a covered bias. But if the defendant takes the same action with a knife in his hand, that act would constitute an attempt subject to prosecution under the HCPA (assuming other elements are met).

All three subsections criminalize assaults undertaken because of both actual and *perceived* characteristics. In other words, mistake of fact is not a defense. If a defendant assaults a heterosexual person believing that the victim is gay, the statute is fully applicable. In addition, while most hate crime defendants are motivated by bias against the person they assault, the statute provides that a defendant may be found guilty if he is motivated by the actual or perceived characteristic of *any person*. Thus, for example, if a racist skinhead assaults a white man because he is dating a woman of color, the assault is prosecutable under the HCPA even though the defendant was not motivated by the *victim's* race but, rather, by the race of the woman the victim was dating.

Proof of all elements specific to each subsection constitutes a 10-year felony.⁹ There is no misdemeanor violation of the statute. If death results from the offense, or if the offense includes kidnapping or its attempt, aggravated sexual abuse or its attempt, or an attempt to kill, a defendant may be sentenced to any term of years or for life.¹⁰ The statute does not include a death penalty provision.

In May 2021, Congress enacted legislation amending 18 U.S.C. § 249 as it relates to sentencing.¹¹ This provision permits courts to impose, as part of a defendant's overall punishment, an explicit condition of supervised release for a defendant convicted of a section 249 offense, requiring that the defendant "undertake educational classes or community service directly related to the community harmed by the defendant's offense."¹² Prosecutors should consider requesting this condition of supervised release in appropriate cases, understanding that there may be times when the dangerousness of a particular defendant

⁹ 18 U.S.C. §§ 249(a)(1)(A), (a)(2)(A)(i), (a)(3).

¹⁰ 18 U.S.C. §§ 249(a)(1)(B), (a)(2)(A)(ii), (a)(3).

¹¹ This provision, introduced as part of the Jabara-Heyer NO HATE Act, was enacted as part of the COVID-19 HATE CRIMES ACT, which passed Congress in April 2021 and was signed into law in May. *See* Pub. L. No. 117-13, 135 Stat. 265, as codified at 18 U.S.C. § 249(e).

¹² 18 U.S.C. § 249(e).

makes it inappropriate for the defendant to have direct contact with individuals in that particular community. Prosecutors should consult with victims to obtain their position and weigh the overall benefit before requesting this specific condition of supervised release.

2. Section 249(a)(1)—“racial” hate crimes

The first subsection of the HCPA, section 249(a)(1), addresses crimes motivated by characteristics that were historically deemed racial. The “racial” subsection is the simplest provision to prove because it requires proof of only two elements. The provision prohibits willfully causing bodily injury or attempting to do so with a dangerous weapon if the assault is undertaken “because of the actual or perceived race, color, religion, or national origin of any person.”¹³ Prosecutors need prove no other jurisdictional factor to obtain a conviction. Accordingly, it is a powerful tool to combat racially based hate crimes, which are, according to FBI data, the most common type of hate crime.¹⁴

The provision’s inclusion of the terms “religion” and “national origin” raise the obvious question of why this article has repeatedly referred to this first subsection as covering “racial” hate crimes. The short answer is that, despite the statute’s use of the terms “religion” and “national origin” without any apparent limitation, this particular provision of the Act reaches only a *subset* of religious- or national-origin-based hate crimes. This provision of the HCPA was enacted pursuant to Congress’s authority under the Thirteenth Amendment, which grants Congress the power to identify and remedy badges and incidents of slavery and has been interpreted to grant Congress the authority to enact federal laws to prevent and punish discrimination (including violence) motivated by *race*.¹⁵ But Congress’s power under the Thirteenth Amendment extends *only* to remedying racial discrimination; it does not empower Congress to address discrimination on any other basis.

Some might believe that the Thirteenth Amendment is limited to ensuring freedom to those held in slavery before the Civil War and that it thus empowers Congress to act only on behalf of African Americans

¹³ See 18 U.S.C. § 249(a)(1).

¹⁴ *FBI Releases 2020 Hate Crime Statistics*, DEP’T OF JUST., <https://www.justice.gov/hatecrimes/hate-crime-statistics> (last visited Dec. 15, 2021).

¹⁵ *United States v. Roof (Roof I)*, 10 F.4th 314, 392 (4th Cir. 2021) (“concluding there is a relationship between slavery and racial violence ‘is not merely rational, but inescapable’” (quoting *United States v. Beebe*, 807 F. Supp. 2d 1045, 1052 (D.N.M. 2011))).

(that is, the victims of chattel slavery). The Thirteenth Amendment, however, has never been given such a narrow construction. Rather, it “was a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag.”¹⁶ For this reason, Congress has broad Thirteenth Amendment authority to protect all racial groups. Native American victims,¹⁷ Hispanic victims,¹⁸ and white victims may be protected by legislation enacted pursuant to the Thirteenth Amendment legislation.

Because Congress, in enacting this provision of the HCPA, expressly relied on its Thirteenth Amendment power, it had the authority to legislate only with respect to violence based on “race.” The concept of “race,” however, has changed since the mid-Nineteenth Century, when the Thirteenth Amendment was passed, and certain characteristics that were then considered “races” are now considered “religions” or “national origins.” Although this subsection of the HCPA explicitly states that it applies to conduct motivated by religion and national origin, the statute can only be constitutionally applied if the religious characteristic (for example, Judaism)¹⁹ or national origin characteristic (for example, Arab)²⁰ was, at the time of passage of the Thirteenth Amendment, considered to be a racial characteristic.²¹

¹⁶ *Bailey v. Alabama*, 219 U.S. 219, 240–41 (1911).

¹⁷ *United States v. Hatch*, 722 F.3d 1193, 1208 (10th Cir. 2013) (affirming section 249(a)(2) conviction of defendants who used a hot wire to brand a Navajo man with a swastika).

¹⁸ *United States v. Maybee*, 687 F.3d 1026, 1031 (8th Cir. 2012) (affirming conviction of defendants who deliberately rammed a vehicle into a sedan driven by Hispanic victims after an encounter in which the defendants harassed the victims using racial slurs).

¹⁹ *See Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18 (1987) (holding that Jews are a race for purposes of 42 U.S.C. § 1982).

²⁰ *See Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (holding that Arabs are a race for purposes of 42 U.S.C. § 1981).

²¹ 34 U.S.C. § 30501(8) (“Both at the time when the 13th, 14th, and 15th amendments to the Constitution of the United States were adopted, and continuing to date, members of certain religious and national origin groups were and are perceived to be distinct ‘races.’ Thus, in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins, at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments to the Constitution of the United States.”).

The corollary to this rule, of course, is that section 249(a)(1) *cannot* be used to prosecute violent conduct motivated by religion or national origin if that religion or national origin was *not* considered a racial characteristic when the Thirteenth Amendment was enacted. For example, because Baptists, in 1865, were considered a religious group (not a racial one), a defendant cannot be prosecuted under this provision for targeting a victim because he is a Baptist. That defendant would be prosecuted under the second or third subsections of the HCPA (discussed more fully below), if there is sufficient evidence to prove the jurisdictional elements required by those provisions.

The constitutionality of section 249(a)(1) of the HCPA has been upheld by five courts of appeals²² and several district courts.²³ A circuit-by-circuit summary of cases is available in the appendix to this issue.

3. Section 249(a)(2)—non-racial hate crimes

The second subsection of the HCPA, section 249(a)(2), prohibits willfully causing bodily injury because of the “actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person.”²⁴ This list of characteristics includes some that are not listed in the first subsection of the HCPA (gender, disability, sexual orientation, and gender identity). Additionally, when crimes are committed because of a religion or national origin that was not considered a racial characteristic when the Thirteenth Amendment was enacted, prosecutors should analyze the crime under section 249(a)(2) of the HCPA. For example, the Department has prosecuted a case involving victims who are members of the Amish religion under this provision.²⁵

²² *Roof I*, 10 F.4th at 395; *United States v. Metcalf*, 881 F.3d 641, 645 (8th Cir. 2018); *United States v. Cannon*, 750 F.3d 492, 505 (5th Cir. 2014); *Hatch*, 722 F.3d at 1201; *Maybee*, 687 F.3d at 1031.

²³ *United States v. Earnest*, No. 19-cr-01850, 2021 WL 3829129, at *19–20 (S.D. Cal. May 5, 2021); *United States v. Bowers*, 495 F. Supp. 3d 362, 368 (W.D. Pa. 2020); *United States v. Diggins*, 435 F. Supp. 3d 268, 273–74 (D. Me. 2019); *United States v. Roof (Roof II)*, 225 F. Supp. 3d 438, 450 (D.S.C. 2016); *United States v. Metcalf*, No. 15-CR-1032, 2016 WL 827763, at *4 (N.D. Iowa Mar. 2, 2016); *United States v. Henery*, 60 F. Supp. 3d 1126, 1132 (D. Idaho 2014).

²⁴ 18 U.S.C. § 249(a)(2).

²⁵ The convictions were reversed due to jury instructions found erroneous under a Supreme Court case decided after the date that the case was tried. *See United States v. Miller*, 767 F.3d 585, 591–92 (6th Cir. 2014).

The second subsection of the HCPA was enacted pursuant to Congress's power to regulate interstate and foreign commerce.²⁶ To prove a violation of this provision, federal prosecutors must prove not only that the defendant willfully caused bodily injury because of a bias motive listed in the statute, but also that the offense occurred during, or affected, interstate or foreign commerce.

Legislative history indicates that, in enacting this section of the HCPA, Congress intended to legislate to the fullest extent of its Commerce Clause power.²⁷ The statute explicitly lists several ways that prosecutors may meet their burden of establishing that an offense occurred during, or affected, interstate or foreign commerce.²⁸ These include showing that (1) there was travel across a state line or national border in connection with the offense; (2) the defendant or the victim traveled "using a channel, facility, or instrumentality of interstate or foreign commerce" in connection with the offense; (3) there was use of a "channel, facility, or instrumentality of interstate or foreign commerce in connection with the" offense; (4) the offense involved a dangerous weapon that has traveled in interstate or foreign commerce; (5) there was interference "with commercial or other economic activity in which the victim [was] engaged at the time of the" offense; and (6) the conduct "otherwise affect[ed] interstate or foreign commerce."²⁹

The constitutionality of section 249(a)(2) of the HCPA has been upheld by the Fourth Circuit³⁰ and by several district courts.³¹ A

²⁶ See U.S. CONST. art. I, § 8, cl. 3.

²⁷ See 155 CONG. REC. S10772-02 (daily ed. Oct. 27, 2009) (statement of Sen. Patrick Leahy) ("I want to note that the sponsors and supporters intend with its passage, to authorize Federal investigations and prosecutions of those hate crimes described to the fullest extent permitted by the Constitution.").

²⁸ See 18 U.S.C. § 249(a)(2)(B).

²⁹ *Id.*

³⁰ See *United States v. Hill*, 927 F.3d 188, 197 (4th Cir. 2019) (holding that Congress had not exceeded the scope of its Commerce Clause authority in enacting 18 U.S.C. § 249), *cert. denied*, 141 S. Ct. 272 (2020).

³¹ See *United States v. Beckham*, No. 18-CR-00075-1, 2019 WL 2869189, at *7 (M.D. Tenn. July 3, 2019); *United States v. Gardner*, 993 F. Supp. 2d 1294, 1305 (D. Or. 2014); *United States v. Mason*, 993 F. Supp. 2d (D. Or. 2014); *United States v. Jenkins*, 909 F. Supp. 2d 758, 767–68 (E.D. Ky. 2012); *United States v. Mullet*, 868 F. Supp. 2d 618, 621 (N.D. Ohio 2012), *conviction overturned on other grounds*, *United States v. Miller*, 767 F.3d 585, 590 (6th Cir. 2014) (holding jury instructions were infirm under law that issued while case was on appeal).

circuit-by-circuit summary of cases is available in the appendix to this issue.

4. Section 249(a)(3)—hate crimes in SMTJ

The third subsection of the HCPA prohibits causing bodily injury, or attempting to cause bodily injury with a dangerous weapon, if the crime occurred because of race, color, religion, national origin, gender, gender identity, sexual orientation, or disability, *and* if the crime occurred in the Special Maritime and Territorial Jurisdiction (SMTJ) of the United States.³² Congress’s power to enact this subsection of the HCPA flows from its plenary power to regulate its own property.³³

If a crime occurs on federal land and can be prosecuted as a violation of the first (racial) subsection of the Act (because it is motivated by a racial characteristic), then this SMTJ provision adds little. Prosecutors will likely prefer to use subsection (a)(1) of the HCPA to eliminate the need to prove any jurisdictional element. However, if the first subsection is unavailable because the crime was motivated by a non-racial characteristic (such as gender, disability, sexual orientation, gender identity, or a religion or national origin not considered a racial factor at the time the Thirteenth Amendment was enacted), and the crime occurred on federal land, then subsection (a)(3) becomes an attractive option because it obviates the need to prove that the crime was in or affecting interstate or foreign commerce.

In section 7 of Title 18, Congress precisely defined what lands fall within the SMTJ.³⁴ This definition generally includes the high seas and lands over which the federal government has exclusive or concurrent jurisdiction. Note that, while many gang-related hate crimes occur in federal prisons, and although some federal prisons do fall within the SMTJ, federal prisons do not automatically fall within the SMTJ, and

³² 18 U.S.C. § 249(a)(3).

³³ *See* U.S. CONST. art. IV, § 3, cl. 2 (giving Congress the power to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”); *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (“[T]he Property Clause gives Congress plenary power to legislate the use of the federal land”); *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (holding that the property clause, in broad terms, gives Congress the power to determine what are “needful” rules “respecting” the public lands”).

³⁴ *See* 18 U.S.C. § 7.

prosecutors should carefully check the law in their circuit and the status of any federal prisons.³⁵

B. 42 U.S.C. § 3631: Criminal provisions of the Fair Housing Act

In 1968, Congress enacted the criminal provisions of the Fair Housing Act, codified at 42 U.S.C. § 3631, as part of a broad statute designed to “assure every American a full opportunity to obtain housing for himself and his family free from any discrimination on account of race, color, religion, or national origin.”³⁶ These provisions are particularly useful in cases involving threats (which cannot be prosecuted under the HCPA) that are delivered at or near a victim’s home (or that otherwise interfere with a victim’s ability to enjoy her home). Threats relating to a person’s home can be particularly disquieting. Because cross burnings are often committed at victims’ homes—and are a particularly virulent form of threat—the Fair Housing Act is the most often charged federal statute in cross burning cases.

To establish a violation of section 3631, the government must prove that the defendant (1) used or threatened force; (2) willfully injured, intimidated, or interfered with (or attempted to injure, intimidate, or interfere with) a victim; (3) acted because of the victim’s race, color, religion, sex, handicap, familial status, or national origin; and (4) acted because the victim was enjoying one of the housing rights set forth in the statute—most commonly the victim’s occupation of a dwelling.³⁷

Proof of these four elements establishes a misdemeanor violation. To establish a 10-year felony, the government must prove that the offense resulted in bodily injury or involved “the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire.”³⁸ To prove a life offense, the government must prove that the offense involved kidnapping or an attempt to kidnap, aggravated sexual abuse or its attempt, an attempt to kill, or that death resulted. The offense is not a capital offense.

³⁵ See *United States v. Davis*, 726 F.3d 357, 365 (2d Cir. 2013) (holding that “mere fact that [an] assault took place in federal prison on federal land” insufficient to prove offense occurred in SMTJ).

³⁶ H.R. Res. 16340, 90th Cong. (1968).

³⁷ 42 U.S.C. § 3631.

³⁸ *Id.*

1. Element 1: force or threat of force

The first element that the government must prove is that the defendant used force or the threat of force. “Force” means power, violence, compulsion, or restraint exerted upon or against a person or thing.³⁹ Assaults are generally charged using the “force” provision. As explained more fully in the accompanying article by Kate Gilbert, threats “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”⁴⁰ The use of ugly and insulting slurs are generally not enough to constitute a true threat; such statements, although hurtful and sometimes frightening, are generally protected by the First Amendment.

2. Element 2: willfully injuring, intimidating, or interfering with another

The government must also prove that the defendant willfully injured, intimidated, or interfered with the victim or attempted to do so. The words “injure,” “intimidate,” and “interfere with” cover a variety of conduct; they generally refer to actions intended to harm, frighten, prevent, or punish the free action of others.⁴¹ It is not necessary for the government to prove that the defendant’s conduct actually intimidated or injured the victims or that the defendant drove the victims from their homes.⁴²

³⁹ See *Johnson v. United States*, 559 U.S. 133, 138–39 (2010) (interpreting 18 U.S.C. § 924(e)(2)(B)(i) by recognizing that “force has a number of meanings,” noting that in its “more general usage it means strength or energy; active power; vigor; often an unusual degree of strength or energy, power to affect strongly in physical relations, or power, violence, compulsion, or constraint exerted upon a person,” and observing that Black’s Law Dictionary “defines ‘force’ as power, violence, or pressure directed against a person or thing”) (cleaned up). Use of force thus includes all acts of physical violence. See *United States v. Bamberger*, 452 F.2d 696, 699, 699 n.5 (2d Cir. 1971) (discussing and relying on Webster’s definition of force).

⁴⁰ *Virginia v. Black*, 538 U.S. 343, 359 (2003) (defining “true threats”); *United States v. Dutcher*, 851 F.3d 757, 761 (7th Cir. 2017) (explaining *Virginia v. Black*), *cert. denied*, No. 16-9610, 2017 WL 2654689 (Oct. 2, 2017).

⁴¹ *United States v. McDermott*, 29 F.3d 404, 408–09 (8th Cir. 1994) (approving jury instruction using similar language).

⁴² *United States v. Redwine*, 715 F.2d 315, 322 (7th Cir. 1983) (“[I]nterference or intimidation is to be inferred from violent acts or threats, and there is no need to show the subjective state of mind of the intended victim.”); *see*

3. Element 3: because of race, color, religion, sex, handicap, familial status, or national origin

The government must establish that the defendant acted “because of” a protected characteristic set forth in the Fair Housing Act, that is, race, color, religion, sex, handicap, familial status, or national origin. Two of these terms are specifically defined in the Fair Housing Act. Under the Act, “[h]andicap’ means . . . (1) a physical or mental impairment which substantially limits one or more of such person’s major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment.”⁴³ The term “[f]amilial status’ refers to the presence of minor children in the household.”⁴⁴

The plain language of section 3631 does not provide for prosecutions undertaken because of a victim’s sexual orientation or gender identity. Because of this, the Department did not previously use section 3631 to prosecute cases involving the violent interference based on these motivations. In 2020, however, the Supreme Court held that discrimination “because of sex,” as used in Title VII, included discrimination undertaken “because of” sexual orientation or gender identity.⁴⁵ Because section 3631 likewise prohibits force or threats of force undertaken “because of,” among other things, “sex,” it must be similarly construed. Thus, section 3631 should be used to prosecute a defendant who uses force or violence to interfere with a victim’s housing rights because of sexual orientation or gender identity. To date, no court has expressly applied *Bostock* to section 3631. Guidance from the Department of Housing and Urban Development, however, applies *Bostock* to all fair housing cases and may be cited in support of construing the criminal statute in this manner.⁴⁶

United States v. Magleby, 241 F.3d 1306, 1311 (10th Cir. 2001) (holding that a jury may properly consider victims’ reaction when assessing defendant’s intent to violate housing rights by burning a cross).

⁴³ 42 U.S.C. § 3602(h).

⁴⁴ Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 247 (9th Cir. 1997) (interpreting 42 U.S.C. § 3602(k)).

⁴⁵ *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1741 (2020) (holding that “because of sex” includes discrimination based upon sexual orientation and transgender status and noting that it is “impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex”).

⁴⁶ See Memorandum from Damon Y. Smith, Principal Deputy Gen. Couns., C to Jeanie M. Worden, Acting Assistant Sec’y for Fair Hous. & Equal Opportunity, Application to the Fair Hous. Act of the Sup. Ct.’s decision in *Bostock v. Clayton*

4. Element 4: because of a housing right

In addition to proving bias motivation, the government must also establish that the defendant acted because of a housing right. The housing rights protected by the statute include: (1) “selling, purchasing, renting, financing, [or] occupying” a dwelling; (2) contracting or negotiating to do so; (3) “applying for[,] or participating in[,] a] service, organization, or facility relating to the business of selling or renting dwellings;” (4) affording other persons the ability to participate in such activities; and, (5) aiding or encouraging other persons to participate in such activities.⁴⁷ The broadest of these terms, and the one most frequently used in indictments, is a person’s right to enjoy the “occupancy” of a home. The activities covered by the term “occupancy” include associating with persons of another race inside one’s dwelling.⁴⁸

Most cases arising under the Fair Housing Act are ones that occur at or near the victim’s dwelling; however, this is not a requirement.⁴⁹ There is also no requirement that the government prove that the defendants

County, GA (Feb. 9, 2021); Memorandum from Jeanine M. Worden, Acting Assistant Sec’y for Fair Hous. & Equal Opportunity to Off. of Fair Hous. & Equal Opportunity, Fair Hous. Assistance Program Agencies, Fair Hous. Initiatives Program Grantees, Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act (Feb. 11, 2021).

⁴⁷ 42 U.S.C. § 3631.

⁴⁸ *See, e.g.,* *United States v. Hayward*, 6 F.3d 1241 (7th Cir. 1993) (upholding application of section 3631 where cross was burned in front of house of white family that hosted Black friends), *overruled on other grounds by* *United States v. Colvin*, 353 F.3d 569 (7th Cir. 2003) (en banc); *United States v. Wood*, 780 F.2d 955, 961 (11th Cir. 1986) (“Section 3631 was clearly designed to protect an individual’s right to occupy a dwelling of one’s choice free from racial pressure. This right, however, means very little if the occupant’s physical safety inside that dwelling is contingent upon his refraining from associating with members of another race.”).

⁴⁹ *See, e.g.,* *United States v. Piekarsky*, 687 F.3d 134, 148 (3d Cir. 2012) (“Viewing [evidence that, during the attack, the defendants yelled that the victim should get out of “our town” and get out of Shenandoah]—coupled with the other testimony about the Defendants’ general dislike of Hispanic or Latino individuals moving into Shenandoah, . . . we conclude that a reasonable juror could rationally conclude that the nature of the beating, . . . the extent of the violence involved in this case, and the gratuitous nature of the racial epithets . . . were, taken together, indicative that [the defendants] intended to injure [the victim] with the purpose of intimidating him, or other Hispanic or Latino individuals, from residing in Shenandoah.”).

intended to force the victims to move from their homes or neighborhood. However, if the victims did move (or if they searched for alternative housing) because of the defendant's actions, this may be powerful evidence that the defendant's conduct interfered with their housing right. A circuit-by-circuit summary of cases is available in the appendix to this issue.

C. 18 U.S.C. §§ 245(b)(2), (4), and (5): federally protected activities

Before enactment of the HCPA, the statute prohibiting the use of violence to interfere with federally protected activities (18 U.S.C. § 245) was the federal hate crime statute that covered the broadest range of activities. The first section, section 245(b)(1), prohibits the interference, by force or threat of force, with certain federal rights that are protected against interference regardless of the motivation (this section is enforced by the Criminal Division rather than the Civil Rights Division). The second section, section 245(b)(2), prohibits using force or threats of force to interfere with various enumerated activities *because of race, color, religion, or national origin* (this section is enforced by the Civil Rights Division). Additional provisions of section 245, discussed below, while used more rarely, are also enforced by the Civil Rights Division and may also be useful in some situations.

Section 245 is most useful in cases involving threats (which are not prosecutable under the HCPA) and are not related to housing rights (and that are thus not covered by the Fair Housing Act). However, the statute does not cover threats based on gender, sexual orientation, gender identity, or disability. Any federal prosecution of such crimes must be undertaken using general threats statutes, such as 18 U.S.C. § 875, when the jurisdictional elements of such statutes can be met.

No prosecution may be undertaken in a case arising under section 245 without certification from the Attorney General, Deputy Attorney General, Associate Attorney General, or a specially designated Assistant Attorney General that the prosecution is in the public interest and necessary to secure substantial justice.⁵⁰ The certification authority for sections 245(b)(2), (b)(4), and (b)(5) offenses has been delegated to the Assistant Attorney General for Civil Rights.⁵¹ The Criminal Section can help AUSAs obtain certification and should be consulted early if an AUSA is considering bringing charges under section 245.

⁵⁰ See 18 U.S.C. § 245(a)(1).

⁵¹ See 28 C.F.R. § 0.50(k).

A circuit-by-circuit summary of cases is available at in the appendix to this issue.

1. Elements of section 245(b)(2)

To establish a violation of section 245(b)(2),⁵² the government must prove beyond a reasonable doubt that the defendant (1) used force or the threat of force; (2) willfully injured, intimidated, or interfered with a person (or attempted to do so); (3) acted because of the victim’s race, color, religion, or national origin; and (4) acted because the victim was enjoying one of the activities identified in the statute, which are set forth as follows (along with the corresponding statutory citation):

- (b)(2)(A) Attending or enrolling in public school or college.⁵³
- (b)(2)(B) Participating or enjoying a “benefit, service, privilege, program, facility, or activity provided or administered by [a] State or [its] subdivision.”⁵⁴
- (b)(2)(C) Applying for or enjoying state or private employment.⁵⁵
- (b)(2)(D) Serving on a state jury or attending state court regarding such service.⁵⁶
- (b)(2)(E) Traveling or using a facility of interstate commerce or common carrier.⁵⁷
- (b)(2)(F) “[E]njoying the goods, services, facilities, privileges, advantages, or accommodations of” hotels, restaurants, theaters, concert halls, sports arenas, or similar establishments.⁵⁸

These activities are generally ones provided or maintained by state or local governments. Protection against violent interference with federal activities (such as the right to serve on a federal grand jury or interference with benefits or services provided by the federal government) are set forth in a different part of the statute, section 245(b)(1).

⁵² 18 U.S.C. § 245(b)(2).

⁵³ 18 U.S.C. § 245(b)(2)(A).

⁵⁴ 18 U.S.C. § 245(b)(2)(B).

⁵⁵ 18 U.S.C. § 245(b)(2)(C).

⁵⁶ 18 U.S.C. § 245(b)(2)(D).

⁵⁷ 18 U.S.C. § 245(b)(2)(E).

⁵⁸ 18 U.S.C. § 245(b)(2)(F).

Proof of these elements constitute a misdemeanor. To establish a ten-year felony, the government must prove that the offense resulted in bodily injury or involved “the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire.”⁵⁹ To prove a life offense, the government must prove that the offense involved “kidnapping or an attempt to kidnap[;] aggravated sexual abuse or [its] attempt[;] . . . an attempt to kill”; or that death resulted.⁶⁰ Death-resulting offenses are eligible for the death penalty.⁶¹

2. Elements of section 245(b)(4)(A)—prohibiting persons from participating without discrimination in protected activities

A separate subsection of section 245 prohibits the use of force or threats or force to interfere with another person because that person is participating without discrimination in any of the federally protected activities listed in any subsection of the statute. To prove a violation of this provision, prosecutors must prove that the defendant (1) used force or the threat of force; (2) willfully injured, intimidated, or interfered with another person (or attempted to do so); and (3) acted because the victim was participating, without discrimination on account of race, color, religion, or national origin, in any of the benefits or activities described elsewhere in section 245.

This provision reaches interference both with the rights enumerated in section 245(b)(2) and with the rights enumerated in the non-civil-rights section of the statute, section 245(b)(1). Subsection (b)(1) prohibits forceful interference with certain enumerated federally protected activities, including voting, applying for or serving in federal employment, serving on a jury, and receiving federal benefits. (Thus, for example, if a defendant uses violence to interfere with a victim’s access to federal Social Security benefits, the defendant violates section 245(b)(1)(B)⁶² regardless of whether the defendant was motivated by the victim’s race or whether the defendant had a purely financial motive).

If, however, a defendant interferes with one of the federally protected activities enumerated in the statute *and is also motivated by race, color, religion, or national origin*, then the case may be prosecutable under section 245(b)(4)(A). In essence, this means that section 245(b)(4)(A)

⁵⁹ 18 U.S.C. § 245.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² 18 U.S.C. § 245(b)(1)(B).

separately prohibits the forceful infringement of rights identified in subsection (b)(1), whenever such interference is motivated by animus.

Prosecutors must consider the strategic question of whether, in such cases, a prosecution is better brought under subsection (b)(1), in which case the government need not prove racial bias. It is technically easier, of course, to prove a violation of subsection (b)(1) than it is to prove a violation of subsection (b)(4). But if the evidence of racial motivation is strong, and the prosecution wants to ensure that the evidence of bias gets before the jury, the prosecutor may choose to pursue charges under subsection (b)(4)(A). This would allow for the application of a hate-crime-motivation adjustment at sentencing (*see infra*) and to characterize the violation as a hate crime.

3. Elements of section 245(b)(4)(B)—assisting or affording others opportunities

Another subsection of the statute, section 245(b)(4)(B), prohibits violent interference with individuals affording others the opportunity to participate in activities without discrimination. To prove a violation of section 245(b)(4)(B), prosecutors must prove that the defendant (1) used force or the threat of force; (2) willfully injured, intimidated, or interfered with a person (or attempted to do so); and (3) acted because the victim was affording another person the right to participate, without discrimination (on account of race, color, religion, or national origin), in one of the activities described elsewhere in the statute.

Thus, for example, a white supremacist who assaults a white poll worker for allowing people of color to vote violates section 245(b)(4)(B) because voting is one of the activities protected by section 245(b)(1)(A). The government's theory of the case would be that the poll worker, by allowing people of color to vote, was affording voters the right to participate in the protected activity without discrimination, and the attack was, thus, a violation of section 245(b)(4)(B).

4. Elements of section 245(b)(5)—aiding or encouraging participation or protesting discrimination

A final subsection of the statute, section 245(b)(5), prohibits violent interference with those aiding or encouraging individuals to participate in protected activities and also prohibits violent interference with those protesting the denial of the ability to participate in such activities. To prove a violation of section 245(b)(5), the government must prove that the defendant (1) used force or the threat of force; (2) willfully injured, intimidated, or interfered with a citizen (or attempted to do so); and (3)

acted because that citizen was lawfully aiding or encouraging another person to engage in the activities identified elsewhere in the statute *or* because the citizen was lawfully participating in speech or peaceful assembly opposing any denial of the opportunity to participate in one of the activities identified elsewhere. Because section 245(b)(5) expressly applies to assaults on persons engaged in peaceful assembly, it should be considered when peaceful protestors advocating for racial justice are assaulted during a protest.

D. 18 U.S.C. § 247: damage to religious property; obstruction of persons in the free exercise of religious beliefs

The Church Arson Prevention Act⁶³ criminalizes damaging religious real property or obstructing persons in the free exercise of religious beliefs. Although named the Church Arson Prevention Act, it applies to all religious denominations and includes more than just arson. It applies to intentional damage to religious real property, regardless of the means of causing the damage, and it also applies to forceful interference with a victim's ability to worship.

The statutory penalty ranges from misdemeanor time to life imprisonment; moreover, the statute is a capital offense when death results.⁶⁴ Pursuant to amendments made in 2018, if the offense involves damage to religious real property that exceeds \$5,000, the offense is a three-year felony; before the amendment, such an offense would have been a misdemeanor.⁶⁵ Offenses involving dangerous weapons, fire, or firearms *or* that result in bodily injury are subject to a 20-year penalty.⁶⁶ Offenses that result in bodily injury *and* involve fire or explosives are subject to a 40-year penalty.⁶⁷ Offenses involving kidnapping or its attempt, aggravated sexual abuse or its attempt, or an attempt to kill, may be punished by life imprisonment.⁶⁸ If death results, a defendant may be sentenced to life in prison or may be sentenced to death.⁶⁹ Other offenses are misdemeanors.⁷⁰

⁶³ Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat 1392 (1996) (codified at 18 U.S.C. § 247).

⁶⁴ 18 U.S.C. § 247(d)(1).

⁶⁵ 18 U.S.C. § 247(d)(4).

⁶⁶ 18 U.S.C. § 247(d)(3).

⁶⁷ 18 U.S.C. § 245(d)(2).

⁶⁸ 18 U.S.C. § 247(d)(1).

⁶⁹ *Id.*

⁷⁰ 18 U.S.C. § 247(d)(5).

No prosecution may be undertaken for violating the Church Arson Prevention Act without certification from the Attorney General or his designee that “a prosecution . . . is in the public interest and necessary to secure substantial justice.”⁷¹ The certification authority has been delegated to the Assistant Attorney General for Civil Rights.⁷² Attorneys in the Criminal Section can assist AUSAs in obtaining a certification.

The Church Arson Prevention Act has three substantive subsections, each discussed more fully below. The three sections, generally speaking, prohibit (1) destruction of religious property because of religion; (2) interference, through force or threat of force, with the practice of religion; and (3) destruction of religious property because of race. A circuit-by-circuit summary of cases is available in the appendix to this issue.

1. Section 247(a)(1)—damage to religious property because of religion

The first subsection of the Church Arson Prevention Act, 18 U.S.C. § 247(a)(1), punishes damaging houses of worship and other religious real property when the defendant is motivated by the religious nature of the property. To obtain a conviction for violating section 247(a)(1), the government must prove beyond a reasonable doubt that (1) the defendant defaced, damaged, or destroyed religious real property, or attempted to do so; (2) the defendant acted intentionally; (3) the defendant did so because of the religious character of the property; and, (4) the offense was in or affected interstate commerce or foreign commerce.⁷³

“Religious real property” is defined by statute to mean “any church, synagogue, mosque, religious cemetery, or other religious real property, including fixtures or religious objects contained within a place of religious worship.”⁷⁴ In 2018, the term was broadened to include “real property owned or leased by a nonprofit, religiously affiliated organization.”⁷⁵ This term was intended to cover “solemn symbols or

⁷¹ 18 U.S.C. § 247(e).

⁷² See Att’y Gen. Order No. 2048-96, Delegation of Authority to Authorize the Initiation of Prosecutions under 18 U.S.C § 247.

⁷³ 18 U.S.C. § 247(a)(1).

⁷⁴ 18 U.S.C. § 247(f).

⁷⁵ 18 U.S.C. § 247(f), as amended by *Protecting Religiously Affiliated Institutions Act of 2018*, Pub. L. No. 115-249, 132 Stat. 3162.

objects, such as a Torah.”⁷⁶ In addition, the term “fixture” is defined as “[p]ersonal property that is attached to land or a building and that is regarded as an irremovable part of the real property.”⁷⁷

To satisfy this subsection of the statute, prosecutors must prove that the defendant acted as she did because the property was *religious* property.⁷⁸ Congress used its Commerce Clause authority in enacting section 247(a)(1). Therefore, prosecutors must also prove that the offense occurred in or affected interstate or foreign commerce.⁷⁹ The government need not prove that the defendant knew or intended any effect on commerce.⁸⁰ The constitutionality of section 247(a)(1) has been upheld over Commerce Clause-based challenges.⁸¹

2. Section 247(a)(2)—interference with free exercise of religious beliefs

The second subsection of the Church Arson Prevention Act, 18 U.S.C. § 247(a)(2), prohibits using force or threats of force to interfere with a victim’s free exercise of religion. To obtain a conviction for violating section 247(a)(2), the government must prove beyond a reasonable doubt that (1) the defendant obstructed, by force or threat of force, any person in the enjoyment of that person’s free exercise of religious beliefs, or attempted to do so; (2) the defendant acted intentionally; and (3) the offense was in or affected interstate or foreign commerce.⁸² There is no need to prove that the defendant was motivated by religious animus. In fact, unlike other federal hate crime statutes, section 247 does not even require proof that a defendant acted “because of” any person’s religion.

⁷⁶ 142 CONG. REC. S6517-04, S6522 (Statement of Sen. Kennedy on S.1890).

⁷⁷ *Fixture*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁷⁸ S. Rep. No. 100-324 (1988).

⁷⁹ See 18 U.S.C. § 247(b).

⁸⁰ See *United States v. Grassie*, 237 F.3d 1199, 1206 n.5 (10th Cir. 2001); CRIM. PATTERN JURY INSTRUCTIONS § 2.71 (TENTH CIR. CRIM. PATTERN JURY INSTRUCTION COMM. 2021) (explaining that, in Hobbs Act prosecution, it is not necessary for government to prove that the defendant knew his conduct would interfere with or affect interstate commerce).

⁸¹ *United States v. Ballinger*, 395 F.3d 1218, 1230 (11th Cir. 2005) (en banc) (holding that “Congress’ commerce authority includes the power to punish a church arsonist who uses the channels and instrumentalities of interstate commerce to commit his offenses”); *Grassie*, 237 F.3d at 1211 (“[B]y making interstate commerce an element of the crime under . . . § 247 . . . , to be decided on a case-by-case basis, constitutional problems are avoided.”).

⁸² 18 U.S.C. § 247(a)(2).

All that is required is to show that the defendant intentionally obstructed the victim's free exercise of religion by force or threats.

Section 247(a)(2) covers obstruction accomplished both through physical force and through threats of physical force. To survive First Amendment scrutiny, prosecutors who charge a defendant with violating this provision by use of threats must prove that the threat is a "true threat." As noted above, another article in this series more fully explores what kinds of statements qualify as true threats. Under the plain language of the statute, as amended in 2018, threats against religious real property qualify as threats of force.⁸³ Because section 247(a)(2) includes threats, it may be a good option to charge in a case involving religious-based threats that cannot be prosecuted under the HCPA,⁸⁴ which lacks a threats provision.

Section 247(a)(2) of the Church Arson Prevention Act was, like section 247(a)(1), enacted pursuant to Congress's Commerce Clause authority. Thus, as with section 247(a)(1), the government must prove that the offense was in or affecting interstate or foreign commerce. In *United States v. Roof*,⁸⁵ the district court upheld the constitutionality of section 247(a)(2) as a valid exercise of Congress's power to enact legislation pursuant to its Commerce Clause authority. The Fourth Circuit affirmed this decision but stressed that Roof's use of the internet to plan and execute an attack on a church satisfied the Commerce Clause jurisdictional element primarily because it was "closely linked, both in purpose and temporal proximity, to his violation of the religious-obstruction statute."⁸⁶ This evidence, along with Roof's use of a phone, GPS, and an interstate highway, when taken together, was sufficient to meet the Commerce Clause element. The court cautioned that, "[a]lone, each of those activities might be insufficient to satisfy the Commerce Clause."⁸⁷ Finding this evidence sufficient, the court did not consider the government's additional evidence that Roof used a gun, magazines, ammunition, and a pouch that had traveled through commerce.⁸⁸ Prosecutors should carefully research the controlling law in

⁸³ See *id.*, as amended by *Protecting Religiously Affiliated Institutions Act of 2018*, Pub. L. No. 115-249, 132 Stat. 3162.

⁸⁴ 18 U.S.C. § 249.

⁸⁵ *Roof II*, 225 F. Supp. 3d at 452–56.

⁸⁶ *Roof I*, 10 F.4th at 386.

⁸⁷ *Id.* at 387.

⁸⁸ *Id.* at 387, n.46.

their circuits and be sure to look for all possible links to interstate and foreign commerce.

3. Section 247(c)—damage to religious property because of race

The third subsection of the Church Arson Prevention Act, 18 U.S.C. § 247(c), prohibits damaging houses of worship and other religious real property because of the racial characteristic of someone associated with the property. To obtain a conviction for violating section 247(c), the government must prove beyond a reasonable doubt that the defendant (1) defaced, damaged, or destroyed religious real property, or attempted to do so; (2) acted intentionally; and (3) acted “because of the race, color, or ethnic characteristics of any individual associated with that religious property.”⁸⁹

The term “religious real property” should be given the same meaning as set forth above in discussing the first subsection of the Church Arson Prevention Act. Congress enacted the third subsection of the Church Arson Prevention Act using its Thirteenth Amendment authority, not its Commerce Clause authority. Thus, prosecutors need not prove a connection to interstate or foreign commerce. They must, however, prove that the defendant was motivated by the race, color, or ethnic characteristic of someone associated with the property. This provision is, thus, often used to prosecute the burning of Black churches.

E. Solicitation to commit a federal hate crime (crime of violence)

If a defendant solicits another to commit a hate crime, that defendant may be charged under the federal solicitation statute, 18 U.S.C. § 373.⁹⁰ The Sixth Circuit has recently upheld the conviction of a defendant charged with soliciting the destruction of religious real property in violation of 18 U.S.C. § 247.⁹¹

To prove a violation of the federal solicitation statute, the government must prove that, under circumstances strongly corroborative of intent, (1) the “defendant intended for another person to commit a violent federal crime, and (2) . . . [the] defendant solicited or otherwise endeavored to persuade the other person to carry out the crime.”⁹² A

⁸⁹ 18 U.S.C. § 247(c).

⁹⁰ 18 U.S.C. § 373.

⁹¹ *United States v. Doggart*, 947 F.3d 879, 887–88 (6th Cir. 2020).

⁹² *United States v. White*, 610 F.3d 956, 959 (7th Cir. 2010).

violation of section 373 is punishable by half the sentence of the sentence for the offense solicited or, when the solicited crime is a life offense or a capital offense, by a 20 year maximum.⁹³

To fall under the federal solicitation statute, the solicited crime must be a federal felony. The solicited crime must also be a crime of violence, meaning that it has as an element the use, attempted use, or threatened use of physical force against the person or property of another.⁹⁴ Most federal hate crimes satisfy this requirement. The HCPA⁹⁵ contains only a felony punishment and requires proof that the defendant willfully caused bodily injury or an attempted to do so with a weapon.⁹⁶

Other federal hate crime statutes contain both misdemeanor and felony provisions. If the defendant solicits a misdemeanor violation of these hate crime statutes, such solicitation may not be charged using the federal solicitation statute. All *felony* violations of these hate crime statutes are, however, crimes of violence. Specifically, 18 U.S.C. §§ 245(b)(2), (b)(4), and (b)(5) (interference with protected rights), 42 U.S.C. § 3631 (criminal Fair Housing Act provisions), and 18 U.S.C. § 247(a)(2) (obstruction by force or threat of the right to free exercise of religion) qualify as crimes of violence because, as explained more clearly above, for each of these offenses, the jury must find that the defendant used, attempted to use, or threatened to use force. The elements thus mirror section 373's requirement that the solicited crime have as an element the use, threatened use, or attempted use of physical force. Courts analyzing these statutes have held that they constitute crimes of violence.⁹⁷ The conclusion is even stronger in cases in which

⁹³ 18 U.S.C. § 373(a).

⁹⁴ *Id.*

⁹⁵ 18 U.S.C. § 249.

⁹⁶ *See* *United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir. 2018) (“[K]nowing or intentional causation of bodily injury necessarily involves the use of physical force.” (quoting *United States v. Castleman*, 572 U.S. 157 (2014)); *see, e.g., Jima v. Barr*, 942 F.3d 468, 472 (8th Cir. 2019) (“One cannot cause bodily injury to another without using the force capable of producing that injury.”)).

⁹⁷ *See* *United States v. Bowers*, No. CR 18-292, 2020 WL 6119480, at *2 (W.D. Pa. Oct. 16, 2020) (adopting the analysis in *United States v. Roof*); *United States v. Hari*, No. 18-150(1), 2019 WL 6975425, at *2 (D. Minn. Dec. 20, 2019) (adopting Report and Recommendation of Magistrate Judge that section 247(a)(2) is a crime of violence); *United States v. Roof (Roof III)*, 252 F. Supp. 3d 469, 475 (D.S.C. 2017).

death results (or in a solicitation case in which death is intended or *would* result) from the offense.⁹⁸

Defacing, damaging, or destroying religious real property in violation of section 247(a)(1) or (c) necessarily requires some use of force against property to accomplish the defacement, damage, or destruction. It is possible, however, that a defendant may convince a court that simple defacement includes *de minimis* force that does not qualify as physical force. The government, however, has prevailed in arguing that section 247 offenses involving dangerous weapons are crimes of violence, including for the purposes of fulfilling the definition of a crime of violence in a section 373 solicitation case.⁹⁹ Prosecutors should be able to argue that section 247 offenses involving enhancements for death or bodily injury are likewise crimes of violence, although prosecutors should, of course, research the law in their circuit carefully before making charging decisions.

To prove a violation of the federal solicitation statute, there must likewise be proof that the defendant intended that the crime of violence be committed in circumstances strongly corroborative of that intent. Courts have held that evidence corroborative of such intent includes (1) offers to pay the solicitee (or provide him or her with some other benefit) for carrying out the offense; (2) threats to harm the solicitee for failing to commit the offense; (3) repeated solicitations and assurances of the solicitor's seriousness; (4) knowledge that the solicitee had previously committed a similar offense; and (5) providing weapons, tools, or information to the solicitee or otherwise assisting in making preparations for carrying out the offense.¹⁰⁰

F. 18 U.S.C. § 371 (conspiracy) and section 241 (civil right conspiracy)

When two or more people join together to commit hate crimes, they may be charged with conspiracy as well as with a substantive offense. Prosecutors may, of course, use the general federal conspiracy statute, 18 U.S.C. § 371, to charge such defendants with conspiring to violate any of the substantive hate crime statutes described above. Prosecutors

⁹⁸ *Roof I*, 10 F.4th at 401.

⁹⁹ *United States v. Doggart*, 947 F.3d 879, 887 (6th Cir. 2020) (posing the question: “Does intentionally defacing, damaging, or destroying religious real property using a dangerous weapon, explosives, or fire necessarily involve the use of physical force?” and holding that “It does.”) (cleaned up).

¹⁰⁰ *United States v. White*, 698 F.3d 1005, 1015 (7th Cir. 2012) (per curiam).

should, however, also consider using the civil rights conspiracy statute, 18 U.S.C. § 241.

The civil rights conspiracy statute was enacted over a century ago in response to acts of racial violence committed by the Ku Klux Klan (KKK), and it remains a powerful tool in the government's efforts to combat racially motivated crimes of violence. The civil rights conspiracy statute prohibits conspiracies designed to violate rights guaranteed by the Constitution or other federal laws. Thus, in a civil rights conspiracy, the indictment should not charge that the defendants conspired to violate a *criminal law* but, instead, should allege that the defendants conspired to violate a *right protected by civil or constitutional law*.¹⁰¹

One difference between the civil rights conspiracy statute, section 241 (as opposed to using the general conspiracy statute, section 371), is that section 241 always constitutes a felony offense, even when the related substantive actions that defendants conspired to commit would, if executed, only constitute a misdemeanor offense. Section 241 provides a maximum sentence of 10 years and, if the conspiracy results in death or involves kidnapping, an attempt to kidnap, aggravated sexual abuse, an attempt to commit aggravated sexual abuse, or an attempt to kill, it may be punishable up to life imprisonment or be eligible for the death sentence. Another difference between sections 241 and 371 is that prosecutors need not prove an overt act to convict a defendant for violating section 241, while proof of an overt act is an element of section 371.¹⁰²

To establish a conspiracy under 18 U.S.C. § 241, the government must prove beyond a reasonable doubt that (1) a conspiracy existed and the defendant joined it; (2) the object of the conspiracy was to “injure, oppress, threaten or intimidate” a person or persons in the free exercise or enjoyment of a right protected by the Constitution or other federal

¹⁰¹ United States v. Kozminski, 487 U.S. 931, 940 (1988).

¹⁰² See United States v. Colvin, 353 F.3d 569, 576 (7th Cir. 2003) (en banc) (stating that “§ 241 does not specify an overt-act requirement”); United States v. Whitney, 229 F.3d 1296, 1301 (10th Cir. 2000) (same); United States v. Crochiere, 129 F.3d 233, 237 (1st Cir. 1997) (stating that “[t]he Supreme Court case of United States v. Shabani, 513 U.S. 10 . . . (1994) . . . requires a holding that § 241 contains no overt act requirement”); United States v. Skillman, 922 F.2d 1370, 1375–76 (9th Cir. 1990) (stating that § 241 does not require proof of an overt act in furtherance of the conspiracy); United States v. Morado, 454 F.2d 167, 169 (5th Cir. 1972) (same); Wilkins v. United States, 376 F.2d 552, 562 (5th Cir. 1967) (same).

laws; and (3) the planned interference with the protected right or rights was willful.¹⁰³

The individual rights most commonly charged in civil rights hate crime conspiracies are rights associated with (1) housing and property ownership;¹⁰⁴ (2) the use of public accommodations;¹⁰⁵ (3) public schooling free of racial discrimination;¹⁰⁶ (4) freedom to travel;¹⁰⁷ (5) voting;¹⁰⁸ and (6) reporting federal crimes;¹⁰⁹ and serving as a witness in a federal case.¹¹⁰

The civil rights conspiracy statute may not be used to charge private persons (that is, non-governmental actors) with depriving victims of rights that are secured by the Constitution; it can only be used against interference by the government. Thus, for example, the government may not charge private individuals with violating the First Amendment for interfering with protest activity; even though the protestors may well have been engaged in exercising their right to free speech, the First Amendment prohibits only the *government* from interfering with that right. Accordingly, private persons cannot be prosecuted for conspiring to

¹⁰³ *United States v. Epley*, 52 F.3d 571, 575–76 (6th Cir. 1995) (“To obtain a conviction for conspiracy to violate civil rights under § 241, the government must prove that [the defendant] knowingly agreed with another person to injure [the victim] in the exercise of a right guaranteed under the Constitution.”).

¹⁰⁴ *See, e.g., United States v. Skillman*, 922 F.2d 1370, 1372 (9th Cir. 1990) (interference with housing rights).

¹⁰⁵ *See, e.g., United States v. Johnson*, 390 U.S. 563, 565–66 (1968) (patronizing a restaurant); *United States v. Allen*, 341 F.3d 870, 876–78 (9th Cir. 2003) (using a public park); *United States v. Baird*, 85 F.3d 450, 452–55 (9th Cir. 1996) (frequenting a convenience store).

¹⁰⁶ *See, e.g., Hayes v. United States*, 464 F.2d 1252, 1261 (5th Cir. 1972) (“[T]he right of black students to attend public schools without regard to race or color is secured by federal statute,” that is, 42 U.S.C. § 2000c, and therefore a private conspiracy to deprive students of this right is “an offense against the United States.”).

¹⁰⁷ *See, e.g., United States v. Guest*, 383 U.S. 745, 759 n.17 (1966) (“[T]he constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private.”).

¹⁰⁸ *See, e.g., United States v. Classic*, 313 U.S. 299, 315 (1941) (federal primary elections); *Ex parte Yarbrough*, 110 U.S. 651 (1884) (federal elections).

¹⁰⁹ *See, e.g., Motes v. United States*, 178 U.S. 458, 462–63 (1900) (right to inform about a federal crime).

¹¹⁰ *See, e.g., United States v. DiNome*, 954 F.2d 839, 845 (2d Cir. 1992) (federal witness).

violate the First Amendment, even if the interference with free speech is bias-motivated.

A circuit-by-circuit summary of cases is available in the appendix to this issue.

G. Guideline enhancements

The Federal Sentencing Guidelines (Guidelines) provide for sentencing adjustments when a defendant specifically targets a victim based upon characteristics listed in the Guidelines.¹¹¹ Specifically, section 3A1.1 of the Guidelines provides for a three-level upward adjustment to a defendant's base offense level if the defendant "intentionally selected any victim or any property as the object of the offense . . . because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity,¹¹² disability, or sexual orientation of any person."¹¹³

These adjustments are most often applied when a defendant is convicted of violating one of the federal hate crime statutes discussed above. These adjustments, however, may also be used to increase the sentence for any non-hate crime federal offense, if the defendant selected the victim (or property) because of an enumerated characteristic of the victim. In effect, application of the adjustment in these circumstances results in a hate crime sentence for a conviction of a non-hate crime offense.

Using this provision requires advance planning, however, as the hate crime adjustment, unique among all other Guidelines, requires the finder of fact at trial, or a court at sentencing of a plea, to determine *beyond a reasonable doubt* that the defendant intentionally selected the victim (or property) because of the actual or perceived characteristic of the victim (or property).

Requiring that bias motivation be proved beyond a reasonable doubt is easily satisfied when the defendant has been convicted after trial or when the defendant has pleaded guilty to a federal hate crime offense because, as discussed above, to obtain a conviction in the first place, the government had to prove that the defendant acted because of an

¹¹¹ UNITED STATES SENTENCING GUIDELINES MANUAL § 3A1.1(a) (U.S. SENT'G COMM'N 2021) (hereinafter U.S.S.G.).

¹¹² Gender identity was added in 2010 following passage of the Hate Crimes Prevention Act.

¹¹³ U.S.S.G. § 3A1.1(a).

identified characteristic.¹¹⁴ In such a case, no special verdict form need be submitted to the jury, as the bias motivation will have been submitted to them as part of the underlying crime upon which it must render its verdict. If it is a plea, the defendant necessarily admitted to the element.

There may be times, however, when prosecutors wish to apply the guideline to a non-hate crime offense (for example, bank robbery) that does not require proof of bias motivation. In such a case, if the evidence establishes beyond a reasonable doubt that the defendant had a bias motivation, the guideline may still be used. For example, in the bank robbery case, the enhancement may apply if the defendant robbed only banks managed by African Americans. In such a case, prosecutors should use a special verdict form and ask the jury to expressly determine whether the evidence presented at trial established beyond a reasonable doubt the defendant's bias motivation.

III. Conclusion

Hate crimes are serious crimes that can tear communities apart. Federal prosecutors should thus be prepared to use every tool available to bring perpetrators to justice. The Criminal Section of the Civil Rights Division stands ready to assist in this endeavor, whether a U.S. Attorney's Office needs assistance with prosecutions, jury instructions, or obtaining the certification required by many of the statutes described above.

About the Authors

Barbara Kay Bosserman has served as the Deputy Chief of the Cold Case Unit of the Criminal Section of the Civil Rights Division since April 2017; in this capacity, she works on implementation of the Emmett Till

¹¹⁴ See, e.g., 18 U.S.C. §§ 245(b)(2) (criminalizing conduct where the defendant has acted "because of" the victim's "race, color, religion, or national origin" and because the victim was engaged in a federally-protected activity), 247(c) (criminalizing conduct where the defendant destroys religious real property "because of the race, color, or ethnic characteristics" of anyone associated with the property), 249 (criminalizing conduct where the defendant causes bodily injury to any person because of the victim's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability); 42 U.S.C. § 3631 (criminalizing conduct where the defendant interferes with a person's housing rights because of the person's race, color, religion, sex, disability, or national origin). *But see* 18 U.S.C. § 241 (criminalizing conspiracies to violate civil rights without regard to any protected characteristic of the victim).

Reauthorization Act. She has served as Senior Legal Counsel of the Criminal Section since October 2008. Before the passage of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, Ms. Bosserman provided advice and counsel to the Department regarding its position on the pending hate crime legislation. Since the Act's passage, she has worked on developing and implementing training on this Act, as well as on other federal hate crime laws. In 2010, she was part of a team that received the John Marshall Award for work on the Shepard-Byrd Act.

Ms. Bosserman joined the Civil Rights Division in May of 2000. She was detailed to New Orleans, Louisiana, for nine months in 2007, working as an Assistant United States Attorney for the Eastern District of Louisiana. Before joining the Department, Ms. Bosserman worked as a staff attorney for the Fifth Circuit Court of Appeals; as a Legal Services Attorney in Saginaw, Michigan; and as a law clerk in federal district court in the Western District of Michigan. She received her J.D. from The George Washington University in 1991.

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Prosecuting Acts of Domestic Violent Extremism as Federal Hate Crimes

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In June 2016, three local militia members began plotting a violent attack on an apartment complex and mosque in Garden City, Kansas, where a large number of Somali-Muslim immigrants lived and worshipped.¹ The men envisioned their attack as a response to the June 12, 2016 mass shooting at the Pulse nightclub in Orlando, Florida, carried out by Omar Mateen, an American citizen who had pledged allegiance to the Islamic State of Iraq and Syria (ISIS).² The three men held numerous planning meetings over the course of several months, discussing their belief that the federal government was responsible for what they deemed the Muslim “threat that we have in the country right now” and describing Muslims as “f*ckin’ cockroaches in this country.”³ The militia members ultimately coalesced around the idea of parking explosive-laden vehicles at each corner of the complex, which they would detonate during the mosque’s time for prayer. They desired “an explosion that would be sure to level the building and kill its occupants.”⁴

Based largely on information provided by a fourth militia member (who acted as a confidential government source) and an undercover Federal Bureau of Investigation (FBI) agent posing as an arms dealer, the three men were arrested in October 2016. They were charged with

¹ *United States v. Stein*, 985 F.3d 1254, 1261 (10th Cir. 2021); Press Release, Dep’t of Just., Three Southwest Kansas Men Convicted of Plotting to Bomb Somali Immigrants in Garden City (April 18, 2018) [hereinafter *Garden City Conviction Press Release*].

² *Stein*, 985 F.3d at 1261; Press Release, Fed. Bureau of Investigation, Investigative Update Regarding Pulse Nightclub Shooting (June 20, 2016).

³ *United States v. Allen*, 364 F. Supp. 3d 1234, 1239 (D. Kan. 2019), *aff’d sub nom.* *United States v. Stein*, 985 F.3d 1254 (10th Cir. 2021).

⁴ *Garden City Conviction Press Release*, *supra* note 1; *Allen*, 364 F. Supp. 3d at 1239.

conspiring to use a weapon of mass destruction and conspiring to violate the civil rights of their intended victims, along with various firearms charges.⁵ A federal jury convicted the men. The court, applying hate crime and terrorism sentencing enhancements, sentenced each to between 25 and 30 years in prison.⁶

I. Introduction

Bias-motivated crimes and domestic violent extremism (DVE) long predate any federal law enforcement efforts to combat that conduct. In 1870, Congress passed a law establishing the United States Department of Justice (Department) in large part to address pre-existing Southern anti-Reconstruction violence—including Ku Klux Klan attacks that terrorized entire populations and even some local governments.⁷ The newly created Department embraced the mission with zeal, aggressively investigating and prosecuting hundreds of racially motivated acts of violence against Black victims and communities.⁸

The need to prosecute bias-motivated and DVE-related crimes remains. As *United States v. Allen* illustrates, such criminal conduct is far from a thing of the past. In 2021, the Department acknowledged the persistence of bias-motivated incidents and noted a rise in reported hate crimes—particularly against Black, African American, and Asian American and Pacific Islander communities.⁹ On August 30, 2021, Attorney General (AG) Merrick Garland reaffirmed the Department’s commitment to combating bias-motivated crimes, making clear that “[p]reventing and responding to hate crimes and hate incidents is one of the Justice Department’s highest priorities.”¹⁰ At the same time, in the domestic terrorism context, the Department

⁵ Garden City Conviction Press Release, *supra* note 1; *Stein*, 985 F.3d at 1261 (charges against one of the men included making materially false statements to the FBI, in violation of 18 U.S.C. § 1001).

⁶ Garden City Sentencing Press Release, *supra* note 1; *Allen*, 364 F. Supp. 3d at 1244–50.

⁷ *150 Years of the Department of Justice*, DEP’T OF JUST., <https://www.justice.gov/history/timeline/150-years-department-justice#event-1195101> (last visited Feb. 4, 2022).

⁸ *Id.*

⁹ Press Release, Dep’t of Just., Attorney General Garland Issues Statement on 2020 FBI Hate Crimes in the United States Statistics (August 30, 2021).

¹⁰ *Id.*

has recognized the threat posed by DVE and by white supremacy in particular. AG Garland noted that, “[i]n the FBI’s view, the top domestic violent extremist threat comes from ‘racially or ethnically motivated violent extremists, specifically those who advocated for the superiority of the white race.’”¹¹ These assessments are consistent with those made across the federal government.¹²

The intersection of hate crimes and acts of DVE is thus an important one. At an institutional level, the Department has sought to increase the exchange of information, expertise, and resources on these issues. The Department’s Civil Rights Division and National Security Division regularly exchange case-related data. The FBI’s Domestic Terrorism-Hate Crimes Fusion Cell, created in April 2019 and comprised of experts from the Bureau’s Criminal Investigative and Counterterrorism Divisions, continues to promote information sharing and reciprocal advising to better detect, deter, and respond to acts of hate or domestic terrorism.

Recognizing the overlap on a case-by-case level is equally crucial. Many domestic terrorism investigations may best be prosecuted using federal hate crime statutes. The reverse is also true: The facts and circumstances of hate crime incidents may implicate domestic terrorism concerns. Approaching cases well-informed about potential hate crime or DVE angles allows federal prosecutors and investigators to equip themselves with a robust set of tools to combat bias-motivated crime. This approach permits more fulsome investigations, more successful prosecutions, and more appropriately weighty sentences. Above all, it promotes swift and suitable law enforcement action to address past attacks and deter future ones.

This article reviews the many reasons to take this broadminded approach and to consider charging acts of bias-motivated DVE as federal hate crimes. After providing some foundational definitions, the

¹¹ Merrick B. Garland, Att’y Gen., Domestic Terrorism Policy Address, Remarks at the Dep’t of Just., (June 15, 2021).

¹² See, e.g., OFF. OF THE DIR. OF NAT’L INTEL., DOMESTIC VIOLENT EXTREMISM POSES HEIGHTENED THREAT IN 2021 (Mar. 1, 2021) [hereinafter DNI DVE Report]; FED. BUREAU OF INVESTIGATION AND DEP’T OF HOMELAND SECURITY, STRATEGIC INTELLIGENCE ASSESSMENT AND DATA ON DOMESTIC TERRORISM (May 2021) [hereinafter *FBI-DHS Intelligence Assessment*]; WHITE HOUSE NAT’L SECURITY COUNCIL, NATIONAL STRATEGY FOR COUNTERING DOMESTIC TERRORISM (June 2021) [hereinafter *National Strategy for Countering Domestic Terrorism*].

article discusses how to bring hate crimes charges reactively (in the wake of bias-motivated DVE incidents) and proactively (to disrupt future incidents). It then examines evidentiary advantages to hate crimes charges, as well as advantages at sentencing when DVE conduct is charged as a hate crime. Finally, the article addresses the value to victims and victim communities of recognizing, where appropriate, acts of DVE as federal hate crimes.

II. Defining hate crimes, domestic terrorism, and domestic violent extremism

A. Hate crimes

In a colloquial sense, the term “hate crime” seems self-explanatory: a crime fueled by hate. Under the law, the phrase has taken on a plethora of meanings as lawmakers define the term for hate crime legislation enacted across the country.

Whether an act constitutes a chargeable *federal* hate crime depends on the language of the applicable statute as well as any governing caselaw interpreting that language. As a general matter, federal hate crime statutes criminalize violence or threats of violence against individuals or groups based on certain protected characteristics.¹³ The Department has explained that hate crimes include “acts of physical harm and specific criminal threats motivated by animus based on race, color, national origin, religion, gender, sexual orientation, gender identity, or disability.”¹⁴ The FBI similarly describes them as “criminal offense[s] against a person or property motivated in whole or in part by an offender’s bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.”¹⁵ The decision to charge any individual federal hate crime, however, will always require a case-specific, fact-based analysis.

¹³ See Barbara Bosserman & Angela Miller, *Prosecuting Federal Hate Crime Laws*, 66 U.S. ATT’YS’ BULL., no. 1, 2018, at 191 [hereinafter *Prosecuting Federal Hate Crime Laws*].

¹⁴ *What Are Hate Crimes?*, DEP’T OF JUST., <https://www.justice.gov/crt/hate-crimes-prosecutions#hatecrimes>.

¹⁵ *Hate Crimes*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/investigate/civil-rights/hate-crimes> (last visited Feb. 4, 2022).

B. Domestic terrorism, domestic violent extremism, and homegrown violent extremism

Several terms used in the domestic terrorism context may also apply in federal hate crime cases. Federal law defines “domestic terrorism” as activities that:

(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily within the territorial jurisdiction of the United States.¹⁶

Separately, the FBI and Department of Homeland Security (DHS) use the term DVE to mean those “based and operating primarily within the territorial jurisdiction of the United States [and] who seek[] to further [their ideological] goals wholly or in part through unlawful acts of force or violence.”¹⁷ Despite some differences between the statutory definition of “domestic terrorism” and the law enforcement definition of DVE, these terms are often used interchangeably.

Within this rubric, the FBI and DHS have identified several extremism “threat categories.” As relevant here, these categories include “racially and ethnically motivated violent extremism,” which the agencies define as involving “the use or threat of force or violence in furtherance of ideological agendas derived from bias, often related to race or ethnicity, held by the actor against others or a given population group.”¹⁸ The threat categories also include “abortion-related violent extremism,” defined to include the “use or threat of force or violence in furtherance of ideological agendas relating to

¹⁶ 18 U.S.C. § 2331(5).

¹⁷ *FBI-DHS Intelligence Assessment*, *supra* note 12, at 2 n.3.

¹⁸ *Id.* at 15.

abortion, including individuals who advocate for violence in support of either pro-life or pro-choice beliefs.”¹⁹ Another category of “all other domestic terrorism threats” covers conduct motivated by “bias[es] related to religion, gender, or sexual orientation.”²⁰

C. Definitional overlap

With these definitions, it is easy to see how conduct classified as a form of domestic terrorism or extremism could concurrently give rise to a federal hate crime. For instance, this overlap is apparent when, perhaps in adherence to the ideology of an extremist organization, acts or threats of violence are motivated by bias against members of certain groups and are meant to intimidate these broader civilian communities or to affect government policy and action.

But definitions do not tell the whole story. It is important to remember that subjects in these cases may, in fact, be motivated by a mix of ideological, socio-political, and personal grievances. They may aspire to impact national politics, local communities, and individual victims simultaneously. They may act alone or as part of a well-defined group. And their sources of inspiration, means of planning, and methods for carrying out criminal conduct may evolve, making successful law enforcement efforts to address and disrupt this conduct all the more challenging but still critical.

The urgency is not just theoretical. Agencies across government have identified an enduring (and growing) domestic terrorism threat involving subjects motivated by bias. The federal intelligence community has determined, for instance, that racially or ethnically motivated violent extremists are among the “most likely to conduct mass-casualty attacks against civilians.”²¹

¹⁹ *Id.* at 16.

²⁰ *Id.* at 5, 15–16 (additional categories, less relevant here, include “animal rights and environmental violent extremism” and “anti-government or anti-authority violent extremism”).

²¹ *National Strategy for Countering Domestic Terrorism*, *supra* note 12, at 10.

III. Federal hate crime statutes

When bias-motivated threats, acts of violence, and mass attacks do occur, it is imperative to bring criminal charges that reflect the severity of such conduct. Yet the federal code does not contain a statute that specifically criminalizes domestic terrorism.²²

This is where federal hate crime statutes can play a key role. The statutes provide fitting charging mechanisms for acts of DVE in many instances. Indeed, some of the most devastating DVE incidents—ranging from online threats of violence to arsons to mass shootings—have been successfully investigated and prosecuted as federal hate crimes.

Each of these hate crime statutes accounts for the fact that holding or articulating hateful and extremist views (or associating with others who do so) does not itself violate the law. But they do recognize criminality when such views and ideologies *motivate* acts or threats of violence.

A. The Church Arson Prevention and Hate Crimes Prevention Acts

Two federal hate crime statutes have repeatedly been used to prosecute acts of DVE, most notably so in the wake of several bias-motivated mass shootings.

The Church Arson Prevention Act, 18 U.S.C. § 247, covers the use of force or threats to obstruct a person in the enjoyment of his free exercise of religious beliefs.²³ It also criminalizes defacing, damaging, or destroying religious real property either (1) because of its religious character or (2) because of the race, color, or ethnic characteristics of those associated with the property.²⁴

The Matthew Shepard-James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249, proscribes the willful infliction of bodily injury, or the

²² Cases involving domestic terrorism are often charged under a variety of statutes, including: 18 U.S.C. §§ 2332a (for the use of weapons of mass destruction), § 2339A (providing material support to terrorism); *see also, e.g.*, 18 U.S.C. § 922; 26 U.S.C. § 5861 (unlawful firearm possession or use); 18 U.S.C. § 875 (interstate threats).

²³ 18 U.S.C. § 247(a)(2).

²⁴ 18 U.S.C. § 247(a)(1)-247(c); *see also Prosecuting Federal Hate Crime Laws, supra* note 13 (providing detailed overview of elements and other statutory requirements).

attempt to do so with a weapon, because of a person's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability.²⁵

These statues were charged in tandem in *United States v. Dylann Roof*, a case arising from a mass shooting at Emanuel African Methodist Episcopal ("Mother Emanuel") Church in Charleston, South Carolina.²⁶ In June 2015, Roof entered the church while 12 of its members engaged in a weekly Bible study.²⁷ Roof joined the group in worship until they reached closing prayers, at which point Roof took out a gun and began to fire upon the church members.²⁸ The shooting left nine people dead.²⁹

Afterward, Roof told FBI agents that, after researching Black churches in Charleston, he selected Mother Emanuel Church as his target for its historical significance. Roof described himself as a white nationalist who wanted "to 'bring attention to this cause' and 'agitate race relations' because 'it causes friction and then, you know it could lead to a race war.'"³⁰ Law enforcement officers later found a manifesto in which Roof espoused his racist and white supremacist views and further "issued a call to action, explaining that it was not 'too late' to take America back."³¹

Roof was charged with 12 counts of violating section 249 for the racially motivated murders of the nine church members and the racially motivated attempt to kill three additional members.³² He faced an additional 12 counts of violating section 247 for obstructing the religious exercise of the nine members he killed and the three he attempted to kill.³³ After a one-week trial on these and associated firearms charges, a jury convicted Roof on all counts.³⁴

²⁵ 18 U.S.C. § 249; see also *Prosecuting Federal Hate Crime Laws*, *supra* note 13.

²⁶ *United States v. Roof*, 10 F.4th 314, 331 (4th Cir. 2021).

²⁷ *Id.* at 332.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* (cleaned up).

³¹ *Id.* at 333.

³² *Id.*

³³ *Id.* (In addition to the 12 counts of violating § 247, Roof faced nine counts of violating 18 U.S.C. § 924(c) and (j)).

³⁴ *Id.* at 334.

The pair of statutes were charged again in *United States v. Robert Bowers* for the defendant's lethal anti-Semitic attack during religious services at Pittsburgh, Pennsylvania's Tree of Life synagogue that killed 11 and wounded additional congregants and responding law enforcement officers.³⁵ And they were charged yet again in *United States v. John Earnest* for the defendant's animus-fueled murder of one congregant and attempted murder of many more during services at the Chabad of Poway Synagogue in California.³⁶

B. Interference with protected rights

Two more federal hate crime statutes may be used when DVE subjects act on their animus to target victims engaged in certain federally protected activities. Such cases may include criminal conduct that seeks to disturb a family's ability to live peacefully in their own home, impedes a student's ability to pursue a public school education, or interferes with a person's ability to enjoy private employment.

The first of these two statutes, 42 U.S.C. § 3631, governs criminal interference with housing rights, prohibiting bias-motivated force or threats to injure, intimidate, or interfere with a person's ability to buy, sell, rent, or occupy a dwelling.³⁷ The second, 18 U.S.C. § 245, governs bias-motivated force or threats that interfere with other specifically enumerated rights, including going to public school, working for a state or private employer, or using a state service, program, or facility.³⁸

DVE conduct often implicates these statutes in cases where subjects, motivated by bias, terrorize victims in places where they may feel particularly vulnerable. Section 245 was charged, for instance, in the case of James Fields, Jr., a white supremacist who drove his car into a racially diverse crowd that was using public streets (a state facility) to

³⁵ *United States v. Bowers*, 495 F. Supp. 3d 362, 364 (W.D. Pa. 2020).

³⁶ Press Release, Dep't of Just., John Earnest Pleads Guilty to 113-Count Federal Hate Crime Indictment in Connection with Poway Synagogue Shooting and Mosque Arson (Sept. 17, 2021) [hereinafter Earnest Press Release].

³⁷ 42 U.S.C. § 3631; *see also Prosecuting Federal Hate Crime Laws, supra* note 13 (providing detailed overview of elements and other statutory requirements).

³⁸ 18 U.S.C. § 245(b)(2); *see also Prosecuting Federal Hate Crime Laws, supra* note 13.

counter-protest the “Unite the Right Rally” in Charlottesville, Virginia.³⁹

It was also charged against four members of the Atomwaffen Division, a neo-Nazi extremist group, for carrying out a plot to intimidate Jewish journalists and journalists of color.⁴⁰ The group specifically selected its victims both because of their race or religion and because they worked in journalism or media.⁴¹ The plot was carried out by delivering posters with threatening messages and swastika images to the victims’ homes in the middle of the night—a move explicitly taken to maximize the terror inflicted.⁴² The group intended, as one Atomwaffen member put it, “to send a clear message that we too have leverage,” “to erode the media/state[']s air of legitimacy by showing people that they have names and addresses, and hopefully embolden others to act as well.”⁴³ Three defendants pled guilty; the fourth was convicted at trial.⁴⁴

C. Freedom of access to clinic entrances

Violence or threats directed at reproductive health services providers, including abortion providers, are covered by the Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 248. The FACE

³⁹ Press Release, Dep’t of Just., Ohio Man Charged with Federal Hate Crimes Related to August 2017 Rally in Charlottesville (June 27, 2018); *see, e.g.*, *United States v. Nelson*, 277 F.3d 164, 193, 193 (2d Cir. 2002) (affirming the district court’s application of the streets theory because “the term ‘facility’ clearly and unambiguously includes city streets within its meaning”).

⁴⁰ Superseding Indictment, *United States v. Shea*, No. 20-cr-32 (W. Dis. Wa. Aug 5, 2020), ECF No. 94; *see also* Press Release, Dep’t of Just., Leader of ‘Atomwaffen’ hate group convicted of five federal felonies for conspiracy to threaten journalist and Anti-Defamation League employees (Sept. 29, 2021) [hereinafter *Atomwaffen Trial Press Release*].

⁴¹ *See United States v. Cole*, 465 F. Supp. 3d 1175, 1178 (W.D. Wash. 2020) (One “defendant targeted victims because of their religion and ethnicity, and otherwise sought to retaliate against journalists who had reported on Atomwaffen Division (‘AWD’) unfavorably.”).

⁴² *Atomwaffen Trial Press Release*, *supra* note 40; Plea Agreement, *Shea*, No. 20-cr-32, ECF No. 181 [hereinafter *Shea Plea Agreement*].

⁴³ *Shea Plea Agreement*, *supra* note 42.

⁴⁴ Garza Acceptance of Plea of Guilty, *Shea*, No. 20-cr-32, ECF No. 126; Parker-Dipeppe Acceptance of Plea of Guilty, *Shea*, 20-cr-32, ECF No. 128; Shea Acceptance of Plea of Guilty, *Shea*, 20-cr-32, ECF No. 183; Jury Verdict, *United Shea*, 20-cr-32, ECF No. 252.

Act prohibits the use of force, threats, or physical obstruction to injure, intimidate, or interfere with a person who seeks or provides reproductive health services.⁴⁵ Relevant to most cases involving abortion-related violent extremism, this statute can be used to prosecute both violent attacks⁴⁶ as well as in person or online threats⁴⁷ against clinics, their staff, or their patients.

IV. Inchoate offenses

The use of federal hate crime statutes is not limited to addressing past violence or threats. When charged as attempts, conspiracies, or solicitations, hate crime laws can be powerful tools to disrupt future criminal conduct.

A. Attempt

With enough evidence, prosecutors need not wait for a subject to complete a violent attack before acting. When a DVE subject intends to commit a bias-motivated crime and takes a substantial step toward doing so, the hate crime offense may be charged as an attempt.⁴⁸ Most hate crime statutes explicitly contemplate this scenario, criminalizing the offense as well as attempts to commit the offense.⁴⁹ In these cases,

⁴⁵ 18 U.S.C. § 248(a)(1); *see also* Sanjay Patel, *FACE Off with Anti-Abortion Extremism—Criminal Enforcement of 18 U.S.C. § 248 (FACE Act)*, 70 DOJ J. FED. L. & PRAC., no. 2, 2022, at 277.

⁴⁶ *See, e.g.*, *United States v. Hill*, 893 F. Supp. 1034, 1036 (N.D. Fla. 1994) (anti-abortion extremist shot and killed abortion doctor and individual escorting him to clinic).

⁴⁷ *See, e.g.*, *United States v. Hart*, 212 F.3d 1067, 1072 (8th Cir. 2000) (anti-abortion activist threatened clinics, staff, and patients by placing Ryder trucks outside clinics); *United States v. Bird*, No. 95-20793, 1997 U.S. App. LEXIS 33988 (5th Cir. 1997) (verbal threat to kill abortion provider); Press Release, Dep't of Just., *Indiana Man Sentenced to 18 Months in Prison for Posting Online Threats of Violence at Women's Reproductive Clinics* (May 15, 2019).

⁴⁸ *See, e.g.*, *Braxton v. United States*, 500 U.S. 344, 349 (1991); *United States v. Goetzke*, 494 F.3d 1231, 1235 (9th Cir. 2007) (“An attempt conviction requires evidence that the defendant ‘intended to violate the statute and took a substantial step toward completing the violation.’”); *United States v. Crowley*, 318 F.3d 401, 407 (2d Cir. 2003).

⁴⁹ *See, e.g.*, 18 U.S.C. §§ 245 (including “attempts to injure, intimidate or interfere”), 247 (“or attempts to do so”); *cf.* 18 U.S.C. § 249 (criminalizing

the “substantial step” required to prove an attempt can often be satisfied by acts like surveilling victims or targeted locations, obtaining weapons or other materials for the planned attack, or traveling to the attack site.⁵⁰

The fact that a subject may acquire weapons from an undercover law enforcement agent does not vitiate the significance of that step. In a disrupted synagogue bombing plot, for instance, defendant Richard Holzer was arrested upon taking possession of weapons from undercover officers. Holzer was an admitted neo-Nazi white supremacist who planned to destroy a Pueblo, Colorado synagogue as “a move for our [white] race.”⁵¹ The defendant repeatedly met with undercover FBI agents to discuss his anti-Semitic sentiments, his predictions for a race war, and his plans to attack the synagogue. He spoke with the undercover agents about obtaining explosives for the attack that would “get that place off the map.”⁵² Holzer later met with the undercover agents to pick up several (inert) explosive devices, a step that triggered his arrest.⁵³ He ultimately pleaded guilty to an attempted hate crime and was sentenced to over 19 years in prison.⁵⁴

attempts “through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device”).

⁵⁰ See, e.g., *United States v. Davis*, No. 19-1696, 2021 WL 97427, at 5 (3d Cir. Jan. 12, 2021), cert. denied, 142 S. Ct. 865 (2022) (“Every other court of appeals that has addressed this issue has held that travel can constitute a substantial step.”).

⁵¹ Press Release, Dep’t of Just., Southern Colorado Man Sentenced to More Than 19 Years for Plotting to Blow Up Synagogue (Feb. 26, 2021) [hereinafter *Holzer Sentencing Press Release*].

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Press Release, Dep’t of Just. Colorado Man Pleads Guilty to Federal Hate Crime and Explosives Charges for Plotting to Blow up Synagogue (Oct. 15, 2020); *Holzer Sentencing Press Release*, *supra* note 51.

B. Conspiracy

If a subject works with others to plan a bias-motivated DVE incident, then prosecutors should consider conspiracy charges.

The general federal conspiracy statute, 18 U.S.C. § 371, presents a viable charging option if two or more people willfully join an agreement to commit a federal criminal offense and at least one co-conspirator commits an overt act to further the conspiracy's purpose or achieve its goal.⁵⁵ A section 371 conspiracy may apply to any federal hate crime statute. For example, in the case of the Atomwaffen members' plot to intimidate journalists, in addition to facing a substantive section 245 charge, each defendant was charged with a section 371 conspiracy to violate section 245, to commit mail threats (18 U.S.C. § 876(c)), and to commit stalking (18 U.S.C. § 2261A).

Section 371 may be charged even if co-conspirators never achieve the object of their conspiracy. For example, co-conspirators belonging to a white supremacist group could, consistent with promoting their white supremacist ideology, willfully agree and plan to carry out physical attacks against people of color. If carried out, the plan (to target victims for violence because of their actual or perceived race or color) would give rise to a violation of § 249 (which prohibits causing bodily injury because of actual or perceived race or color). This is true even if the conspiracy also sought to achieve broader ideological or political goals, like reversing trends toward or policies promoting racial diversity. Thus, if such an agreement was made and at least one co-conspirator took an overt step to advance the plan, prosecutors would have grounds to charge a § 371 conspiracy to violate § 249.⁵⁶

A separate statute, 18 U.S.C. § 241, offers another avenue for charging conspiracies to commit bias-motivated acts of DVE. Section 241 is a specific civil rights conspiracy statute. It criminalizes conspiracies to "injure, oppress, threaten, or intimidate any person" because he is or has been exercising or enjoying "any right or privilege secured to him by the Constitution or laws of the United States."⁵⁷ By

⁵⁵ 18 U.S.C. § 371.

⁵⁶ See 18 U.S.C. § 371; see also 18 U.S.C. § 249(a)(1) (prohibiting willfully causing bodily injury to any person because of the actual or perceived race, color, religion, or national origin of any person).

⁵⁷ 18 U.S.C. § 241; see also Samantha Trepel, *Prosecuting Color of Law Civil Rights Violations: A Legal Overview*, 70 DOJ J. FED. L. & PRAC., no. 2, 2022, at 21.

its language, the statute does not cover conspiracies to violate other *criminal* laws—section 371 does that—but focuses instead on conspiracies to violate constitutional rights or statutory rights created by civil laws.⁵⁸ Also, in contrast to section 371—which requires an overt act and is a felony charge only if the underlying violation is also a felony—a section 241 conspiracy does not require any overt act and always yields a felony charge.

Cases involving bias-motivated DVE conduct will likely support a section 241 conspiracy charge when the co-conspirators plan to harm a victim’s ability to exercise any one of the many rights guaranteed by civil statute. For example, in *United States v. Yousef Barasneh*, the defendant and other members of The Base, a militant neo-Nazi extremist group, conspired to “vandalize property owned by or associated with non-white and Jewish Americans.”⁵⁹ They planned to terrorize the intended victims by starting fires, breaking windows, slashing car tires, and spray-painting anti-Semitic words and phrases.⁶⁰ Because the conspiracy sought to inhibit the victims from freely enjoying their property, its aim was to infringe on a right created by 42 U.S.C. § 1982 “to inherit, purchase, lease, sell, hold, and convey real and personal property” in the same manner as non-Jewish white citizens.⁶¹ For his participation in this agreement, the defendant was charged with, and pled guilty to, a section 241 conspiracy to violate this property right.⁶²

In *United States v. Allen*—the Garden City, Kansas case involving the plot to attack a Somali-Muslim apartment complex and mosque—the defendants planned to target the victims in their homes, where they lived and worshiped. That conspiracy, therefore, sought to interfere with a right guaranteed by the *civil* portions of the Fair Housing Act: the right to sell, purchase, rent, or occupy a dwelling without injury, intimidation, and interference because of race,

⁵⁸ Because civil statutes can *create* rights (hence the term, “statutory rights”), section 241 may be used to charge conspiracies that seek to violate those rights created by civil statute—just as it can be used to charge conspiracies to violate rights enshrined in the U.S. Constitution. Criminal laws penalize conduct (including the violation of rights), but they do not create rights.

⁵⁹ Plea Agreement at 3, *United States v. Barasneh*, No. 20-cr-26 (E.D. Wis.), ECF No. 31.

⁶⁰ *Id.* at 3–4.

⁶¹ 42 U.S.C. § 1982; Plea Agreement, *supra* note 59, at 3.

⁶² Plea Agreement, *supra* note 59, at 2.

national origin, or religion.⁶³ Each of the defendants was charged with, and convicted at trial of, a section 241 conspiracy to violate this fair housing right.⁶⁴ On that count, the court sentenced each defendant to 10 years' imprisonment.⁶⁵

C. Solicitation

The federal solicitation statute, 18 U.S.C. § 373, offers a third proactive charging option in the DVE-hate crimes context. Section 373 prohibits soliciting, commanding, inducing, or otherwise endeavoring to persuade another person to commit a federal crime of violence.⁶⁶ It requires that a defendant intend the other person to commit the crime of violence, as well as evidence of “circumstances strongly corroborative of that intent.”⁶⁷ Any statute that prohibits crimes of violence may thus serve as a sound basis for a solicitation charge—including federal hate crime statutes such as 18 U.S.C. §§ 247, 249.

The solicitation statute is particularly useful if there is strong evidence of a subject's intent to commit a bias-motivated crime, but the subject does not take action and only discusses his plans with someone other than a truly like-minded co-conspirator—perhaps an undercover law enforcement agent. In *United States v. Robert Doggart*, the defendant planned a terrorist attack against an Islamic community in New York, convinced that the community was going to attack New York City. The defendant posted to social media that the community should be “utterly destroyed,” thereby prompting contact from an FBI confidential informant.⁶⁸ Through a series of messages with the informant, Doggart explained his detailed plan to burn down the community's mosque and discussed that residents who resisted his planned attack were potential “collateral damage.”⁶⁹ Doggart made repeated requests that the informant assist in the assault.⁷⁰

⁶³ Fair Housing Act, 42 U.S.C. §§ 3601–3619.

⁶⁴ Second Superseding Indictment at 2–3, *United States v. Allen*, No. 16-cr-10141 (D. Kan. Mar. 16, 2017), ECF No. 89.

⁶⁵ Judgment as to Allen, *Allen*, No. 16-cr-10141, ECF No. 486; Judgment as to Stein, *Allen*, No. 16-cr-10141, ECF No. 488; Judgment as to Wright, *Allen*, No. 16-cr-10141, ECF No. 490.

⁶⁶ 18 U.S.C. § 373(a).

⁶⁷ *Id.*

⁶⁸ *United States v. Doggart*, 947 F.3d 879, 881 (6th Cir. 2020).

⁶⁹ *Id.*

⁷⁰ *Id.*

Doggart was arrested and charged with solicitation to damage religious property in violation of section 247, solicitation to commit federal arson, and interstate threats.⁷¹ He was convicted of the solicitation charges and, on the section 247 solicitation conviction, sentenced to 120 months' incarceration.⁷² On appeal, the defendant challenged his section 247 solicitation conviction, arguing, among other things, that section 247 did not qualify as a "crime of violence" under the solicitation statute. The court rejected this argument and upheld that conviction.⁷³

V. Evidence

From an evidentiary standpoint, two major advantages accrue when acts of DVE are investigated and charged as federal hate crimes: (1) a reason to expand the scope of investigation; and (2) a basis to introduce evidence of a defendant's animus at trial.

Both advantages result from the fact that most federal hate crime statutes *require* evidence of bias motivation—meaning that a subject's actions were taken *because of* a person's protected characteristics. This motive element demands proof that bias or discriminatory animus was a but-for cause of the offense.⁷⁴ Rather than viewing it as "other acts" evidence admissible only for limited purposes,⁷⁵ prosecutors must treat bias-motivation evidence as necessary to proving the crime beyond a reasonable doubt. For this reason, courts have regularly allowed the government to introduce evidence of a defendant's bias or animus as highly probative of the motive element.⁷⁶

⁷¹ *Id.* at 881–82.

⁷² *Id.* at 882 (defendant also sentenced to 115 months imprisonment on arson solicitation conviction) (district court granted judgment of acquittal on interstate threats charges, after jury convicted him of those offenses as well).

⁷³ *Id.* at 887 (finding § 247(d)(3), under which Doggart was convicted, met the solicitation statute's requirement of "the use, attempted use, or threatened use of physical force against property or against the person of another" but reversing conviction on solicitation to commit federal arson).

⁷⁴ *Burrage v. United States*, 571 U.S. 204, 214 (2014).

⁷⁵ *See* FED. R. EVID 404(b)(2) (evidence of other crimes, wrongs, or acts may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.").

⁷⁶ *See, e.g., United States v. Magleby*, 241 F.3d 1306, 1319 (10th Cir. 2001) (evidence of defendant's racial bias was "probative of his intent" under 42

First, investigating bias-motivated DVE conduct as a hate crime can provide sound justification to obtain a wide variety of evidence related to a subject's motivation. Search warrants can and should seek evidence of a subject's bias or animus toward the victim of his crime. Warrants for electronic evidence, for example, may request to search computers, cell phones, social media accounts, or internet activity for expressions of a subject's views on the group to which the victim belongs. Such evidence could reflect the subject making online or social media posts espousing those views, disseminating images or memes consistent with those views, or engaging with other individuals who themselves promote those views.⁷⁷ Similarly, warrants to search residences, vehicles, or storage facilities may look for copies of books and magazines, original writings, photographs, posters, or other objects reflecting a subject's animus. Presuming, of course, that the facts of a case support probable cause for these searches, the evidence secured as a result can provide a more complete portrait of the subject, his criminal conduct, and his motive.

The same rationale works to expand the universe of witnesses and the scope of witness interviews. To develop bias-motivation evidence, investigators and prosecutors should explore a subject's personal history, views, and belief systems. Such efforts could include speaking with family members, friends, employers, coworkers, schoolmates, religious leaders, or other associates—those familiar with the subject—even if they lack knowledge of the subject's criminal conduct.

Second, bringing federal hate crime charges ensures that bias evidence is admissible at trial. Such evidence could include racist song lyrics that a defendant has played or sung;⁷⁸ previous bias-motivated conduct or crimes;⁷⁹ tattoos;⁸⁰ membership in extremist groups or organizations motivated by animus;⁸¹ racial epithets a defendant has

U.S.C. § 3631(a) and 18 U.S.C. § 241); *United States v. Franklin*, 704 F.2d 1183, 1188 (10th Cir. 1983).

⁷⁷ See Mary Hahn, *Using Digital Evidence to Strengthen Hate Crime Prosecutions*, 70 DOJ J. FED. L. & PRAC., no. 2, 2022, at 221.

⁷⁸ *Magleby*, 241 F.3d at 1319.

⁷⁹ *Franklin*, 704 F.2d at 1187–88.

⁸⁰ *United States v. Allen*, 341 F.3d 870, 886 (9th Cir. 2003).

⁸¹ *United States v. Dunnaway*, 88 F.3d 617, 618 (8th Cir. 1996); *United States v. Stewart*, 65 F.3d 918, 930 (11th Cir. 1995).

used;⁸² racially insensitive comments a defendant has made;⁸³ and other statements evincing bias.⁸⁴ Because the evidence is necessary to prove an essential element of most hate crime charges, it is intrinsic to the government's case. And, because the evidence is usually far more probative than prejudicial, it will likely survive defense motions for exclusion under Federal Rule of Evidence 403.⁸⁵ A defendant may object to being linked to his own hateful or biased views, but it is precisely the conduct motivated by those views that gives rise to hate crime charges.

VI. Sentencing

At sentencing, federal hate crime statutes carry maximum penalties and allow for sentencing enhancements that enable the government to seek appropriately weighty sentences for bias-motivated acts of DVE.

The statutory maximum penalties under hate crime statutes can reach 20 years, 40 years, or up to life imprisonment, depending on the presence of certain aggravating factors.⁸⁶ Two statutes, 18 U.S.C. §§ 245, 247, carry the possibility of capital punishment when the most serious aggravators are present: when death results or the offense involves an attempt to kill, kidnapping or its attempt, or aggravated sexual abuse or its attempt.⁸⁷

⁸² *United States v. Whitney*, 229 F.3d 1296, 1303 (10th Cir. 2000).

⁸³ *Franklin*, 704 F.2d at 1187; *United States v. Piekarsky*, 687 F.3d 134, 148 (3d Cir. 2012).

⁸⁴ *United States v. Craft*, 484 F.3d 922, 926 (7th Cir. 2007); *United States v. Pospisil*, 186 F.3d 1023, 1028–29 (8th Cir. 1999); *Dunnaway*, 88 F.3d at 619; *United States v. White*, 788 F.2d 390, 391 (6th Cir. 1986).

⁸⁵ FED. R. EVID. 403 (permitting courts to exclude relevant evidence “if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . or needlessly presenting cumulative evidence”).

⁸⁶ *See* 42 U.S.C. § 3631; *see also* 18 U.S.C. §§ 245(b), 247(d), 248(b), 249(a)(1) 249(a)(2).

⁸⁷ *See* 18 U.S.C. §§ 245(b), 247(d)(1). Moreover, the presence of these aggravators removes any statutory limitation on the time to bring criminal charges, even if the crime is ultimately ineligible for capital punishment under existing law and practice. *See* 18 U.S.C. §§ 3281 (no limitation for capital-eligible offenses), 3591 (threshold intent factors for capital punishment); 3592 (aggravating and mitigating factors bearing on capital punishment).

In addition, various sentencing enhancements may apply to increase the applicable U.S. Sentencing Guidelines (U.S.S.G.) range. U.S.S.G. § 3A1.1, for instance, provides for a three-level hate-crime-motivation enhancement when a defendant intentionally targets “any victim or any property . . . because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person.”⁸⁸ The Guidelines specifically note that the enhancement applies to hate crime offenses.⁸⁹

The facts of many bias-motivated DVE crimes may also call for application of the terrorism sentencing enhancement. Under U.S.S.G. § 3A1.4, a 12-level increase (up to a Guidelines level 32) may be applied to any felony offense “that involved, or was intended to promote, a federal crime of terrorism.”⁹⁰ Section 3A1.4 also increases any defendant’s criminal history to a Category VI, regardless of how it is otherwise calculated.⁹¹ An application note to the section further clarifies that the “federal crime of terrorism” has the same meaning as in 18 U.S.C. § 2332b(g)(5)⁹²—which provides that the offense must both be “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct” and be in violation of several specifically enumerated federal statutes.⁹³ Courts have made clear that the enhancement applies so long as it meets this definition, even if a defendant’s conduct “was also calculated to accomplish other goals simultaneously.”⁹⁴ The presence of a bias motive for a defendant’s conduct thus does not preclude the application of this enhancement. In fact, both the hate-crime-motivation and terrorism sentencing enhancements may be applied in cases where the factual findings justify doing so.⁹⁵

⁸⁸ U.S. SENT’G GUIDELINES MANUAL § 3A1.1(a).

⁸⁹ U.S. SENT’G GUIDELINES MANUAL § 3A1.1, app. note 1.

⁹⁰ U.S. SENT’G GUIDELINES MANUAL § 3A1.4(a).

⁹¹ See U.S. SENT’G GUIDELINES MANUAL § 3A1.4(b).

⁹² U.S. SENT’G Guidelines Manual § 3A1.4, app. note 1.

⁹³ 18 U.S.C. § 2332b(g)(5).

⁹⁴ *Stein*, 985 F.3d at 1267 (quoting *United States v. Van Hafen*, 881 F.3d 543, 545 (7th Cir. 2018)); see also *United States v. Wright*, 747 F.3d 399, 408 (6th Cir. 2014); *United States v. Awan*, 607 F.3d 306, 317 (2d Cir. 2010).

⁹⁵ See *Allen*, 364 F. Supp. 3d at 1238, 1243–50 (discussing, and overruling defense objections to, application of hate-crime-motivation and terrorism enhancements).

Another application note to the terrorism enhancement allows for an upward departure at sentencing when an offense meets one portion, but not the other, of the two “federal crime of terrorism” definition components.⁹⁶ For example, the note offers grounds for an upward departure when an offense involves, or was intended to promote, one of the enumerated section 2332b(g)(5) offenses but sought to intimidate or coerce a *civilian* population, rather than to influence or retaliate against government conduct.⁹⁷

Together, the application of these two sentencing enhancements can lead to a serious sentence that reflects the equally serious nature, circumstances, and impact of these types of bias-motivated crimes.

VII. Victim and community impact

Even one act or threat of bias-motivated violence can have an immediate, devastating impact. The victims of such conduct include not just the individuals most directly targeted but also their family members and friends, as well as the local, national, and international communities to which they belong. As the Department has acknowledged, this broad impact results, in part, from a fear that others, too, “could be threatened, attacked, or forced from their homes, because of what they look like, who they are, where they worship, whom they love, or whether they have a disability.”⁹⁸

Hate crimes may further impact individuals and communities insofar as one attack serves as fodder for another. The three men who planned to level the Somali-Muslim apartment complex and mosque in Garden City, Kansas, were roused to action by the Pulse nightclub shooting in Orlando, Florida. The deadly Poway synagogue shooting was inspired, in part, by the mass shooting at Tree of Life Synagogue in Pittsburgh nearly a year earlier.⁹⁹

⁹⁶ U.S. SENT’G GUIDELINES Manual § 3A1.4, app. note 4.

⁹⁷ *Id.*; see *United States v. Jordi*, 418 F.3d 1212, 1217 (11th Cir. 2005) (finding upward departure applicable). It is important to note, however, that the application note does not provide for an upward departure in the reverse circumstance: where an offense did not involve or intend to promote a specifically enumerated § 2332b(g)(5) offense but nonetheless sought to intimidate or coerce a civilian population.

⁹⁸ *Hate Crimes Prosecutions: What Are Hate Crimes?*, DEP’T OF JUST., <https://www.justice.gov/crt/hate-crimes-prosecutions#hatecrimes>.

⁹⁹ Earnest Press Release, *supra* note 36.

Key to addressing these broad impacts is building relationships with, and making appropriate resources available to, victims and their communities. But it is often the case that those affected by these crimes distrust government and law enforcement or simply do not know how and to whom they can report hate crime incidents. To this end, the Civil Rights Division has a history of working successfully with vulnerable, underserved, and marginalized communities, as well as with organizations and community groups that serve as a link to and a voice for hate crime victims.

VIII. Conclusion

Investigators and prosecutors should treat bias-motivated DVE incidents as hate crimes when possible. Doing so allows for comprehensive charging decisions that address acts already committed and that disrupt planned future violence. It permits the gathering and introduction of probative and compelling bias-motivation evidence. It can help achieve appropriately weighty sentences. And, importantly, it can help acknowledge and address the fact that these bias-motivated crimes impact not only individual victims but local, national, and international communities as well.

About the Author

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Implementation of the Emmett Till Unsolved Civil Rights Crime Act

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“The way to right wrongs is to turn the light of truth upon them.”
—Ida B. Wells

I. Introduction

Horrific violence against Black Americans has occurred in every era of U.S. history. In fact, more than 4,400 racial lynchings were perpetrated in the United States between Reconstruction and World War II alone.¹ Few of the murderers in these cases have ever been identified or prosecuted.² Against this backdrop of violence and injustice, Congress passed the Emmett Till Unsolved Civil Rights Crime Act (Till Act) and its later reauthorization.

The Till Act authorizes the federal government to reopen—for investigation and, where possible, prosecution—cold cases that involve civil rights allegations and resulted in death.³ Even when prosecution is not possible, the law is meant to uncover the truth about each incident to the extent possible. Because these injustices can have lasting effects on the communities where they occurred, participation of U.S. Attorneys’ Offices (USAOs) is essential to successful Till Act work. Designated civil rights contacts in USAOs are uniquely positioned to engage in community outreach and navigate decades of distrust from individuals who often believe that

¹ EQUAL JUST. INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3d ed. 2017).

² *Id.*

³ Although these cases usually involve racially motivated murders, like the infamous murder of Emmett Till, the definition also encompasses murders motivated by religion, national origin, or ethnicity; deaths that resulted from excessive force willfully used by law enforcement officers; and deaths that occurred during a human trafficking offense.

law enforcement did little to solve past lynchings and other forms of racial violence when they occurred.

If Assistant U.S. Attorneys (AUSAs) learn of civil rights crimes in their districts that occurred before 1980, they are encouraged to notify the Civil Rights Division's Cold Case Unit (Unit). Even when federal prosecution is unavailable, attorneys from the Civil Rights Division (Division) and the district can work together to achieve some measure of justice, either by uncovering information for state prosecutions or by providing a full accounting of the matter to rebuild community trust. Moreover, these investigations may possibly uncover a basis for federal jurisdiction and prosecution, and even if that possibility is small, it should be fully explored.

II. Background

Named for Emmett Till, a 14-year-old Black youth who was brutally murdered in Mississippi in 1955,⁴ the Till Act was enacted in 2008.⁵ It was reauthorized and expanded in 2016.⁶ Together, the Till Act and its reauthorization obligate the Department of Justice (Department) to identify, investigate, and where appropriate, prosecute any civil rights crime that occurred before 1980 and resulted in death.⁷ The legislation's underlying goal, however, is broader. It is not simply to bring justice in cases that are still prosecutable. But rather, in the words of Representative John Lewis, a sponsor of the Till Act, the goal is "to develop a full accounting for these long-standing, gross human and civil rights atrocities."⁸

⁴ See generally *Emmett Till*, DEP'T OF JUST., <https://www.justice.gov/crt/case/emmett-till-0> (last updated Dec. 8, 2021); *Emmett Till's Death Inspired a Movement*, NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE (Aug. 28, 2018), <https://nmaahc.si.edu/blog-post/emmett-tills-death-inspired-movement>; *Emmett Till*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/history/famous-cases/emmett-till> (last visited Feb. 8, 2022).

⁵ Emmett Till Unsolved Civil Rights Crime Act of 2007, Pub. L. No. 110-344, 122 Stat. 3934 (2008) [hereinafter Till Act].

⁶ Emmett Till Unsolved Civil Rights Crimes Reauthorization Act of 2016, Pub. L. No. 114-325, 130 Stat. 1965 [hereinafter Till Act Reauthorization].

⁷ Till Act, *supra* note 5.

⁸ Press Release, House Comm. on the Judiciary, Conyers, Lewis & Sensenbrenner Applaud House Passage of Emmett Till Unsolved Civil Rights Crimes Reauthorization Act (Dec. 7, 2016).

For more than 13 years, the Division has attempted to provide this accounting, working with the FBI, USAOs, and state and local partners.⁹ For example, in 2006, the Division and the USAO for the Southern District of Mississippi reopened an investigation into the infamous murders of two 19-year-old Black men, Charles Moore and Henry Dee, by Klan members in Franklin County, Mississippi.¹⁰ The renewed federal investigation determined that the subjects had crossed state lines during the commission of the crime and, as a result, could be prosecuted under the federal kidnapping statute (18 U.S.C. § 1201) which, at the time of the offense, had no statute of limitations when the death resulted. Charles Edwards, who did not directly participate in the murders, was granted immunity and testified against James Ford Seale, the only surviving participant in the murders.¹¹ Seale was indicted in January 2007 and convicted in June 2007 on two counts of kidnapping and one count of conspiracy.¹² After extensive appellate litigation, Seale's convictions were upheld, and he died in prison in 2011.¹³

To date, the Department has opened 134 matters for review, involving 157 known victims, and has fully investigated and resolved 120 of these matters through prosecution, referral, or closure.¹⁴ Although there are many obstacles to successful prosecution of such old cases, the Division remains hopeful that the Till Act's extension to cases occurring in the 1970s, coupled with the recent revitalization of its Unit, will help overcome some of these barriers.

⁹ See *Cold Case Initiative*, DEP'T OF JUST., <https://www.justice.gov/crt/cold-case-initiative> (last updated Feb. 8, 2022); *The Department of Justice's Efforts to Investigate and Prosecute Unsolved Civil Rights Era Homicides*, DEP'T OF JUST., <https://www.justice.gov/crt/department-justice-s-efforts-investigate-and-prosecute-unsolved-civil-rights-era-homicides-3> (last updated July 28, 2017).

¹⁰ DEP'T. OF JUST., THE ATTORNEY GENERAL'S NINTH ANNUAL REPORT TO CONGRESS PURSUANT TO THE EMMETT TILL UNSOLVED CIVIL RIGHTS CRIME ACT OF 2007 AND THIRD ANNUAL REPORT TO CONGRESS PURSUANT TO THE EMMETT TILL UNSOLVED CIVIL RIGHTS CRIMES REAUTHORIZATION ACT OF 2016 12–14 (2021) [hereinafter Annual Report] (discussing *United States v. Seale*, 600 F.3d 473 (5th Cir. 2010)).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 18.

III. The fundamentals of Till Act work

When a case is referred to the Unit, the first step is for an attorney to determine if the case falls within the parameters of the Till Act (that is, if there was a civil rights crime that took place before 1980 and resulted in death). If so, Unit attorneys, in coordination with the FBI, gather available documentary evidence, including contemporaneous FBI and Department records, state and local investigative agencies' records, and court records.

Unit attorneys then analyze these records and determine whether there are living witnesses who can provide additional information. Unit attorneys reach out to the relevant USAOs' contacts to alert them of upcoming investigative activities and welcome their advice and participation. When appropriate, Unit attorneys refer matters to the FBI for agents to conduct witness interviews. Additionally, in 2021, the Unit employed a retired FBI agent to serve as a contract investigator handling witness interviews for many of these cases.

During this process, the Division reaches out to close family members, if any can be identified and located. The Department's Victim Witness Coordinators notify the victim's relatives of the Division's investigation and make sure that the relatives can provide Unit attorneys with information. Next of kin are contacted again when the investigation ends and are notified about whether the Department intends to seek charges, refer the case to the state for prosecution, or close the matter.

IV. How the Department may overcome barriers to prosecution in Till Act cases

Federal prosecutors face several obstacles in Till Act cases, one of which is that prosecutors may bring charges only pursuant to statutes that were in effect at the time a crime was committed.¹⁵ Because the first federal hate crime laws were not enacted until 1968, it is often the case that no federal law prohibited the perpetrator's conduct at the time the offense was committed. Additionally, many of the

¹⁵ See *id.* at 15–17 (describing obstacles to federal prosecution).

statutes in place when these crimes were committed were subject to a five-year statute of limitations.¹⁶

Despite these challenges, viable Till Act prosecutions and other remedies exist. Accordingly, AUSAs should refer any civil rights era cold cases to the Unit, even if it appears that the statute of limitations for any federal prosecution has expired.

Importantly, state murder prosecutions are unlikely to be barred by statutes of limitation. And so, under the Till Act, the Division may refer cases to state authorities and assist in their prosecution.¹⁷

Additionally, the Till Act's reauthorization expanded the Division's reach to cases occurring in the 1970s,¹⁸ and it is more likely that witnesses and perpetrators from this era are still alive. If such cases are brought to the Division quickly, then it increases the opportunity for thorough investigation and possible prosecution.

For this reason, the Division has revitalized the Unit. In 2021, the Unit hired three new attorneys to review these cases and employed a former FBI agent with experience in civil rights cases to conduct investigations. Additionally, the Unit continues to actively seek new cases and welcomes referrals from local law enforcement partners, civil rights non-profits, academics, and universities.

The FBI and Division have developed further resources for those interested in this work. These resources include trainings on the history and parameters of the Till Act, which can be requested by interested groups (such as local law enforcement, academics, and community groups), and a webpage that contains information about reporting hate crimes, including Till Act crimes.¹⁹

¹⁶ In 1994, the Federal Death Penalty Act of 1994, enacted as Title VI of The Violent Crime Control and Law Enforcement Act of 1994, made several civil rights crimes eligible for the death penalty, which had the effect of extending the statute of limitations for such crimes. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 60001–26, 108 Stat. 1796 (codified as amended at 18 U.S.C. §§ 3591–98).

¹⁷ Till Act, *supra* note 5, § 3; Annual Report, *supra* note 10, at 16–17 (discussing potential barriers to state prosecutions).

¹⁸ Annual Report, *supra* note 10, at 31–32; Till Act Reauthorization, *supra* note 6.

¹⁹ *Hate Crimes-Cold Case Initiative*, DEP'T OF JUST., <https://www.justice.gov/hatecrimes/webform/cold-case-initiative> (last visited Feb. 15, 2022).

Additionally, pursuant to funding provisions of the Till Act, the Bureau of Justice Assistance (BJA) can award competitive grant money to state, local, and tribal law enforcement and prosecution agencies for costs associated with investigations and prosecutions of cold case murders.²⁰ These funds also can support activities to assist victims' families and stakeholders affected by these cases. For example, in approximately November 2020, the BJA awarded nearly \$300,000 to the Maryland Office of the Attorney General to fund the investigation of more than 40 unsolved, racially motivated lynchings committed in Maryland.²¹ USAOs are encouraged to inform state and local law enforcement organizations in their districts about the availability of these funds.

Finally, it is worth noting that, in 2018, Congress enacted the Cold Case Records Collection Act, recognizing the importance that crimes from the Jim Crow Era not be forgotten.²² This Act establishes a collection of hate crime investigative records within the National Archives, accessible to scholars, the civil rights community, and the general public.²³ The Unit is currently in the process of collecting Division files that are subject to the Act; digitizing and reviewing them; and making appropriate redactions to ensure the safety and privacy of victims, cooperating witnesses, and others named in these records. Not only will this release of information to the public help shine light on these past injustices, it may increase interest in and leads for Till Act cases.

²⁰ The BJA has a posted webinar online, made with assistance from the Civil Rights Division's Cold Case Unit, to explain the application process to interested entities. *Emmett Till Cold Case Investigations Program*, BJA, <https://bja.ojp.gov/program/emmett-till-cold-case-investigations-program/funding> (last updated May 27, 2021); see also *FY 2021 Emmett Till Cold Case Investigations and Training and Technical Assistance Program*, BUREAU OF JUST. ASSISTANCE, <https://bja.ojp.gov/funding/opportunities/o-bja-2021-45002> (last updated May 18, 2021).

²¹ Annual Report, *supra* note 10, at 29–30.

²² See Civil Rights Cold Case Records Collection Act of 2018, Pub. L. No. 115-426, 132 Stat. 5489 (2019).

²³ *Id.*

V. Conclusion

The Department will continue to devote resources to ensure that all Till Act cases are reviewed, investigated, and prosecuted as appropriate. Given the small window of opportunity to meaningfully pursue these cases due to their age, it is critical that attorneys across the Department, as well as community partners, refer these incidents for investigation. Shining the light of truth upon instances of racial injustice remains important to the Division, the Department, the victims, the communities, and posterity.

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Breaking the Pattern: Anti-AAPI Hate Crimes During the Pandemic

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As the country was sequestered at home for much of 2020 and 2021 during the first 18 months of the COVID-19 pandemic, some of us may have felt bombarded with media reports of attacks on Asian American Pacific Islander (AAPI)¹ people in the United States. It was almost impossible to avoid the videos showing a 65-year-old AAPI woman who was knocked to the ground and repeatedly kicked outside a luxury apartment building in New York City or an AAPI father who was punched and kicked while pushing his one-year-old in a stroller in San Francisco.²

The increase in media reports about attacks against AAPI people was borne out by the FBI's hate crime statistics, which reported an approximately 73% increase in 2020 from 2019 in anti-AAPI hate crimes.³ One national AAPI advocacy group began collecting data on

¹ *About the Topic of Race*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population/race/about.html> (updated Dec. 3, 2021). The term "Asian American and Pacific Islander," or AAPI, indicates people of Asian descent and the native communities that inhabit various American states and territories in the Pacific. In 2020, the U.S. Census defined "Asian" as "[a] person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam"; and "Native Hawaiians and Pacific Islanders" as "having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands." *Id.*

² Wilson Wong, *Asian woman, 65, knocked down, repeatedly kicked as witnesses appear to watch*, NBC NEWS (Mar. 30, 2021), <https://www.nbcnews.com/news/asian-america/asian-woman-65-knocked-down-repeatedly-kicked-witnesses-appear-watch-n1262431>; Dion Lim, *Asian father brutally attacked while walking with 1-year-old child in SF*, ABC7 NEWS (May 3, 2021), <https://abc7news.com/san-francisco-asian-hate-crime-man-attacked-grocery-store-sf/10575684/>.

³ *Crime Data Reporter*, FED. BUREAU OF INVESTIGATION, <https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/hate-crime> (last visited Jan. 25, 2022).

March 19, 2020 (the beginning of the global COVID-19 pandemic), looking at anti-AAPI hate crimes and hate incidents in broader terms. Their research found 4,548 reports through the end of 2020 and an alarming 4,533 reports in just the first six months of 2021.⁴ Those numbers almost certainly gravely undercount the true numbers of these offenses, as the targeted communities are traditionally reluctant to report the crimes and nervous about cooperating with law enforcement.⁵

Unfortunately, anti-AAPI hate crimes are not new, as illustrated by a 1998 case involving three white men and members of the Hmong community living in Manitowoc, Wisconsin. As one of the prosecutors explained, a father of six woke up in the middle of the night. As he came to, he realized that a stranger was banging on his bedroom window, trying to wake him, and that his home was in flames around him. The father then woke his wife and his children, and all of them miraculously escaped the fire physically unharmed. When the family learned later that the three white men who set fire to their home had done so simply because they were Asian, the family suffered a severe blow to their sense of security and lawfulness that had led the father to fight for American troops in the Vietnam War and had led him to immigrate to the United States.⁶

The arson of the Hmong family's home, which was part of a larger plan by the defendants to find and injure Hmong people living in their town, led to a successful federal hate crime prosecution. The family, as well as another Hmong family harmed as part of the defendants' crime spree, ultimately cooperated thoroughly with the federal prosecution, but only after initially expressing fear and hesitation.

To gain the victims' trust, agents and prosecutors needed to be aware not only of the history that influenced the family's hesitation, but also of certain cultural customs that, if violated, could have caused a rift between the victims and the government. By taking some time to educate themselves about Hmong culture, the prosecution team

⁴ STOP AAPI HATE, NATIONAL REPORT 1 (2021), <https://stopaapihate.org/wp-content/uploads/2021/08/Stop-AAPI-Hate-Report-National-v2-210830.pdf>.

⁵ Eugene Lee & Max Mizono, *The Taraval Hate Crime*, 19 *ASIAN AM. L.J.* 117, 119 (2012); Mark Stromer, *Combating Hate Crimes Against Sikhs: A Multi-Tentacled Approach*, 9 *J. GENDER, RACE & JUST.* 739, 752–53 (2006).

⁶ See *Criminal Section Selected Case Summaries*, DEP'T OF JUST., <https://www.justice.gov/crt/criminal-section-selected-case-summaries#interferencereigion> (updated Jan. 6, 2022) (*U.S. v. Nicholson*)

was able to build rapport with—and more importantly, avoid insulting—the victims. For example, the team learned that it would be considered disrespectful to touch a Hmong person on the head or to display the bottom of a shoe to another person. So, agents and prosecutors who might otherwise have patted a young child in greeting or sat for an interview with one leg crossed over the other knew to honor these cultural norms while interacting with the victims. Embracing the cultural norms helped the prosecution vindicate the victims’ rights with a successful prosecution and lengthy sentences.

The lessons of that case are equally important today because the incidence of hate crimes against AAPI people in the United States is on a meteoric rise. With the rise in anti-AAPI hate crimes, it is more important than ever for federal agents and prosecutors to understand the roots of such hesitancy and to arm themselves with tools that will help them bridge that divide. Through this article, I will provide a brief overview of the history of discrimination that AAPI communities have faced in the United States and then offer thoughts about steps agents and prosecutors might take to overcome that history, build rapport with these victims, and thereby bring justice to more and more individuals and communities affected by these crimes.

I. A brief history of AAPI discrimination in the United States

The ebb and flow of anti-AAPI sentiment in the United States over the last 200 years and resulting mistreatment has caused many members of AAPI communities to feel distrust towards American law enforcement and the American legal system. Though small pockets of Asian communities existed in relative peace in North America as far back as the 1760s,⁷ the first major wave of Asian immigration to the United States, during the California gold rush of 1848–1850, sparked an anti-AAPI backlash.⁸ Thousands of Chinese men arrived and settled in California, working as fishermen, farmers, domestic

⁷ Randall, *Filipino American history: First Asian American settlement to receive new recognition*, ASAMNEWS: FILIPINO AMERICAN (Oct. 3, 2019), <https://asamnews.com/2019/10/03/filipino-american-history-first-asian-american-settlement-to-receive-new-recognition/>.

⁸ *Chinese Immigration and the Chinese Exclusion Acts*, U.S. DEP’T OF STATE, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1866-1898/chinese-immigration> (last visited Jan. 25, 2022).

servants, and laborers for the transcontinental railroad.⁹ Believing that the influx of Chinese laborers posed a threat to American society and cultural norms, Congress passed, in 1882, “The Chinese Exclusion Act.”¹⁰ The Act barred Chinese laborers from entering the United States and prohibited those who entered after 1882 from continuing to reside in the United States.¹¹ Drafted in response to anti-Chinese sentiment, the Chinese Exclusion Act was the first immigration act in United States history to bar an ethnic or racial group from immigrating to the United States.¹²

Although the U.S. Supreme Court held, in 1886, that Chinese people living in the United States were entitled to the same due process rights and, thus, qualified as protected persons under the equal protection clause of Fourteenth Amendment, only “white persons” and newly freed Black slaves were permitted, at that time, to become

⁹ Carlos Echeverria-Estrada & Jeanne Batalova, *Chinese Immigrants in the United States*, MIGRATION POL’Y INST. (Jan. 15, 2020), <https://www.migrationpolicy.org/article/chinese-immigrants-united-states-2018>; Part One: Early Chinese Immigrants, in *CHINESE AMERICAN VOICES: FROM THE GOLD RUSH TO THE PRESENT* (Judy Yung et al. eds., 2006).

¹⁰ Echeverria-Estrada & Batalova, *supra* note 9; David W. Dunlap, *135 Years Ago, Another Travel Ban Was In the News* N.Y. TIMES (Mar. 17, 2017), <https://www.nytimes.com/2017/03/17/insider/chinese-exclusion-act-travel-ban.html>. In support of the Act, U.S. Senator John Franklin Miller said at the time, “It is a fact of history that wherever the Chinese have gone they have always taken their habits, methods, and civilization with them; and history fails to record a single example in which they have ever lost them. They remain Chinese always and everywhere; changeless, fixed and unalterable.” *Id.*

¹¹ Chinese Exclusion Act, ch. 126, 22 Stat. 58, 58–61 (1882) (repealed 1943).

¹² Will Sarvis, *Melting Pot Benevolence and Liberty Patriotism: The Importance of the Moral Cosmopolitanism Precedent in Asian American History*, 3 BRIT. J. AM. LEGAL STUD. 197, 202 (2014); *Ping v. United States*, 130 U.S. 581, 606–07 (1889) (“The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments.”). Note that some individual parties who challenged the application of the Chinese Exclusion Act prevailed while the Act remained in effect. *See Chew v. United States*, 112 U.S. 536 (1884); *United States v. Wong Kim Ark*, 169 U.S. 649, (1898); *Chin v. United States*, 186 U.S. 193 (1902).

naturalized citizens.¹³ The bar against naturalization for Asian people reaffirmed their outsider status. In the 1920s, the Supreme Court considered two separate cases that dealt with the naturalization applications of a Japanese¹⁴ and an Indian man.¹⁵ Despite the fact that each man had attended U.S. universities, owned businesses, and served in the U.S. military—and therefore demonstrated significant ties to the United States—the Court found that both men were ineligible for naturalization.¹⁶ In the 1940s, in *Hirabayashi v. United States*¹⁷ and in *Korematsu v. United States*,¹⁸ the Court upheld the federal government’s decision to forcibly remove Japanese communities from their lands and homes and sending them to internment camps under the premise that these drastic measures were necessary to protect U.S. national security during World War II.¹⁹ From the enactment of the Chinese Exclusion Act through the Japanese internment cases, the Supreme Court repeatedly described people of Asian descent as being culturally incongruous with American society, even doubting their loyalty and allegiances, solely based on their countries of origin.²⁰

Although Congress eventually repealed the Chinese Exclusion Act in 1943 and, a decade later, repealed the race restrictions for naturalized U.S. citizenship,²¹ AAPI people continued to be treated as outsiders and a threat.²² Additional immigration reforms in the 1960s allowed

¹³ *Yick v. Hopkins*, 118 U.S. 356 (1886); Naturalization Act of 1790, Pub. L. No. 1-3, 1 Stat. 103 (1790); Naturalization Act of 1870, Pub. L. No. 41-254, 16 Stat. 254 (1870). Note that Native Hawaiians and people born in Hawaii were granted citizenship in 1900 pursuant to the Hawaiian Organic Act, Pub. L. No. 56-339, 31 Stat. 141 (1900).

¹⁴ *Ozawa v. United States*, 260 U.S. 178 (1922).

¹⁵ *United States v. Thind*, 261 U.S. 204 (1923).

¹⁶ *Ozawa*, 260 U.S. at 198; *Thind*, 261 U.S. at 215.

¹⁷ 320 U.S. 81 (1943).

¹⁸ 323 U.S. 214 (1944).

¹⁹ *Korematsu*, 323 U.S. 214 (1944).

²⁰ See *Gong v. Rice*, 275 U.S. 78 (1927); *Hirabayashi*, 320 U.S. 81 (1943); *Korematsu*, 323 U.S. 214 (1944); *Ex Parte Endo*, 323 U.S. 283 (1944).

²¹ McCarran-Walter Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).

²² See, e.g. Robert Lindsey, *Resentment of Japanese is Growing, Poll Shows*, N.Y. TIMES (Apr. 6, 1982), <https://www.nytimes.com/1982/04/06/us/resentment-of-japanese-is-growing-poll-shows.html>.

more Asians to immigrate and settle in the United States,²³ yet conflicts erupted around AAPI communities that were falsely blamed for economic downturns and job losses.²⁴ For example, in 1979, Vietnamese refugee fishermen in Seadrift, Texas, were menaced and attacked by native white fishermen in a protracted conflict that culminated with the Ku Klux Klan burning crosses on the Vietnamese fishermen's yards.²⁵ In 1982, Vincent Chin, a Chinese American, was beaten to death with a baseball bat by two white men who believed Chin was Japanese and blamed him for their recent layoff from an auto plant.²⁶ When the murderers received probationary sentences in state court, the outcome simply reaffirmed for many in the AAPI community that the American criminal justice system did not take crimes committed against AAPIs seriously.²⁷

The relationship between the AAPI community and law enforcement further eroded in the wake of the September 11, 2001 terrorist attacks. With the increase in government surveillance, members of AAPI communities, many of whom were Muslim, felt profiled and targeted by law enforcement, causing them to be reluctant in reporting civil rights violations,²⁸ even as anti-AAPI hate crimes

²³ *Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065*, PEW RSCH. CTR. (Sep. 28, 2015), <https://www.pewresearch.org/hispanic/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065/>.

²⁴ Fox Butterfield, *Violent Incidents Against Asian-Americans Seen as Part of Racist Pattern*, N.Y. TIMES (Aug. 31, 1985), <https://www.nytimes.com/1985/08/31/us/violent-incidents-against-asian-americans-seen-as-part-of-racist-pattern.html>.

²⁵ John Burnett, *Decades After Clashing with the Klan, A Thriving Vietnamese Community in Texas*, NPR (Nov. 25, 2018), <https://www.npr.org/2018/11/25/669857481/decades-after-clashing-with-the-klan-a-thriving-vietnamese-community-in-texas>.

²⁶ John White & Wynne Davis, *His Life Cut Short, Vincent Chin is Remembered For What Might Have Been*, NPR (June 23, 2017), <https://www.npr.org/2017/06/23/533977175/his-life-cut-short-vincent-chin-is-remembered-for-what-might-have-been>.

²⁷ Niraj Warikoo, *Vincent Chin Murder 35 Years Later: History Repeating Itself?* DETROIT FREE PRESS (June 24, 2017), <https://www.freep.com/story/news/2017/06/24/murder-vincent-chin-35-years-ago-remembered-asian-americans/420354001/>.

²⁸ U.S. COMM'N ON CIV. RTS., FEDERAL CIVIL RIGHTS ENGAGEMENT WITH ARAB AND MUSLIM AMERICAN COMMUNITIES POST 9/11 (2014).

dramatically increased after 2001.²⁹ The Department of Justice (Department) responded to this uptick by creating the Post 9/11 Backlash Initiative, which facilitated over 70 prosecutions by state and local authorities of post 9/11 violence, including several federal prosecutions.³⁰ Nonetheless, the long-term effects of government monitoring programs and immigration concerns has left the AAPI community hesitant and fearful of cooperating with law enforcement.³¹

II. Bridging the trust gap with proactive outreach

In light of this history, prosecutors have much to do to overcome the reluctance of AAPI victims and to develop trust within the AAPI community. Prosecutors who make a concerted effort, consisting of proactive outreach and collaboration with local law enforcement agencies, will convey the Department's sincere concern for the safety and well-being of the AAPI community and lay the groundwork for victim and witness cooperation in future prosecutions. It is important to note that AAPI communities are not unlike other underserved communities of color that tend to be victims of hate crimes, which also require similar outreach efforts. These groups also have storied pasts in American history, and the proscriptions discussed below apply to them as well.

First, U.S. Attorneys' Offices should familiarize themselves with the demographics of their districts and the corresponding groups or associations for the AAPI communities. With that understanding, the U.S. Attorney Offices can then foster open communication with the relevant nonprofit organizations and advocacy groups that serve the AAPI populations and, when possible, have direct relationships with community leaders. Targeted outreach will build trust and mutual

²⁹ Katayoun Kishi, *Assaults against Muslims in U.S. surpass 2001 level*, PEW RSCH. CTR. (Nov. 15, 2017), <https://www.pewresearch.org/fact-tank/2017/11/15/assaults-against-muslims-in-u-s-surpass-2001-level/>.

³⁰ Press Release, Dep't of Just., Zachary J. Rolnik Pleads Guilty to Federal Hate Crime Violations Against Dr. James J. Zogby (June 6, 2002).

³¹ Lily Zheng, *To Dismantle Anti-Asian Racism, We Must Understand Its Roots* HARVARD BUS. REV. (May 27, 2021), <https://hbr.org/2021/05/to-dismantle-anti-asian-racism-we-must-understand-its-roots>.

understanding between law enforcement and the AAPI community so that AAPIs know that their reports and fears will be taken seriously.

Next, U.S. Attorney Offices should facilitate meetings with local prosecutors and law enforcement and the AAPI community. As many hate incidents committed against AAPIs may not rise to the level of a federal hate crime, local law enforcement counterparts should be included in outreach events to demonstrate a coordinated effort to protect the AAPI community from future violence.

Finally, prosecutors and agents should not undervalue making personal appearances at community events when feasible. Not only will these appearances allow the AAPI community to air its concerns directly, but they may also lead to valuable information for law enforcement about how and where anti-AAPI hate crimes are occurring. AAPI witnesses and victims who may be initially fearful or reluctant to meet in law enforcement offices may overcome their trepidation if they are able to first interact with prosecutors and agents in more familiar, less intimidating surroundings. By preemptively investing some time and effort, prosecutors and agents can overcome some of the historical distrust the AAPI community has for law enforcement and allow for a better understanding between them.

III. Developing cultural competency— case-specific considerations

While rebuilding the relationship between the AAPI community is an important first step, it will not resolve all the difficulties prosecutors may encounter when investigating AAPI hate crimes, as AAPI victims may be reluctant to cooperate in an investigation for other reasons. Language barriers, differing cultural norms, and unfamiliarity with the American legal system can also cause an AAPI victim to hesitate to come forward or cooperate.³²

It may seem obvious to use interpreters when speaking with victims and witnesses who are not fluent in English. Nonetheless, the need for victims to speak in their own language cannot be overstated. While it is crucial that the interpreters speak the specific dialect of a victim or witness, it is also important that the interpreter does not know or is

³² Terri Yuh-lin Chen, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 *ASIAN L.J.* 69, 76 (2000); Note, *Racial Violence Against Asian Americans*, 106 *HARV. L. REV.* 1926, 1930 (1993).

not associated with the victim to ensure complete candor, to protect privacy, and to prevent embarrassment for the victim. Employing the same interpreter for every interview, when possible, will also ensure consistency and familiarity for the witnesses and will contribute to the witnesses' overall feeling of comfort as well.

Similarly, the Department has expanded language access to its website for reporting hate crimes.³³ As of December 2021, the website includes five of the most frequently spoken AAPI languages—Chinese, Japanese, Korean, Tagalog, and Vietnamese—and there are plans to add 10 additional languages.

Overcoming linguistic barriers is an important first step, but even more can be gained by understanding the cultural norms of the victims as well. When handling AAPI hate crimes, the onus is on the prosecutors to prepare and educate themselves for the possibility of a cultural divide. To begin with, AAPI victims and witnesses may not possess a basic understanding of how the criminal justice system works; they may not have watched procedural crime dramas that afford most Americans with a working knowledge of how law enforcement operates. Prosecutors and agents should be prepared to explain their roles and the fundamentals of the investigative process at the onset of an interview. Furthermore, depending on the circumstances, prosecutors may not be able to rely solely on the victims' or witnesses' ability to narrate an event, as they may not be accustomed to having conversations about fear or emotions with strangers. If a victim is not providing the information needed to put together a prosecutable case, however, prosecutors and agents should not automatically assume that the evidence is not there.

For example, in one of my cases involving Thai restaurant workers, the prosecution team struggled with reconciling the flat and understated reactions the victims had with their horrific abuse by an employer. Puzzled by their reserved responses, the prosecutors consulted a professor and Thai cultural expert for the State Department's Foreign Service Institute. Well-versed in Thai protocol and customs, the professor explained to the prosecution team that the victims' reactions were consistent with the Thai cultural practice of *Kreng Jai*, which involve avoiding conflict and deferring to authority figures or people of higher social status. The consultation added a

³³ *Civil Rights Division*, DEP'T OF JUST., <https://www.civilrights.justice.gov/> (last visited Feb. 15, 2022).

depth of understanding about the victims' responses and provided an explanation for their behavior as crime victims. Armed with this cultural context, the prosecutors altered their questions, probed a little deeper with the victims, and were ultimately able to secure the evidence needed to proceed with our case.

Given the recent rise of attacks on AAPIs, prosecutors and agents who work anti-AAPI hate crime investigations should be aware of the historical background they are contending with when seeking cooperation of AAPI victims and witnesses. The AAPI community in general has long-held suspicions and distrust of law enforcement that go back generations. To overcome the reluctance and hesitation for AAPIs to cooperate in investigations, U.S. Attorney Offices should invest in community outreach efforts and work collaboratively with state and local agencies. And by delving into the potential cultural divide, prosecutors will better understand their AAPI witnesses and, eventually, bring their assailants to justice.

About the Author

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Beyond Hate: Investigating and Prosecuting Bias-Motivated Violence Targeting the LGBTQI Community

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I. Introduction

In December 2017, a group of men between the ages of 17 and 24 engaged in a coordinated scheme to target gay men for violent crimes in Dallas, Texas. In less than a week, they used Grindr—a cell phone application that calls itself “the World’s Largest Social Networking App for Gay, Bi, Trans, and Queer People”—to lure at least nine gay men to a vacant apartment in Dallas, Texas.¹ When the victims arrived, expecting to meet a man for a date, they were met, instead, by the conspirators, held at gunpoint, threatened, assaulted, or carjacked. On the final night of the scheme, the conspirators kidnapped five men and held them captive in the back room and closet of the vacant apartment. On this final night, the conspirators sexually assaulted at least three of the victims while shouting, “Isn’t this what you came here for?!” The victims were freed due to the bravery of one victim, who escaped and called 911. The local police responded and freed the remaining captive victims, some of whom were bruised, bleeding, soaked with urine, and smeared with human feces.²

¹ Indictment at 1, *United States v. Jenkins*, No. 18-cr-406 (N.D. Tex. Aug. 7, 2018), ECF No. 5 [hereinafter *Jenkins* Indictment].

² Factual Resume, *Jenkins*, No. 18-cr-406, ECF No. 50; *see also* Press Release, Dep’t of Just., Texas Man Sentenced for Hate Crime and Other Charges After Using App to Target Gay Men for Violent Crimes (Oct. 13, 2021); Press Release, Dep’t of Just., Three Texas Men Sentenced to Prison for Using Dating App to Target Gay Men for Violent Crimes (June 24, 2021); *Jenkins* Indictment, *supra* note 1; Superseding Indictment, *Jenkins*, No. 18-cr-406, ECF No. 41; Transcript of Sentencing Hearing at 18, *United States v. Henry*, No. 18-cr-406 (N.D. Tex. July 1, 2021), ECF No. 188; Superseding Indictment, *Jenkins*, No. 18-cr-406, ECF No. 59.

During the subsequent federal investigation, investigators developed proof that these defendants specifically targeted these victims for violent crimes based on stereotypes about gay men. Simply put, the defendants selected these victims for violence *because of* the defendants' perception of the victims' sexual orientations.

The phrase "hate crime" is a commonly used shorthand descriptor for crimes in which the victim is chosen because of an actual or perceived personal characteristic, which can include sexual orientation and gender identity. But the phrase is a misnomer because, as this article explains, federal criminal civil rights statutes do not require federal prosecutors to prove hate. Through this article, we seek to encourage federal prosecutors to think beyond hate to increase meritorious prosecutions of bias crimes committed against the LGBTQI community.³ Drawing on *Jenkins* and other successful federal bias crime prosecutions, this article provides prosecutors with the tools to (1) identify bias crimes targeting LGBTQI persons; and (2) develop critical *because of* evidence. It also discusses important considerations for prosecutors who conduct survivor-victim interviews and additional statutory tools that a prosecutor may use to prosecute violent crimes committed against LGBTQI community members, in addition to the traditional federal criminal civil rights statutes.

II. Because of sexual orientation or gender identity

There are two substantive statutes that federal prosecutors can use to prosecute violent crimes committed against members of the LGBTQI community *because of* sexual orientation or gender identity: 18 U.S.C. § 249(a)(2) (Hate Crime Prevention Act) and 42 U.S.C. § 3631 (Fair Housing Act).

Both statutes cover conduct committed because of the victim's sexual orientation or gender identity. Section 249(a)(2) prohibits willfully causing or, in certain circumstances, attempting to cause bodily injury because of any person's actual or perceived sexual orientation or gender identity.⁴ Section 3631 prohibits using force or

³ LGBTQI refers to persons who identify as lesbian, gay, bi-sexual, transgender, queer (or questioning), and intersex.

⁴ For prosecution under section 249(a)(2), the government is also required to prove that the offense was in or affecting interstate commerce. See Barbara Bosserman & Angela Miller, *Prosecuting Federal Hate Crimes*, 70 DOJ J.

threat of force to willfully injure, intimidate, or interfere with (or attempt to injure, intimidate, or interfere with) a victim because of the victim's sex, among other characteristics, and because the victim was enjoying one of the housing rights set forth in the statute.⁵ Although the Fair Housing Act refers to "sex" and not "sexual orientation," the Supreme Court's 2020 decision in *Bostock v. Clayton County* held that "because of sex" includes discrimination based upon sexual orientation and transgender status, explaining that it is "impossible to discriminate against a person for being [gay or lesbian] or transgender without discriminating against that individual based on sex."⁶

Under both statutes, the government is required to prove that the prohibited conduct was undertaken *because of* the actual or perceived

FED. L. & PRAC., no. 2, 2022, at 127. [hereinafter *Prosecuting Federal Hate Crimes*], for more discussion on this topic. Section 249 also states that no person may be prosecuted unless the Attorney General or an authorized designee certifies in writing that: "(A) the State does not have jurisdiction; (B) the State has requested that the Federal Government assume jurisdiction; (C) the verdict or sentence obtained pursuant to state charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or (D) a prosecution by the United States is in the public interest and necessary to secure substantial justice." 18 U.S.C. § 249(b)(1). The Assistant Attorney General of the Civil Rights Division is the authorized designee.

⁵ JUSTICE MANUAL 8-1.010 also requires consultation between the United States Attorney's Office and the Civil Rights Division before bringing a charge under 42 U.S.C. § 3631. In addition, "[a]ny statements issued to the press in connection with civil rights investigations, litigation, or trial should be coordinated through the Department of Justice's Office of Public Affairs and the Assistant Attorney General for the Civil Rights Division, and the relevant United States Attorney's Office, where such office is involved." *Id.* See *Prosecuting Federal Hate Crimes*, *supra* note 4, for a detailed discussion of the elements, in this issue.

⁶ *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1741, 1754 (2020) (Discrimination based on "sex" includes discrimination based upon sexual orientation and gender identity, therefore "an employer who fires an individual merely for being gay or transgender defies the law."). For a more complete discussion of *Bostock*, see Dylan Nicole de Korver & Alyssa Connell Lareau, *Applying Bostock v. Clayton County to Civil Rights Statutes Beyond Title VII*, 70 DOJ J. FED. L. & PRAC., no. 1, 2022, at 21. For purposes of our discussion, because the term "sex" is inclusive of sexual orientation and gender identity, we will simply refer to bias based upon sexual orientation, gender identity, or LGBTQI status.

characteristic of a person, like sexual orientation or gender identity.⁷ Proving *because of* is arguably the most challenging aspect of bias crime prosecutions; thus, our discussion focuses on exploring how a prosecutor may develop *because of* evidence.

Because of has been defined by caselaw. In *United States v. Burrage*, the Supreme Court explained that proving *because of* requires “proof that the harm would not have occurred in the absence of—that is, but for—the defendant’s conduct.”⁸ More recently, in *Bostock*, the Supreme Court further described what it means for something to be a *but-for* cause, noting that “a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.”⁹

The following discussion provides information that a prosecutor may use to help identify potential bias crimes and develop *because of* evidence. In this article, when we refer to “*because of* evidence” or “bias evidence,” we are referring to evidence that the perpetrator engaged in the prohibited conduct *because of* the perpetrator’s perception of the victim’s sexual orientation or gender identity.

III. Identifying bias crimes and developing *because of* evidence

When evaluating a case involving violence committed against a member of the LGBTQI community, prosecutors should first ask: What brought the perpetrator and victim together? The answer to this question may provide evidence that the perpetrator engaged in the prohibited conduct because of the victim’s sexual orientation or gender identity. Next, prosecutors must know where to look for bias evidence,

⁷ As explained in *Prosecuting Federal Hate Crimes*, “while most hate crime defendants are motivated by bias against the person they assault, the statute provides that a defendant may be found guilty if he is motivated by the actual or perceived characteristic of any person.” *Prosecuting Federal Hate Crimes*, *supra* note 4; see also 18 U.S.C. § 249(a)(2). For example, if cisgender people are attacked because they host gay or transgender people in their homes, they could be victims of section 3631 bias crimes. A cisgender person is one whose gender identify corresponds with their birth sex.

⁸ *Burrage v. United States*, 571 U.S. 204, 204 (2014) (internal quotations omitted).

⁹ *Bostock*, 140 S. Ct. at 1739 (noting that, “[o]ften, events have multiple but-for causes”).

which could be found in how the perpetrator selected the victim or the perpetrator's choice of assaultive conduct. Prosecutors should also be familiar with what type of bias or *because of* evidence will be admissible.

A. Identifying bias crimes

At the outset, the question the screening prosecutor should ask is this: Did the perpetrator select the victim for violence *because of* the perpetrator's perception of the victim's sexual orientation or gender identity? As discussed more fully below, some bias crimes are premeditated, others are crimes of opportunity, and others are committed by persons known to the victims. In all scenarios, evidence related to what brought the perpetrator and victim together may provide helpful bias-motivation evidence.

1. Premeditated bias crimes

Some bias crimes are thought out well in advance. The story of how the perpetrator came to find the victim may reveal critical bias evidence. Conducting witness interviews, executing social media and cell phone search warrants, and seeking other legal process¹⁰ may help prosecutors learn answers to these important questions:

- What brought the victim and perpetrator to the location? For example, did the perpetrator lure the victim to the location through social media, a dating website, or through some other means?
- Had the victim been to this location before? Had the perpetrator? For example, is there location evidence in phone records to show that the perpetrator had the opportunity to observe the victim in this location on some earlier occasion?
- Is there any evidence that the perpetrator was looking to encounter LGBTQI persons? For example, did the perpetrator search the internet for gay bars, transgender book clubs, or the like?
- Is there anything significant about the place related to the identity of the victim? For example, was the victim attacked

¹⁰ For more information on digital evidence and hate crimes, please see Mary Hahn, *Using Digital Evidence to Strengthen Hate Crime Prosecutions*, 70 DOJ J. FED. L. & PRAC., no. 2, 2022, at 221.

outside of an organization that provides services to members of the LGBTQI community or displays rainbow flags or other indicia of LGBTQI support?

- Is there evidence that the perpetrator would have, could have, or should have known that the location was a meeting place for LGBTQI persons? For example, is it a widely known meeting place for members of the LGBTQI community? Does it have a website or otherwise advertise or hold itself out as a meeting location for LGBTQI persons?
- Is it a place where LGBTQI persons are known to engage in illegal activity? For example, is this an area where one would expect to find transgender sex workers?

If the prosecutor finds evidence that the perpetrator was looking for victims in places the perpetrator expected to find LGBTQI persons, the prosecutor will have identified compelling evidence that the perpetrator targeted the victim *because of* the perpetrator's perception of the victim's sexual orientation or gender identity.

For example, in *Jenkins*, investigators determined that the conspirators were using Grindr to contact the victims and to lure them to areas suitable for robbery, kidnapping, carjacking, and other violent crimes. Similarly, in *United States v. Shelton*, the defendants used Grindr to contact the victims, posed as gay men, and then, pretending to be arriving for a planned date, entered the victims' homes before robbing the victims at gunpoint and beating them.¹¹ In both cases, the defendants' repeated and consistent use of Grindr to lure the victims was important evidence because it revealed that the defendants were indeed looking in a particular place for their victims—a popular dating website for gay men. This is very similar to a perpetrator searching out restaurants or other places that are known to be meeting locations for gay men.

As these examples demonstrate, evidence related to how and where the perpetrator selects or finds a victim is important evidence; it may help a prosecutor prove that the crime was premeditated and that the

¹¹ First Superseding Indictment, *United States v. Shelton*, No. 17-cr-39 (E.D. Tex. May 10, 2017), ECF No. 64; Press Release, Dep't of Just., Two Texas Men Sentenced to 20 And 15 Years in Prison for Hate Crime Assault Based on Victim's Sexual Orientation (Apr. 30, 2018).

defendant specifically selected the victim *because of* the victim's sexual orientation or gender identity.

2. Bias crimes of opportunity

Not all bias crimes are the result of planning or premeditation. Some incidents of bias-motivated violence occur when a person who harbors bias against LGBTQI persons comes into contact, by happenstance, with a member of the LGBTQI community. The following four successful section 249(a)(2) prosecutions illustrate this point.

In *United States v. Avery*, the victim entered a gas station and stood in line behind the defendant waiting to make a purchase. The defendant had never met the victim before but, nonetheless, began calling the victim gay slurs. The defendant then punched the victim in the face, fracturing the victim's left orbital bone. The defendant later pleaded guilty and admitted that he attacked the victim because he believed the victim was gay.¹²

In *United States v. Burns*, the defendant had never met the victim, but when he saw him walking with two other men, he came up behind the group and shouted homophobic slurs. Fearing for their safety, the men started running. The defendant gave chase and, again, used a gay slur and attempted to stab one of the men. The police were able to arrest the defendant on the scene. While detained in the police car, the defendant continued to yell homophobic slurs. The defendant pleaded guilty to violating section 249(a)(2).¹³

In *United States v. Cain*, two adult males and one juvenile male saw a 20-year-old gay man in Atlanta, followed him, beat him, and made a recording of the beating *because of* their perception that the victim was a gay man. The victim, an openly gay man, was walking down a street with a male friend when the defendants caught sight of him. According to witnesses, one of the defendants believed the victim had "hit on him" as he walked by. This defendant took offense. The victim walked into a grocery store and, while the victim was in the grocery

¹² Plea Agreement, *United States v. Avery*, 12-CR-20529 (E.D. Mich. Aug. 29, 2012), ECF No. 8; Press Release, Dep't of Just., Michigan Man Pleads Guilty to Federal Hate Crimes Charge (Aug. 29, 2012).

¹³ Transcript of Felony Sentencing Proceedings, *United States v. Burns*, No. 15-cr-263 (W.D. Wash. Dec. 15, 2015), ECF No. 26; Press Release, Dep't of Just., Bremerton, Washington, Man Sentenced for Anti-Gay Hate Crime on Seattle's Capitol Hill (Nov. 9, 2015).

store, the defendants waited outside and made their plan. When the victim came out of the store, the defendants attacked him by first hitting him and then throwing a tire at him, causing injury. During the beating, the defendants yelled gay slurs at the victim. The defendants pleaded guilty, thus admitting that they beat the victim because of his sexual orientation.¹⁴

In *United States v. Hill*, the defendant assaulted his co-worker. The defendant had never interacted with the victim but had come to learn that the victim was a gay man. While the two were at work performing their duties, the defendant walked up to the victim, unprompted, and punched him several times. The defendant admitted that he punched the victim because of his dislike of gay men. After trial, the defendant was convicted of violating section 249(a)(2).¹⁵

As these examples demonstrate, premeditation is not required to prosecute a person for committing a bias crime.

3. Bias crimes committed by perpetrators known to the victims

Not all bias crimes are committed by persons who are strangers to the victims. A prosecutor should not automatically decline to investigate a potential bias crime if the prosecutor learns that the victim and perpetrator had a prior relationship, even a romantic one. Indeed, one of the most heinous federal prosecutions of a bias-motivated crime was committed by a perpetrator who had a previous intimate relationship with his victim.

Joshua Vallum began a sexual relationship with the victim, Mercedes Williamson, a transgender female, in 2014. Vallum was an active member in Gulf Coast Chapter of the Almighty Latin Kings and Queens Nation. Vallum kept the relationship secret and did not disclose Williamson's transgender status to his friends, family, and his gang associates. Eventually, Vallum terminated the relationship with Williamson. The following year, a friend of Vallum's learned of Williamson's transgender status. Vallum decided to kill Williamson

¹⁴ *United States v. Cain*, Nos. 13-cr-85 (N.D. Ga.), ECF No. 15; Press Release, Dep't of Just., Two Atlanta Men Plead Guilty to Federal Hate Crime Against Gay Man (Apr. 18, 2013).

¹⁵ Position of the United States with Respect to Sentencing, *United States v. Hill*, No. 16-cr-9 (E.D. Va. Feb. 17, 2021), ECF No. 131; Press Release, Dep't of Just., Virginia Man Convicted of Anti-Gay Hate Crime (Jan. 24, 2018).

because he believed he would be in danger if other members of the Latin Kings discovered that he had engaged in a sexual relationship with a transgender female.

On May 29, 2015, Vallum contacted Williamson and invited her on a date, planning to kill her. “Vallum drove Williamson to his father’s residence in Lucedale, Mississippi, where he parked his vehicle behind the house. As Williamson sat in the vehicle’s passenger seat, he assaulted her,” first with a stun gun and then with a 75th Ranger Regiment pocketknife. Williamson was able to escape at first, but Vallum chased her down and beat her in her head with a hammer until she died. When Vallum was initially interviewed, he claimed that he killed Williamson in a panic after discovering Williamson was transgender. Vallum ultimately pleaded guilty to a Section 249(a)(2) offense and admitted that he killed Williamson because of her status as a transgender person.¹⁶

Vallum illustrates two critical points. First, bias crimes may be committed by persons who had previous romantic relationships with the victims. Second, the fact that the perpetrator identifies as LGBTQI or has previously had a same-sex sexual relationship or a sexual relationship with a member of the LGTBQI community does not preclude the government from proving that the defendant committed a bias crime.

B. Developing bias evidence

As we discussed at the outset, hate is not required to prove a bias crime. A prosecutor need not uncover a detailed manifesto or evidence that the defendant was a member of an anti-LGBTQI hate group to successfully prosecute a bias crime. Prosecutors need to develop evidence that bias, not necessarily hate, was the *but-for* cause of the defendant’s decision to engage in the prohibited conduct.

Here, we discuss two concepts related to the development of bias evidence. First, perpetrators may select victims *because of* stereotypes

¹⁶ United States v. Vallum, No. 16-cr-114 (S.D. Miss. May 17, 2017); Press Release, Dep’t of Just., Mississippi Man Pleads Guilty to Hate Crime for Murdering Transgender Victim Because of Her Gender Identity (Dec. 21, 2016); Press Release, Dep’t of Just., Mississippi Man Sentenced To 49 Years in Prison for Bias-Motivated Murder of Transgender Woman in Lucedale, Mississippi (May 15, 2017); *Historic Sentencing for Gang Member Who Killed Transgender Woman*, FBI (June 12, 2017), <https://www.fbi.gov/news/stories/historic-hate-crime-sentencing>.

associated with the LGBTQI community. Second, perpetrators may employ certain types of violence *because of* the victim’s status as LGBTQI and the associated stereotypes. Finally, at the end of this discussion, we provide a summary of the wide variety of bias evidence that has been admitted in federal courts. Knowing the type of evidence that is admitted in these types of cases should help a prosecutor identify bias evidence.

1. Perpetrators may select victims because of stereotypes associated with the LGBTQI community

A stereotype is “a set of attributes ascribed to a group and imputed to its individual members simply because they belong to that group.”¹⁷ In other words, a stereotype is an assumption about an individual based on his membership in a group. If the evidence proves that the perpetrator selected the victim because of a stereotype associated with LGBTQI persons, this evidence can be used to prove that the perpetrator engaged in the prohibited conduct *because of* his perception of the victim’s sexual orientation or gender identity. Some stereotypes associated with the LGBTQI community include: “[G]ay men act like women”;¹⁸ “all lesbians are masculine”;¹⁹ transgender

¹⁷ Rebecca D. Gill et al., *Are Judicial Performance Evaluations Fair to Women and Minorities? A Cautionary Tale from Clark County, Nevada*, 45 LAW & SOC’Y REV. 731, 737 (2011) (quoting Nadeline E. Heilman, *Sex Bias in Work Settings: The Lack of Fit Model*, 5 RSCH. ORG. BEHAV. 269, (1983)); see also Anna Roberts, *Reclaiming the Importance of the Defendant’s Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 861 (2016) (defining stereotypes “as well-learned sets of associations between some trait and a social group”) (quoting Elizabeth N. Chapman et al., *Physicians and Implicit Bias: How Doctors May Unwittingly Perpetuate Health Care Disparities*, 28 J. GEN. INT. MED. 1504, 1504 (2013)).

¹⁸ J.D. Wellman et al., *Masculinity threat increased bias and negative emotions toward feminine gay men*, 22 PSYCH. MEN MASCULINITIES, no. 4, 2021, 787.

¹⁹ M. Salvati et al., *Gender stereotypes and contact with gay men and lesbians: The mediational role of sexism and homonegativity*, 29 J. CMTY. & APPLIED SOC. PSYCH., no. 6, 2019, at 461–73. Please note these are only two of the dozens of common stereotypes associated with members of the LGBTQI community.

people are dangerous, immoral, and mentally ill;²⁰ and gay men are predators.²¹

Some stereotypes may cause a perpetrator to believe that a member of the LGBTQI community is an attractive crime victim. For example, in *Jenkins*, the defendants' beliefs about gay men were based on stereotypes, and these stereotypes played a determinative role in the defendants' decision to target gay men for violent crimes. The perpetrators believed that gay men are weak, have more money than non-gay persons, and are less likely to report crimes committed against them. These beliefs, not hatred for gay men, led the defendants to target gay men for violent crimes. This stereotype evidence—the reasons *why* the defendants selected gay men as their victims—was critical *because of* evidence.

The facts in that case give rise to two common defense arguments that arise in the context of section 249 prosecutions. First, a defendant may argue that the defendant caused injury as a result of, for example, the victim attempting to fight off an armed robber and not *because of* the victim's sexual orientation or gender identity. This resistance by the victim, the defendant will argue, created a break in the causal chain such that the defendant cannot be said to have caused the injury *because of* the victim's identity. Second, a defendant may argue that he targeted the victim not out of "hatred" but out of a desire to get cash.

Both defenses suffer from the same flaw. Both are predicated on the legally erroneous argument that the victim's sexual orientation or gender identity must be the *only* reason the defendant engaged in the prohibited conduct. The victim's sexual orientation or gender identity need not be the *only* reason for the defendant's decision to engage in the prohibited conduct. Multiple federal courts have reviewed this issue and come to the same conclusion: Equating *but-for* causation with sole cause is legally erroneous.²²

²⁰ Jennifer L. Levi & Kevin M. Barry, *Transgender Tropes & Constitutional Review*, 37 YALE L. & POL'Y REV. 589 (2019).

²¹ Nancy J. Knauer, *Historical Contingency and the Limits of Identity: Implications for Law and Policy*, 28 S. CAL. INTERDISC. L.J. 387, 411 n.152 (2019).

²² See *United States v. Porter*, 928 F.3d 947, 956 (10th Cir. 2019) (citing with approval jury instructions given in a hate crime prosecution brought under 42 U.S.C § 3631, explaining that the victim's "race must have been a necessary motivation but not the sole motivation."); *McDonald v. City of*

If we apply the *Bostock but-for* test and change one fact in *Jenkins*—the fact that the victims were perceived to be gay men—the defendants would not have chosen these men as their victims for violent crimes. Had the victims not been selected by the defendants, they would not have been subjected to violence, and no injury would have resulted. Therefore, the defendant’s perception that the victims were gay men was a *but-for* cause of the bodily injury suffered by the victims.

There have been multiple successful section 249(a)(2) prosecutions of individuals who targeted members of the LGBTQI community for violent crimes where the defendants were, in part, motivated by a desire to steal the victim’s property. Prosecutors should not shy away from prosecuting individuals who intentionally target members of the LGBTQI community for violent crimes simply because *one* of the defendant’s goals was to steal from the victim or because the victim was injured attempting to defend himself or escape during a violent crime.

2. The perpetrator’s choice of assaultive conduct may be rooted in stereotypes related to the LGBTQI community

Stereotypes associated with LGBTQI persons may inform *how* a defendant chooses to assault the victim. A prosecutor should seek to collect specific details about any violent acts or threats of violence the perpetrator inflicts upon the victim. These details may help the

Wichita, Kan., 735 F. App’x 529, 531 (10th Cir. 2018) (not precedential) (“jury instructions equating but-for causation and ‘sole cause’ are legally erroneous.”), *cert. denied*, 139 S. Ct. 944 (2019); *United States v. Salinas*, 918 F.3d 463, 466 (5th Cir. 2019) (recognizing that “[b]ut-for causation requires the government to show merely ‘that the harm would not have occurred in the absence of . . . the defendant’s conduct,’” that such a showing “is ‘not a difficult burden to meet,’” and that an event might have many but-for causes); *see also* *Perrone v. United States*, 889 F.3d 898, 906 (7th Cir. 2018) (same); *Arthur v. Pet Dairy*, 593 F. App’x 211, 220 (4th Cir. 2015) (not precedential) (“[F]or an event to be the ‘but-for cause,’ it need not be the sole cause”); *United States v. Spiva*, No. 15-CR-169(2), 2019 WL 2330064, at *5 (S.D. Ohio May 30, 2019) (“‘But for’ causation does not mean sole causation.”).

prosecutor prove that the assaults were committed *because of* the victim's status.²³

In *Jenkins*, the defendants used specific types of violence and threats of violence toward the victims. These threats and acts of violence were specifically related to stereotypes about gay men and certain sex acts. The victims reported that the defendants threatened to rape them. These were not just threats. On the final night of the conspiracy, three victims reported being subjected to sexual assaults that involved anal penetration and attempted forced oral sodomy.²⁴

In another particularly heinous case, *United States v. Garza*, the defendants admitted to beating a Black gay man because of his race and sexual orientation. There, the defendants punched and kicked the victim and assaulted him with various weapons, including a frying pan, a mug, a sock filled with batteries, a broom, and a belt. The defendants also poured bleach onto the victim's face and into his eyes, and one defendant struck the victim in the head with a handgun. When the victim began to bleed during the assault, they forced him to remove all his clothing and clean up the blood that had spilled onto the floor. After the victim was naked, one defendant pointed a gun at the victim while the other defendant sodomized the victim with a broom handle. Throughout the assault, the defendants called the victim "gay" and used racial and homophobic slurs. The defendants also repeatedly whipped the victim with a belt while calling him a "slave" and making other references to slavery. Both defendants pleaded guilty and admitted to causing injury to the victim because of their perception of the victim's sexual orientation.²⁵

In both case examples, the defendants forcibly sodomized the victims, causing bodily injuries, while using slurs related to the victims' sexual orientations. This type of assault is inextricably linked

²³ Evidence that the defendant used a specific type of violence *because of* his perception that his victim would find it particularly demeaning extends beyond prosecutions of crimes against members of the LGBTQI community. *See, e.g.* *United States v. Miller*, 767 F.3d 585, 601 (6th Cir. 2014) (defendant cut off the hair and beards of the Amish victims because they knew this type of attack would be religiously degrading to the victims).

²⁴ Transcript of the Sentencing Hearing, *United States v. Henry*, No. 18-cr-406 (N.D. Tex. July 7, 2021), ECF No. 188.

²⁵ *United States v. Garza*, No. 15-cr-691 (S.D. Tex.); Press Release, Dep't of Just., Two Texas Men Sentenced for Federal Hate Crime Against Gay African-American Man (Feb. 17, 2016).

to stereotypes about gay men and sex. Had these cases proceeded to trial, the government was in a position to argue that the defendants chose to assault the victims in this manner—forced sodomy—because the defendants believed that the victims were gay men. Therefore, the resulting bodily injury was *because of* the defendants’ perception of the victims’ sexual orientations. That is, the defendants’ perception of the victims’ sexual orientations was the *but-for* cause of the defendants’ decision to subject the victims to this type of assault.

As these examples illustrate, knowledge of stereotypes associated with the LGBTQI community is important. If a prosecutor is unfamiliar with stereotypes associated with the LGBTQI community, she should reach out to persons familiar with these issues, including victim-witness advocates and advocacy or community groups who provide services to the LGBTQI community. Prosecutors should also consider the potential for regional or cultural differences in the stereotypes or derogatory language used to disparage members of the LGBTQI community. For example, *la loca* is a Spanish term that literally means “crazy woman,” but it is a term often used to disparage gay or effeminate men.²⁶

The more the prosecutor understands about stereotypes and bias associated with LGBTQI persons, the more equipped she will be to develop an investigative plan that will uncover *because of* evidence and the less likely she will be to overlook potentially important bias-related evidence based in stereotypes.

3. Federal courts admit a wide variety of evidence to prove the defendant acted because of the victim’s status

The government has successfully introduced a wide variety of evidence to prove bias motivation in bias crime prosecutions involving race, including a defendant’s use of slurs and the extent of violence

²⁶ George De Stephano, *Living La Vida ‘Loca,’* THE NATION (Aug. 19, 1999), <https://www.thenation.com/article/archive/living-la-vida-loc/>; Melissa M. Gonzalez, *La Loca*, 1 TRANSGENDER STUD. Q. Nos. 1–2, 2014, at 123.

used against the victim,²⁷ defendant's tattoos,²⁸ defendant's prior vandalism,²⁹ membership in groups formed around animus,³⁰ prior threats against similar victims,³¹ possessions of the defendant indicating animus (including bias-related literature),³² evidence that

²⁷ *United States v. Piekarsky*, 687 F.3d 134, 148 (3rd Cir. 2012) (when evaluating the sufficiency of the evidence the court found that defendant's use of racial slurs, the extensive amount of violence involved, and other testimony about "[d]efendants' general dislike of Hispanic or Latino individuals" living in his community were sufficient for a section 3631 conviction); *United States v. Metcalf*, 881 F.3d 641, 646 (8th Cir. 2018) (finding when evaluating the sufficiency of the evidence that defendant's repeated racist comments and viciousness of his attacks were sufficient to find his assault motivated by race for section 249(a)(1)).

²⁸ *United States v. Cannon*, 750 F.3d 492, 508 (5th Cir. 2014) (taking note of defendants' tattoos and repeated use of racial slurs when evaluating the sufficiency of the evidence for section 249(a)(1) case because "the First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent") (internal quotation marks and citations omitted).

²⁹ *United States v. Whitt*, 752 F. App'x 300, 304 (6th Cir. 2018) (not precedential) (reversing motion to exclude evidence of defendant's prior vandalism that included racist symbols, such as a swastika and markings associated with white supremacist gangs, because the "evidence has probative value with respect to whether [defendant] harbored a racial animus that could have motivated his alleged involvement in the [current] crime").

³⁰ *United States v. Dunnaway*, 88 F.3d 617, 619 (8th Cir. 1996) (finding that admitting evidence that defendant was a member of a "skinhead" group, did not like Black people, commonly used racial slurs, and believed interracial relationships were wrong was not erroneous "[b]ecause [defendant] was charged with a racially motivated crime, evidence of his racist views, behavior, and speech were relevant and admissible to show discriminatory purpose and intent, an element of the charges against him").

³¹ *United States v. Barrentine*, 39 F.3d 1182, 1994 WL 601339, at *2-3 (6th Cir. Nov. 2, 1994) (finding no abuse of discretion when district court admitted defendant's prior bad act of threatening an interracial couple and using racial slurs because it "was relevant to establish the defendant's intent and motive for the crimes with which he had been charged").

³² *United States v. McInnis*, 976 F.2d 1226, 1231-32 (9th Cir. 1992) (finding no abuse of discretion when district court admitted defendant's possession of items showing racial animus over a Rule 403 challenge, including a poster printed with a swastika and racial slurs, a flashlight imprinted with a swastika, a wooden plaque with a swastika painted on it; and clothing in the

defendant wanted to avoid contact with persons with the same race as the victim,³³ a defendant's choice of music,³⁴ and a defendant's prior acts of violence against persons with the same race as the victim.³⁵

These are just a handful of examples of bias evidence that courts have admitted to establish that a defendant engaged in the prohibited conduct *because of race*. These same kinds of evidence should be admissible when the government seeks to prove *because of sexual orientation or gender identity*. This is so because, no matter the characteristic, the government is required to prove that the defendant

form of a red armband with a swastika, because it was “clearly relevant to establishing his racial hatred and that he acted on that hatred” for a section 3631 case); *United States v. Allen*, 341 F.3d 870, 885–86 (9th Cir. 2003) (finding no abuse of discretion where district court admitted “skinhead and white supremacist evidence, including . . . photographs of [defendants’] tattoos (e.g., swastikas and other [white supremacy] symbols . . .), Nazi-related literature, group photographs [of] some of the defendants (e.g., in ‘Heil Hitler’ poses and standing before a large swastika that they later set on fire), and skinhead paraphernalia (e.g., combat boots, arm-bands with swastikas, and a registration form for the Aryan Nations World Congress)” because “although prejudicial, the skinhead and other white supremacy evidence was not unfairly so and properly was admitted to prove racial animus”).

³³ *United States v. Porter*, 928 F.3d 947, 958–59 (10th Cir. 2019) (when evaluating the sufficiency of the evidence, court took note of defendant's past comments about not wanting Black people to live near him and found them relevant to determining if he assaulted the victim because of his race); *United States v. Woodlee*, 136 F.3d 1399, 1410 (10th Cir. 1998) (finding no abuse in discretion when district court admitted evidence that defendant refused to accompany some friends on an outing because woman of “mixed race” would also attend because “[e]vidence of past . . . animosity is relevant to establish this element of the offense. Accordingly, it falls squarely within the motive and intent purposes delineated in 404(b)”).

³⁴ *United States v. Magleby*, 241 F.3d 1306, 1318–19 (10th Cir. 2001) (finding no abuse of discretion when district court admitted evidence that defendant listened to a CD with racist lyrics as it was relevant and admissible to establishing that defendant targeted victims because of their race).

³⁵ *United States v. Franklin*, 704 F.2d 1183, 1188 (10th Cir. 1983) (finding no abuse of discretion when district court admitted defendant's prior act of assaulting an interracial couple and telling police that he thought interracial interaction was wrong to prove animus, even when act was four years ago and defendant did not deny racism, because “racial motive was still an element of the crime that the government had to prove”).

engaged in the prohibited conduct *because of* the personal characteristic of the victim.

IV. Witness and survivor-victim interviews

Investigators will likely interview friends, family, and associates of victims and survivor victims. These interviews are often the key to the investigation. Here are four issues to consider when reviewing a case and preparing to conduct these critical interviews.

First, some members of the LGBTQI community may be reluctant to speak with law enforcement for various reasons, including previous negative interactions with police, fear or concerns about “outing” themselves as LGBTQI, and a lack of confidence in the criminal justice system.³⁶

Second, a survivor-victim who is not yet open with their status as LGBTQI may be reluctant to reveal that they encountered the defendant through a site like Grindr or at a location that caters to the LGBTQI community. Investigators and prosecutors should recognize that reporting a bias crime may require personal disclosures a survivor-victim may be reluctant to make. This disclosure is not required. Neither statute requires the government to prove the actual sexual orientation or gender identity of the victim. Instead, as discussed above, the statutes apply where the government proves that the defendant engaged in the prohibited conduct because of the “actual or perceived” sexual orientation or gender identity of the victim.

Third, and somewhat related to the first two points, a survivor-victim may not reveal every important detail in the first interview. For that reason, prosecutors should not assume that, just because an initial report does not have details about slurs or violence, slurs were not used and that violence didn’t occur.

Fourth, language matters. Prosecutors and investigators must not use outdated or offensive language. The ability to build rapport with witnesses is essential. To that end, investigators and prosecutors need to take care to become familiar with appropriate terminology to use when conducting these critical interviews and interacting with others involved in the case. Using outdated or offensive terminology to

³⁶ See generally JAMES E. COPPLE & PATRICIA M. DUNN, GENDER, SEXUALITY AND 21ST CENTURY POLICING: PROTECTING THE RIGHTS OF LGBTQI+ COMMUNITY (2017).

address a person who is a survivor or the family member of a survivor may end the potential for a productive interview before the interview even begins.³⁷

The Department of Justice (Department) has resources available to help prosecutors and investigators prepare for these interviews. Here are just a few places to go for help.

- COPS (Office of Community Oriented Policing):³⁸ For information related to appropriate terminology to use when engaging with members of the LGBTQI community, refer to *Gender, Sexuality, and 21st Century Policing: Protecting the Rights of the LGBTQ+ Community*.³⁹
- CRS (Department's Community Relations Services) has online training videos available that provide important information related to gender, gender identity, and sexual orientation and tips on how to conduct respectful interviews.⁴⁰

In addition to these resources, please see Karen Stevens and Joshua Douglas's article in this issue.⁴¹

V. The federal toolkit

Prosecutors should also consider other non-bias-based statutes that have been successfully used to obtain justice for victims targeted *because of their sexual orientation or gender identity*.⁴²

³⁷ For an updated listed of terms, please see Human Rights Campaign's (HRC) Glossary of Terms: *Glossary of Terms*, HUMAN RIGHTS CAMPAIGN, www.hrc.org/resources/glossary-of-terms (last visited on Mar. 4, 2022).

³⁸ *COPS*, DEP'T OF JUST, <https://cops.usdoj.gov/> (last visited Feb. 15, 2022).

³⁹ COPPLE & DUNN, *supra* note 36.

⁴⁰ *Respecting Identity: Law Enforcement Training and the Transgender Community*, DEP'T OF JUST (Nov. 29, 2016), <https://www.justice.gov/crs/video/respecting-identity-law-enforcement-training-and-transgender-community>; *Engaging and Building Relationships with Transgender Communities*, DEP'T OF JUST., www.justice.gov/crs/our-work/training/engaging-building-relationships-with-transgender-community (last visited Feb. 15, 2022); DEP'T OF JUST., WORKING WITH LGBTQ COMMUNITIES TO CREATE SAFER, MORE PEACEFUL COMMUNITIES (n.d.).

⁴¹ Joshua Douglas & Karen Stevens, *Resources for Hate Crimes Enforcement and Prevention*, 70 DOJ J. FED. L. & PRAC., no. 2, 2022, at 265.

⁴² For a discussion on prosecuting threats, please see *Prosecuting Hate Crime Threats*, *supra* note 4.

A. Kidnapping (18 U.S.C. § 1201) and carjacking (18 U.S.C. § 2119)

In two cases already discussed, *Jenkins* and *Garrett*, prosecutors charged both hate crime and other violent crime offenses. In both cases, the defendants were also charged with kidnapping in violation of 18 U.S.C. § 1201(a), carjacking in violation of 18 U.S.C. § 2119, and use of a handgun during and in relation to crime of violence in violation of 18 U.S.C. § 924(c).⁴³

There are at least two strategic reasons to bring a bias crime charge with a kidnapping or carjacking charge, where appropriate. First, in a jurisdiction where a prosecutor has reason to believe a trial jury, judge, or both may be skeptical or hostile toward the federal government's enforcement of bias crimes that protect LGBTQI persons, including these more traditional violent crimes charges may provide a trial jury with options for conviction that can more easily overcome potential jury bias or nullification related to LGBTQI victims or hostility to statutes prohibiting bias crimes. Second, gathering sufficient evidence to prove *because of* beyond a reasonable doubt is sometimes challenging. Adding these other charges, where appropriate, will, in most cases, increase the likelihood that the government can achieve justice through a conviction.

In the following example, the addition of the kidnapping charge may have saved the case from an outright acquittal. In Harlan County, Kentucky, four family members were charged with violations of sections 249(a)(2) and 1201(a) for kidnapping and assaulting a gay man because of his sexual orientation. The four lured the victim into a vehicle, drove him to a secluded location, and beat him. The group intended to kill the victim, but he was able to escape while they searched for a weapon. Two members of the conspiracy pleaded guilty to aiding and abetting kidnapping and the bias crime offense. Still, after trial, the remaining two defendants were acquitted of the bias crime offense but nonetheless convicted of the kidnapping and related conspiracy charges.⁴⁴ As this example demonstrates, there are

⁴³ *Jenkins* Indictment, *supra* note 1; Indictment, United States v. Shelton, No. 17-cr-00039 (Mar. 8, 2017), ECF No. 31.

⁴⁴ *Jenkins*, No. 12-cr-15; Press Release, Dep't of Just., Four Kentucky Individuals Sentenced for Roles in Kidnapping and Assaulting a Harlan County Man (June 19, 2013).

significant strategic reasons to bring all appropriate and available charges in addition to charging the bias crime.

B. Handgun offenses (18 U.S.C. § 924(c))

When applicable, prosecutors should consider adding firearm charges to their indictments, specifically 18 U.S.C. 924(c), which criminalizes using or carrying a firearm during and in relation to a crime of violence or possessing a firearm in furtherance of any “crime of violence.” Both sections 249(a)(2) and 3631 are predicate offenses upon which a violation of 18 U.S.C. § 924(c) can be charged. The ability for prosecutors to charge section 924(c) has been limited by two somewhat recent Supreme Court decisions: *Davis* and *Dimaya*, both limiting the definition of crime of violence.⁴⁵ These decisions, however, did not strike down the definition of crime of violence that applies to sections 249 or 3631 offenses: Section 924(c)(3)(A). Section 924(c)(3)(A) defines a crime of violence as a felony that “has an element the use, attempted use, or threatened use of physical force against the person or property of another.” Because section 249 has an element that includes the use or attempted use of physical force, courts have consistently held that section 249 is a crime of violence for purposes of section 924(c).⁴⁶ A felony violation of section 3631 is a crime of violence and, therefore, a proper predicate offense for a violation of 18 U.S.C. § 924(c)(3).⁴⁷

Defendants frequently challenge the use of hate crime statutes as predicate offenses for section 924(c) charges. The Civil Rights Division’s Criminal Section has successfully litigated this issue

⁴⁵ *United States v. Davis*, 139 S. Ct. 2319 (2019) (the definition of “crime of violence” in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (striking the definition of “crime of violence” in 18 U.S.C. § 16(b)).

⁴⁶ *See United States v. Roof*, No. 17-3, 2021 WL 3746805, at *61 (4th Cir. Aug. 25, 2021); *United States v. Earnest*, 536 F. Supp. 3d 688, 721–22 (S.D. Cal. 2021); *United States v. Bowers*, No. CR 18-292, 2020 WL 6119480, at *2 (W.D. Pa. Oct. 16, 2020); *United States v. Daggart*, No. 1:15-CR-39, 2016 WL 6205804, at *5 (E.D. Tenn. Oct. 24, 2016) (holding that 18 U.S.C. § 249(a)(1) is a crime of violence because it “categorically include[s] an element of using or attempting to use physical, violent force sufficient to cause physical pain or injury”).

⁴⁷ *See United States v. Whittington*, 721 F. App’x 713 (9th Cir. 2018) (not precedential); *see Prosecuting Federal Hate Crimes*, *supra* note 4.

multiple times.⁴⁸ If a prosecutor encounters this issue, she should reach out to the Criminal Section for the most up to date guidance on this topic.

C. Crimes on federal lands (18 U.S.C. §§ 1111 and 113)

If an LGBTQI person is the victim of a violent crime on federal land, a prosecutor may use the federal murder (18 U.S.C. § 1111) or assault (18 U.S.C. § 113) statutes where appropriate. These offenses may be less burdensome to prove because the prosecutor need not prove that the assault or murder occurred *because of* the defendant's perception of the victim's status. Even though it is not necessary to charge and prove bias motivation to convict a defendant on federal murder and assault statutes, the Sentencing Guidelines provide an enhancement where the defendant selects the victim because of bias. As discussed in *Prosecuting Federal Hate Crimes*,⁴⁹ the trier of fact must find the bias motivation beyond a reasonable doubt. Therefore, a prosecutor should submit the question of whether the defendant "intentionally selected [the] victim . . . because of the actual or perceived . . . gender identity . . . or sexual orientation of any person" to the jury in a special verdict so the jury can make this express finding of bias motivation.⁵⁰

VI. Conclusion

"All people in this country should be able to live without fear of being attacked or harassed because of where they are from, what they look like, whom they love or how they worship."⁵¹ On August 30, 2021, recognizing the rise in hate motivated violence, Attorney General Merrick Garland announced that "preventing and responding to hate crimes and hate incidents is one of the Justice Department's highest priorities." The Attorney General announced that reports of bias incidents were up 6.1% in calendar year 2020; he also recognized an

⁴⁸ See *United States v. Bowers*, No. CR 18-292, 2020 WL 6119480, at *2 (W.D. Pa. Oct. 16, 2020); *Earnest*, 536 F. Supp. at 721–22; *United States v. Duggart*, No. 15-CR-39, 2016 WL 6205804, at *5 (E.D. Tenn. Oct. 24, 2016).

⁴⁹ *Prosecuting Federal Hate Crimes*, *supra* note 4.

⁵⁰ U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(a) (U.S. SENT'G COMM'N 2021) (Hate Crime Motivation or Vulnerable Victim). For a more detailed discussion of the applicability of the Sentencing Guidelines please see *Prosecuting Federal Hate Crimes*, *supra* note 4.

⁵¹ Press Release, Dep't of Just., Attorney General Garland Issues Statement on 2020 FBI Hate Crimes in the United States Statistics (Aug. 30, 2021).

increase in incidents where the victim was targeted because of gender identity or sexual orientation.⁵² According to the FBI, there were 8,052 bias incidents involving 11,126 victims reported in calendar year 2020.⁵³ Of those victims, 20.% were victimized because of their sexual orientation and another 2.7% were targeted because of gender identity bias.⁵⁴ Prosecuting bias crimes committed against the LGBTQI community is a necessary step toward eradicating bias-motivated violence.

Not all of these reported bias incidents are prosecutable as federal bias crimes; some of these incidents may best be pursued by state prosecutors. Indeed, most bias crimes are prosecuted at the state level, but not every state has passed laws specifically protecting members of the LGBTQI community. As of 2021, not every state had laws protecting persons targeted because of sexual orientation or gender identity.⁵⁵ In those jurisdictions without protections, federal prosecutions may be the only means to specifically vindicate the rights of persons to not be victimized because of their sexual orientation or gender identity. Thus, federal prosecutors should take a close look at cases where a victim may have been targeted *because of* sexual orientation or gender identity.⁵⁶

From the enactment of the Matthew Shepard and James Byrd, Jr. Hate Crime Prevention Act, signed into law by President Barack Obama in 2009, through 2021, the Department successfully prosecuted 34 defendants who targeted their victim(s) *because of* sexual orientation or gender identity using section 249(a)(2). Even with these successful federal prosecutions, there is still a great deal of work to be done. The Criminal Section of the Civil Rights Division is available to provide advice, resources, and support to our law

⁵² *Id.*

⁵³ *Hate Crime Statistics*, Dep't of Just., <https://www.justice.gov/hatecrimes/hate-crime-statistics> (last visited Mar. 1, 2022).

⁵⁴ *Id.*

⁵⁵ For a more detailed look at state statutes that prohibit bias motivated violence, see *Laws and Policies*, DEP'T OF JUST, www.justice.gov/hatecrimes/laws-and-policies (updated Jan. 13, 2022).

⁵⁶ Prosecutors considering successive or consecutive investigations or prosecutions should consult the Department's Petite Policy within Justice Manual 9-2.031(B)–(C) and any state law that may prohibit successive or concurrent state and federal investigations or prosecutions.

enforcement partners around the country to ensure that the Department continues to successfully pursue these important investigations and prosecutions.

About the Author

Rose E. Gibson is a Deputy Chief in the Criminal Section of the Civil Rights Division. Gibson has served in the Criminal Section since 2015, and she has investigated and prosecuted some of the Section's most significant bias crimes in recent years, including *United States v. Jenkins* and other bias-motivated violence against members of the LGBTQI community. Before joining the Department, Gibson was a state prosecutor in both Maryland and Oregon. Gibson is a graduate of the University of Oregon School of Law, Washington State University (Vancouver), and Clark Community College.

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Using Digital Evidence to Strengthen Hate Crime Prosecutions

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I. Introduction

Digital evidence often plays a critical role in proving a central element in hate crimes cases—the defendant’s bias motivation.¹ Proving bias motivation requires the government to establish what was in the defendant’s mind, and it is often the most difficult element to prove at trial. As the use of social media and online forums has flourished, digital evidence has played an increasingly important role in successful hate crime prosecutions.

Many white supremacists and violent extremists seek out like-minded peers with whom they promote violence and share racist ideologies. Historically, many would have met in person and joined hate groups like the Ku Klux Klan. The modern-day Klan meeting is often found online, and an increasing number of individuals self-radicalize through their exposure to online media without ever formally joining or participating in any defined hate groups. For example, Dylann Roof, the white supremacist who murdered nine Black parishioners at the Mother Emanuel Church in Charleston, South Carolina, adopted his violent white supremacist beliefs principally from internet-based media and other sources, rather than through his personal associations or experiences with white supremacist groups.

Perpetrators of recent high-profile hate crimes have used online media to amplify their message of hate and to incite others to commit violence. For example, Robert Bowers, who killed 11 members of the Tree of Life Synagogue in Pittsburgh, posted a message on the online

¹ *Burrage v. United States*, 571 U.S. 204 (2014). For a fuller discussion of the intent requirement, see Barbara Kay Bosserman & Angela M. Miller, *Prosecuting Federal Hate Crimes*, 70 DOJ J. FED. L. & PRAC. no. 2, 2022, at 127.

forum Gab right before he entered the synagogue, declaring: “I can’t sit by and watch my people get slaughtered. Screw your optics, I’m going in.”² Patrick Wood Crusius, who murdered 23 people at a Walmart in El Paso, Texas, uploaded to the internet shortly before the attack a document in which he declared, “This attack is a response to the Hispanic invasion of Texas. They are the instigators, not me. I am simply defending my country from cultural and ethnic replacement brought on by the invasion.”³

This article provides examples of federal hate crime prosecutions and investigations to demonstrate some of the ways that digital evidence has proven essential to establishing a defendant’s intent. The article then provides an outline of practical steps that prosecutors and investigators should consider during hate crime investigations to help ensure that they identify and collect relevant digital evidence related to defendants’ culpability and motives.⁴ By proactively collecting and reviewing digital evidence during the investigatory stage, prosecutors and investigators can ensure that they build the strongest case for proving defendants’ intent and rebut potential defenses at trial.

II. Case examples

There are myriad ways that a prosecutor can use digital evidence to establish a defendant’s culpability and intent. In its hate crime prosecutions, the Civil Rights Division’s Criminal Section has used digital evidence establishing, for example, that defendants openly posted and texted about their bias motives and bragged about committing hate crimes; conducted online research of potential targets and images of hate symbols; used online mapping tools to locate victims and to plan their attacks; took photos and videos of crime scenes; and visited websites that espouse hate ideologies and violence.

² Superseding Indictment at ¶ 5, *United States v. Bowers*, No. 18-cr-292 (W.D. Pa. Jan. 29, 2019), ECF No. 44.

³ Superseding Indictment at ¶¶ 2, 4, *United States v. Crusius*, No. 20-cr-389 (W.D. Tex Jul. 9, 2020), ECF No. 82.

⁴ This article is intended to provide an overview of common sources of digital evidence related to a defendant’s bias motives. Other digital investigative techniques that may be relevant to an investigation, such as using Title III warrants and identifying anonymous subjects through cell tower data, geofencing, and reverse IP lookups, are not addressed here. The Criminal Section and the Computer Crime and Intellectual Property Section (CCIPS) can serve as resources if prosecutors and investigators seek guidance on these techniques.

Such evidence, standing alone and as corroboration of witness testimony, can provide juries with powerful images of defendants' culpability through their own words and actions.

Digital evidence may also reveal the identity of critical witnesses who can establish a defendant's intent. The most powerful witnesses at trial are often a defendant's family and friends who testify about the defendant's bias or violent tendencies. Today, perpetrators of hate crimes may develop friendships in secret and exclusively online; the only ways to identify these important trial witnesses may be through defendants' toll records, friends lists in social media accounts, contacts lists in their cell phones, or user accounts of fellow participants in online forums. Given their relationships with the defendant, such witnesses may be hostile to federal investigators and may deny knowing the defendant or ever discussing violence or hate ideologies with the defendant. Confronting recalcitrant witnesses with irrefutable digital evidence, including their own communications with the defendant, can be key to ensuring that they tell the truth.

Digital evidence can also corroborate a cooperating defendant's testimony. In hate crime cases, the government's cooperators are often subjected to vigorous cross-examination, during which defense counsel attempts to cast the cooperator as the true instigator who had an undue influence over the defendant or as a liar who is testifying to get a better plea deal. Digital evidence of the defendant's own words and actions can provide the jury with powerful corroboration in the face of such attacks on a cooperator's credibility.

Finally, digital evidence can be key to rebutting likely defenses that subjects will raise. Defendants in hate crimes cases often admit to committing the underlying substantive crimes but claim that they did so for a reason unrelated to any bias. Or they claim that their communications about race or violence constitute mere hyperbole and political views that are protected speech under the First Amendment. Digital evidence may be the best evidence to rebut these claims.

Below are several cases that highlight some of the ways digital evidence has been used to obtain convictions in hate crime cases:

A. *United States v. Perez*⁵

Marq Perez, a member of the quasi-militia group known as the “Three Percenters,” was convicted for burning down and destroying the Victoria Islamic Center, a mosque in Victoria, Texas. Perez denied being responsible for the arson.⁶

Investigators, however, discovered strong evidence that he committed the crime and did so because of an anti-Muslim bias. A search of his cell phone revealed photos that he took as the fire burned. These images of the burning mosque were powerful evidence to establish his culpability for the arson and to depict the utter devastation he created.

Perez also tried to cast doubt on the credibility of the government’s witnesses, including witnesses who testified about Perez’s animus against Muslims and a witness who was with Perez on the night of the fire.⁷ These witness accounts were corroborated by evidence that Perez repeatedly expressed anti-Muslim views on social media. Perez communicated with other members of the Three Percenters through various Facebook groups, and the government introduced several of his anti-Muslim Facebook posts, including one that called Muslims “goat-fuckers” and another that threatened to “burn every mother FUCKER WITH A RAGGEDLY [sic] TOWEL ON THEIR HEAD.”⁸ He also used his posts to advocate for using violence against Muslims, calling for “the war to begin.”

⁵ No. 17-cr-35 (S.D. Tex. Jan. 16, 2019).

⁶ Christina Caron, *Texas Man Found Guilty of Hate Crime in Mosque Fire*, N.Y. TIMES (July 17, 2018), <https://www.nytimes.com/2018/07/17/us/mosque-arson-guilty-verdict.html>.

⁷ *Id.*

⁸ Brief for the United States as Appellee at 4–5, *United States v. Perez*, No. 18-40707 (5th Cir. 2021).



Marq Perez

Let the war begin, and let the Germans have their way. They'll stop Muslims cold and kill any that try anything that doesn't involve leaving Germany. May no god stand between them and what's coming to the Muslims

Friday, Dec 23, 2016, 6:05 pm



These posts memorialized in writing the defendant's own anti-Muslim animus, providing independent corroboration of the government's witnesses and their testimony of the defendant's anti-Muslim bias.

B. United States v. Fields⁹

On August 12, 2017, James Fields was sitting in his car watching a peaceful crowd marching as a counter-protest to the alt-right Unite the Right Rally in Charlottesville, Virginia. He decided to kill the counter-protestors and sped directly into the crowd, murdering Heather Heyer and injuring dozens of innocent men, women, and children because of the actual and perceived race, color, national origin, and religion of the people in the crowd.

Searching through his social media, the government found Fields had widely promoted anti-Semitic, anti-Black, and pro-Nazi views on Instagram and Twitter. For example, in the months leading up to the attack, Fields tweeted or direct messaged 30 images depicting Adolph Hitler, repeatedly used the hashtag “#hitlerwasright,” tweeted “Sieg Heil,” argued for the superiority of the “white race,” and referred to Blacks as “nigger” and “gorilla” and to Jews as “kikes.”¹⁰

In addition to this direct evidence of Fields's bias, the digital evidence rebutted the potential defense that he drove into the crowd by accident or in self-defense. Videos showed that Fields deliberately

⁹ No. 18-cr-11 (W.D. Va. Oct. 1, 2019).

¹⁰ Sent'g Memorandum of the United States at 12, *Fields*, No. 3:18-cr-11, ECF No. 50.

backed his car up and then gunned his vehicle toward the crowd.¹¹ Other digital evidence supplemented these videos and established that this attack was far from a spontaneous mistake. Before leaving for the protests, his mother warned him to be careful, and he responded by texting, “We’re not the ones who need to be careful” and attached an image of Adolf Hitler to the message.¹² And mere months before the attack, he twice posted on social media memes that advocated using a car to plow through protestors—the exact type of attack he carried out.¹³



C. *United States v. Allen*¹⁴

In 2016, three militia members conspired to bomb an apartment complex in Garden City, Kansas, where scores of Somali Muslims lived and prayed in a mosque located in the complex. Through a confidential source, the government obtained hours of recordings of the defendants talking about a plan to bomb the complex during prayer time to kill and maim as many men, women, and children as possible because of the defendants’ virulent hatred of Muslims.

At trial, the defendants did not deny that they engaged in these conversations. Instead, they claimed that their anti-Muslim views were protected under the First Amendment and that their discussions about violence against Muslims were mere political rhetoric that they and their fellow militia members used to blow off steam. The government faced the difficult challenge of demonstrating to the jury

¹¹ *Id.* at 10.

¹² *Id.* at 14.

¹³ *Id.* at 13.

¹⁴ 16-cr-10141 (D. Kan. Feb. 4, 2019).

that the defendants' conversations about the bombing constituted a criminal conspiracy and that these conversations were separate from the anti-Muslim and, at times, violent rhetoric used by other militia members who were not part of the conspiracy.

Digital evidence made clear that the defendants had splintered off into a separate group intent on committing mass murder and were not merely engaging in political rhetoric. For example, one of the defendants, Patrick Stein, declared in a text message that the larger militia group "has absolutely nothing to do with what the four of us are doing on the side."¹⁵ He claimed that he and his co-defendants had the "will, determination, and dedication second to none" to carry out the bombing.¹⁶

The government also used digital evidence to rebut the defendants' claims that the federal government was persecuting them because of their political beliefs, rather than the actual threat that they posed to public safety. For example, the government corroborated the testimony of one militia member with a Facebook message, in which he resigned from the militia shortly after the defendants attempted to recruit him into the conspiracy. This witness's testimony demonstrated that even someone who shared and expressed similarly strong anti-Muslim views immediately recognized the defendants' seriousness of purpose and disavowed their violent plot. This militia member's testimony was a pivotal turning point in the trial and helped establish that the government's prosecution was based on the defendants' conspiracy to carry out a mass murder, not on protected speech.

III. The investigation

As these cases show, digital evidence can be crucial in successfully prosecuting bias-motivated crimes. At the start of an investigation, prosecutors and investigators should establish a strategy to identify, preserve, and obtain digital evidence. This section provides an overview of some common steps used in hate crimes investigations. The Criminal Section has extensive experience in collecting this type of bias evidence and is available to advise investigators and

¹⁵ Transcript of Jury Trial Volume XI at 17–18, *United States v. Allen*, No. 16-cr-10141 (D. Kan. Apr. 4, 2019), ECF No. 547.

¹⁶ Government's Sentencing Memorandum at 43, *Allen*, No. 16-cr-10141, ECF No. 449.

prosecutors on developing a plan to collect digital evidence that may prove critical for proving a defendant's culpability and bias motives.

A. Identify and preserve digital evidence

All sources of digital evidence, including physical devices and online accounts, should be identified as early as possible in an investigation. Seizing and searching physical devices (for example, cell phones, computers, and tablets) can be especially important because people who commit hate crimes often use encrypted messaging applications to avoid detection by law enforcement. In addition, certain service providers, especially those that support platforms frequented by white supremacists and violent extremists, may be less responsive to law enforcement requests. Searching physical devices is sometimes the only way to access the richest evidence of a subject's intent.

Identifying all of a subject's social media and other online accounts is also critical. Individuals who commit hate crimes often have multiple online accounts, using certain accounts to communicate publicly with family, friends, and colleagues, while using other accounts to communicate anonymously with people who share their ideologies. As a result, hate crime cases often involve evidence drawn from multiple online accounts, and searching only the accounts that can be found using open-source research may overlook the anonymous accounts that are most relevant to proving the case. Investigators should immediately send preservation letters pursuant to 18 U.S.C. § 2703(f) for each email and social media account identified during the investigation.¹⁷ Prosecutors should also consider seeking nondisclosure orders under 18 U.S.C. § 2705(b) to preclude a provider of telephone or online communications services from providing notice to any person of the government's service of warrants, subpoenas, or court orders.¹⁸

The process of identifying all relevant devices and online accounts is often iterative and may require multiple rounds of subpoenas, section

¹⁷ If investigators plan to go overt with the investigation, prosecutors should consider, if public safety permits, first using subpoenas and section 2703(d) orders to identify as many online accounts as possible and issuing preservation letters for those accounts before doing so.

¹⁸ A decision to seek a nondisclosure order should be consistent with the Memorandum from Rod J. Rosenstein, Deputy Att'y Gen., on Policy Regarding Applications for Protective Orders Pursuant to 18 U.S.C. § 2705(b) (Oct. 19, 2017).

2703(d) orders, and search warrants. With each set of returns, investigators should look for indicia (such as customer service emails indicating that the subject has obtained a new cell phone or opened a new online messaging account) that the subject uses other devices and accounts. Investigators should include in interviews of the subject's friends and family, especially those who may share the subject's ideologies, questions to identify all of the subject's physical devices and online accounts.

B. Obtain digital evidence

1. Publicly available data

As a starting point, investigators should canvass publicly available information, such as public social media posts. Such public posts often reveal evidence, such as photographs, posts, likes, and comments, that can be used to build probable cause to search the account.

2. Consent searches

In many hate crime cases, investigators have obtained consent from the subject to search physical devices, such as computers and cell phones, or have discovered that the subject used a device that is owned by a third party, such as a parent or spouse, and have obtained consent from that third party. When investigators go to interview subjects or others in their household, they should consider bringing consent forms and the forensic tools necessary to extract the data from pertinent physical devices.

When seeking information from social media and other online accounts, investigators may also seek consent to search. Many internet service providers, however, will not provide a user's account information to law enforcement based on the account user's consent. Instead, investigators need to obtain the account information directly from the account user. There are several ways to obtain this information, and the methods used depend on the needs of the investigation. For example, investigators can ask the account user to log into the application and then review the records that are readily accessible to the user. That set of data, however, may be incomplete. If the investigation warrants a review of the full account information, investigators may need to ask the account user to conduct a full download of the account. For example, when Facebook users log into their accounts, they can view only certain categories of information about their account; however, Facebook maintains a larger data set of

information about its users. To access that larger data set, the user has to use a Facebook tool called “Download Your Information” and then provide those results to investigators.¹⁹

3. Subpoenas and section 2703(d) orders

Investigators can substantially advance an investigation by quickly issuing subpoenas and obtaining court orders under 18 U.S.C. § 2703(d) for records associated with social media, email, and other online accounts.

Subpoenas can be used to identify basic subscriber information, session connection records, cell phone or instrument numbers associated with the account, and records of phone calls and text messages exchanged with the subject.²⁰ Section 2703(d) orders can be used to obtain additional non-content account information, such as records of user activity made to, or from, the account (that is, user names; messaging logs; the date, time, length, and method of connections; and source and destination IP addresses) as well as non-content information about each communication (that is, the date and time of the communication, the method of communication, and the source and destination of the communications, such as source and destination email addresses, IP addresses, and telephone numbers).²¹

This information is important in several ways. First, it can be used to identify potential witnesses with whom a subject regularly communicated. As noted above, a subject’s friends and family can play key roles at trial by providing testimony about the subject’s intent.

Second, subpoena returns may include information about accounts associated with the known account, such as recovery email addresses, and 2703(d) order returns may include information about linked accounts with the same provider, that is, accounts registered with

¹⁹ See Accessing & Downloading Your Information, FACEBOOK, <https://www.facebook.com/help/930396167085762> (last visited Jan. 31, 2022).

²⁰ 18 U.S.C. § 2703(c)(2).

²¹ To obtain an order under 18 U.S.C. § 2703(d), the government must offer “specific and articulable facts showing that there are reasonable grounds to believe that” the records sought “are relevant and material to an ongoing criminal investigation.” 18 U.S.C. § 2703(d). This standard is higher than the standard to obtain records by subpoena, but it is less than probable cause. Using Section 2703(d) orders allows the government to quickly obtain records that contain highly relevant evidence, including the subject’s identity and linked accounts and may provide information that the government can use to establish probable cause for a search warrant.

unique identifiers (such as the creation an IP address or an account holder's telephone number) and accounts accessed by the same devices and identified by cookies.

Where investigators have information about the accounts that a subject used with friends and family, the associated account information can lead to other, anonymous accounts that the defendant used to commit the crime, to brag about the crime, and to express his ideologies and to espouse violence. Conversely, where investigators do not know a subject's identity but have information about an account, the associated account information can be used to trace back to accounts with legitimate subscriber information that reveals the subject's identity.

Third, information about the devices associated with an account can identify potential devices for investigators to seize during the execution of Rule 41 search warrants.

Finally, subpoena and section 2703(d) returns from electronic service providers will include the types of services used by a subject and can bolster the probable cause for a warrant.

C. Search warrants

This section summarizes several issues that are particular to drafting and obtaining search warrants to obtain digital evidence in hate crime investigations.²² Every case is unique, however, and we strongly recommend that investigators and prosecutors consult with the Criminal Section about the categories of information to be searched and seized based on the particular facts in your investigation.

It is also important to keep in mind the different legal authorities that govern searches and seizures of different types of digital evidence. Rule 41 of the Federal Rules of Criminal Procedure governs searches and seizures of evidence from computers, cell phones, and other physical devices,²³ and the Electronic Communications Privacy Act (ECPA) regulates how the government can obtain stored customer

²² This article is focused on issues that arise in hate crime investigations. CCIPS provides guidance on obtaining search warrants for digital evidence more generally.

²³ FED. R. CRIM. P. 41.

or subscriber records from internet service providers, such as email and social media providers.²⁴

1. Evidence of motive and use of violence or threats of violence

A search warrant affidavit should establish probable cause to search and seize evidence about a defendant's motives, and the attachments should authorize the seizure of evidence of each of the required motive elements.²⁵

Prosecutors should consider including in the attachment a general category authorizing the seizure of evidence of the defendant's state of mind as it relates to the offenses under the investigation and categories that specifically seek evidence about the defendant's views about each of the protected characteristics (for example, race, religion, sex, etc.) at issue; the victims; and any of the required motive elements.²⁶ Although a general category seeking evidence of the defendant's state of mind related to the crimes under investigation is sufficient to satisfy the warrant requirements, more tailored categories will provide additional grounds to ensure that the warrant will withstand judicial scrutiny.

It is important to remember that evidence of motive often includes evidence that does not appear to be linked to the crime itself. One common example is evidence of a defendant's animus against the targeted group but not the specific victim. Another example is evidence that the defendant treated the victim differently than he treated similarly situated persons. For example, suppose a subject in a hate crime investigation admits that he threatened the victim, his

²⁴ Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848.

²⁵ For warrants covered by the ECPA (for example, social media providers, email providers, online messaging forums), Attachment B1 should include all categories of data that the government seeks for the provider to disclose, and Attachment B2 should identify the categories of information that the government will seize as evidence. Prosecutors should consult with CCIPS or the Criminal Section if they have questions about the general process for obtaining ECPA warrants.

²⁶ Several hate crime statutes include multiple motive elements, *see, e.g.*, 18 U.S.C. § 245(b)(2), and threats cases require proof that the defendant acted with the intent to convey a threat or with the knowledge that the recipient of the threat would view it as a threat. *Elonis v. United States*, 575 U.S. 723, 740 (2015).

neighbor who is Black, but claims that he did so because they had a disagreement about noise levels and not because of the victim's race. The investigation might reveal that the defendant has had many disputes with his neighbors who are not Black but that he had never threatened violence or used slurs against anyone other than the victim or that multiple neighbors have had disputes with the subject over noise, but the victim is the only neighbor whom the subject confronted and threatened with violence. Evidence that the defendant treated similarly situated people differently would be relevant to proving that the defendant targeted the victim with violence because of the victim's race and not because of any neighborhood dispute. Prosecutors should review warrants to ensure that the full scope of motive evidence can be seized and used at trial.

2. Time frames

Because of the Fourth Amendment's particularity requirement, search warrants often include time frames to limit the scope of the government's authority to search and seize records in social media accounts. In most cases, the date of the crime serves as the touchstone by which the time frame for that warrant is based, and a common request is for records going back one year before the crime. When obtaining search warrants in hate crime investigations, however, prosecutors should consider using longer time frames to ensure that the warrants authorize the seizure of all relevant motive evidence. That is because defendants in hate crime cases often begin to endorse racial or other extremist ideologies well before the commission of the crime. Courts have consistently held that evidence of the defendant's intent is admissible even when it is not directly linked to the crime itself.²⁷

As a result, the investigative team should consider including broader time frames so that the warrant encompasses the full period for which probable cause exists to believe that the defendant has espoused racial or other extremist ideologies. For example, certain providers may be able to limit the scope of the records disclosed by the provider under Attachment B1; if prosecutors choose to limit Attachment B1 by a time frame, that time frame should include the

²⁷ See, e.g., *United States v. Piekarsky*, 687 F.3d 134, 148 (3rd Cir. 2012); *United States v. Allen*, 341 F.3d 870 (9th Cir. 2003); *United States v. Magleby*, 241 F.3d 1306 (10th Cir. 2001).

entire period for which probable cause exists to believe that the subject communicated about his hate ideologies.²⁸

3. Planning and commission of the crime under investigation and similar bad acts

A warrant should authorize searches for evidence about the crime itself, as well as evidence of any previous conduct that was motivated by hate or that involved the use of violence or threat of violence. Prior acts can be particularly useful to establishing the defendant's intent. Suppose, for example, a defendant emailed a threat to a Black family but denied intending to convey a true threat. If investigators find that he made a similar statement in the past, and friends and family reacted by telling him that the statement was offensive and intimidating, such evidence can be very useful in establishing that he sent the email with the full knowledge that his words would be interpreted as a threat. And evidence that the defendant followed through on prior threats could be vital to showing that the communications under investigation were not mere "idle threats."

4. Identities of, and communications with, potential witnesses

Warrants should authorize searches for information sufficient to identify any person with whom the defendants communicated about their crimes, their shared ideologies, or the use of violence or threats of violence.

5. Location data

If identity is an issue, establishing the defendant's location at relevant times can be critical. The defendant's location can be determined by a variety of means, including cell-site data and GPS data and a wide variety of applications, such as Google maps, Google Location History, photographs, messages, and video messaging that may identify a user's location.

²⁸ Before including time frames in Attachment B1, the government should consider whether there are reasons not to do so. For example, some providers lack the technical ability to limit by time the productions under Attachment B1, or there may be probable cause to believe that the entire account (such as an account set up to communicate on hate forums or to send bias-motivated threats) will contain evidence, fruits, or instrumentalities of a crime.

6. User attribution data

As noted earlier, many individuals who espouse extremist ideologies often mask their identities by using anonymized accounts. In addition, individuals accused of bias-motivated incidents have claimed that their accounts have been hacked. Some courts have held that, given the ease with which social media accounts can be set up in another person's name, certificates of authenticity from the provider may not be sufficient, standing alone, to establish that a defendant is the author of a post that the government seeks to admit at trial.²⁹ To rebut the "I was hacked" defense and to ensure that inculpatory social media posts will be admitted at trial, prosecutors should include in the search warrant application authorization to seize user attribution evidence. Such evidence could include photos of the defendant and communications with friends and family, even if that evidence is entirely unrelated to the underlying crime.

D. Searches

Once returns are obtained, the question that remains is how to search them for relevant evidence. Although the exact parameters of a search depend on the nature of the case, there are a few things that prosecutors and investigators should keep in mind during hate crime investigations. First, white supremacists and violent extremists often use code words and symbols, and investigators and prosecutors should ensure that the search team is familiar with them. Many symbols and code words (for example, Celtic crosses; references to religions such as Odinism/Asatru; runes; acronyms; names and symbols of militia and hate groups; hand symbols; and numbers such as 14 and 88) that are widely used among white supremacists are not, standing alone, indicative of bias or animus, and it is important that any investigator conducting a search of the accounts be sufficiently trained to recognize and seize such information as potential evidence of bias or animus.

Second, running simple word searches may be insufficient to reveal all relevant evidence. As noted above, the defendant's conduct toward individuals who are not in the victim's protected class might provide strong circumstantial evidence of the defendant's intent. As a result, word searches for the victim's name or for racial slurs may miss entire categories of evidence that can be relevant to a successful prosecution.

²⁹ *United States v. Blanchard*, 867 F.3d 1, 6 (1st Cir. 2017); *United States v. Vayner*, 769 F.3d 125, 131 (2d Cir. 2014).

Third, prosecutors and investigators should think broadly about the types of evidence that may be relevant. A defendant's online search history may reveal, for example, that he searched for and downloaded hate symbols or the victim's location. Deleted files often contain critical evidence. If the investigation reveals that a service provider removed the subject's posts for violating community standards on hate speech or violence, consider obtaining the content of those removed posts. Those posts may corroborate the defendant's bias motives and may constitute evidence that the defendant was aware that third parties would interpret his statements as racist or violent.

Fourth, as noted above, investigators and prosecutors should review returns to identify any other potentially relevant physical devices, online accounts, and communications. In addition, consider whether to obtain additional search warrants to provide the necessary context surrounding a defendant's social media comments. For example, if Facebook returns indicate that the defendant commented, "I hate them monkeys" in response to another person's post, investigators should consider obtaining an additional search warrant for the original post to determine whether the defendant was using the word "monkeys" as an animal reference or as a racial slur.

Finally, it is important that prosecutors and investigators be familiar with the types of data that will be produced and develop a plan for reviewing that data. Warrants should include provisions authorizing searches to be conducted by prosecutors and any agency that may be necessary to review the data. Prosecutors and investigators should receive training on the tools necessary to review the returns, such as Cellebrite, and develop a common method for marking documents to be seized. Moreover, prosecutors and investigators should ensure that the tool that will be used to extract data is sufficient for the investigation. For example, different forensic tools extract different categories of data from physical devices and may not process certain data from service providers. Investigators and prosecutors should evaluate the types of evidence that they will need and should consult with the assigned forensic examiner about the needs of their investigations to ensure that the correct forensic tools are used to obtain all relevant evidence.

Finally, critical evidence is often included in backups and deleted files that are often unintelligible as produced. If returns are provided in a format that is unintelligible (for example, the raw data for iCloud backup files is often unintelligible), the FBI CART unit or other

forensic examiners may be able to process them into a more user-friendly format.

IV. Conclusion

Whether used in the government's affirmative case or used to rebut a defense and rehabilitate witnesses, digital evidence has often proven critical to successful hate crime investigations and prosecutions. This article highlighted some of the common issues that arise during hate crime investigations; the Criminal Section can answer questions about the circumstances of your case.

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Prosecuting Hate Crime Threats

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I. Introduction

Consider two threatening communications. The first was mailed to a Jewish Community Center:

My plan of action is to level the playing field

I have had ample time to methodically plan an attack. . . . I am committed and fully intend to murder as many [slur for Jewish people] as I possibly can. . . . I have access to an AR-15 as well as a 9mm handgun and body armor. If I must die accomplishing my ultimate goal, then I will be a casualty of war, a seat in Valhalla all but secured for me. . . .

. . . .

. . . This will be a bloody massacre of epic proportions. It will put the shooting of the sikh [sic] temple on Oak Creek to shame, that much I can promise you. . . .

. . . .

144788 SWP¹

The second was sent to several individual recipients:

Your actions have consequences. Our patience has its limits. You have been visited by your local Nazis.²

Which communication may be federally prosecuted as a bias-motivated crime? At first glance, the first communication appears more straightforwardly prosecutable, but consider these additional facts: It was sent by a subject who could not personally follow through on his threat because he was incarcerated 100 miles away from his

¹ Plea Agreement, *United States v. Grubbs*, No. 18-cr-176 (E.D. Wis. Nov. 10, 2018), ECF No. 19.

² Plea Agreement as to Johnny Garza, *United States v. Shea*, No. 20-cr-32 (W.D. Wash. Sept. 8, 2020), ECF No. 116.

stated target. Further, for various reasons, the community center did not receive the subject's letter through the mail. Is it prosecutable now?

With respect to the second communication, consider these facts: It was among several communications sent by a group of conspirators, one of whom admitted that the conspirators' goal was to make the recipients feel "terrorized by targeted propaganda." The recipients included Black and Jewish journalists and activists. One recipient woke to find a threatening communication glued to the window of her home. Prosecutable?

Consider, with respect to both communications, that the recipients—including the staff at the Jewish Community Center, which became aware of the threats—were terrified. In both cases, the threats accomplished their obvious purpose: to target recipients because of their identities and to disrupt their sense of safety and well-being through fear. Federal prosecutors charged both sets of defendants with bias-motivated crimes, obtaining convictions in both cases.³ In both cases, and in all bias-motivated threats cases, thorough investigations and careful legal analysis made the prosecutions possible.

This Article addresses two key points: First, it addresses which types of threatening communications may be criminally prosecuted under federal civil rights statutes and other statutes and, second, it addresses practical considerations for successful investigations and prosecutions of bias-motivated threats. These threats are worth prosecuting not only because they often portend more serious conduct in the future, but because threats can, and often do, in and of themselves, disrupt the ordinary functioning of businesses, religious organizations, and individual lives; destroy victims' sense of personal safety; and undermine entire communities' security and welfare.

³ See *Grubbs*, No. 18-CR-176 (first communication); *Shea*, No. CR20-032 (second communication).

II. Prosecutable bias-motivated threats: statutes implicated and “true threats”

A. Civil rights and non-civil rights statutes criminalizing bias-motivated threats

Bias-motived threats may implicate several federal criminal statutes. The elements of federal civil rights statutes are discussed elsewhere in this issue,⁴ but in summary, four types of threats of force violate criminal civil rights statutes:

- (1) Threats made to interfere with certain *housing rights*, including occupying a home, when the threats are made because of race, color, religion, sex, sexual orientation, gender identity,⁵ disability, familial status, or national origin;⁶
- (2) Threats made to interfere with certain *federally protected activities*, including enjoying any state-provided facility (such as public streets or parks) or activity, working or seeking private or state employment, using any facility of interstate commerce, enjoying any public accommodation, and participating in other activities, when the threats are made because of race, color, religion, or national origin;⁷

⁴ See Barbara Kay Bosserman & Angela M. Miller, *Prosecuting Federal Hate Crimes*, 70 DOJ J. FED. L. & PRAC., no. 2, 2022, at 127.

⁵ By its terms, the Fair Housing Act applies to threats made “because of” sex. In *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1741 (2020), the Supreme Court held that sex discrimination encompasses discrimination on the basis of sexual orientation or gender identity in the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17. Accordingly, at least with respect to incidents that occurred after *Bostock*, federal bias-motivated crime statutes that prohibit discrimination on the basis of sex should be read to encompass discrimination on the basis of sexual orientation and gender identity. See Rose E. Gibson, *Beyond Hate: Investigating and Prosecuting Bias-Motivated Violence Targeting our LGBTQI Community*, 70 DOJ J. FED. L. & PRAC., no. 2, 2022, at 197.

⁶ See 42 U.S.C. § 3631.

⁷ See 18 U.S.C. § 245. Section 245(b)(2) is primarily enforced by the Criminal Section of the Civil Rights Division, while § 245(b)(1) is primarily enforced by the Public Integrity Section of the Criminal Division. See JUSTICE MANUAL 8-3.140, 9-85.200.

- (3) Threats made to interfere with individuals' *free exercise of religion*, regardless of any additional bias motivation;⁸ and
- (4) Threats made to interfere with *reproductive healthcare services*, regardless of any additional bias motivation.⁹

Each of these statutes also criminalizes threats of force that attempt to interfere with the above-described rights.¹⁰

Bias-motivated threats may also be prosecuted under non-civil rights statutes. Threats that involve interstate commerce—including those transmitted by mail or telephone—may be prosecutable under 18 U.S.C. § 844(e) (threats to kill, injure, or intimidate that involve fire or an explosive), 18 U.S.C. § 875(c) (threats to kidnap or injure), or 18 U.S.C. § 876(c) (threats to kidnap or injure transmitted by mail). Crucially, these statutes may be used to prosecute bias-motivated threats that fall outside of civil rights statutes; for example, a threat made because of gender identity that is unrelated to housing rights.¹¹

B. “True threats”

To be prosecuted under any statute, a threatening communication must be a “true threat.” Certain categories of speech, including true threats, are excepted from First Amendment protection and, therefore, may be criminally proscribed.¹² A “true threat” is a statement in which “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹³ Accordingly, to

⁸ See 18 U.S.C. § 247.

⁹ See 18 U.S.C. § 248.

¹⁰ Prosecutors planning to charge violations of 42 U.S.C. § 3631 or 18 U.S.C. §§ 245(b)(2), 247, among other statutes, must obtain certification from the Assistant Attorney General for Civil Rights before undertaking their federal prosecutions. The Criminal Section of the Civil Rights Division can assist Assistant U.S. Attorneys in navigating these procedures. For more information on the certification process, see Bosserman & Miller, *supra* note 4.

¹¹ Although 18 U.S.C. § 249 is one of the most effective civil rights statutes for reaching bias-motivated violent conduct, it does not criminalize threats of force.

¹² See, e.g., *Elonis v. United States*, 575 U.S. 723, 746 (2015) (Alito, J., concurring in part) (“It is settled that the Constitution does not protect true threats.”).

¹³ *Virginia v. Black*, 538 U.S. 343, 359 (2003).

prosecute a threat under any of the above-described statutes, the government must show that the charged conduct amounted to a true threat.

True threats are more easily defined by what they are not than by what they are. Jokes, “idle talk,” and political arguments—even if coarse or offensive—are not true threats.¹⁴ For example, the Supreme Court has held that a Vietnam War protestor who said, “If they ever make me carry a rifle the first man I want to get in my sights is [the President].” engaged in mere “political hyperbole,” not a true threat against the President.¹⁵ As the Court explained, public debate and discourse “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹⁶ On the other hand, actual “threats of violence are outside the First Amendment.”¹⁷

Whether threatening language constitutes a true threat is highly context specific. Words that are non-threatening in one context are true threats in another. For example, few people would feel threatened by a door-to-door fire insurance salesman who said, in the middle of his sales spiel, “It would be such a shame if your house burned down.” If a known arsonist holding a gas can and a match came to your home at night and said the same thing, however, you would probably feel differently.

1. Relevant factors in a true threats analysis

The Supreme Court and other federal courts have identified several non-dispositive factors relevant to determining whether threatening language constitutes a true threat, including (1) the listener’s reaction; (2) whether the threat was conditional; (3) whether the threat was communicated directly to its victim; and (4) the context in

¹⁴ *E.g.*, *United States v. Viefhaus*, 168 F.3d 392, 395 (10th Cir. 1999) (“A ‘true threat’ means ‘a serious threat as distinguished from words as mere political argument, idle talk or jest.’”); *United States v. Spruill*, 118 F.3d 221, 228 (4th Cir. 1997) (defining true threat as “a serious threat as distinguished from words as mere political argument, idle talk or jest”); *United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir. 1983) (“A true threat is a serious one, not uttered in jest, idle talk, or political argument.”).

¹⁵ *Watts v. United States*, 394 U.S. 705, 706–08 (1969).

¹⁶ *Id.* at 708.

¹⁷ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) (citing *Watts*, 394 U.S. 705).

which the threat was made, including the relationship between the speaker and the listener.

Listener reactions

No one factor is determinative, but courts have held that a listener's reaction to a threat is particularly relevant.¹⁸ After all, whether the threat recipient felt fearful and took the threat seriously is good evidence that it was a serious threat. Such evidence may include not only a listener's stated emotions¹⁹—for example, fear, anxiety, or shock—but also actions the listener took in response to the threat, including precautionary measures. A victim who notifies law enforcement,²⁰ takes additional security measures,²¹ or warns others

¹⁸ See, e.g., *United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994) (“In making this determination, proof of the effect of the alleged threat upon the addressee is highly relevant.”); *United States v. Schneider*, 910 F.2d 1569, 1571 (7th Cir. 1990) (“The fact that the victim acts as if he believed the threat is evidence that he did believe it, and the fact that he believed it is evidence that it could reasonably be believed and therefore that it is a threat. By this chain of inference, the relevance of the [recipient's] testimony is established.”). Courts have often framed this factor in terms of the reaction of the objective, “reasonable person.” E.g., *United States v. Wheeler*, 776 F.3d 736, 744 (10th Cir. 2015) (“[S]tatements amount to true threats when a reasonable person would interpret the statements to be threats”); *United States v. Nishnianidze*, 342 F.3d 6, 16 (1st Cir. 2003) (same).

¹⁹ See, e.g., *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 626 (8th Cir. 2002) (finding relevant the fact that victim said she was afraid, cried, and slept with the lights on for two nights after reading threatening letter); *United States v. Morales*, 272 F.3d 284, 288 (5th Cir. 2001) (finding relevant recipient's apprehension).

²⁰ See, e.g., *United States v. Hart*, 212 F.3d 1067, 1072 (8th Cir. 2001) (finding relevant fact that reproductive health facility notified police); *United States v. Spruill*, 118 F.3d 221, 228 (4th Cir. 1997) (finding relevant a victim's early morning notification to federal law enforcement agency); *Schneider*, 910 F.2d at 1570 (finding relevant fact that recipient was sufficiently alarmed to request protection from local sheriff).

²¹ See, e.g., *Planned Parenthood of Columbia/Willamette, Inc. v. American Coal. of Life Activists*, 290 F.3d 1058, 1086 (9th Cir. 2002) (en banc) (finding relevant victim's donning of bullet-proof vest); *United States v. Whiffen*, 121 F.3d 18, 22 (1st Cir. 1997) (holding that fact that victims changed mail-handling procedures was relevant).

of a safety concern²² provides useful evidence that the threat was seriously taken and, therefore, seriously made. Relatedly, law enforcement reactions to such notifications may also underscore the seriousness of such threats and provide additional evidence of a true threat.²³

Conditional and predictive language

If a threat is conditioned on an event that is impossible or unlikely to occur—for example, “If teleportation were possible, I would teleport you off this planet”—the threat is less likely to constitute a true threat. On the other hand, the mere fact that a threat is conditional is not usually a barrier to prosecution. As one court has explained, “[m]ost threats are conditional; they are designed to accomplish something; the threatener hopes that they *will* accomplish it, so that he won’t have to carry out the threats. They are threats nonetheless.”²⁴ Accordingly, courts have repeatedly held that even threats using conditional language may constitute true threats.²⁵

²² See, e.g., *Wheeler*, 776 F.3d at 745–46 (finding relevant that recipients armed themselves and their spouses and warned their children’s teachers and pastors).

²³ See, e.g., *Hart*, 212 F.3d at 1072 (finding relevant police use of bomb squad and evacuation of threatened facility); *United States v. Roberts*, 915 F.2d 889, 891 (4th Cir. 1990) (finding relevant that law enforcement authorities became involved and viewed letter as threat).

²⁴ *Schneider*, 910 F.2d at 1570.

²⁵ See, e.g., *United States v. Credico*, 718 F. App’x 116, 122 (3d Cir. 2017) (not precedential) (holding that multiple serious threats with vivid details were true threats despite inclusion of one arguably conditional clause); *United States v. Bellrichard*, 994 F.2d 1318, 1322 (8th Cir. 1993) (“A threat may be considered a ‘true threat’ even if it is premised on a contingency.”); *United States v. Cox*, 957 F.2d 264, 266 (6th Cir. 1992) (holding that a threat is not to be construed as conditional if it “had a reasonable tendency to create apprehension that its originator will act in accordance with its tenor”). *But see* *United States v. Bagdasarian*, 652 F.3d 1113, 1119, 1122 (9th Cir. 2011) (holding, *inter alia*, that a statement made of a presidential candidate, “he will have a 50 cal in the head soon,” was not a “true threat” because statement was a “prediction” and “convey[ed] no explicit or implicit threat” that the defendant himself would harm the recipient). Practitioners in the Ninth Circuit should be familiar with *Bagdasarian* and its progeny, e.g., *United States v. Bachmeier*, 8 F.4th 1059, 1064 (9th Cir. 2021), which require the government to prove that a defendant in any true threats case possessed

For example, a defendant who sent several threatening communications in which he threatened violence “if” the victims failed to accede to his demands engaged in true threats, despite his use of conditional language.²⁶ The court reasoned that, although the defendant’s threats contained “grammatically conditional” language, he had nevertheless “both implicitly and explicitly promised violent retribution if he did not receive the result he sought,” leaving the reader “unsure what measure of justice would appease” the defendant.²⁷ Specifically, the defendant had enclosed firearm practice targets with his letters and said, among other things, “bullets are far cheaper and much more decisive” than legal channels; “it would be a shame to brutalize [the victims] . . . in order to guarantee that I receive . . . justice”; and his prowess with firearms would have “no bearing” on the victims, “as long as [they did their] part” and submitted to the defendant’s demands.²⁸ That he framed these explicit threats of violence conditionally did not render them protected speech.

Direct communication

Directly and specifically communicated threats, such as those made by letter, email, or phone to a particular recipient, are more likely to constitute true threats than indirectly communicated threats, such as those made in a public place to a random person.²⁹ That said, courts have repeatedly held that generally communicated threats may nevertheless constitute true threats because they may still reflect the requisite serious intent to commit violence against a particular

a subjective intent to threaten the victim. *See United States v. Nissen*, 432 F. Supp. 3d 1298, 1317 (D.N.M. 2020) (“Only the Ninth Circuit consistently interprets the First Amendment as requiring proof of a specific intent to threaten.”). In practice, this additional requirement may be insignificant, as many threats facially evince the requisite subjective intent, but practitioners should ensure juries are properly instructed. *See Bachmeier*, 8 F.4th 1059 at 1065 (finding error harmless where jury was not instructed on subjective intent requirement).

²⁶ *United States v. Bly*, 510 F.3d 453, 456, 459 (4th Cir. 2007).

²⁷ *Id.*

²⁸ *Id.* at 455–56.

²⁹ *See, e.g., Bellrichard*, 994 F.2d at 1321–22 (“As a general proposition, correspondence . . . delivered to a person at home or at work is somewhat more likely to be taken by the recipient as a threat than is an oral statement made at a public gathering . . .”).

target.³⁰ For example, “wanted” posters identifying reproductive healthcare providers by name were true threats because there was a previous pattern of “wanted” posters “identifying a specific physician followed by that physician’s murder.”³¹ Relatedly, courts have recognized that public internet communications, including social media posts, may constitute true threats.³²

³⁰ See, e.g., *Pulaski Cnty. Special Sch. Dist.*, 306 F.3d at 625 (holding that the fact that the defendant had not personally delivered the threatening letter to the victim was not dispositive because the letter was “extremely intimate and personal, and the violence described in it was directed unequivocally” at the victim); *United States v. Spring*, 305 F.3d 276, 281–82 (4th Cir. 2002) (holding that statements made by defendant to inmates threatening a probation officer qualified as threats within the meaning of a sentencing enhancement provision); *United States v. Hanna*, 293 F.3d 1080, 1088 (9th Cir. 2002) (holding that a jury could conclude that statements were true threats against the President even though they were never delivered to him, his aides, or federal agencies); *United States v. Vartanian*, 245 F.3d 609, 615 (6th Cir. 2001) (“The fact that a threat or act of intimidation was not addressed directly to the protected individual does not mean that those words or conduct cannot or will not have the effect desired by the defendant.”); *Planned Parenthood of Columbia/Willamette, Inc.*, 290 F.3d at 1086 (holding that “guilty” posters that were “publicly distributed, but personally targeted” were true threats); *Morales*, 272 F.3d at 288 (holding that statements made to a third party in an internet chat room were true threats); *United States v. Myers*, 104 F.3d 76, 77–78 (5th Cir. 1997) (holding that threats made by a defendant against the Veterans Administration and Congress during a phone call to an employee of the Paralyzed Veterans of America were true threats); *United States v. Kelner*, 534 F.2d 1020, 1023 (2d Cir. 1976) (holding that a statement was a threat despite the fact that it was made to the media during a press conference).

³¹ *Planned Parenthood of Columbia/Willamette, Inc.*, 290 F.3d at 1063.

³² See, e.g., *United States v. Stock*, 728 F.3d 287, 299 (3d Cir. 2013) (“[A] reasonable jury could find that the [Craigslist] posting, in context and as a whole, constitutes a threatening communication.”); *United States v. Baker*, 514 F. Supp. 3d 1369, 1382 (N.D. Fla. 2021) (finding probable cause that defendant who created a Facebook event calling upon readers to “encircle” and “trap” victims and “drive them out . . . with every caliber available” had issued true threats).

Context

Ultimately, and as explained above, whether a threat was meant seriously depends on context.³³ Courts have considered as relevant context the speaker's tone;³⁴ historical or political context, including the speaker's explicit or implicit historical references;³⁵ and the recipient's awareness of the speaker's propensity for violence.³⁶ For example, courts have repeatedly found relevant the fact that threats against reproductive healthcare providers occur in the context of historical violence against such individuals and organizations and have held that such threats are particularly intimidating when they allude to that history.³⁷

³³ See, e.g., *United States v. Alaboud*, 347 F.3d 1293, 1297 (11th Cir. 2003) (“The fact-finder must look at the context in which the communication was made to determine if the communication would cause a reasonable person to construe it as a serious intention to inflict bodily harm.”); *Heller v. Bedford Cent. Sch. Dist.*, 665 F. App'x 49, 52 (2d Cir. 2016) (not precedential) (“Context is crucial to identification of a true threat.”).

³⁴ E.g., *United States v. Fulmer*, 108 F.3d 1486, 1495–96 (1st Cir. 1997) (holding that, “[w]here a statement may be ambiguous, the entire context, including the tone used, may assist the jury in determining whether that ambiguous statement was a threat”).

³⁵ *Hart*, 212 F.3d at 1072 (holding that the context and manner in which Ryder trucks were placed in abortion clinic driveways after Oklahoma City bombing could support jury's finding that the defendant's conduct constituted a true threat).

³⁶ See, e.g., *United States v. Worrell*, 313 F.3d 867, 871 (4th Cir. 2002) (“Given the history of physical abuse and threats of violence inflicted by [defendant], it probably would have been unreasonable for [victim] simply to dismiss these threats as harmless.”); *Pulaski County Special Sch Dist.*, 306 F.3d at 626 (finding the victim's knowledge of defendant's reputation for aggression relevant); *United States v. Sovie*, 122 F.3d 122, 125 (2d Cir. 1997) (finding history of abusive relationship relevant); see also *United States v. Miller*, 115 F.3d 361, 364 (6th Cir. 1997) (finding that perpetrator's “instability and irrationality . . . did not objectively diminish the letter's credibility but instead predictably heightened apprehension by its recipients that the author could be sufficiently imbalanced to seek the realization of his proclamations.”).

³⁷ See, e.g., *United States v. Dillard*, 795 F.3d 1191, 1201 (10th Cir. 2015) (finding relevant history of violence against abortion providers in same area); *Planned Parenthood of Columbia/Willamette, Inc.*, 290 F.3d at 1085 (finding

2. Irrelevant factors in a true threats analysis

Courts have also identified factors that are *not* relevant to a true threats analysis. Defendants often argue that they should not be prosecuted for threatening victims because they had no desire or ability to actually physically hurt the victims or because they hold political or religious views that merit First Amendment protection. At bottom, these arguments invite jury nullification in that they appeal to the jury to acquit based on their own sense of equity rather than following the court's instructions.³⁸ Courts have consistently rejected such arguments. Prosecutors should use motions in limine and carefully crafted jury instructions to ensure the factfinder's focus remains on legally relevant elements.

Inability or unwillingness to carry out the threat

A subject's inability or unwillingness to follow through on a threat does not render the threat unprosecutable. Threat recipients typically do not know whether a person can or will carry out the threatened conduct, so those facts are irrelevant to the threat's terrorizing effect. Courts have repeatedly held that a defendant's actual intent or ability to carry out a threat is irrelevant to whether the threat is a true one.³⁹ As one court has explained, defense arguments to the contrary "miss[] the point" because the threat *is* the crime; attempted or actual use of force is separately criminalized.⁴⁰

relevant context of prior deadly shootings of reproductive healthcare providers named on posters).

³⁸ Jury nullification is a juror's "knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jur[or's] sense of justice, morality, or fairness."

United States v. Edwards, 303 F.3d 606, 633 (5th Cir. 2002) (alteration in original) (quoting BLACK'S LAW DICTIONARY 862 (7th ed.1999)).

³⁹ *See, e.g., Virginia v. Black*, 538 U.S. 343, 359–60 (2003) ("The speaker need not actually intend to carry out the threat."); *United States v. Dutcher*, 851 F.3d 757, 761 (7th Cir. 2017) ("A true threat does not require that the speaker intend to carry it out, or even that she have the capacity to do so."); *Monroe v. Houston Indep. Sch. Dist.*, 794 F. App'x 381, 385 (5th Cir. 2019) (not precedential) ("[A] statement can be a true threat even when the speaker does not 'intend to carry out the threat.'").

⁴⁰ *Dutcher*, 851 F.3d at 761.

Relatedly, the threatened individual does not need to have received the threat for the threat to be prosecutable. For example, a defendant who threatened realtors showing a home to African American homebuyers by saying to the realtors, among other things, that the neighbors would probably cut up Black inhabitants in the area “into little pieces and bury [them] in the back yard” was properly convicted of a federal civil rights crime even though he did not speak directly to the African American homebuyers.⁴¹ As the court explained, “Congress’s obvious intent in enacting the provision under which [the defendant] was convicted was to protect citizens from intimidating discrimination in all aspects of housing selection and purchase,” and “[t]he fact that a threat . . . was not addressed directly to the protected individual does not mean that those words or conduct cannot or will not have the effect desired by the defendant.”⁴²

Other protected speech

Incorporating protected speech, including political and religious speech, does not insulate a true threat from prosecution. Courts have repeatedly rejected First Amendment defenses in true threats prosecutions.⁴³ For example, a federal court rejected the effort of a defendant to dismiss hate crime charges when the defendant had accompanied threats, such as “death to the Arabs” and “[you] will burn in hellfire on this earth and in the hereafter,” with political

⁴¹ *Vartanian*, 245 F.3d at 611 (upholding conviction under 42 U.S.C. § 3631(a)).

⁴² *Id.* at 615.

⁴³ *See, e.g.,* *United States v. Castillo*, 564 F. App’x 500 (11th Cir. 2014) (not precedential) (holding that threat to kill President was not protected as “political hyperbole” although in a Facebook posting containing criticism of policies); *United States v. Gregg*, 226 F.3d 253, 267–68 (3d Cir. 2000) (“Activities that injure, threaten, or obstruct are not protected by the First Amendment, whether or not such conduct communicates a message.”); *United States v. Callahan*, 702 F.2d 964, 966 (11th Cir. 1983) (“That the letter contains certain political and religious statements does not serve to remove it from the prohibition of the statute.”); *see also* *United States v. Rahman*, 189 F.3d 88, 117 (2d Cir. 1999) (“[T]he fact that [the defendant’s] speech or conduct was ‘religious’ does not immunize him from prosecution under generally-applicable criminal statutes.”).

speech, such as “God Bless America,” in threatening communications to staff of the Arab American Institute.⁴⁴

3. Symbolic expression and expressive conduct

Actions, such as using racist symbols, may also constitute prosecutable true threats. Courts have repeatedly concluded that certain expressive conduct, including cross burning, may constitute a true threat.⁴⁵ As is true of threatening language, whether an act constitutes a true threat depends on the context. The Supreme Court has held that cross burnings are not categorically true threats; cross burnings that evince an intent to intimidate are, however, true threats.⁴⁶ As explained above, victim reactions to symbolic expressions

⁴⁴ *United States v. Syring*, 522 F. Supp. 2d 125, 132 (D.D.C. 2007).

⁴⁵ *See Black*, 538 U.S. at 363 (“The First Amendment permits [the government] to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation.”); *see also, e.g.*, *United States v. Magleby*, 241 F.3d 1306 (10th Cir. 2001) (upholding convictions under civil rights and other statutes for cross burning); *United States v. Hartbarger*, 148 F.3d 777 (7th Cir. 1998) (same); *United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994) (same); *see also, e.g.*, *United States v. Jones*, 308 F.3d 748, 749 (7th Cir. 2002) (holding that spreading a harmless powder that resembled anthrax was a true threat); *Hart*, 212 F.3d at 1072 (holding placing a Ryder truck outside a reproductive healthcare clinic in an apparent reference to the Ryder truck used during the Oklahoma City bombing was a true threat). Using nooses, swastikas, and other such symbols may also constitute true threats. *See Turner v. Commonwealth*, 67 Va. App. 46 (2016) (upholding defendant’s conviction under state statute prohibiting displaying a noose with intent to intimidate for displaying a life-size Black dummy hanging by a noose from a tree in his yard); *cf. United States v. Khorrami*, 895 F.2d 1186, 1193 (7th Cir. 1990) (upholding a defendant’s conviction for communications containing swastikas and threatening language). The Criminal Section of the Civil Rights Division and its partners have prosecuted several such cases. *E.g.*, *United States v. Halfin*, No. 18-cr-00142 (N.D. Tex. Oct. 25, 2018) (defendant pleaded guilty to civil rights charge for hanging dolls from nooses to intimidate African American neighbors). As with cross burnings, to be prosecutable, the use of such symbols must evince an intent to intimidate.

⁴⁶ *See Black*, 538 U.S. at 356 (“[W]hile a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives.”).

such as cross burnings are relevant evidence of a defendant's intent.⁴⁷ Evidence that a defendant "knew that burning crosses were symbols of racial hatred"—including his admissions that "the general public saw a burning cross as a symbol of racial hatred"—is also persuasive evidence that the defendant had the requisite intent.⁴⁸

III. Practical considerations: investigating and prosecuting true threats

Recall one of the examples in the introduction: "Your actions have consequences. Our patience has its limits. You have been visited by your local Nazis."⁴⁹

Applying the above-discussed factors, is it a true threat? On its face, and taken alone, perhaps not. The language is unconditional, but the poster does not use words to threaten a particular action. Further, the language is on a poster and not in a letter or transmitted through a phone call, so it does not—on its own—appear to be directed at a particular individual. Now imagine the language is accompanied by the image of a hooded, masked figure holding a Molotov cocktail outside of someone's house.

With the violent illustration, the poster looks and sounds closer to a true threat, but only an investigation will reveal the context necessary to determine and prove whether the poster reflects a serious expression of an intent to commit an act of unlawful violence on a particular individual or group.



⁴⁷ See *United States v. Magleby*, 241 F.3d 1306, 1311 (10th Cir. 2001) (approving use of jury instruction that victims' reaction to cross burning may be considered relevant evidence of a defendant's intent and upholding conviction under 42 U.S.C. § 3631).

⁴⁸ *Id.* at 1313.

⁴⁹ Plea Agreement as to Johnny Garza, *supra* note 2.

In this case, and as alluded to in the introduction, federal investigation (including collecting electronic evidence)⁵⁰ revealed that the poster was one of several used as part of a plot by members of the Atomwaffen Division, a violent white supremacist group, to make Black and Jewish journalists and activists and others, including individuals affiliated with the Anti-Defamation League, feel, as one co-conspirator admitted, “terrorized by targeted propaganda.”⁵¹ Some of the posters were mailed to victims by name, while others were affixed to victims’ homes in the middle of the night.⁵² This context—violent images and hateful language that physically entered victims’ homes; was personally delivered to victims who, by virtue of their identities and work, were well-placed to understand and fear the significance of Nazi symbols and white supremacist allusions; was timed to heighten victims’ feelings of being targeted—makes clear that the threats not only satisfied the elements but also formed the basis of a compelling criminal case.⁵³

For several reasons, the goal of the investigation and prosecution of a bias-motivated threat is to gather and present as much evidence about the context of the threat as possible. First and foremost, and as discussed above, careful investigation is necessary to proving the elements of the offense. Some true threats factors are apparent from the face of the threat (for example, whether the threat was conditional), but most (for example, listener reaction) require investigation.

Careful investigation is also key to anticipating common defenses. These defenses usually amount to the flip side of the affirmative case: Defendants argue they lacked the requisite intent because they were “just joking,” inarticulate, drunk, upset, or simply “didn’t mean it like that.” Investigations often uncover evidence that speakers *did* in fact “mean it like that.” Threateners choose threats because they obtain a particular reaction: fear and disruption. Sometimes, the threatener

⁵⁰ Electronic evidence is often crucial in bias-motivated threats cases and is discussed at greater length elsewhere in this volume. See Mary J. Hahn, *Using Digital Evidence to Strengthen Hate Crime Prosecutions*, 70 DOJ J. FED. L. & PRAC., no. 2, 2022, at 221.

⁵¹ Government’s Sentencing Memorandum as to Cameron Shea, *Shea*, No. 20-cr-00032, ECF No. 196.

⁵² *Id.*

⁵³ *See Id.*

has tried other means and failed to get the desired result, leading to escalating conduct.

Thorough investigations can also make the difference between *arguing* to a jury or other factfinder that threats were intimidating and asking factfinders to infer as much and *proving* that the threats were intimidating and all but compelling the factfinder to find as much. For example, while many Americans probably understand that swastikas are associated with Nazism, many are unfamiliar with the ideology of white supremacist groups and may also be unaware of the genuine and well-founded fear those symbols and ideology can inspire.

A. Investigating and proving listener reactions

Victim interviews serve several crucial functions in threat cases. First, and most obviously, when a threat is verbally conveyed, the victim's specific recollection of the words and tone may provide the best or only evidence of the criminal act. Second, as discussed above, listener reaction is a key element of a true threats analysis. Third, listeners are often the witnesses best placed to provide contextual information about the threat. Finally, listeners are essential witnesses at trial or sentencing; building a compelling case with jury appeal begins during the first victim interview.

1. Victim interviewing to obtain evidence of a threat

In cases in which a threat is orally transmitted, such as in person or over the phone, investigators should of course aim to interview the victim and other witnesses as close in time as possible to the alleged threat, when recollection of the subject's words and tone are freshest. Cognitive interviewing techniques may also help witnesses recall details; for example, asking a victim about sensory details, such as where they were looking when they received a threatening phone call, may help the victim recall the details of the threatening communication.

2. Victim interviewing to obtain evidence of emotional responses

Sometimes, threat victims are able to say immediately that they felt afraid and to describe in detail steps they took to protect themselves from anticipated physical harm. But often, victims are reluctant to admit—to themselves or to others—that a threat made them feel scared. Such victims may, instead, express anger, irritation, or apathy. To the extent these reactions are genuine, they are relevant.

But to the extent these reactions mask other emotions, they are worth exploring compassionately.

Trauma-informed interview techniques facilitate rapport and are likely to yield better interview results. Such techniques include allowing a victim to exercise control over aspects of the interview (for example, scheduling, taking breaks, and meeting in an agreed-upon location—some witnesses may be uncomfortable meeting in a law enforcement or office setting); using conversational and open-ended questions rather than following a strict outline under short time constraints; and allowing victims to describe seemingly mundane or irrelevant details in the course of their account. A victim interview with time and space for reflection in a comfortable environment may help a victim address difficult topics.

Understanding the source of a victim's reluctance or apprehension also helps address the issue. Victims may downplay their fear first out of embarrassment or a desire not to seem oversensitive or weak. Investigators can anticipate and address this issue by demonstrating that the investigation team takes the allegation seriously. For example, conducting victim interviews in person rather than over the phone and traveling to meet with victims in their chosen area demonstrate to victims that the federal government is willing to expend resources to investigate what it perceives as serious allegations.

Victims may also minimize or rationalize threatening communications to make themselves or others (for example, congregants; employees; or family members, especially children) feel protected, empowered, calm, and in control. Investigators can explore this issue by asking victims about what they told others (and what they deliberately withheld from others) about what happened and why. Additionally, and as discussed below, even a victim who may not admit to feeling fear may be able to describe behavioral changes before and after a threat that reflect feelings of fear, however buried. Victims' friends, family, and colleagues may also provide insight into victims' reactions; in some cases, spouses and colleagues may have more insight into a victim's true feelings of fear than the victim does.

A victim's muted reaction may also reflect desensitization. Victims who have previously experienced and even reported threats may have had to develop thick skin, especially if they feel their previous experiences were not taken seriously. Exploring prior threats (whether from the same person or another) and harassment in detail

and openly acknowledging their feelings of frustration may not only yield contextual evidence but may also explain a victim's initially understated reaction and contribute to rapport building.

Understanding what the victim's emotional reaction was is only the first step. The "why" of the reaction is as important as the "what." For a victim who expresses fear, the next question is "why" or, perhaps better put, "I can guess why, but please help me understand what about the letter/call/email/text made you feel that way." Such follow-up questions may yield insight into the relevance of the subject's word choices to the victim, the victim's knowledge of the subject's propensity for violence or ability to carry out threats, the resonance of historical or cultural references for the victim, the victim's prior experiences of threats or harassment, or the victim's prior relationship history with the subject.

If a listener was truly unafraid, or if the listener did not receive the threat, that does not mean the case is not prosecutable. As noted above, no one factor is dispositive to the true threats analysis, and courts have repeatedly held that a communication may constitute a true threat even if the communication was never received. Exploring this issue early in the investigation is nevertheless important to charging decisions and to anticipating the issue at trial.

3. Precautionary measures

Victims' actions (and in some cases, omissions) after threats are not only excellent evidence of listener reaction but also provide a crucial narrative for trial and sentencing. Bias-motivated threats often make for compelling cases because they disrupt victims' lives and the lives of others around them.

Investigators should ask victims about changes to personal routines (for example, altering travel routes to work, using a different entrance or exit, locking doors they previously left unlocked, attending fewer religious services), security precautions (for example, notifying law enforcement or private security providers, asking a colleague to walk together to their cars at night, purchasing a personal weapon, avoiding standing in front of windows, disallowing children from playing in the yard, asking neighbors to watch for unusual activity), and public statements or appearances. As above, the "why" is as important as the "what." A victim's explanation of why they took particular measures in response to a threat may provide not only context relevant to the threats analysis but also a compelling trial narrative.

Law enforcement notifications are especially useful for more than just showing that the victim took the threat seriously. Victims' (or witnesses') 911 calls and other reports to law enforcement (as reflected in body camera videos or officer testimony) can also help victims recall their emotional responses to the threats and may even be independently admissible under hearsay exceptions, such as excited utterances.⁵⁴

4. Other witnesses

Witnesses who observe a victim receive a threat and “outcry” witnesses a victim told about a threat may remember or notice a victim’s reaction as well as or better than the victim. Such evidence is admissible as direct evidence of a true threats factor (subject to evidentiary limitations, such as the rules against hearsay). These witnesses may also be able to testify to a victim’s evident fear in cases in which the victim is unable or unwilling to testify to that emotion. In particular, detailed questions about a victim’s nonverbal reactions to a threat, such as how the victim’s face, body, or voice looked or sounded before and after the receipt of a threat may yield evocative evidence of a fearful reaction.

By the same token, interviews of other witnesses present some of the same challenges as victim interviews. Non-victim witnesses may feel embarrassed or ashamed because they also felt fear even though they were not personally targeted or even because they felt relief at not being targeted. Investigators’ compassion and careful follow-up questioning is as important with these interviews as with victim interviews.

B. Investigating and proving subject intent

Subjects of threat investigations often provide evidence of their own intent, not only through the threatening communication itself, but also through admissions to others.

⁵⁴ See FED. R. EVID. 803(2) (excluding from the rule against hearsay statements “relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused”).

1. Investigating subjects: what to look for

Evidence probative of bias motive⁵⁵—for example, the subject’s stated views of a protected group or the subject’s knowledge of historical context or references—is relevant to proving threatening intent. For example, a subject who espouses hateful views toward a particular group on social media will struggle to argue that a threatening communication he sent to the same group evinces anything other than the same views.

To return to the first example from the introduction, the subject promised a “massacre” and described his plot in graphic detail. The communication itself thus evinced the requisite intent, but additional investigation uncovered that the subject had a history not only of making threats, but of engaging in bias-motivated violence; his criminal history included a prior state conviction for a bias-motivated crime. The defendant had also made statements aligning himself with white supremacist ideology and hate groups. Among the best evidence that the subject sought to terrify Jewish victims was his stated hatred of Jewish people.

Historical and cultural references can prove not only a subject’s bias motivation but also his threatening intent. To return to the first example in the introduction, the subject’s threatening letter referred to “the shooting of the [S]ikh temple on Oak Creek,” an apparent allusion to a 2012 mass shooting at the Sikh temple in Oak Creek, Wisconsin, in which seven victims lost their lives and others were injured. The reference suggests that the subject believed and hoped that the recipients (who were located in the same area) would understand the allusion and fear a similar attack. Other references in the letter that carry significance to white supremacists and their targets—including racial slurs, “Valhalla,”⁵⁶ and “14788 SWP”⁵⁷—

⁵⁵ See Bosserman & Miller, *supra* note 4.

⁵⁶ White supremacists have co-opted aspects of Viking history and culture, including Norse mythology. Valhalla is “the hall assigned to those who have died in battle, in which they feast with Odin.” *Valhalla*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/221182?redirectedFrom=valhalla#eid> (last visited Feb. 2, 2022).

⁵⁷ The number “14” is a reference to “the 14 words,” a white supremacist slogan, “We must secure the existence of our people and a future for white children.” David Lane, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/individual/david-lane>

suggest that the speaker is steeped in white supremacist ideology and has considered and chosen his words to exact fear. A listener might also reasonably fear that the speaker is part of an organized group with the capability of executing the threatened harm.

A subject's past behavior—particularly evidence of escalating conduct—may also provide useful context for the subject's threatening intent. In particular, comparing a subject's previous communications regarding the same topics or victims to the threatening communication may be fruitful. A subject who did not get the reaction he desired when engaging in protected First Amendment activity may turn to criminal threats to exact a desired reaction: fear or silence.

2. Investigating subjects: where to look

As is true of victim interviews, the carefully investigated “why” is as important as the “what” in subject interviews. A subject may agree to an interview in an effort to persuade investigators that he lacked the requisite criminal intent. For such a subject, who admits he made the communication but claims that he was misunderstood, questions such as “Why did you make the communication?” or, worse, “Did you mean to threaten [the victim]?” are likely to yield unhelpful answers such as “I was just kidding around,” “I wasn't really thinking,” “I was angry,” or “I didn't think [the victim] would make a federal case out of it.” Detailed questions about the actions the subject took, as well as the actions he did not take, may yield further results: “What did you hope to come about when you made that statement? What other ways could you have tried to bring about that result (for example, letter writing, protesting, boycotting)? But you chose this way? Why did you choose this way over those other means? Why did you choose those words?”

(last visited Feb. 3, 2022). The lightning bolts symbol, “⚡,” is a reference to the Nazi police force Schutzstaffel, also referred to as the SS. *SS corps of Nazi Party*, BRITANNICA, <https://www.britannica.com/topic/SS> (last visited Feb. 3, 2022). The number “88” is white supremacist code for “Heil Hitler” (H being the eighth letter of the alphabet). *Racist Skinhead Glossary*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/intelligence-report/2015/racist-skinhead-glossary> (last visited Feb. 3, 2022). “SWP” represents a white supremacist slogan, “Supreme White Power.” *Hate on Display™ Hate Symbols Database*, ANTI-DEFAMATION LEAGUE, https://www.adl.org/hate-symbols?cat_id%5B149%5D=149 (last visited Feb. 3, 2022).

What do you know about that symbol? Why did you choose that individual or organization?”

Subject statements to friends, family members, colleagues, and others can also provide crucial context, particularly in cases in which the subject declines to be interviewed. Relevant statements include not only comments about the threatening communication itself. Adherents of discriminatory ideology often try out their ideas on others, testing boundaries as they develop their theories. Subjects may also express growing frustration at an individual or group. Family and friends can also provide information about subjects’ past education, work experience, group memberships, and interpersonal conflicts, all of which may be relevant to understanding a subject’s motivation and proving a subject’s knowledge of, for example, historical or cultural references. Finally, subject acquaintances may be able to provide information about the relationship between the subject and the victim.

Digital evidence, including social media, is essential to proving bias-motivated crimes, including threat cases. For a complete discussion of why and how to collect such evidence, see Mary J. Hahn, *Using Digital Evidence to Strengthen Hate Crime Prosecutions*.⁵⁸

C. Common legal issues

Several common legal issues arise in bias-motivated and other threats cases.

1. First Amendment challenges to evidence

In addition to the First Amendment defense discussed above, that is, a defendant’s argument that his threatening communication was itself protected speech or insulated by protected speech, defendants have raised First Amendment challenges to other evidence used to prove discriminatory and threatening intent. Such evidence, including political and religious statements made by the subject on other occasions, may provide direct evidence of elements of the offense; namely, threatening intent and bias motivation. Accordingly, courts have repeatedly rejected defendants’ efforts to limit introduction of such evidence and have held that “alleged threat[s] must be analyzed

⁵⁸ See Hahn, *supra* note 50.

in light of [their] entire factual context,” including otherwise protected political expression.⁵⁹

2. Federal Rule of Evidence 404(b)

Relatedly, defendants in threat cases often move to exclude evidence of other threatening communications as improper propensity evidence. Because such evidence often falls into one or more of the exceptions for other bad acts evidence under Federal Rule of Evidence 404(b), however, appellate courts have frequently upheld its admission by trial courts.⁶⁰

3. *Elonis v. United States* and mens rea

The civil rights statutes discussed in section II.A, *supra*, contain their own mens rea requirements; specifically, to prove a criminal civil rights offense in a bias-motivated threat case, the government must show that the defendant issued the threatening communication as part of an effort to willfully or intentionally deprive the victims of their rights.⁶¹

⁵⁹ *Planned Parenthood of Columbia/Willamette, Inc.*, 290 F.3d at 1078 (collecting cases); *see also, e.g.*, *United States v. Turner*, 720 F.3d 411, 428 (2d Cir. 2013) (finding no error where trial court allowed government to present evidence of defendant’s previous non-threatening statements during radio broadcasts).

⁶⁰ *See, e.g.*, *United States v. Stahmer*, 755 F. App’x 214, 217 (4th Cir. 2018) (not precedential) (upholding admission of previous threats to a police officer in a case in which the defendant was accused of threatening a Coast Guard officer and reasoning, *inter alia*, that such evidence was relevant to counter defense arguments that the charged threats were not serious); *United States v. Springer*, 753 F. App’x 821, 828 (11th Cir. 2018) (not precedential) (upholding admission of defendant’s ISIS support in threats case involving threats against judge because such evidence was intrinsic to true threats analysis).

⁶¹ *See, e.g.*, 18 U.S.C. §§ 245(b) (using threat of force to willfully intimidate or interfere with someone because of protected characteristic and because of his or her enjoyment of enumerated rights), 247(a)(2) (using threat of force to intentionally obstruct someone in the free exercise or enjoyment of religious beliefs), 248 (using threat of force to intentionally intimidate or interfere with someone because the person is obtaining or providing reproductive health services); 42 U.S.C. § 3631 (using threats to willfully interfere with someone because of a protected characteristic and because of his or her enjoyment of housing rights).

The non-civil rights statutes discussed above, however, may also contain a mens rea requirement. In *Elonis v. United States*, the Supreme Court held that, to prove a violation of the interstate threats statute,⁶² the government must prove that not only that the threat was a “true threat,” but also that the defendant transmitted the charged communication with a purposeful or knowing mens rea, that is, that the defendant sent the “communication for the purpose of issuing a threat, or with knowledge that the communication [would] be viewed as a threat.”⁶³ The Court left open two questions (1) whether a defendant’s reckless intent—that is, a conscious disregard of a substantial and unjustifiable risk that the communication would be taken as a threat—would satisfy this element;⁶⁴ and (2) whether the rationale of *Elonis* extends past section 875(c).⁶⁵

IV. Conclusion

Bias-motivated threats cases present investigative and legal challenges, but these compelling cases merit the use of government resources. Some of the same evidence used to prove that bias-motivated threats *can* be prosecuted also illustrates why such threats *should* be prosecuted. To return to the Atomwaffen threats example, victims in that case testified about the fear those communications wrought: Some victims moved away from their homes. Others installed security systems. One purchased a gun. One quit her job. One began opening her mailbox with a stick out of fear of what might lie waiting inside. Federal civil rights statutes and other criminal statutes recognize that bias-motivated threats have real effects for individuals who should not have to fear living their lives solely because of who they are.

⁶² 18 U.S.C. § 875(c).

⁶³ 135 S. Ct. 2001, 2012 (2015).

⁶⁴ *Id.* at 2012–13.

⁶⁵ *See, e.g.,* *United States v. Kirsch*, 903 F.3d 213, 233 (2d Cir. 2018) (noting that the Supreme Court left open the question “whether *Elonis* extends beyond 18 U.S.C. § 875(c)”; *United States v. Credico*, 718 F. App’x 116 (3d Cir. 2017) (not precedential) (same).

About the Author

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Resources for Hate Crimes Enforcement and Prevention

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I. Hate crimes 101—where to begin

There is an enormous amount of information about hate crimes available online. A quick web search for “hate crimes resources” generates links to hundreds of advocacy, nonprofit, academic, and government websites that each host or link to an ever-growing assortment of information. This type of volume can be too much to sift through for an introduction to the topic.

Finding information from the Department of Justice (Department) about hate crimes used to be almost as complicated. But since 2018, the Department’s hate crimes website¹ has provided a one-stop portal with links to all types of publicly available hate crimes resources either written by or funded by Department components. And around the same time, the Civil Rights Division (Division) revamped and updated the information on the Enforcement of Civil Rights Criminal Statutes on DOJBook, an internal Department resource.

The purpose of this article is to point Assistant U.S. Attorneys (AUSAs) and U.S. Attorneys’ Offices (USAOs) to key personnel and resources to help with investigating, prosecuting, preventing, and conducting outreach about hate crimes. These key personnel in the Division’s Criminal Section and the Executive Office for U.S. Attorneys (EOUSA) are specifically designated to assist AUSAs with substantive training, practice tips, and technical assistance on specific complaints and cases. This article also provides information and links to videos, brochures, and trainings produced by the Department to

¹ *Hate Crimes*, DEP’T OF JUST. <https://www.justice.gov/hatecrimes> (last visited Feb. 3, 2022).

support outreach to law enforcement partners and communities of interest in your district.

Consulting these key personnel and resources will give AUSAs new to hate crimes a solid foundation on which to build and give experienced AUSAs additional insights and updates on the most relevant news, statistics, and practice developments.

A. Key personnel—the Division’s Criminal Section Deputy Chiefs and EOUSA’s Civil Rights Coordinator

USAOs and the Division share responsibility for enforcement of criminal civil rights statutes. The Assistant Attorney General for the Civil Rights Division and the Division’s Criminal Section oversee that enforcement.

One of the first steps for any AUSA interested in hate crimes enforcement and prevention, and particularly for all Criminal Civil Rights Coordinators, is contacting the Criminal Section of the Division. Every state and U.S. territory are assigned to one of four Deputy Chiefs in the Criminal Section. Your assigned Deputy Chief reviews all the Division’s criminal civil rights prosecutions in the states that she covers. She can also point you to the most relevant live and on-demand hate crimes trainings for AUSAs. These interactive sessions and videos are designed for busy AUSAs and incorporate case studies and practical tips to share the best practices developed by the Criminal Section’s subject matter experts. Do not hesitate to contact the Criminal Section with questions, information about possible hate crimes in your district, or just to introduce yourself and learn more about the Criminal Section’s work.

Another key resource for all AUSAs is the Civil Rights Coordinator in EOUSA’s Office of Legal Programs. The EOUSA Civil Rights Coordinator is generally an AUSA detailee with experience litigating civil or criminal civil rights matters. As EOUSA’s liaison to the Civil Rights Division, the Civil Rights Coordinator works closely with the Criminal Section, as well as the other civil enforcement and policy sections, on training, capacity building, and furthering civil rights enforcement and outreach by USAOs.

B. Key AUSA resources—DOJBook and the hate crimes website

1. DOJBook

DOJBook, the Department’s internal reference guide, includes a topic page on hate crimes. The hate crimes topic page links to federal hate crimes statutes, the criminal civil rights chapter of the Justice Manual,² sample indictment forms, a monograph, an analysis of “true threats,” and relevant Sentencing Guidelines. Contact your district’s Criminal Section Deputy Chief with any questions or suggestions about these pages.

2. The Department’s hate crimes website

The Department’s hate crimes website provides a centralized portal to hate crimes news, resources, and events authored, funded, or hosted by the Department.³ No longer is it necessary to search websites for the Division, the FBI, and other USAOs in your state to find the latest developments on hate crimes in your area. The hate crimes website also includes resources for the public, advocates, and law enforcement that you can share with community leaders, police departments, and service providers in your district.

The hate crimes website was one of the Initiative’s first projects. Since launching in 2018, it has received over 1.6 million visitors and has become one of the most frequently visited sites for hate crimes information. The website is searchable and written in plain English. It also includes links for reporting hate crimes to the FBI.⁴

Providing meaningful language access is a priority for hate crimes enforcement and prevention. To improve language access, the Department has published a detailed Spanish hate crimes website with links to Department resources and press releases available in Spanish.⁵ Key information about hate crimes, including a description of how to report hate incidents to the FBI tip line and receive

² JUSTICE MANUAL 8-2.000.

³ *Hate Crimes*, DEP’T OF JUST., <https://www.justice.gov/hatecrimes> (last visited Feb. 3, 2022).

⁴ *Get Help Now*, DEP’T OF JUST., <https://www.justice.gov/hatecrimes/get-help-now> (last visited Feb. 3, 2022).

⁵ *Estadísticas Sobre Delitos de Odio*, DEP’T OF JUST., <https://www.justice.gov/hatecrimes-espanol/Estadisticas-sobre-delitos-de-odio> (last visited Feb. 3, 2022).

translation services, is available in additional languages, including Arabic, Chinese (Simplified and Traditional), Farsi, French, Haitian Creole, Japanese, Korean, Portuguese, Tagalog, Vietnamese, and many more.⁶

Anyone can sign up to receive regular email updates as new information is added to the website.⁷ Once registered, users will receive timely notices about upcoming events and trainings, recent press releases, grant opportunities, and more.

State Specific Information

The hate crimes website includes a webpage for each state and U.S. territory with key Department information for each state.⁸ You may want to start exploring the site on your state’s page. Your state’s page

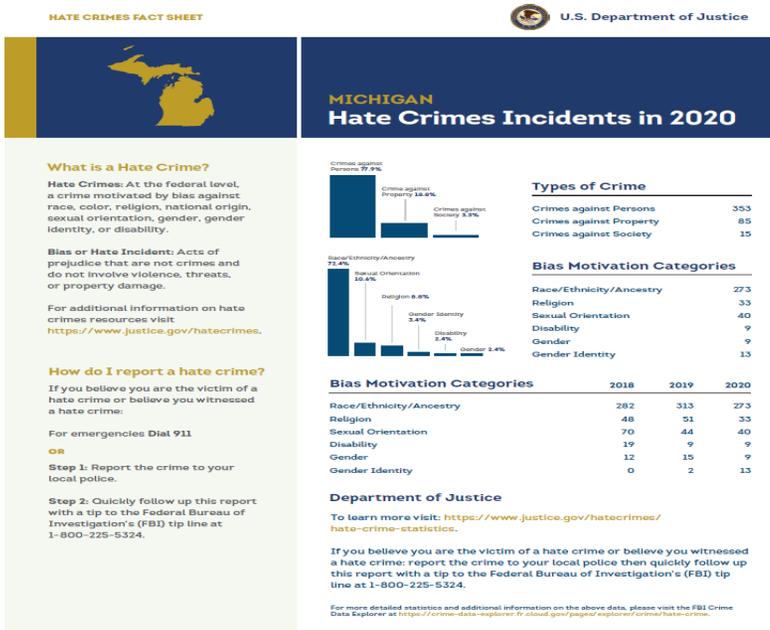


Figure 1: State graphic example, District of Columbia 2019 Hate Crime statistics.

⁶ *Hate Crimes*, DEP’T OF JUST., <https://www.justice.gov/hatecrimes> (last visited Feb. 3, 2022).

⁷ *Keep Informed with Email Updates*, DEP’T OF JUST., <https://public.govdelivery.com/accounts/USDOJ/subscriber/new> (last visited Feb. 3, 2022).

⁸ *State Specific Information*, DEP’T OF JUST., <https://www.justice.gov/hatecrimes/state-specific-information> (updated Apr. 23, 2021).

links to recent press releases and case examples, along with contact information for the Department component offices that cover your state, including the FBI field office and the CRS regional office. The page also includes a downloadable flyer with graphs and tables summarizing the FBI Hate Crime Statistics for your state from 2017 to 2020.⁹

Your state page also includes links to any Department-authored or -funded resources that specifically mention your state, including research studies and technical assistance publications funded by the Department's Office of Justice Programs or the Office of Community Oriented Policing Services (COPS).

The rest of the hate crimes website provides a national overview. Below we outline some of the most frequently visited pages on the website and some of the Department's resources that are most relevant to AUSAs.

Facts and statistics

Understanding hate crimes requires accurate information. The hate crimes website's Facts and Statistics page¹⁰ is the most visited page on the website. It provides a quick picture of the national statistics for the most recent two years. The Department's most recent hate crime statistics, released in August 2021, cover hate crimes reported to the FBI by law enforcement in 2020.¹¹ There are charts and tables comparing the number of incidents and victims and a breakdown of percentages by bias category.

The Facts and Statistics page links to additional Department statistics, including the FBI Crime Data Explorer (CDE).¹² The CDE includes hate crimes statistics going back to 1991 and allows users to view the statistics by state or by individual law enforcement agency.

⁹ See Figure 1, *supra*.

¹⁰ *Facts and Statistics*, DEP'T OF JUST., <https://www.justice.gov/hatecrimes/facts-and-statistics> (last visited Feb. 3, 2022).

¹¹ *Id.*

¹² *Facts and Statistics*, DEP'T OF JUST., <https://www.justice.gov/hatecrimes/facts-and-statistics> (last visited Feb. 3, 2022); *Crime Data Reporter*, FED. BUREAU OF INVESTIGATION, <https://crime-data-explorer.fr.cloud.gov/pages/explorer/crime/hate-crime> (last visited Feb. 3, 2022).

The CDE also has a feature that compiles and displays tables and charts for a one-year, two-year, five-year, or ten-year period.

Laws and policies

The hate crimes website's Laws and Policies page provides a brief outline of current federal hate crimes statutes and recently issued hate crimes policies, including the AG's May 2021 Memorandum on Improving the Department's Response to Hate Crimes and Hate Incidents.¹³ That memorandum set forth Department-wide mandates to address hate-based violence and incidents. The page also includes a chart showing the bias categories covered by each State's hate crime laws.¹⁴

Addressing hate crimes against Asian Americans and Pacific Islanders (AAPI)

The hate crimes website features a page devoted to key resources for addressing the rise in anti-Asian hate crimes.¹⁵ The page serves as a clearinghouse for Department resources, blog posts, and news related to confronting anti-AAPI hate.

Resources table

For the full range of public resources, past and present, related to hate crimes, the hate crimes website also includes a searchable table.¹⁶ There are over 100 resources covering a range of topics and types of material, including training materials, outreach flyers, films, funding opportunities, hate crimes research, and podcasts.¹⁷ The table's filters allow searches by target audience, format (video, report, training), Department component, and date. The table is regularly updated with the latest Department resources.

¹³ *Laws and Policies*, DEP'T OF JUST., <https://www.justice.gov/hatecrimes/laws-and-policies> (updated Jan. 13, 2022).

¹⁴ *Id.*

¹⁵ *Addressing Hate Crimes Against Asian Americans and Pacific Islanders*, DEP'T OF JUST., <https://www.justice.gov/hatecrimes/addressing-hate-crimes-against-AAPI> (last visited Feb. 3, 2022).

¹⁶ *Resources*, DEP'T OF JUST., <https://www.justice.gov/hatecrimes/resources> (last visited Feb. 3, 2022).

¹⁷ *Id.*

C. Key resources for outreach to law enforcement partners

The resources table offers law enforcement and prosecutor filters that can help AUSAs and law enforcement coordinators find publicly available resources to share with agencies in their districts. All of the resources listed below, and many more, are included in the hate crime website resources table.

- *Collaborative Reform Initiative Technical Assistance Center (CRI-TAC)*. COPS is responsible for advancing the practice of community policing by the nation's state, local, territorial, and tribal law enforcement agencies through information, funding, and resources. State, local, and tribal law enforcement agencies can request free hate crimes training and technical assistance via the COPS Office CRI-TAC program. Each solution is customized, and the technical assistance can cover resource referrals, web-based training, in-person training, virtual mentoring, meeting facilitation, and on-site consultations. In addition to this customized technical assistance, CRI-TAC can deliver its *Hate Crimes: Recognition and Reporting* line-level officer training that addresses the immediate response on the scene of a potential hate or bias crime.¹⁸
- *Improving the Identification, Investigation, and Reporting of Hate Crimes: A Summary Report of the Law Enforcement Roundtable*. This comprehensive report by the Initiative sets forth key recommendations and action steps to combat hate crime. The *Roundtable Report* highlights the results of a problem-solving and action planning session by representatives of diverse law enforcement agencies, national policing organizations, and federal government leaders in October 2018. The report, authored by the COPS Office and the Division, also incorporates stakeholder feedback received during the first years

¹⁸ *Collaborative Reform Initiative Technical Assistance Center (CRI-TAC)*, DEP'T OF JUST., <https://www.theiacp.org/projects/collaborative-reform-initiative-technical-assistance-center-cri-tac> (last visited Feb. 3, 2022).

of the Hate Crimes Initiative. The result is a valuable roadmap for change, including a field-driven checklist.¹⁹

- *Bureau of Justice Assistance Programs That Support Prosecutors.* A collection of resources, including information on recurring grants, that can assist prosecutors in their role within the criminal justice system and within communities they represent throughout the country.²⁰
- *Bureau of Justice Assistance National Training and Technical Assistance Center (BJA NTTAC).* BJA NTTAC offers training and technical assistance to prosecutors' offices to help assess their capacity to prosecute violent crime cases; identify programming gaps and make recommendations to enhance processes; provide actionable recommendations across the prosecution landscape to ensure violent crime cases are prioritized; and identify strategies to strengthen cases and increase convictions.²¹
- *Helping Communities Prevent and Respond to Hate Crimes.* This CRS flyer describes 19 resources and program brochures available for communities and law enforcement related to the prevention and response to bias incidents and hate crimes, including one on Working with Law Enforcement & Communities to Improve Partnerships and Collaboration.²²
- *FBI Hate Crimes Page.* The FBI hate crimes page provides an outline of the FBI's role investigating and enforcing hate crimes laws and links to the public-facing page for reporting hate crimes, tips.fbi.gov.²³

¹⁹ DEP'T OF JUST., IMPROVING THE IDENTIFICATION, INVESTIGATION, AND REPORTING OF HATE CRIMES; A SUMMARY REPORT OF THE LAW ENFORCEMENT ROUNDTABLE (2020).

²⁰ DEP'T OF JUST., PROGRAMS THAT SUPPORT PROSECUTORS (July 2021).

²¹ *Bureau of Justice Assistance National Training and Technical Assistance Center*, DEP'T OF JUST., <https://bjatta.bja.ojp.gov/> (last visited Feb. 3, 2022).

²² DEP'T OF JUST., HELPING COMMUNITIES PREVENT AND RESPOND TO HATE CRIMES (n.d.); DEP'T OF JUST., WORKING WITH LAW ENFORCEMENT & COMMUNITIES TO IMPROVE PARTNERSHIPS AND COLLABORATION (n.d.).

²³ *Hate Crimes*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/investigate/civil-rights/hate-crimes> (last visited Feb. 3, 2022).

D. Key resources for working with the communities of interest

The Department has produced a variety of hate crimes training and outreach materials to support communities working to prevent and respond to hate and to improve collaborations between law enforcement and the communities they serve. This can improve reporting of hate crimes and hate incidents. These resources can be located on the hate crimes website by selecting the filters for victim advocacy and community, universities and college campuses, and public officials. A few representative resources are listed below. Visit the Upcoming Events page for additional resources and more information about current and upcoming training and outreach opportunities.²⁴

- *Not in Our Town videos and resources.*²⁵ These films and organizing tools help local leaders build vibrant, diverse cities and towns where everyone can participate. Law enforcement, prosecutors, and community stakeholders can request free copies of the films and selected resources on a flash drive from the COPS Office.²⁶ There is also a companion guide with action steps for community leaders and schools.²⁷
- *Responding to Hate: Building Safe, Inclusive Communities.*²⁸ This toolkit is designed to help communities develop solutions that can address racism and bigotry and lead to a more equitable and inclusive environment.

²⁴ *Upcoming Events*, DEP'T OF JUST., <https://www.justice.gov/hatecrimes/upcoming-events> (last visited Feb. 3, 2022).

²⁵ *Not in Our Town*, <https://www.niot.org/> (last visited Feb. 3, 2022).

²⁶ *Publications*, DEP'T OF JUST., <https://cops.usdoj.gov/RIC/Publications/ric.php?page=detail&id=COPS-USB03> (last visited Feb. 3, 2022).

²⁷ *Stop Hate: Action Steps for Local Communities*, DEP'T OF JUST. (May 2016), https://cops.usdoj.gov/html/dispatch/05-2016/action_steps_for_local_communities.asp.

²⁸ *RESPONDING TO HATE: BUILDING SAFE, INCLUSIVE COMMUNITIES* (2021).

- *StopBullying.gov Resources Page*. A collection of training tools and resources to address bullying and hate at schools.²⁹
- *The Community Relations Service*.³⁰ CRS facilitates a wide range of programs and services for law enforcement and communities related to hate crimes, including fora on Protecting Places of Worship and on Bias Incidents and Hate Crimes.³¹ CRS also facilitates programs, including a Dialogue on Race, Empowering Local Communities to Collaboratively Identify & Address Conflicts, and Empowering Campus Communities to Collaboratively Identify and Address Conflicts.³² CRS has developed additional tip sheets, brochures and trainings on working with Asian American, Native Hawaiian, and Pacific Islander communities (collectively, AANHPI), transgender communities, and responding and preventing hate crimes against persons with disabilities.³³ Additional information on these programs is available at the links above and by contacting your CRS regional office.³⁴

²⁹ *Research Resources*, DEP'T OF HEALTH AND HUMAN SERVS., <https://www.stopbullying.gov/resources/research-resources> (updated May 21, 2021).

³⁰ *Community Relations Service*, DEP'T OF JUST., <https://www.justice.gov/crs> (last visited Feb. 3, 2021).

³¹ DEP'T OF JUST., PROTECTING PLACES OF WORSHIP FORUM: GUIDE FOR COMMUNITY LEADERS (n.d.); DEP'T OF JUST., BIAS INCIDENTS AND HATE CRIMES FORUM: GUIDE FOR COMMUNITY LEADERS (n.d.).

³² DEP'T OF JUST., TRANSFORMING CONFLICT AND DEVELOPING SOLUTIONS THROUGH DIALOGUE ON RACE (n.d.); DEP'T OF JUST., EMPOWERING LOCAL COMMUNITIES TO COLLABORATIVELY IDENTIFY & ADDRESS CONFLICTS (n.d.); DEP'T OF JUST., EMPOWERING CAMPUS COMMUNITIES TO COLLABORATIVELY IDENTIFY ISSUES AND ADDRESS CONFLICTS (n.d.).

³³ DEP'T OF JUST., PREVENTING AND RESPONDING TO BIAS AND HATE INCIDENTS AGAINST ASIAN AMERICAN, NATIVE HAWAIIAN, AND PACIFIC ISLANDER (AANHPI) COMMUNITIES (n.d.); DEP'T OF JUST., ENGAGING AND BUILDING RELATIONSHIPS WITH TRANSGENDER COMMUNITIES (n.d.); DEP'T OF JUST., ADDRESSING CONFLICT BASED ON DISABILITY TO HELP COMMUNITIES PREVENT AND RESPOND TO DISABILITY-RELATED HATE CRIMES (n.d.).

³⁴ *Our Reach*, DEP'T OF JUST., <https://www.justice.gov/crs/crs-our-reach> (updated Sept. 27, 2021).

II. So what's next—an eye toward the future

Combating hate crimes and hate incidents remains a top enforcement priority across the federal government, and the Department remains focused on providing AUSAs with critical training, news, and resources.

After reading this article, you should contact the Criminal Section Deputy Chief for your state and the EOUSA Civil Rights Coordinator. Review resources and visit the hate crimes website. Remember to sign up for alerts. Doing these simple things will not only connect you with key personnel and valuable information, but also strengthen the communication and collaboration that is essential to effectively combat hate crimes.

About the Authors

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FACE Off with Anti-Abortion Extremism—Criminal Enforcement of 18 U.S.C. § 248 (FACE Act)

Sanjay Patel
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I. Introduction

On October 23, 1998, at approximately 10:00 p.m., Dr. Barnett Slepian was killed as he stood with his family in the kitchen of his home. He was shot by a sniper who fired a single gunshot from a distant wooded area. The bullet entered the home through a rear window. Dr. Slepian died as his wife and children tried to stem the flow of blood until help arrived. Dr. Slepian was an obstetrician-gynecologist who provided reproductive healthcare services, including abortions, at a local clinic in Buffalo, New York.¹

The sniper—James Kopp—had carefully prepared to commit this act of violence for over a year. Kopp was an anti-abortion extremist who spent substantial time choosing his victim, planning the attack, and orchestrating an exit strategy. Aided by two cohorts who shared his militant anti-abortion views, Kopp fled the country immediately after he murdered Dr. Slepian. A massive international manhunt ensued, and federal investigators were able to determine Kopp's whereabouts as they tracked his movements through Europe. Finally, on March 29, 2001, Kopp was arrested in France.²

Kopp was charged with a Freedom of Access to Clinic Entrances (FACE) Act offense for killing Dr. Slepian. Kopp had admitted shooting Dr. Slepian, and investigators uncovered evidence that proved the killing was motivated by Kopp's extreme anti-abortion views. Kopp stated that he did not regret shooting Dr. Slepian.

¹ See Liam Stack, *A Brief History of Deadly Attacks on Abortion Providers*, N.Y. TIMES (Nov. 29, 2015), <https://www.nytimes.com/interactive/2015/11/29/us/30abortion-clinic-violence.html>

² See *Id.*

Kopp was convicted after a jury trial of violating the FACE Act for killing Dr. Slepian and was sentenced to life imprisonment.³

The murder of Dr. Slepian is a high-profile example of a FACE Act crime. A FACE Act offense is a crime that is motivated by the victim exercising the right to obtain or provide reproductive healthcare. A perpetrator's intentional use of force, threat of force, or a physical obstruction when a victim is exercising this right with the purpose of injuring, intimidating, or interfering is what makes the conduct a federal offense. Victimization is not limited to the person who was directly impacted by the offender's conduct. The FACE Act also criminalizes damage or destruction of property belonging to a reproductive healthcare facility.

This article provides an overview of the FACE Act and its elements, case examples to demonstrate the law's scope and limitations, suggestions for other federal criminal statutes that can be used in these cases, and a discussion on collaborations with federal partners that are necessary for successful enforcement and victim protection.

II. Historical background

Following *Roe v. Wade*,⁴ the 1973 landmark Supreme Court decision that recognized a woman's constitutional right to seek an abortion, anti-abortion activists launched efforts to deter patients and providers from seeking, obtaining, and providing abortions. Although much of this activity constituted legal forms of protest protected by the First Amendment, the number of illegal blockades and incidents of violence also rose steadily through the 1970s and 1980s. Tactics included bombing and burning clinic buildings, butyric acid attacks, anthrax threats, and assaults on and kidnappings of individuals employed in reproductive healthcare clinics.

In the 1990s, extremist activity escalated dramatically, particularly by those aligned with extremist groups who believed that the murder of reproductive healthcare providers was defensible as "justifiable

³ See Government's Trial Memorandum, *United States v. Kopp (Kopp I)*, No. 00-cr-189 (W.D.N.Y. Apr. 11, 2005), ECF No. 230; Government's Sentencing Memorandum, *Kopp I*, No. 00-cr-189, ECF No. 327; see also *United States v. Kopp (Kopp II)*, 562 F.3d 141 (2d Cir. 2009); Report and Recommendation, *Kopp I*, No. 00-cr-189, ECF No. 145; *Kopp v. Fischer (Kopp III)*, 811 F.Supp.2d 696 (W.D.N.Y. 2011).

⁴ 410 U.S. 113 (1973).

homicide.”⁵ In March 1993, the first murder of a doctor in the United States by an anti-abortion extremist occurred when a doctor was fatally shot during a protest at his clinic in Florida.⁶ In August of 1993, a doctor survived being shot outside of an abortion facility in Kansas.⁷ In July of 1994, a doctor and a clinic escort were fatally shot in Florida; the doctor’s wife was also shot, but she survived.⁸ In December of 1994, two receptionists at a reproductive care clinic in Massachusetts were fatally shot and five others were wounded.⁹ In total, there have been 11 murders and 26 attempted murders from anti-abortion violence since 1993.¹⁰

Against this backdrop of escalating violence targeting reproductive healthcare providers and facilities, Congress enacted the FACE Act in 1994 to create federal penalties for anti-abortion-related violence, threats of violence, and physical obstruction. Additionally, in 1998, two weeks after the shooting death of Dr. Slepian, the Department of Justice created the National Task Force on Violence Against Reproductive Health Care Providers to coordinate federal law enforcement efforts in the investigation and prosecution of anti-abortion violence.¹¹

III. 18 U.S.C. § 248—The FACE Act

A. Overview

The FACE Act¹² was enacted to protect reproductive healthcare patients and providers from violence and obstructive tactics being used to interfere with access to reproductive healthcare services,

⁵ *Stack*, *supra* note 1.

⁶ *Id.*

⁷ *Id.* That same doctor was fatally shot at his church by an anti-abortion extremist in 2009. *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *National Task Force on Violence Against Reproductive Health Care Providers*, DEP’T OF JUST., <https://www.justice.gov/crt/national-task-force-violence-against-reproductive-health-care-providers#:~:text=and%20clinics%20nationwide.,National%20Task%20Force%20on%20Violence%20Against%20Reproductive%20Health%20Care%20Providers,1998%2C%20shooting%20death%20of%20Dr.%20Slepian> (updated Sept. 17, 2021).

¹² Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248.

including abortions.¹³ It established federal criminal penalties and civil remedies for using force, threats of force, or physical obstruction—or attempting to do so—to injure, intimidate, or interfere with any person because that person is seeking to obtain or provide reproductive health services.¹⁴ The statute also provides penalties for damaging or destroying—or attempting to damage or destroy—the property of a reproductive health clinic.¹⁵

The FACE Act protects persons seeking or providing any type of reproductive health care, including gynecological examinations, breast cancer screenings, infertility treatments, prenatal care, pregnancy counseling services, and abortion services. It also protects the property of facilities that provide reproductive health services. Accordingly, the FACE Act is content neutral because it also protects facilities counseling alternatives to abortion.¹⁶ Nevertheless, since the statute’s enactment in 1994, various organizations and individuals have unsuccessfully challenged the constitutionality of the FACE Act’s restrictions on their anti-abortion efforts. The primary thrust of these challenges is that the statute violates free speech and free exercise rights. Because the plain language of the statute is content neutral,

¹³ See S. REP. NO. 103-117, at 3 (1993); *see also* *United States v. Dinwiddie*, 76 F.3d 913, 919 (8th Cir. 1996) (The “FACE Act’s protection of [reproductive health care facilities] and [their] staff and patients is a valid exercise of Congress’s power to protect people and businesses involved in interstate commerce”).

¹⁴ 18 U.S.C. § 248(a)(1). Although the FACE Act also has provisions for criminal conduct that affects a victim lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship, 18 U.S.C. § 248(a)(2), or damages/destroys the property of a place of religious worship, 18 U.S.C. § 248(a)(3), such incidents are better addressed by using 18 U.S.C. § 247, which includes an interstate commerce jurisdictional hook to ensure its constitutionality.

¹⁵ 18 U.S.C. § 248(a)(3).

¹⁶ *See, e.g.*, *United States v. Weslin*, 156 F.3d 292, 296–97 (2d Cir. 1998); *United States v. Wilson*, 154 F.3d 658, 663 (7th Cir. 1998) (“The Act punishes anyone who engages in the prohibited conduct, irrespective of the person’s viewpoint and does not target any message based on content. “The Access Act thus does not play favorites: it protects from violent or obstructive activity not only abortion clinics, but facilities providing pre-pregnancy and pregnancy counseling services, as well as facilities counseling alternatives to abortion.”) (citation omitted).

however, courts have routinely denied these constitutional challenges.¹⁷

Importantly, the FACE Act provides both a federal criminal and federal civil cause of action. Only the U.S. Department of Justice can prosecute a criminal FACE Act case. But more actors can file a civil FACE Act case, including the Department of Justice, state attorneys general, and private persons involved in providing or obtaining reproductive healthcare services. There are two important differences between a criminal FACE Act prosecution and a civil FACE Act suit: the burden of proof and the available remedies.

B. Elements

The elements of a criminal and civil FACE Act violation are the same. However, a criminal FACE Act prosecution requires proof beyond a reasonable doubt, whereas a civil cause of action only requires proof by preponderate evidence.

The FACE Act has two separate intent elements: first, the defendant must act with the intent to injure, intimidate, or interfere; the second requires that the defendant act because the victim was seeking, obtaining, providing, had obtained, had provided, might obtain, or might provide reproductive health services.¹⁸ Because of this dual-intent requirement, the linchpin to a successful FACE Act prosecution is motivation. Evidence showing a defendant's motivation is often gleaned from statements the defendant made before and after the offense conduct. With incidents involving online threats, it is important for investigators to have threat recipients print or save the defendant's threatening communication, including headers and footers; screenshots; and any other digital evidence with evidentiary value.

A FACE Act defendant will often admit motive during post-incident interviews. Additionally, prosecutors can uncover motivation evidence from leaflets, pamphlets, and signs that a defendant possessed at the time of the incident. Video footage, photos, and comments posted on social media accounts have also been routinely used in prosecutions to prove intent. Other less obvious sources of FACE Act intent and

¹⁷ *Weslin*, 156 F.3d at 296–97; *Wilson*, 154 F.3d at 663; see also *Dinwiddie*, 76 F.3d at 923.

¹⁸ See *Sharpe v. Conole*, 386 F.3d 482, 484 (2d Cir. 2004).

motive evidence can come from 911 calls, a witness's prior interactions with a defendant, and even a defendant's bumper stickers.

The two subsections of the FACE Act that are used to prosecute anti-abortion crimes are 18 U.S.C. § 248(a)(1), involving force, threat of force, or physical obstruction; and 18 U.S.C. § 248(a)(3), involving damage or destruction of clinic property. The FACE Act's statutory definitions for terms such as "interfere with," "intimidate," and "physical obstruction" will impact how prosecutors should assess whether conduct amounts to a FACE Act violation.¹⁹

Below is a discussion of the elements²⁰ of a FACE Act prosecution under subsections (a)(1) and (a)(3) and case examples from prosecutions by the Department of Justice.

1. Section 248(a)(1)

Under 18 U.S.C. § 248(a)(1), the prosecution must prove that the defendant (1) used force, threat of force, or physical obstruction; (2) acted with the intent to injure, intimidate, or interfere with a person; and (3) did so knowingly and because a person was, or had been, providing or obtaining reproductive health services. To make the criminal violation a felony, the prosecution must also prove (1) that the defendant's acts resulted in bodily injury or death, or (2) that the defendant has a prior conviction under 18 U.S.C. § 248(a).

Use of force

"Force" has been broadly defined as "power, violence, or pressure directed against a person or thing."²¹ As applied in FACE Act prosecutions, the term "force" is not limited to intentional acts that result in bodily injury.²² Therefore, use of force can include incidents involving kidnappings, as well as assaultive force, such as shootings and murder, so long as the "force" used was for the purpose of injuring, intimidating, or interfering (or attempting to do the same) with any person seeking or providing reproductive health services.

¹⁹ See 18 U.S.C. § 248(e).

²⁰ *E.g.*, ELEVENTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS No. O10.1, O10.2 (2021); *Conole*, 386 F.3d at 484.

²¹ *Dickson v. Ashcroft*, 346 F.3d 44, 50 (2d Cir. 2003).

²² *State of New York v. Cain*, 418 F.Supp.2d 457, 473 (S.D.N.Y. 2006) ("There is no exception for fleeting and *de minimis* contact . . . (assuming, of course, that the fleeting use of force was intentional)").

The Department of Justice has criminally charged many “use of force” cases under the FACE Act. In *United States v. Kopp* (discussed above), the defendant was convicted of a death-resulting FACE Act violation and sentenced to life imprisonment after he shot and killed a doctor in his home²³ because he performed abortion procedures.²⁴

In *United States v. Dear*, the defendant was indicted in 2019 in the District of Colorado for his FACE Act crimes related to the 2015 shooting at a Planned Parenthood clinic in Colorado Springs.²⁵ The defendant in that case is alleged to have traveled to the clinic with the intent to “wage ‘war’” because the clinic offered reproductive health services. He shot at several civilians and police officers, killing three people and injuring several others.²⁶

And, in *United States v. Keiser*,²⁷ the defendant pleaded guilty to violating the FACE Act for, among other violations, physically assaulting a staff member who attempted to restrain the defendant until police arrived.²⁸

Threats of force

The FACE Act also criminalizes threats. The FACE Act’s proscription on “threats of force” is limited to “true threats” that “place a person in reasonable apprehension of bodily injury” and, thus, are not protected by the First Amendment.²⁹

To establish a true threat, the prosecution must show that a defendant transmitted the communication “for the purpose of issuing a threat, or with knowledge that the communication will be viewed as

²³ FACE Act offenses—whether involving the use of force, threat of force, or physical obstruction—are not limited to occurrences on reproductive healthcare facility grounds (that is, within a facility or in the facility parking lot); *see also, e.g.*, *United States v. Soderna*, 82 F.3d 1370, 1375 (7th Cir. 1996) (“A group of demonstrators could not insist upon the right to cordon off a street . . . and allow no one to pass who did not agree to listen to their exhortations.”).

²⁴ *Kopp II*, 562 F.3d at 144.

²⁵ No. 19-cr-506 (D. Co Sept. 16, 2021).

²⁶ *Id.*

²⁷ No. 08-cr-04035 (W.D. Mo. Feb. 23, 2010).

²⁸ *See Information, Keiser*, No. 08-cr-0435, ECF No. 1.

²⁹ “Threats of force” prosecuted under the FACE Act are often also chargeable under other federal statutes.

a threat.”³⁰ Threats of force are not limited to written or spoken words; the communication can be nonverbal.³¹

The Department of Justice has brought numerous FACE Act cases involving threats of force. In *United States v. Hart*, for example, the defendant was found guilty of violating the FACE Act for parking Ryder rental trucks at the entrances of two Little Rock, Arkansas, area abortion clinics in 1997.³² The placement of the trucks coincided with a visit to Little Rock from then-President Clinton and was approximately two years after the well-known events of the Oklahoma City bombing, which involved a Ryder truck packed with explosives.³³ Combined with other evidence, these circumstances were reasonably interpreted as a threat to injure, and a jury convicted the defendant of violating the FACE Act for the threatened use of force.³⁴

In *United States v. Waagner*,³⁵ a defendant was convicted on multiple FACE Act counts and other federal offenses for threatening employees of reproductive healthcare clinics with a biological agent. The defendant first posted a death threat on the extremist “Army of God” website, stating that he was going to escalate the war on abortionists. The defendant subsequently sent hundreds of letters to abortion clinics throughout the United States that contained an unidentified powder purported to be anthrax, which were sent on the heels of other letters he mailed to Florida, Washington, D.C., and New Jersey that contained anthrax spores. Although none of the letters sent to the clinics actually contained anthrax, the associated costs were enormous, including disruptions to clinic operations, the use of expansive law enforcement resources, and meticulous decontamination procedures for clinic staff, patients, mail carriers, etc.

Private parties have also filed civil FACE Act suits for the threatened use of force. For example, in *Planned Parenthood of*

³⁰ *Elonis v. United States*, 575 U.S. 723, 739–41 (2015).

³¹ For a detailed discussion about prosecuting “true threats,” including suggestions on how to question subjects to elicit useful statements regarding their intent and other federal statutes that can be charged, please see Kathryn E. Gilbert, *Prosecuting Hate Crime Threats*, 70 DOJ J. FED. L. & PRAC. no. 2, 2022, at 239.

³² 212 F.3d 1067 (8th Cir. 2000).

³³ *Id.* at 1072.

³⁴ *Id.*

³⁵ No. 02-cr-582 (E.D. Pa July 22, 2005).

Columbia/Willamette, Inc. v. American Coalition of Life Activists, which was a FACE Act case brought by Planned Parenthood under 18 U.S.C. § 248(c)(1)(A), the defendants were found to have violated the statute by targeting abortion physicians with threats on a series of posters.³⁶ The posters identified the physicians by photographs, names, and addresses, along with the captions “the Deadly Dozen,” “GUILTY,” and the “Nuremberg Files.”³⁷ The posters were circulated in the wake of a series of “WANTED” and “unWANTED” posters that identified other doctors who performed abortions before they were murdered.³⁸ After an appeal, the Ninth Circuit held that, although the posters did not contain an explicit threat on their face, with context, the defendants were aware that the posters would be interpreted as a serious threat of death or bodily harm by the named abortion physicians.³⁹

Physical obstruction

To prove a defendant used a physical obstruction in violation of the FACE Act, the evidence must establish that the obstructive act rendered passage to or from the facility “unreasonably difficult.”⁴⁰ Courts have taken a broad view of what constitutes a physical obstruction, and the prosecution need not prove that the obstruction rendered access to the facility impassable.⁴¹ Nevertheless, it is important to note that the statute does require some type of physical obstruction.⁴² Merely making the approach to health facilities “unpleasant and even emotionally difficult does not” constitute physical obstruction.⁴³

Courts have held that the following acts of physical obstruction are sufficient to establish a FACE Act violation: obstructing or slowing access to driveways or parking lots; standing in front of pedestrians as they try to enter a clinic; blocking clinic doors by standing directly in

³⁶ 290 F.3d 1058, 1062 (9th Cir. 2002).

³⁷ *Id.*

³⁸ *Id.* at 1063–64.

³⁹ *Id.* at 1079.

⁴⁰ *United States v. Mahoney*, 247 F.3d 279, 284 (D.C. Cir. 2001).

⁴¹ *Id.*

⁴² *See State of New York v. Operation Rescue Nat’l*, 273 F.3d 184, 195 (2d. Cir. 2001) (criticizing “constructive obstruction” as “an uncertain and potentially slippery concept”).

⁴³ *Id.* at 195–196.

front of them; blocking patients inside automobiles by standing close to car doors; and participating in a demonstration so close to a clinic entrance that patients are compelled to use an alternate entrance.⁴⁴

In *United States v. Soderna*, the Department of Justice convicted six defendants under the FACE Act for creating a physical obstruction by blocking the entrances to a Milwaukee abortion clinic using a disabled automobile, a large drum filled with concrete and steel, and their bodies.⁴⁵ Although the defendants' conduct was nonviolent, it violated the FACE Act because it physically impeded entry to the facility.⁴⁶

Similarly, in *United States v. Dugan*, a defendant was convicted of violating the FACE Act for kneeling in front of a New York City Planned Parenthood clinic door, blocking the entrance, and refusing to move.⁴⁷ Coupled with statements that the defendant made indicating that it was his duty to "interven[e] against the slaughter of our unborn citizens," the evidence established that his blockade was to prevent access to the facility.⁴⁸

"Providers" of reproductive health services

Victims of section 248(a)(1) violations are persons seeking to obtain or provide reproductive health services. As it pertains to "providers," courts have taken a broad view of who "provides" reproductive health services, and prosecutable incidents of violence under the FACE Act are not limited to conduct directed toward medical personnel. Clinic employees, patient escorts, and volunteers are "providers" of reproductive health services for purposes of the FACE Act.⁴⁹

For example, in *United States v. Dinwiddie*, the defendant was charged with FACE Act offenses that included a count for assaulting a maintenance supervisor at a Planned Parenthood clinic with an electric bullhorn.⁵⁰ The defendant argued she did not violate the FACE Act because the victim was not "providing reproductive health services."⁵¹ In holding that the FACE Act applied to all workers at the

⁴⁴ *Id.*; *Mahoney*, 247 F.3d at 284.

⁴⁵ 82 F.3d 1370, 1373 (7th Cir. 1996).

⁴⁶ *Id.* at 1375.

⁴⁷ 450 Fed. App'x 20, 22 (2d Cir. 2011) (not precedential).

⁴⁸ *Id.*

⁴⁹ *See, e.g., United States v. Hill*, 893 F. Supp. 1034 (N.D. Fla. 1994); *Greenhut v. Hand*, 996 F. Supp. 372 (D.N.J. 1998).

⁵⁰ 76 F.3d at 926.

⁵¹ *Id.*

clinic, the Eighth Circuit reasoned that physicians who perform abortions could not do so without the facility or its workers and that “workers at an abortion clinic . . . ‘provide[]’ reproductive-health services” much like “[a] building that houses an abortion clinic ‘provides’ reproductive-health services.”⁵²

2. Section 248(a)(3)

In addition to criminalizing conduct directed toward any individuals exercising their reproductive healthcare rights, the FACE Act also prohibits damaging or destroying the property of a facility because it provides reproductive health services.⁵³

Under 18 U.S.C. § 248(a)(3), the prosecution must prove that the defendant (1) intentionally damaged or destroyed the property of a facility and (2) did so knowingly and because the facility was being used to provide reproductive health services. To make the criminal violation a felony, the prosecution must also prove (1) that the defendant’s acts resulted in bodily injury or death or (2) that the defendant had a prior conviction under section 248(a).

Criminal prosecutions brought by the Department of Justice under this provision of the FACE Act have included damage or destruction caused by fire or arson. Since 2019, the Department has brought several FACE Act cases charging defendants with causing damage to reproductive healthcare clinics for throwing Molotov cocktails at the facilities.⁵⁴

Additionally, the Department of Justice has charged acts of damage or destruction for spray-painted graffiti when the damage was motivated by the clinic’s status as a reproductive healthcare facility. In *United States v. Miller* and *United States v. Reynolds*,⁵⁵ two

⁵² *Id.*

⁵³ 18 U.S.C. § 248(a)(3).

⁵⁴ *See, e.g.*, *United States v. Kaster*, No. 19-cr-4031 (W.D. Mo. Sept. 9, 2020); *United States v. Gullick*, No. 21-cr-01 (D. Del. Feb. 11, 2021); *United States v. Little*, No. 21-cr-40 (M.D. Fla. Oct. 13, 2021). A Molotov cocktail is “[a] makeshift incendiary device for throwing by hand, consisting of a bottle or other breakable container filled with flammable liquid and with a piece of cloth, etc., as a fuse.” *Molotov*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/120965?redirectedFrom=molotov+cocktail#eid36199995> (last visited Feb. 4, 2022).

⁵⁵ *United States v. Miller*, No. 16-cr-520 (D. Md. Mar. 6, 2017); *United States v. Reynolds*, No. 16-cr-490 (D. Md. Feb. 24, 2017).

defendants were convicted of FACE Act violations for vandalizing the exterior walls of a Baltimore, Maryland, area abortion clinic with spray-painted graffiti that included the words “baby killer,” “kill baby here,” and “kill dead babby [sic].”

FACE Act convictions have been obtained even when the vandalism didn’t explicitly express an anti-abortion intent. In *United States v. Curell*,⁵⁶ the defendant broke into a Bloomington, Indiana, Planned Parenthood clinic and caused extensive damage to the clinic’s medical and computer equipment. In that case, the defendant admitted that his goal was to shut the clinic down because it provided abortion services.

The FACE Act applies regardless of what viewpoint any damage or vandalism expresses, so long as the damage or destruction caused was because the facility provides reproductive health services.⁵⁷ Subsection 248(a)(3) applies, for example, to a subject who spray paints the words “keep abortion legal” on a facility providing counseling regarding abortion alternatives, as well as to a subject who spray paints the words “death camp” on a facility providing abortion services.⁵⁸ The cost of repair or loss caused by the damage or destruction has no bearing on the penalties.

C. Penalties

1. Criminal

The circumstances of the charged conduct determine whether a criminal FACE Act charge is a misdemeanor or a felony offense. For the first offense, the available penalty is imprisonment for not more than one year, fines up to \$10,000, or both.⁵⁹ For a second offense, imprisonment of no more than three years, a fine up to \$25,000, or both may be imposed.⁶⁰ If bodily injury occurs, the statute provides for imprisonment for not more than 10 years, fines up to \$25,000, or both; and if death results, the FACE Act provides for imprisonment for any

⁵⁶ No. 14-cr-98 (S.D. Ind. July 2, 2014).

⁵⁷ 18 U.S.C. § 248(a)(3).

⁵⁸ *Riely v. Reno*, 860 F. Supp. 693, 702 (D. Ariz. 1994).

⁵⁹ 18 U.S.C. § 248(b) (For an offense involving exclusively a nonviolent physical obstruction, the available penalty is up to six months’ imprisonment for the first offense and up to 18 months’ imprisonment for any subsequent offense).

⁶⁰ *Id.*

term of years or for life.⁶¹ It is important for federal prosecutors to note that the FACE Act does not provide enhanced penalties in cases involving the use or threatened use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, although, as discussed below, there are other federal statutes that may address such conduct, depending on the underlying facts.

2. Civil

In a civil action brought by a private person involved in providing or obtaining services at a reproductive healthcare facility, the court has the authority to award appropriate relief, including temporary, preliminary, or permanent injunctive relief, and compensatory and punitive damages, as well as reasonable court fees.⁶² A private plaintiff may also elect to recover statutory damages in the amount of \$5,000 per statutory violation.⁶³ In civil actions brought by the Department of Justice or state attorneys general, the court may similarly award relief and, additionally, assess civil penalties of up to “\$10,000 for a nonviolent physical obstruction and \$15,000 for other first violations” and up to “\$15,000 for a nonviolent physical obstruction and \$25,000 for any other subsequent violation” to vindicate the public interest.⁶⁴ For example, in 2017, the Department of Justice filed a civil FACE Act suit against 10 defendants for creating a physical obstruction at a Louisville, Kentucky, area abortion clinic.⁶⁵ The case was settled, and the court awarded the United States monetary damages and temporary injunctive relief.⁶⁶ The defendants were ordered to pay damages up to \$3000, to not enter a “buffer zone” around the clinic, and to not enter the facility for up to three years.⁶⁷

⁶¹ *Id.*

⁶² 18 U.S.C. § 248(c)(1)(B).

⁶³ *Id.*

⁶⁴ 18 U.S.C. §§ 248(c)(2)(B), (3)(B).

⁶⁵ *United States v. Thomas*, No. 17-cv-432 (W.D. Ky Sept. 27, 2021).

⁶⁶ *Id.*

⁶⁷ *Id.*

IV. Other applicable federal statutes

As mentioned above, conduct that constitutes a FACE Act offense may also be chargeable under other federal statutes. Unless bodily injury or death results, the FACE Act does not have felony penalties for (1) offenses involving the use of fire, firearms, dangerous weapons, explosives, or incendiary devices or (2) offenses involving kidnapping, attempted kidnapping, or attempting to kill. Because other applicable statutes may provide stronger penalties, prosecutors should consider charging other federal offenses in addition to FACE Act violations. Some of those other applicable federal offenses include the following:

A. Conspiracy against rights—18 U.S.C. § 241

FACE Act violations are often planned and coordinated offenses that involve more than one subject. In those situations, the investigations may reveal evidence that support conspiracy charges in addition to the underlying offense. Although criminal conspiracy offenses are usually charged under 18 U.S.C. § 371, a conspiracy to commit a FACE Act offense should be charged under 18 U.S.C. § 241—conspiracy against rights. Section 241 makes it a crime for:

two or more persons . . . to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same.⁶⁸

The right to seek civil redress under 18 U.S.C. § 248(c) establishes the right to seek, obtain, and provide reproductive health care without interference by force, threat of force, or physical obstruction.

Therefore, an agreement by two or more persons to injure, oppress, threaten, or intimidate anyone who is seeking, obtaining, or providing reproductive health services is a cognizable violation of section 241.

There are three advantages to charging a section 241 conspiracy when the evidence supports it. First, unlike a section 371 conspiracy, a section 241 conspiracy conviction is always a felony, even when the underlying substantive violation would be a misdemeanor. Second, section 241 violations are punishable by up to 10 years' imprisonment; or up to life or the death penalty, if certain aggravators apply. And

⁶⁸ 18 U.S.C. § 241.

third, under section 241, the government is not required to prove an overt act or substantial step in furtherance of the agreement.⁶⁹

B. Damage or destruction of property used in interstate commerce—18 U.S.C. § 844(i)

Section 844(i) establishes a federal criminal offense for an individual who “maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce.” Since many reproductive health services clinics serve patients from other states and order medical supplies from other states, clinics may constitute property used in interstate commerce. Charges under section 844(i) frequently have been brought in cases of arson or bombing of reproductive health services clinics. The charge carries a penalty of 5 to 20 years, absent physical injury, and 7 to 40 years if injury results. When death results from a violation of this statute, the offender is eligible for the federal death penalty. For example, in *United States v. Grady*,⁷⁰ the defendant was convicted of arson and a FACE Act offense for setting fire to a Planned Parenthood facility by breaking a clinic window and igniting gasoline he poured onto the floor. The defendant was sentenced to 11 years’ imprisonment.⁷¹

C. Use of fire or explosive in the commission of a felony offense—18 U.S.C. § 844(h)

Section 844(h) provides an enhanced penalty for any federal felony offense that was committed with the use of fire or an explosive. The first offense requires a 10-year sentence. A second offense under this subsection imposes a mandatory minimum 20-year sentence. These sentences must be consecutive to any other sentence and are not probation eligible. This would apply in cases involving an underlying felony FACE Act violation (that is, one that resulted in bodily injury, death, or when the defendant had a prior FACE Act conviction and committed a subsequent FACE Act offense using fire or an explosive).

⁶⁹ See, e.g., *United States v. Colvin*, 353 F.3d 569, 576 (7th Cir. 2003) (en banc) (stating that a “§ 241 does not specify an overt-act requirement”); *United States v. Whitney*, 229 F.3d 1296, 1301 (10th Cir. 2000) (same).

⁷⁰ No. 12-cr-77 (E.D. Wis. Feb. 20, 2013).

⁷¹ Judgment, *Grady*, No. 12-cr-77, ECF No. 81.

D. Use of the mail or commerce for bomb or fire threats—18 U.S.C. § 844(e)

Section 844(e) proscribes the use of the U.S. Mail, phone, or other instrument of interstate commerce to communicate a threat or to convey false information concerning a threat. Cases brought under section 844(e) often involve bomb or arson threats. This offense carries a penalty of up to 10 years' imprisonment. For example, in *United States v. Allen*, the defendant was charged with violating the FACE Act and section 844(e) for making a telephonic bomb threat to a Jacksonville, Florida, area abortion clinic.⁷² The defendant pleaded guilty to the federal offenses and was sentenced to 24 months' imprisonment.⁷³

E. Threats made by use of interstate or foreign commerce—18 U.S.C. §§ 875, 876

These statutes prohibit the use of interstate or foreign commerce—generally telephones, computers, and the mail—to convey threats to kidnap or injure another. Increased penalties apply when the threat is made with the intent to extort a “thing of value.”⁷⁴ Many FACE Act prosecutions involving threatening interstate communications have charged section 875(c) in cases involving the use of the internet or a telephone as a means to communicate the “true threat.” Violations of these statutes are felony offenses. In *United States v. Terry*,⁷⁵ the defendant was convicted of FACE Act and section 875(c) offenses for directing a threatening social media post at a St. Louis, Missouri, area Planned Parenthood clinic.⁷⁶ The defendant was sentenced to six months' imprisonment.⁷⁷

⁷² Criminal Complaint, *United States v. Allen*, No. 19-cr-186 (M.D. Fl. Sept. 23, 2019), ECF No. 1.

⁷³ The defendant pled guilty to an 18 U.S.C. § 1001 offense and a FACE Act offense. *See* Plea Agreement, *Allen*, No. 19-cr-186, ECF No. 50.

⁷⁴ 18 U.S.C. §§ 875, 876.

⁷⁵ No. 19-cr-279 (E.D. Mo. Aug. 23, 2019).

⁷⁶ Judgment, *Terry*, No. 19-cr-279, ECF No. 26.

⁷⁷ *Id.*

F. Use of weapons of mass destruction— 18 U.S.C. § 2332a

Section 2332a prohibits the use, threatened use, attempted use, or conspired use of a weapon of mass destruction, which includes toxins, biological agents, or vectors, against any person within the United States that affects interstate commerce. The term “weapon of mass destruction” is defined under this section and includes any destructive device defined under 18 U.S.C. § 921; any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors; any weapon involving a disease organism; or any weapon that is designed to release radiation or radioactivity at a level dangerous to human life. Use or threatened use of a chemical weapon is covered under 18 U.S.C. § 229. The offender is eligible to be sentenced to any term of years, to life, or in certain cases, to death. For example, in *United States v. Evans*,⁷⁸ the defendant pleaded guilty to violating section 2332a for planting an explosive device, which did not detonate, at an Austin, Texas, area abortion clinic. The defendant was sentenced to 480 months’ imprisonment.⁷⁹

V. Collaboration with federal partners

A. The National Task Force on Violence Against Reproductive Health Care Providers

The National Task Force on Violence Against Reproductive Health Care Providers coordinates the efforts of federal authorities in the investigation and prosecution of acts of anti-abortion violence. The Task Force is led by the Assistant Attorney General for the Civil Rights Division and is comprised of prosecutors from the Civil Rights and Criminal Divisions, as well as investigators and analysts from the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and the U.S. Postal Inspection Service. The U.S. Marshall’s Service is also a key member and contributor to the Task Force, particularly because it is tasked with providing site security and protection services for reproductive healthcare providers.

In addition to federal coordination, the Task Force serves as a clearinghouse for information relating to acts of violence against

⁷⁸ No. 07-cr-98 (W.D. Tex. Oct. 25, 2007).

⁷⁹ *Judgment, Evans*, No. 07-cr-98, ECF No. 38.

abortion providers and collects and coordinates data identifying national trends related to clinic violence. The Task Force also coordinates with many non-governmental organizations (NGOs) that provide security and other services to reproductive healthcare facilities. These NGOs relationships are important to foster particularly because NGOs often provide real-time notification of potential FACE Act incidents, which can be of significant investigative importance.

The Task Force's other functions include assisting U.S. Attorneys' local working groups involved in the investigation and prosecution of clinic violence, including providing training and outreach to federal, state, and local law enforcement partners. The Task Force also provides technical assistance and outreach to local clinic personnel, designed to enhance the safety and protection of providers. Lastly, the Task Force supports federal civil investigation and litigation of abortion-related violence.

B. Required consultation with the Civil Rights Division's Criminal Section

After the 2009 murder of Dr. George Tiller—a Kansas reproductive healthcare physician—by an anti-abortion extremist, the Department of Justice sought to further coordinate the federal response to the investigation and prosecution of incidents of violence targeting reproductive healthcare providers. Today, U.S. Attorneys must

consult with the Criminal Section before making any charging decisions regarding abortion-related violations in their districts.⁸⁰ Also, if there are any legal challenges to the FACE Act, the Criminal Section must be consulted.⁸¹

⁸⁰ Many criminal activities that affect reproductive healthcare providers constitute crimes at the federal, state, and local level. Many jurisdictions have local ordinances for trespassing, disorderly conduct, and stalking, for example, that may overlap with coverage of that same conduct by the FACE Act. Because FACE Act violations implicate strong federal interests, charging decisions usually weigh in favor of federal prosecution.

⁸¹ Unlike other criminal civil rights statutes, a FACE Act prosecution does not require prior certification by the U.S. Attorney General or a designee. *See, e.g.*, 18 U.S.C. §§ 245, 247, 249.

VI. Resource

U.S. Attorneys and the Civil Rights Division share responsibility for enforcing the FACE Act. Cooperation between the two communities will ensure a vigorous enforcement program. Additional information about the Civil Rights Division and its criminal and civil FACE Act enforcement programs can be found on its website.⁸² Information about the National Task Force on Violence Against Reproductive Health Care Providers and law enforcement point-of-contact information can be found on justice.gov.⁸³

About the Author

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⁸² *Civil Rights Division*, DEP'T OF JUST., <https://www.justice.gov/crt> (last visited Feb. 4, 2022).

⁸³ *National Task Force on Violence Against Reproductive Health Care Providers*, DEP'T OF JUST., <https://www.justice.gov/crt/national-task-force-violence-against-reproductive-health-care-providers> (updated Sept. 17, 2021).

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Developing a Successful Human Trafficking Practice

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I. Introduction

Building a successful human trafficking practice poses unique challenges for both prosecutors and law enforcement. Human trafficking cases are hard to investigate for many reasons: The victims often have significant needs and may be reticent to work with law enforcement; it can be difficult to develop corroborating evidence of what is often a hidden crime; and shepherding a case from indictment to conviction is labor and time intensive. The rewards of the work, however, are immense, and with time and persistence, districts can develop a successful human trafficking practice.

Collaboration is key to building an effective and sustainable anti-trafficking practice. Consider, for example, a sex trafficking case that begins with a referral from a local non-governmental organization (NGO). That referral would not be possible in the absence of a trusting relationship between the NGO and law enforcement. Now imagine the tip leads to the identification of several victims, each of whom has experienced significant trauma. To effectively interview the victims, you need experienced and dedicated federal agents or task force officers who are trained in trauma-informed interviewing techniques. If the case is charged and proceeds to trial, victim-witness personnel at the U.S. Attorney's Office (USAO) will be critical to supporting the victims through the process. In short, developing a successful human trafficking practice requires building a multi-disciplinary team of individuals who trust one another, are trained to work with human trafficking survivors, and are dedicated to the work.

In this article, we discuss best practices that Human Trafficking Coordinators can use to develop the partnerships that are necessary to identifying traffickers and developing strong prosecutions. First, we provide advice for building relationships with law enforcement

partners and for encouraging them to dedicate resources to investigate labor and sex trafficking. Second, we share tips for establishing and maintaining partnerships with NGOs and service providers. Next, we discuss effective tactics for building a labor trafficking practice. Finally, we offer suggestions for creating internal USAO protocols for investigating and prosecuting human trafficking cases. Our hope is that you will come away with a roadmap for building a robust and sustainable anti-trafficking practice in your district.

II. Developing partnerships with Law enforcement

A. Developing partnerships with investigators

An essential first step in developing or enhancing a trafficking practice is to establish and prioritize strong relationships with federal and local law enforcement partners. We are both extremely fortunate to work with talented, dedicated agents who are committed to utilizing a victim-centered and trauma-informed approach to investigating trafficking, identifying victims, and holding traffickers accountable. At their best, these partnerships have resulted in successful prosecutions and, more importantly, victims who are able to remove themselves from their trafficking situations and build the lives of their choosing. Yet, we are also aware that these partnerships with law enforcement are not built in a day—they require outreach, communication, and consistency on the part of prosecutors. Below are some of the best practices that we have developed in collaborating with law enforcement.

The first step in developing strong law enforcement partnerships is to identify which agencies in your district are already engaged, at whatever level, in trafficking work. Many Federal Bureau of Investigation (FBI) field offices have a Child Exploitation and Human Trafficking Task Force (CEHTTF) to recover victims and investigate traffickers at the state and federal level. While some field offices have more robust task forces than others, most CEHTTFs include both FBI agents and state or local detectives designated by their respective agencies to investigate trafficking work. In many field offices, Homeland Security Investigations (HSI) agents are also involved in the task force. If your USAO is not already actively involved with the CEHTTF, your Human Trafficking Coordinator, in consultation with

district management, should contact the lead agent and articulate the office's interest in joining the task force.

If the FBI does not have a CEHTTF in your district (or if it is not actively investigating cases), the USAO should consider taking on a leadership role by regularly convening members of local and federal agencies that investigate trafficking. Some districts have successfully utilized other FBI or HSI task forces aimed at combating violent crimes (such as a Safe Streets task force) to include human trafficking crimes within their scope.

Actively participating in a law enforcement task force or working group is key to developing prosecutable federal cases. First, you will have the opportunity to meet and engage with the agents and detectives in your district who are working trafficking cases. This will ensure that you are aware of all open trafficking cases with potential federal implications. You also will be able to guide investigations at their outset, thus ensuring that investigators are fully apprised of relevant trafficking laws and avoiding potential evidentiary or discovery pitfalls. Finally, you will be able to model the importance of taking a victim-centered and trauma-approach approach to investigating trafficking cases.

Once you have engaged with the investigators in your district who are already doing trafficking work, you should identify other law enforcement agencies who should be members of the task force or working group. Although many local agencies may not have the capacity to designate a full-time trafficking investigator, let alone a full unit, it is still worthwhile to reach out to these agencies. In our experience, it has been time well spent to organize and conduct local trainings in the various geographical regions in our districts. These trainings provide an opportunity to educate patrol officers and investigators about federal human trafficking laws, trafficking indicators, and local resources for victims. Most importantly, this outreach will advise local agencies who may not participate in the task force of the USAO's strong interest in trafficking cases. It will also provide a point of contact if an investigator needs technical assistance or has a case referral.

We suggest that the task force or working group meet at least monthly—ideally in person but, if necessary, video conferencing works too. To encourage consistent attendance, make sure these meetings are useful and provide investigators with concrete information they can use in building investigations. Potential agenda items include

updates on current investigations and information on individuals identified by law enforcement as potential traffickers who may be traveling to different jurisdictions within your district. We have also found it useful to include systems-based victim advocates and representatives from social services agencies that serve trafficked youth (such as Child Protective Services) to provide updates on the status of victims and to ensure that they are receiving access to services. Finally, these meetings can give Assistant U.S. Attorneys (AUSAs) the opportunity to provide updates on prosecutions, changes in the law, and “lessons learned” from trials.

Some districts have an Anti-Trafficking Coordination Team (ACTeam). An ACTeam is an interagency initiative between the Department of Justice (Department), the Department of Homeland Security, and the Department of Labor (DOL). Districts with a formal ACTeam designation receive advanced human trafficking training for all ACTeam members and ongoing support from subject matter experts at the Department, HSI, and the DOL. The goal of an ACTeam is to enhance collaboration among USAOs and federal investigative agencies. An ACTeam should include members from the USAO, FBI, HSI, and DOL (both the Office of Inspector General and Wage & Hour Division) and should meet at least monthly to discuss current investigations. In districts following an ACTeam model, most human trafficking cases will be investigated jointly by FBI and HSI, and for forced labor cases, by DOL as well. If you are looking to replicate the ACTeam model, consider adding investigators from the State Department’s Diplomatic Security Service, which can be an invaluable resource when you are seeking information regarding foreign national victims or overseas activity. ACTeams are effective because they allow a small, core group from federal law enforcement to develop cases collaboratively. An ACTeam is not a formal task force and does not include NGO members. As discussed below in section III, however, ACTeams should still work closely with NGOs.

Finally, it is important for prosecutors to keep in mind that investigating trafficking cases is extremely challenging, emotionally intense work. Developing a prosecutable case requires a significant amount of time and energy on the part of investigators to establish trust and rapport with the victim and gather corroborating evidence. Even the most dedicated investigators may face pressures from their management to eschew trafficking work in favor of less complex crimes that require less time and resources to investigate. You can

help support your law enforcement partners by ensuring that their agencies are aware of the importance the USAO places on trafficking work and the appreciation we have for an investigator's work. (You may want to consult your U.S. Attorney or Criminal Chief about communicating these sentiments to their chiefs or agency heads or writing a letter of recognition where appropriate.) You should also look out for potential burnout and encourage the investigators you work with to prioritize their own mental health. Making sure that investigators are supported and recognized for their good work is key to effectively prosecuting trafficking cases.

B. Developing partnerships with local prosecutors

Another key component to building a robust trafficking practice is to develop and maintain collaborative relationships with local prosecutors in your districts. In our experience, local prosecutors' offices run the gamut in their approach to trafficking cases. In many offices, particularly those in larger population centers, one or more deputy prosecuting attorneys (DPAs) are designated to handle trafficking cases and have significant expertise in building and trying such cases. In other offices, local prosecutors rarely receive trafficking referrals from their law enforcement partners and, accordingly, have less subject area expertise. It is essential to communicate and collaborate with your local counterparts to ensure that you are aware of, and effectively respond to, all potential federal trafficking cases in your district.

The first step to developing collaborative relationships with local prosecutors' offices is regular outreach. At the outset, we recommend contacting every local prosecutor's office in your district to find out which, if any, attorneys handle trafficking cases. (FBI and HSI agents located in these counties may also be helpful in determining the appropriate point of contact in each office.) You can then reach out to the DPA in a particular office to introduce yourself and learn about that office's approach to handling trafficking cases. For offices that have less experience prosecuting trafficking cases, you can offer the USAO and your federal law enforcement partners as a source of technical assistance, as well as a place to refer potential trafficking cases. You can also offer to conduct trainings for any interested DPAs or their local law enforcement partners who are interested in developing expertise in prosecuting trafficking cases. These trainings can be a good opportunity to make connections with the DPAs and local law enforcement officers who are most likely to encounter

potential trafficking cases. They can also educate and encourage DPAs to be aware of potential trafficking indicators present in certain crimes, such as intimate partner violence, prostitution/pandering offenses, and drug offenses, that may not immediately present as trafficking.

Once you have identified and contacted your counterpart in each local prosecutor's office, it is important to continue to communicate and build on those relationships. DPAs who handle trafficking cases should be invited to participate in any law enforcement task force that covers their region. This will make it more likely that all relevant parties regularly communicate about general trafficking issues and particular cases. It will also make it more likely that DPAs will reach out to you and your federal law enforcement partners regarding any trafficking cases with potential federal implications.

One issue that sometimes arises between even the most collaborative partnerships is the question of jurisdiction—should a case be prosecuted federally or locally? When both the USAO and a local prosecutor's office are interested in prosecuting a particular case, it is of utmost importance for you and your DPA counterpart to have a frank discussion about which jurisdiction is most appropriate for a particular case. Some of the questions to consider include the following:

- *Does the federal government have a strong interest in prosecuting a particular case?*

Some factors that weigh in favor of a federal prosecution include: criminal conduct across state lines or internationally; a defendant with a serious or violent criminal history; a defendant with prior federal convictions; multiple victims; minor victims; significant physical or sexual violence against the victim; the presence of other federal crimes, such as firearms, immigration, or drug trafficking crimes; or the importance to the community of having a particular defendant on federal supervised release at the conclusion of his sentence.

- *Is this a case that will benefit from federal investigative resources?*

Some cases are complex and may necessitate interviewing out-of-state or foreign witnesses or supporting multiple victims throughout the trial process. In such cases, the ability to access federal resources may result in stronger evidence and yield a more just outcome.

- *Is it in the best interest of the victims to proceed in a particular jurisdiction?*

Sometimes, a victim-centered approach weighs in favor of federal prosecution. For example, some states require all witnesses in a criminal case, including trafficking victims, to participate in a pretrial defense interview in which the defendant is present. Such pretrial interviews can cause significant trauma to a victim, particularly given that the defendant will be present, and the defense lawyer is not constrained by the presence of a judge. In other states, local prosecutors may not have the ability to use protective orders to shield certain discovery materials—such as reports documenting victim interviews—from the public. The ability to avoid such situations would weigh in favor of proceeding federally.

- *Is this a case that would benefit from the ability to utilize a federal grand jury during the investigation?*

In some cases, it may make sense to have a witness testify in front of the grand jury to protect against potential witness tampering or intimidation by the trafficker. Similarly, utilizing federal grand jury subpoenas may make it easier to obtain and develop evidence that will corroborate the victim's statements.

- *If the potential federal charges include a lengthy mandatory minimum sentence, is the defendant's conduct commensurate with the mandatory sentence?*

In many cases, a defendant's conduct and prior criminal history will warrant a lengthy sentence. In other cases, however, the conduct and circumstances of a particular

defendant may weigh in favor of proceeding in a court that will not be statutorily obligated to impose a sentence of ten or fifteen years.

Even if you and your DPA counterpart ultimately decide that a particular trafficking case is more appropriate for state prosecution, the USAO can still support the case and effectuate a just outcome. One such method of support involves advising state defense counsel, via letter, that the USAO is interested in the resolution of the case. These “federal interest letters,” which are usually sent after the local prosecutor’s office has made a plea offer to the defendant, advise the defense counsel that the USAO is interested in adopting the case if the defendant declines to resolve the case via guilty plea and sets out the potential federal penalties. In our experience, the notification of significant federal exposure is often sufficient to encourage a defendant to resolve the state case in advance of trial. Such efforts not only have the benefit of fostering collaboration with your DPA counterparts, but they also help ensure that defendants are held accountable for their crimes while avoiding retraumatizing victims through trial.

Local prosecutors’ offices are crucial allies in identifying and prosecuting all forms of human trafficking in your district. Time spent conducting outreach and collaborating with your DPA counterparts is essential not only to ensuring that you are notified of all potential federal trafficking matters in your district, but also to properly leveraging state and federal resources to hold traffickers accountable for their conduct.

III. Developing partnerships with NGOs and service providers

While building a human trafficking practice presents many challenges, perhaps the biggest is ensuring that systems are in place to support victims throughout the life of a case. Such support is often critical to a successful investigation and prosecution. In addition, AUSAs and investigators should always strive to be victim centered and trauma informed in their human trafficking work, meaning that the priority should be the safety and stability of victims.

In this section, we discuss the importance of cross-sector collaboration in ensuring that victims receive adequate support and in building a strong trafficking practice. We also provide specific guidance for building relationships of trust with NGOs and service

providers, for maintaining those relationships, and for carefully defining each entity's role and responsibilities.

A. The importance of cross-sector collaboration

It is no secret that human trafficking survivors typically have complex needs. Investigators often encounter human trafficking victims who have no stable housing and have not eaten a proper meal in days or weeks. In some cases, they may be foreign nationals who have no legal status in the United States. Beyond these immediate needs, many have experienced significant trauma and suffer from mental health problems and/or substance use disorders. They may have criminal records and negative views of the criminal justice system.

AUSAs and investigators are not well-equipped to manage these needs. While victim advocates and specialists attached to a USAO or to an investigative agency can provide critical supports and services, they too should not be tasked with providing ongoing case management to human trafficking survivors. Instead, that work should fall to those trained to do it—NGOs and other community-based service providers who have the necessary training and expertise. Cross-sector collaboration best serves the needs of victims and allows prosecutors and agents to focus on building successful cases.

B. Building relationships

You should begin by identifying the community-based services that have the capacity and desire to serve trafficking victims. In many communities, sexual assault and domestic violence organizations will assist sex trafficking survivors. Similarly, organizations that work with immigrants may be equipped to provide services to foreign nationals who have been trafficked for their labor. When victims are minors, you will want to partner with child advocacy centers. Some districts are fortunate to have NGOs that focus specifically on aiding trafficking victims. It is also important to build relationships with survivor-led organizations and to regularly solicit survivor input.

Once you identify possible agency partners, you should conduct outreach to those groups. In communities where there are existing human trafficking working groups or task forces, AUSAs and investigators should make sure they consistently attend the meetings of such groups. In other districts, the USAO may have to take the lead in convening meetings to discuss joint anti-trafficking efforts. In all

cases, members of law enforcement should play an integral, or even the primary, role in these outreach efforts. Typically, it will be agents and officers who are contacting service providers for help with a victim. These requests for assistance may come on the weekends or in the middle of the night. In addition, as discussed further below, service providers can be an important source of referrals to investigators they trust. It is thus critical that agents and task force officers have trusting relationships with their NGO partners.

Outreach to NGOs can take many forms. Some districts have had success offering information sessions about the legal system. Meetings of this sort allow prosecutors, agents, and victim advocates to explain the details of their work and answer questions about what a victim might experience. Many service providers, particularly those assisting sexual assault and domestic violence survivors, may have more experience with the state legal system. AUSAs should consider hosting joint information sessions with state prosecutors, which allow all parties to discuss the differences in the two systems and the ways in which those differences may impact victims.

You can also partner with NGOs to provide training about human trafficking to other professional groups or community organizations who might encounter human trafficking victims, such as emergency department nurses and physicians, hotel and motel owners, hairdressers, or school officials. By collaborating in this way, USAOs demonstrate their commitment to anti-trafficking work while also building relationships with service providers. When the District of Maine was developing its human trafficking practice, the USAO's Victim-Witness Coordinator (VWC) convened regular brown bag lunches at which interested stakeholders—service providers, agents, and prosecutors—could discuss pressing issues in their work. Similarly, the Human Trafficking Coordinator for the Western District of Washington conducts quarterly public information sessions, in conjunction with a human trafficking detective and a victim service provider, to provide a multi-sector perspective on trafficking to interested community members. Finally, do not underestimate the value of reaching out to the director of a local NGO or service organization. That sort of personal outreach, whether coming from an AUSA, VWC, or federal agent, can go a long way toward creating a foundation for a strong and collaborative relationship.

C. Maintaining relationships

As noted above, to build a successful human trafficking practice, AUSAs and investigators must establish good working relationships with NGOs. Equally important is ensuring that the relationships remain productive over time. Ongoing, consistent communication is key. Circumstances on the ground may change. For example, new housing or substance abuse treatment resources may become available. Other treatment programs may close. Staying abreast of these changes allows AUSAs, agents, and victim advocates to refer victims effectively and quickly to the appropriate services.

To maintain productive relationships with NGOs, AUSAs and investigators should do three things: be transparent, show up when they say they will, and do what they say they will do.

First, transparency. AUSAs and investigators on the one hand, and service providers on the other, often bring different perspectives. There are bound to be points of disagreement about how certain issues or cases should be handled. We can overcome most areas of friction, however, by being straightforward about what we are doing and why we are doing it. You should be available to answer questions or should explain why, when for investigative, privacy, or legal reasons, you cannot do so. Victim specialists at a USAO, who are often particularly adept at explaining legal processes to laypeople, can play an important role in facilitating these conversations.

Second, show up. AUSAs and agents juggle many demands, and making time for meetings is always a challenge. Nonetheless, when an NGO partner convenes a meeting, or the local human trafficking working group plans a videoconference, someone from federal law enforcement should attend. Even more important, when a victim advocate or social worker calls with a possible referral or asks an agent to come meet with a victim, the agent needs to respond promptly.

Third, follow through. If an agent says she is going to meet with a victim and case manager at a certain time and place, she needs to be there. If a victim specialist with the FBI offers to make a referral to an out-of-state program for human trafficking survivors, he needs to promptly make the referral. By following through, we show both victims and service providers that we are trustworthy and striving to work in the victim's best interests. For this reason, AUSAs and investigators should be careful to set realistic expectations and never over promise.

D. Defining roles and responsibilities

To work together effectively, NGO providers and members of law enforcement must clearly define their respective roles and responsibilities during an investigation and prosecution. Districts with a formal task force structure may want to consider agreeing to memoranda of understanding (MOUs) with their NGO partners. In the absence of a formal MOU, all parties should have frequent discussions about protocols and best practices. Topics you should consider include information sharing, operational integrity, and methods of communication.

While AUSAs and service providers can and should work closely to support victims throughout an investigation and prosecution, there are limits to the amount of information that can be shared. NGO providers often are subject to confidentiality requirements and may not be able to share information about a client absent the client's consent. Similarly, AUSAs and agents cannot share with service providers the details of an investigation and must always be mindful of grand jury secrecy requirements. You should not view these boundaries as hindrances to a productive working relationship, but rather as useful guardrails that protect the integrity of the investigation and the privacy of the victim.

Despite certain limits on information sharing, you should strive to include service providers early and often in your work. For example, if you expect to encounter victims during a law enforcement operation, you should consider alerting providers in advance that their assistance may be needed. While it may be necessary to be vague about the details, investigators can provide basic information, such as the number of victims they expect to encounter, whether any of them are children, whether any language interpreters will be needed, etc. This enables providers to have ready appropriate supports and services.

Often, providers work with clients who are considering making a report to law enforcement but are nervous about doing so. In this instance, a provider may be able to pose a hypothetical to an agent, who can, in turn, provide some general guidance about how federal law enforcement might respond to the scenario. This enables the potential victim to make a more informed choice about making disclosures to law enforcement.

In cases where agents unexpectedly encounter victims, agents should quickly reach out to the appropriate NGO partners for

assistance. Agents should always focus first on the immediate safety and stability of the victim. Often, this means doing only a very brief, basic facts interview with the victim and then stepping aside to let the NGO do its case management work. Once the victim is stabilized, agents can do a more fulsome interview.

You should also consider whether and how to include outside victim advocates or case managers in meetings and interviews with victims. Victims should be advised that, if a service provider attends a substantive meeting with law enforcement, that provider risks being called as a witness to statements the victim made in the meeting. The safest route may be to invite the advocate or provider to participate in discussions regarding logistics, the legal process, and the progress of the case and then ask the person to step outside during the substantive portion of the interview. You should also inform providers that any written communications they make to AUSAs or agents, or other information they provide about the victim, may be discoverable.

Finally, keep lines of communication open. It may be necessary to revisit protocols over time. After a law enforcement operation, or at the conclusion of a prosecution, all involved parties should conduct a debrief to discuss what went well and what should be changed going forward.

We cannot emphasize enough the importance of establishing and nurturing these relationships with NGOs. Human trafficking investigations and prosecutions can be lengthy and place logistical and emotional burdens on victims who have already experienced significant trauma. While AUSAs, investigators, and victim/witness staff within a USAO should always strive to support and develop a rapport with victims, victims must have resources outside of federal law enforcement.

IV. Building a strong labor trafficking practice

According to the Human Trafficking Institute's 2020 Federal Human Trafficking Report, which examined data related to human trafficking prosecutions filed in U.S. federal courts, federal prosecutors filed more sex trafficking prosecutions in 2020 than all forced labor prosecutions filed in the two decades since the enactment

of the Trafficking Victims Protection Act (TVPA).¹ Indeed, in the past 20 years, 93% of all prosecutions brought under the TVPA were sex trafficking cases, while only seven percent were forced labor cases.² Although there is no reliable data to assist in determining the overall prevalence of human trafficking (sex or labor), it stands to reason that the number of forced labor prosecutions filed in federal court do not adequately account for the actual instances of forced labor occurring in the United States.

Even the most experienced AUSAs have faced challenges identifying and developing prosecutable forced labor cases. There are many reasons for this. First, both the media and many law enforcement agencies tend to define “human trafficking” as only encompassing sex trafficking. This focus on building sex trafficking investigations can inadvertently lead to a myopic worldview in which law enforcement either overly prioritizes sex trafficking or fails to recognize or seek out potential labor trafficking. Second, unlike sex trafficking, forced labor often occurs in legitimate business venues and may not immediately present as criminal. Furthermore, many of the industries in which forced labor is prevalent are migratory or lack regular intersection between law enforcement and victims, making it more difficult for law enforcement to follow up on tips or engage in proactive investigations. Finally, many unique barriers exist that dissuade forced labor victims from reporting to law enforcement. These barriers include a fear of law enforcement or immigration consequences; language barriers or unfamiliarity with U.S. laws; self-blame; and isolation and monitoring by their traffickers.

Despite these inherent obstacles, USAOs have a responsibility to work with their law enforcement partners to identify and respond to potential labor trafficking; to hold traffickers accountable; and to ensure that victims of forced labor have access to all services, including immigration benefits, to which they are entitled. Furthermore, while it can be challenging to build a chargeable forced labor case, these cases are also some of the most righteous ones that are brought by the Department. Below are some strategies that

¹ HUM. TRAFFICKING INST., 2020 FEDERAL HUMAN TRAFFICKING REPORT, EXECUTIVE SUMMARY at 2 [hereinafter HUMAN TRAFFICKING REPORT]; Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat 1464.

² HUMAN TRAFFICKING REPORT, *supra* note 1, at 2.

several offices have successfully adopted to develop prosecutable labor trafficking cases.

A. Conduct labor trafficking “in-reach” to law enforcement partners

As noted above, many law enforcement agencies rarely identify or investigate forced labor cases. The reasons for this include both finite resources and a lack of understanding of federal labor trafficking laws. AUSAs can combat these obstacles by engaging in regular, proactive “in-reach” with law enforcement partners and emphasizing the importance of prioritizing labor trafficking investigations.

The first targets of this in-reach should be the law enforcement agents and officers in your district who typically investigate sex trafficking crimes. As an initial matter, these agents are likely to be a receptive audience because they are familiar with the unique dynamics of investigating trafficking cases and recognize the importance of utilizing a victim-centered and trauma-informed approach. They are also likely to have a pre-existing relationship with the USAO and know to reach out to you or another AUSA point of contact in the event they become aware of a potential labor trafficking case. It is also worthwhile to directly reach out to other specialized units within various local and federal agencies that may intersect with labor trafficking, such as those units that handle assault, domestic violence, immigration, visa fraud, or organized crime.

AUSAs should provide comprehensive training to these investigators to ensure that they are familiar with the federal laws addressing forced labor and related crimes. This training should also include information about common labor trafficking indicators; the methods of force, harm, abuse of law, and coercion traffickers use to obtain or provide a victim’s labor; the differences between labor exploitation and labor trafficking; and the unique vulnerabilities and fears experienced by many forced labor victims. As set forth in greater detail below, AUSAs should also inform investigators about the various methods of immigration relief to which labor trafficking victims may be entitled and ensure that they are aware of the processes for obtaining Continued Presence status or a T visa.

AUSAs should also make clear to law enforcement partners that prosecuting forced labor cases is a Department priority and that USAOs are willing to expend time and resources to develop these cases. As a practical matter, most successful labor trafficking

prosecutions require significant collaboration between the AUSA and investigators. As noted above, many labor trafficking crimes occur outside the public view with few witnesses. To bring a chargeable forced labor case, AUSAs should expect to work directly with their law enforcement partners to strategize about the best methods for gathering information, identifying corroborating evidence, and ensuring the safety and stability of the victim. Because many labor trafficking victims involve foreign national victims for whom English might not be a first language, USAOs and investigators also should work together to overcome cultural barriers and ensure language access. This can include developing relationships with trusted interpreters and utilizing the assistance of systems-based victim advocates with cultural competencies.

In addition to providing additional training and encouragement to those agents already familiar with trafficking, AUSAs should also actively engage with, and educate, the broader law enforcement community about labor trafficking. Although you likely will not have the opportunity to provide the in-depth training described above to a large law enforcement audience, it nevertheless is worthwhile to reach out to agencies and training academies in your district about the possibility of providing more general, agency-wide information about forced labor. This can include additional roll call training videos and online webinars, such as those provided by the International Association of Chiefs of Police, or a labor trafficking module at the basic training academy.³

B. Work with law enforcement to conduct threat assessments

As noted above, many labor trafficking victims do not self-report. Accordingly, it is likely necessary to proactively investigate where labor trafficking might be occurring in your district. Once you have identified those law enforcement partners with the capacity for, and interest in, investigating forced labor cases, you should spend time considering which industries in your district could potentially involve forced labor.

³ See, e.g. *The Crime of Human Trafficking: Roll-Call Training Video*, INT'L ASS'N OF CHIEFS OF POLICE, <https://www.theiacp.org/resources/video/the-crime-of-human-trafficking-roll-call-training-video> (last visited Feb. 7, 2022).

These threat assessments are unique to the economic and business makeup of your district. Some industries that might be ripe for labor trafficking include those with a harsh work environment, onerous hours, and worker isolation, as well as those that utilize vulnerable individuals who might be particularly susceptible to exploitation, such as undocumented migrants, visa overstays, guestworkers, or individuals with disabilities or drug dependencies. After identifying these potential threats, work with your law enforcement partners to develop strategies to investigate whether labor trafficking is in fact occurring in any of these industries. These investigative methods may include field work, such as surveillance, trash pulls, traffic stops, undercover operations, witness interviews, or digital investigations, such as monitoring a business's public online activity or social media communications.

C. Conduct strategic outreach to other governmental partners

Law enforcement is not your only governmental ally in the quest to identify potential labor trafficking crimes. Indeed, there are many government agencies whose employees regularly come into contact, often unknowingly, with victims of forced labor. These agencies include other first responders, such as fire departments or emergency medical technicians; code enforcement divisions who ensure code compliance in residential and business settings; regulatory agencies, such as the Occupational Safety and Health Administration and the Equal Employment Opportunity Commission; and the state and federal labor departments.

First, identify other governmental partners in your district whose missions intersect, even tangentially, with labor trafficking. If you are already working with these governmental partners on sex trafficking cases, request time during one of your meetings to specifically discuss the USAO's interest in identifying forced labor. If you have not yet established a relationship with these agencies, identify a potential point of contact and ask to set up an introductory meeting. During these meetings, explain the USAO's role in addressing labor trafficking and provide a basic outline of federal human trafficking laws, potential indicators, and criminal remedies. If you are working with a multi-sector anti-trafficking task force, invite the point of contact to participate in meetings and develop a collaborative agency response to forced labor. Providing these government agencies with a

law enforcement point of contact makes it much more likely that they will be willing to share intelligence and tips relating to potential trafficking within your jurisdiction.

D. Conduct strategic community outreach

Similarly, AUSAs should identify other non-governmental organizations in their communities whose work may intersect with vulnerable populations that are at high risk for exploitation. An important first step is to reach out to those partner NGOs, such as those referenced in section III above, and communicate your office's interest in, and commitment to, prosecuting forced labor cases. Even if those NGO partners do not specialize in serving forced labor victims or foreign nationals, offer to provide training on forced labor. If these NGO partners are well-versed on labor trafficking indicators, they are more likely to recognize that a client may be a victim of forced labor and refer the matter to law enforcement if the victim is willing to do so.

In addition to conducting outreach to NGOs who are already partnering with law enforcement, AUSAs should identify other entities that are likely to encounter forced labor victims. Such stakeholders include faith-based communities; organizations that provide medical care, such as emergency rooms, urgent care facilities, or family planning clinics; direct service providers, such as homeless shelters, food banks, or interpreter communities; and legal organizations, such as public defenders and immigration or family law practitioners. You should offer to provide training to these organizations and encourage them to contact the USAO or federal law enforcement if they become aware of a suspected trafficking situation.

E. Utilize immigration relief tools to provide victim stability and enhance participation in the criminal justice process

In our experience, many forced labor victims are reluctant to report or cooperate with law enforcement due to fears of adverse immigration consequences. AUSAs can help alleviate these obstacles to victim cooperation by being well-versed in the forms of immigration relief available to victims of a severe form of human trafficking and educating both law enforcement and NGO partners about these potential forms of relief.

Upon learning that an individual may be a victim of human trafficking, AUSAs should work with their law enforcement partners to determine if the individual is eligible for Continued Presence (CP), which is a temporary immigration status provided to trafficking victims who are sponsored by any federal, state, or local law enforcement agency with authority to investigate or prosecute trafficking.⁴ In our respective practices, it has been extremely helpful to bring CP paperwork to an initial interview with an individual who may be undocumented. If the individual credibly appears to be a victim and further investigation is likely, we can then immediately initiate the application process. Upon approval, the CP designation allows a cooperative victim to access federal and state benefits and obtain work authorization. The status is granted for two years and can be renewed during the pendency of the investigation. In our experience, initiating the CP process early in the investigation is essential to the stabilization process and makes it much more likely that a victim will feel comfortable cooperating.

Because the CP designation is not permanent, it is important for AUSAs to refer trafficking victims with immigration concerns to NGO partners in the legal community who can advise them of other forms of immigration relief, such as T visas.⁵ To be eligible for T visas, applicants must be victims of a severe form of trafficking; be in the United States because of the trafficking; respond to “reasonable requests for collaboration” with the investigation; and establish that they would experience hardship upon return to their home country. A T visa allows a victim to reside in the United States for four years, with the possibility of adjustment to permanent resident status at the end of three years. Although the victim is responsible for applying for T visa status, law enforcement can and should assist where appropriate by certifying the victim’s cooperation.⁶

⁴ See 28 C.F.R. § 1100.35 (Authority to permit continued presence in the United States for victims of severe forms of trafficking in persons).

⁵ See *Victims of Human Trafficking: T Nonimmigrant Status*, DEPT OF HOMELAND SECURITY, <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-human-trafficking-t-nonimmigrant-status> (updated Oct. 20, 2021).

⁶ AUSAs might find this two-page brochure, prepared by HSI’s Center for Countering Human Trafficking, which outlines important facts regarding Continued Presence and T visas helpful in navigating potential tools for immigration relief: CTR. FOR COUNTERING HUMAN TRAFFICKING, THE FACTS

V. U.S. Attorney's Office protocols

Each USAO has a different structure. Nonetheless, every district seeking to enhance its human trafficking practice should consider developing protocols for case referrals, intake, and handling. This section is not intended to provide substantive advice about how to successfully investigate a human trafficking case but rather to provide suggestions for structuring your district's practice.

A. Tips and referrals

To generate tips and referrals, you should conduct targeted outreach based on circumstances in your districts. State and local law enforcement and NGOs are critical sources of referrals. Additional referral sources may include immigration attorneys, migrant worker advocates, hospitals, juvenile corrections officers, and motel owners. It is particularly important to identify the industries in a district in which workers are most likely to be exploited (discussed in more detail in section IV, *supra*).

Each USAO should consider identifying one AUSA, ideally the Human Trafficking Coordinator, to receive referrals. That person can then pass the information along to the appropriate federal law enforcement agency. In many cases, referrals may go directly to federal law enforcement, in which case the agents should share the information with the Human Trafficking Coordinator.

The National Human Trafficking Hotline, operated by Polaris,⁷ is also an important source of tips. Each district should identify a core group to receive these tips. That group, typically, should consist of the Human Trafficking Coordinator, the VWC or another USAO victim specialist, one or two special agents from FBI, HSI, and DOL, and

ABOUT CONTINUED PRESENCE (n.d.), available at <https://www.ice.gov/doclib/human-trafficking/pdf/continued-presence.pdf>.

⁷ Polaris is a non-governmental organization that serves human trafficking victims. Since 2007, Polaris has operated the National Human Trafficking Hotline, which provides 24 hours of support seven days a week. Trained hotline advocates receive tips of suspected human trafficking and pass them along to personnel designated to receive the tips from the geographic area involved. The hotline can communicate via phone in more than 200 languages and can text, webchat, email, and webform in English and Spanish. For more information, visit *Responding to Human Trafficking*, POLARIS, <https://polarisproject.org/responding-to-human-trafficking/> (last visited Feb. 7, 2022.)

representatives from the primary NGOs in the district working with human trafficking survivors. In districts with large geographic areas, Polaris can create different distribution lists for different regions. The group receiving the tips should consider designating a point person, usually the Human Trafficking Coordinator, to track the response and follow up on these tips.

B. Intake

Ideally, the Human Trafficking Coordinator will be responsible for, or closely involved in, the intake and opening of human trafficking investigations within the USAO. In offices where the Criminal Chief or other supervisor retains formal responsibility for intake of all criminal matters, we recommend that the Human Trafficking Coordinator be made aware of, or consulted on, all new human trafficking cases to ensure that the Human Trafficking Coordinator knows the full scope of the office's human trafficking work.

C. Victim/Witness Coordinator

In our experience, a USAO's human trafficking practice is more likely to flourish if the VWC plays an integral role in all aspects of the practice. The VWC often has pre-existing relationships with NGOs in the community and can serve as a helpful bridge to outside organizations. Similarly, if the VWC is familiar with services in the area, she can be a point of contact for investigators seeking help in referring a victim for assistance.

Before the filing of formal charges, FBI or HSI victim specialists will often take the lead in making referrals and finding supports and services for victims. Even if a VWC does not have a formal role to play in the investigative stage, you should keep your VWC apprised of the status of the investigation and the likely needs of the victim(s). Once the case has been charged, the VWC will play a critical role in supporting victims throughout the prosecution. Because it takes time to develop rapport, VWCs should meet with victims early in the prosecution. You and your VWC should also establish protocols for victim communication. Victims often like to communicate directly with VWCs. You should advise victims, however, that communications with VWCs are not confidential and may be discoverable.

D. Protocols for case handling

Careful thought should be given to who will prosecute human trafficking cases as they require considerable expertise. Some offices

may wish to assign all such cases to the Human Trafficking Coordinator. Others may wish to have a small group of attorneys responsible for these cases. Office management should endeavor to assign attorneys who are committed to developing the necessary skills and eager to do this type of work.

When it appears that a case may be headed to trial, it may be necessary to add a second attorney who is not an experienced human trafficking prosecutor. The primary prosecutor should seek out this help as early as possible.

Finally, as with intake, the Human Trafficking Coordinator should be made aware of all major case decisions, even if approval or declination authority resides elsewhere.

VI. Conclusion

Prosecuting human trafficking crimes gives AUSAs the opportunity to develop unique collaborations not only with law enforcement partners, but also with NGOs and other organizations serving trafficking victims. These collaborative relationships are the key to identifying trafficking in your district, holding traffickers accountable, and ensuring that victims receive services. While the prospect of trying human trafficking cases may seem daunting, these cases are among the most rewarding you will ever prosecute and are well worth the time spent developing your practice.

About the Authors

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Recognizing and Understanding Nonviolent Coercion in Human Trafficking Cases

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I. Introduction

The term “human trafficking” often conjures images of bruised and beaten victims who are chained and restrained in squalid conditions. In reality, traffickers often use more subtle methods to compel a victim’s labor or commercial sex. Many traffickers rely on nonviolent coercion, which—while often as sinister and effective as violent coercion—leaves no visible bruises and does not require physical restraint.¹ Instead, nonviolent coercion involves targeting specific and unique vulnerabilities of victims and exploiting those vulnerabilities to compel the victim’s labor or commercial sex. Understanding nonviolent coercion, therefore, requires us to delve into the “human” aspect of human trafficking—developing a deeper understanding of the victims’ vulnerabilities, the reasons why a trafficker takes specific actions, and why those actions produce specific results.

This article aims to aid practitioners in better understanding the legal applications of the element of coercion, specifically nonviolent coercion. The article begins by exploring the origins of the Trafficking Victims Protection Act of 2000 (TVPA)² and how it defines coercion and why that definition includes nonviolent coercion. The article then analyzes the statutory definition of coercion through the lens of relevant caselaw, highlighting cases that best illustrate the types of victim vulnerabilities that traffickers often target and the means of nonviolent coercion that traffickers typically employ.

¹ See HUMAN TRAFFICKING INST., 2020 FEDERAL HUMAN TRAFFICKING REPORT 47 (2020) [hereinafter 2020 HTI REPORT].

² Trafficking Victims Protection Act Of 2000, Pub. L. No. 106-396, 114 Stat. 1464.

II. Getting to coercion: the TVPA and modern-day trafficking statutes

In 2000, Congress enacted the TVPA, which gave rise to the present-day statutes that are used to combat human trafficking, most notably forced labor and sex trafficking.³ Before the TVPA, trafficking offenses were primarily prosecuted under other chapter 77 offenses that existed at the time, such as involuntary servitude or peonage.⁴ As was the case with most of the pre-TVPA chapter 77 offenses, these statutes were crafted to reflect the type of labor proscribed by the Thirteenth Amendment to the Constitution.⁵ In other words, the applicable statutes at that time prohibited securing labor under conditions akin to Civil War-era chattel slavery, namely through physical force and restraint or abuse of the legal process.⁶ The statutes, therefore, did not contemplate other types of coercion, such as psychological and nonviolent coercion. This legal landscape gave rise to the central issue in *United States v. Kozminski*.⁷

The facts of *Kozminski* are objectively horrific. Ike and Margarethe Kozminski, aided by their son John, compelled the labor of two developmentally disabled adult men to work on their Michigan dairy farm. The victimization began one evening in 1967 as one of the victims, a man named Robert, was walking down the street. Mrs. Kozminski drove her pickup truck up to him and told him to get in. She told him that he now worked for her, and she drove him to her farm. Mr. Kozminksi picked up the other victim, Louis, a homeless man living in Ann Arbor, in a similar manner and took him to the farm. Robert and Louis had intelligence quotients of 67 and 60 respectively. “Though chronologically in their 60’s during the period in question, they viewed the world and responded to authority as would someone of 8 to 10 years.”⁸

Robert and Louis subsequently worked on the Kozminskis’ dairy farm seven days a week, up to 17 hours a day, for \$15 per week at first

³ 18 U.S.C. §§ 1589 (forced labor), 1591 (sex trafficking).

⁴ 18 U.S.C. §§ 1584 (involuntary servitude), 1581 (peonage).

⁵ See *United States v. Kozminski*, 487 U.S. 931, 945 (1988) (“By employing the constitutional language, Congress apparently was focusing on the prohibition of comparable conditions.”).

⁶ 18 U.S.C. § 1584.

⁷ 487 U.S. 931.

⁸ *Id.* at 934–35.

and, eventually, for nothing. The Kozminskis verbally and physically abused the victims for failing to do their work and instructed herdsmen employed at the farm to do the same. The Kozminskis instructed Robert and Louis not to leave the farm and thwarted any attempts by the victims to leave. On one occasion, John Kozminski threatened to institutionalize Louis if he did not do as he was told. This was particularly threatening to Louis, who had previously been institutionalized for his disability.⁹

Although the Kozminskis required the victims to live on the farm, they did not provide them with adequate nutrition, housing, clothing, or medical care. They isolated the victims by prohibiting them from speaking to others or contacting their families. The Kozminskis likewise discouraged others on the farm and visitors from interacting with the victims. The victims asked others for help in leaving the farm, and eventually, a concerned herdsman notified county officials of their condition. County officials assisted the victims in leaving the farm and placed them in an adult foster care home.¹⁰

The government charged the Kozminskis with involuntary servitude under 18 U.S.C § 1584 and related crimes. The government proceeded on a theory of psychological coercion, arguing that the victims were “psychological hostages” who the defendants had “brainwash[ed] into serving them.”¹¹ During deliberations, the jury posed a question about the definition of “involuntary” and what type of harms could be considered in determining the voluntariness of the victims’ labor. Taking a broad view of the term, the district court instructed the jury that they could consider nonviolent harms, such as psychological harms. The jury convicted the defendants.¹² After the conviction and appeal, the court of appeals affirmed the district court’s instruction, but the Supreme Court later reversed. Calling upon the legislative history of section 1584, the Supreme Court narrowly construed the statutory language as only prohibiting labor that is coerced by physical harm, threats of physical harm, and abuse of the law. The Court held that the statute, therefore, did not encompass the

⁹ *Id.* at 935.

¹⁰ *Id.*

¹¹ *Id.* at 936.

¹² *Id.* 936–37.

psychological coercion that the district court described in its instruction.¹³

The Court did not, however, preclude Congress from using the Thirteenth Amendment to proscribe labor compelled by less severe means and left it to Congress to pass laws to address such situations.¹⁴ In enacting sections 1589 and 1591, Congress directly responded to *Kozminski*'s narrow and restrictive construction of the term “involuntary servitude” under section 1584. These sections criminalize a wider range of coercive conduct used to compel labor and commercial sex, including nonphysical coercion.¹⁵ Congress intentionally drafted these statutes broadly so as to reach the “increasingly subtle methods” used to coerce individuals in continued service or labor, including threats of nonphysical types of harm.¹⁶ Since then, courts have consistently agreed that 18 U.S.C. § 1589 was enacted to “reach cases in which persons are held in a condition of servitude through nonviolent coercion as well as through physical or legal coercion,” thus expanding the forms of coercion that could be considered for forced labor beyond that covered by section 1584.¹⁷

III. Statutory overview of coercion

The TVPA thus created what are now the two most commonly employed statutes to combat human trafficking: sex trafficking and forced labor.¹⁸ Both statutes require proof of coercion to compel the labor or commercial sex, but each defines coercion slightly

¹³ *Id.* 945–50.

¹⁴ *Id.* at 944 (“Whether other conditions are so intolerable that they, too, should be deemed to be involuntary is a value judgment that we think is best left for Congress.”).

¹⁵ See 22 U.S.C. § 7101(b)(13).

¹⁶ See 22 U.S.C. §§ 7101(b)(7) (TVPA legislative finding that “traffickers often make representations to their victims that physical harm may occur to them or others should the victim escape or attempt to escape. Such representations can have the same coercive effects on victims as direct threats to inflict such harm.”), 7101(b)(13) (TVPA legislative purpose of criminalizing “servitude through nonviolent coercion,” which has the same “purpose and effect” as physical or legal coercion).

¹⁷ *Burrell v. Loungo*, 750 F. App'x 149, 160 (3d Cir. 2018) (not precedential); see also *United States v. Dann*, 652 F.3d 1160, 1169 (9th Cir. 2011).

¹⁸ 18 U.S.C. §§ 1591 (sex trafficking), 1589 (forced labor).

differently. Sex trafficking can be summarized as prohibiting the use of force, threats of force, fraud, or coercion to cause a person to engage in commercial sex.¹⁹ Section 1591 further defines “coercion” as

- (A) threats of serious harm to or physical restraint against any person;
- (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
- (C) the abuse or threatened abuse of law or the legal process.²⁰

Section 1589 prohibits knowingly providing or obtaining a person’s labor or services through one of, or any combination of, four prohibited means:

- (1) force, threats of force, physical restraint, or threats of physical restraint . . . ;
- (2) . . . serious harm or threats of serious harm . . . ;
- (3) abuse or threatened abuse of law or legal process; or
- (4) . . . any scheme, plan, or pattern intended to cause the person to believe that, if [they] did not perform such labor or services, [he, she,] or another person would suffer serious harm or physical restraint.²¹

Although the statutes are drafted differently, they proscribe essentially the same conduct. Both list prohibited means of securing labor or commercial sex: force; threats of force; physical restraint, or threats thereof; serious harm, or threats thereof; abuse of legal process; and a scheme, plan, or pattern intended to cause the victim to fear serious harm. The statutes differ somewhat in that section 1591 lists “fraud” as a prohibited means

¹⁹ See 18 U.S.C. 1591(a).

²⁰ 18 U.S.C. § 1591(e)(2).

²¹ 18 U.S.C. § 1589(a).

and section 1589 does not; but fraud could nonetheless play into the scheme, plan, or pattern prohibited by section 1589(a)(4).

The statutes then directly overlap in their shared definition of serious harm. Both sections define “serious harm” as

any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing [the requisite activity (labor or commercial sexual activity)] in order to avoid incurring that harm.”²²

This broad definition allows for an expansive view of coercion that previous statutes, like section 1584, did not and evinces Congress’ intent to “reach cases in which persons are held in a condition of servitude through nonviolent coercion.”²³ This also requires the government to prove a “hybrid” of subjective and objective aspects, which “permits the jury to consider the particular vulnerabilities of a person in the victim’s position but also requires that her acquiescence be objectively reasonable under the circumstances.”²⁴

IV. “Serious harm” deconstructed

When evaluating whether a trafficker compelled the victim’s labor, the central question is whether the trafficker intended, by her conduct, to communicate to the victim a threat of serious harm. The harm must be so frightening to the victim that a reasonable person with the same background would have engaged in the labor or commercial sex to avoid the harm. One way to unpack this hybrid of subjective and objective aspects of coercion is to distill this central question and the definition of “serious harm” into three parts: (1) the victim’s perspective; (2) the trafficker’s conduct; and (3) the serious harm the trafficker intended the victim to fear.

²² 18 U.S.C. §§ 1589(c)(2), 1591(e)(5).

²³ Trafficking Victims Protection Act of 2000 § 102, 22 U.S.C. § 7101(b)(13).

²⁴ *United States v. Purcell*, 967 F. 3d 159, 192 (2d Cir. 2020) (citing *United States v. Rivera*, 799 F. 3d 180, 186–87 (2d Cir. 2015)).

The first of the three parts—the victim’s perspective—comes from the language of the statutory definition of serious harm that instructs us to consider the trafficker’s conduct from the perspective of “a reasonable person of the same background and . . . circumstances.”²⁵ The second part—the trafficker’s conduct—comes from the statute’s use of the terms “scheme, plan, or pattern,” in the definition of “coercion,” as well as the use of the term “circumstances” in the statute’s definition of “serious harm” (that is, “under all the surrounding circumstances”), meaning the circumstances created by the trafficker.²⁶ The third part—the harm the trafficker intended the victim to fear—may be physical or nonphysical, so long as it is sufficiently serious to compel the labor or commercial sex of the victim.²⁷



A. Victim’s perspective

The victim’s perspective encompasses his “background and . . . circumstances” under the definition of “serious harm.”²⁸ Analyzing the victim’s perspective begins with assessing his vulnerabilities. “[V]ulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve.”²⁹ Traffickers often target specific victims based on the victims’ backgrounds and unique vulnerabilities. Knowing that “not all persons are of the same courage or firmness,” traffickers aim to execute their coercive schemes on individuals with vulnerabilities

²⁵ *Id.*

²⁶ *See Id.*

²⁷ *See Id.* at 193.

²⁸ 18 U.S.C. § 1589(c)(2).

²⁹ *See Kozminski*, 487 U.S. at 948 (interpreting 18 U.S.C. § 1584); *United States v. Alzanki*, 54 F.3d 994, 1000–01 (1st Cir. 1995) (“[T]he requisite compulsion under section 1584 obtains when an individual . . . intentionally causes the oppressed person reasonably to believe, given her ‘special vulnerabilities,’ that she has no alternative but to remain in involuntary service for a time”).

that can be easily exploited.³⁰ Courts have held that factors to consider when assessing a victim’s vulnerabilities include: immigration status, language isolation, drug or substance addiction, homelessness, prior physical or sexual abuse, age, cognitive impairment, education, socioeconomic status, and inequalities between the victim and defendant.³¹ These factors make certain segments of the population particularly vulnerable to traffickers’ tactics. For example, traffickers frequently target victims who do not have valid immigration status or documents.³² These victims are vulnerable because they often lack immigration status, sufficient language skills, and familiarity with the legal system. Many such victims also fear being deported and sent back to their home countries.³³ When a victim presents with such vulnerabilities, a trafficker can effectively use nonviolent

³⁰ *United States v. Bradley*, 390 F.3d 145, 152–153 (1st Cir. 2004) (upholding jury instruction in Section 1589 prosecution that the “special vulnerabilities” of the victim may be considered in determining if a victim felt compelled to work).

³¹ *United States v. Backman*, 817 F.3d 662, 671 (9th Cir. 2016) (explaining that immigrant victim’s estrangement from her home community made her especially vulnerable to coercion); *United States v. Djoumessi*, 538 F.3d 547, 552–53 (6th Cir. 2008) (construing 18 U.S.C. § 1584 and discussing the victim’s “special vulnerabilities,” including her age, status as an illegal alien, lack of contact with anyone other than the defendant); *Bradley*, 390 F. 3d 145, 152–53 (potential vulnerabilities include victim’s background, physical and mental condition, experience, education, socioeconomic status, and inequalities between victim and defendant including their relative stations in life).

³² *See United States v. Veerapol*, 312 F.3d 1128, 1132 (9th Cir. 2002) (holding that vulnerable victim sentencing enhancement was proper where the defendants exploited the victim’s vulnerabilities due to her illegal status and lack of education).

³³ *See United States v. Sung Bum Chang*, 237 F. App’x 985, 988 (5th Cir. 2007) (not precedential) (upholding vulnerable-victim sentencing enhancement for a forced labor conviction where victim came from an especially impoverished background, spoke limited English, and was in the country illegally, thus making her particularly susceptible to defendant’s fraud and coercion).

coercion—such as threats of deportation or otherwise forcing the victim to leave the country—to compel the victim’s labor.³⁴

Courts have held that cognitive impairment and developmental disabilities may also present exploitable vulnerabilities to a trafficker. *United States v. Callahan*³⁵ exemplifies the vulnerability of a developmentally delayed victim at the mercy of particularly cruel traffickers. In *Callahan*, the traffickers exploited a developmentally delayed victim and her young daughter. The adult victim had a documented history of cognitive impairment and no family she could depend on. She eventually met and moved in with the traffickers, who forced her to clean their apartment, do yardwork, care for their dogs, and run errands. At night, the defendants confined the victim and her daughter to rooms in the apartment that locked from the outside. Over two years, the victim fulfilled the defendants’ every demand. The traffickers subjected the victim and her daughter to deprived physical abuse, verbal abuse, subhuman living conditions, and malnourishment. The traffickers also threatened to have the victim’s daughter taken away from her if she did not comply with their demands. A jury convicted the defendants under section 1589, and the traffickers appealed the district court’s denial of their motion for a new trial, arguing in part that cognitive impairment is not the type of vulnerability that section 1589 was intended to address.³⁶ Relying on *Kozminski*, the Sixth Circuit Court of Appeals rejected that argument, finding that the statute applies to “those who exploit persons with other vulnerabilities, such as cognitive impairment.”³⁷

Similarly, traffickers often target victims who struggle with drug and substance use issues. Since at least 2017, there has been an increase in sex trafficking prosecutions where the trafficker employed a drug-based coercive scheme: A 2020 study conducted by the Human Trafficking Institute revealed that, out of 362 active sex prosecutions in 2020 in which at least one method of coercion was identified, 48% of the cases involved traffickers who exploited

³⁴ See *Dann*, 652 F.3d at 1172 (finding that while defendant never explicitly threatened deportation, “she did repeatedly threaten to send [the victim] back to Peru. That threat alone—to be forced to leave the country—could constitute serious harm to an immigrant”).

³⁵ 801 F.3d 606 (6th Cir. 2015).

³⁶ *Id.* at 613–18.

³⁷ *Id.* at 618.

the substance addictions of victims.³⁸ That is an increase from similar studies that the Human Trafficking Institute conducted in previous years.³⁹ In these situations, the trafficker typically uses drugs to incentivize and motivate victims to prostitute for the trafficker's benefit. Many of the victims also have additional vulnerabilities that make them more susceptible to the traffickers' scheme, such as homelessness, a lack of education, and prior sexual abuse. The trafficker is often a dealer or otherwise has access to drugs and targets victims whom he knows are either already drug addicted or are in vulnerable circumstances such that he can introduce and addict them to drugs. The trafficker then manipulates the victim's addiction by withholding drugs so the victim experiences painful withdrawal symptoms and then offers the victim a "fix" so she feels well enough to perform a commercial sex act. Wanting to end the misery of withdrawal, the victim typically agrees to perform the commercial sex act for the trafficker's benefit. The victims in these cases continue to return to the trafficker for more drugs—and the trafficker accordingly requires them to perform more commercial sex acts—because they want to avoid withdrawal symptoms. Thus, by controlling the victim's access to drugs, the trafficker also wields incredible control over the victim, creating an endless and inescapable cycle.

Many of these factors were present in *United States v. Mack*.⁴⁰ Mack was charged with multiple counts of sex trafficking, and the government alleged that the defendant relied, in part, on a drug-based coercive scheme. Mack recruited victim MB by first selling her heroin and then having sex with her in exchange for "free" heroin. After some time, Mack informed MB that the heroin was never actually free and that she had incurred a large drug debt that she had to pay off by prostituting. MB testified that she could never "catch up with her debt because she was using so much that it just was a never-ending cycle."⁴¹ Mack's second victim, MS, was not addicted to any drug before meeting Mack. Mack recruited her by initially providing her with free cocaine, getting her addicted,

³⁸ 2020 HTI REPORT, *supra* note 1, at 47.

³⁹ See, e.g. HUMAN TRAFFICKING INST., 2017 FEDERAL HUMAN TRAFFICKING REPORT 16 (2017).

⁴⁰ 808 F. 3d 1074 (6th Cir. 2015).

⁴¹ *Id.* at 1078 (cleaned up).

and then cutting back her supply to cause withdrawal symptoms. MS testified that she had seen Mack control the drugs of other victims to cause withdrawal symptoms as well. Victim SW was addicted to heroin before meeting Mack, began purchasing drugs from Mack, and eventually prostituted on his behalf to pay the “debt” that he said she owed him. SW did so to avoid painful opioid withdrawal symptoms. Mack sometimes “fronted” her drugs to alleviate these symptoms, and other times, he withheld drugs until she prostituted.⁴²

After a jury convicted Mack, he appealed, alleging that the evidence of coercion was insufficient to support the verdict. He pointed to some of the victims’ pre-existing drug addictions and argued that he therefore could not have coerced them.⁴³ The Sixth Circuit Court of Appeals found that the victims’ pre-existing addictions were merely vulnerabilities that Mack exploited, noting that Mack “used those addictions to his advantage by supplying ‘free’ drugs to the victims, which not only resulted in a . . . drug debt, but also exacerbated their addictions.”⁴⁴ The Court added that the evidence of Mack’s careful control of the victims’ access to drugs, causing them to engage in prostitution to avoid withdrawal symptoms, was sufficient for a reasonable jury to find that Mack’s “supplying and withholding” of drugs was part of a coercive scheme.⁴⁵

There are endless other types of victim vulnerabilities that traffickers exploit, and what constitutes a vulnerability for one victim might not be a vulnerability for another victim. The inquiry is both subjective and objective. It is subjective in that the fact finder must consider the victim’s background and circumstances. It is objective in that the fact finder must then assess whether a “reasonable person” of such a background and under such circumstances would so fear the defendant’s threat of serious harm that the “reasonable person” would continue to labor or perform commercial sex to avoid that harm.

⁴² *Id.* 1078–79.

⁴³ *Id.* at 1080.

⁴⁴ *Id.* at 1082.

⁴⁵ *Id.*

B. Trafficker's scheme, plan, or pattern

Just as every victim will have different vulnerabilities, a trafficker may devise a different scheme for each victim. Once a trafficker has identified a victim's vulnerabilities, he targets those vulnerabilities and employs a variety of tactics to compel the victim's labor or commercial sex. Some schemes would universally cause fear in any victim of any background, particularly those that involve the threat of physical harm. But many traffickers tailor their scheme to target the specific vulnerabilities of each victim, particularly when the scheme relies on nonviolent coercion. It is not uncommon to see a multi-victim trafficking case where the trafficker coerces each victim in a different way. Irrespective of the vulnerability that the trafficker aims to target, such a scheme typically involves two critical objectives: (1) to make the weak weaker; and (2) to communicate a threat.

Traffickers weaken victims so that they are easier to coerce and manipulate. They do this via a variety of means, such as isolating the victims from the outside world or their families, controlling the victims' movements and how often they can leave, accompanying victims wherever they go, controlling their access to personal items, restricting their food intake, requiring them to work grueling or odd hours, limiting their sleep and rest, verbally abusing and demeaning victims, and pitting them against other victims.⁴⁶ These tactics weaken the victims physically and mentally so that victims are less likely to protest or resist the trafficker's coercive scheme. By exerting control over a victim, the trafficker also strips the victim of agency so that the victim starts to feel dependent on the trafficker and is, therefore, less likely to seek help from others.⁴⁷

Traffickers also communicate threats to victims to convey the harm that they will experience if they do not comply with the trafficker's demands. Threats can be express or implied. In some cases, traffickers will deliver an express threat, such as by telling victims that, if they do not work, the trafficker will cause them to suffer harm. More frequently, however, traffickers' threats are implied and unspoken,

⁴⁶ See *United States v. Nnaji*, 447 F. App'x 558, 560 (5th Cir. 2011) (not precedential) (upholding forced labor conviction where defendants conspired to isolate and psychologically compel domestic worker).

⁴⁷ See, e.g., *Callahan*, 801 F.3d at 615 (finding coercion where defendant had complete control over when and what the victim ate and forced victim to hit her own child).

often subtly and insidiously conveying consequences of the victims' noncompliance. For example, a trafficker who physically abuses a victim is very obviously communicating a threat of serious harm, even if the trafficker does not say so. On the other hand, a trafficker faced with a victim who is reluctant to perform commercial sex acts may simply remind the victim that the trafficker knows where the victim's child lives. While subtle, this threat can be very impactful when coupled with the vulnerability the trafficker is keenly aware of—that the victim loves and wants to protect the child. A trafficker need not actually carry out the threat to convey the intended harm. The victim's belief that the trafficker is *capable* of inflicting serious harm, as evidenced by the totality of the trafficker's conduct toward the victim, is often sufficient to instill that fear in the victim such that the victim continues to perform labor or commercial sex. Indeed, many traffickers threaten to deport victims or report them to the police, but few actually report them; it is the mere notion that the trafficker *might* do so at any moment that affords the trafficker power and control over the victim.

United States v. Purcell is particularly illustrative of implied threats as part of an impactful nonviolent coercive scheme. In *Purcell*, the trafficker was convicted of multiple counts of sex trafficking. With respect to one victim, Purcell did not use physical force but, nonetheless, caused the victim to fear him through nonviolent implied threats. He did this by making the victim call her former pimp to cut off ties, instructing her to change her phone number, taking possession of her cell phone, making her leave the door open even when she used the bathroom, sleeping beside her bed, and suggesting that she could not attend a court appearance or funeral without him. He also signaled that she had no autonomy by taking her cash and earnings, directing her to get a tattoo of his name, prohibiting her from speaking to or looking at other men, and insisting that she follow his other “rules.”⁴⁸

On appeal, Purcell challenged the sufficiency of the evidence of coercion for this count. The Second Circuit held that, although Purcell did not use physical force against the victim and even behaved in a “cordial” manner, he still placed the victim in fear of serious harm, as evidenced by the victim's repeated testimony that “Purcell's behavior inspired fear in her, and that she . . . engaged in commercial

⁴⁸ *Purcell*, 967 F.3d at 168–70.

sex . . . based on that fear.”⁴⁹ The court went on to highlight the defendant’s implicitly threatening behavior: “Though the threat of harm if [the victim] failed to conform to Purcell’s expectations was never made explicit, his actions were imbued with a palpable threatening subtext. . . . Purcell’s pattern of behavior suggests that he acted with an intention to intimidate, and therefore with a knowledge that his conduct was likely to cause [the victim] to engage in commercial sex out of fear.”⁵⁰

Explicit or implicit, the trafficker’s threats do not need to be directly tied to the labor or commercial sex. That is, a trafficker does not need to specifically say to the victim: “go to work, or else.” Rather, repeated, subtle, or overt threats to the victim in various contexts create a “climate of fear” in which the victim feels there is no choice but to do as the trafficker demands—including working or prostituting—to avoid serious harm. Courts have held that the analysis of a defendant’s conduct does not turn on whether the defendant compelled specific acts of labor through specific threats, but rather whether the defendant’s conduct as a whole compelled the victim’s labor.⁵¹ Even if a trafficker’s actions are not directly tied to the victim’s specific work, they are relevant to demonstrate the trafficker’s coercive scheme to prevent the victim from leaving and, thus, compel the work and help the jury understand the nature of this coercive environment.

⁴⁹ *Id.* at 193.

⁵⁰ *Id.* at 194.

⁵¹ See *United States v. Farrell*, 563 F.3d 364, 373 (8th Cir. 2009) (analyzing whether defendants’ threatening conduct “actually compelled the [victims] to serve” in light of the evidence of “the workers’ working and living conditions, as well as their particular vulnerabilities”); *Kozminski*, 487 U.S. 931 at 953 (one method of establishing “physical or legal coercion” is through the nefarious practice of creating a climate of fear among the victims); *United States v. Booker*, 655 F.2d 562, 566 (4th Cir. 1981) (upholding defendants’ convictions under section 1584, finding that the record “readily establishes the climate of fear pervading” the agricultural labor camp); *United States v. Harris*, 701 F.2d 1095, 1100 (4th Cir. 1983) (upholding defendant’s conviction under section 1584 based on climate of fear); *Alzanki*, 54 F.3d at 999, 1004–05 (finding that depriving victim of food and medical care, while simultaneously threatening violence or deportation, contributed to the climate of fear that compelled victim into involuntary servitude).

Note that a trafficker can still create a coercive environment even if the trafficker pays the victim. It is not uncommon for traffickers to pay the victim some amount, usually less than minimum wage, or pay a victim sporadically. This uncertainty can play into traffickers' schemes because victims then continue to work with the hope that they will someday be paid all the money that the traffickers once promised, even if they do not know when. Likewise, courts have consistently upheld trafficking convictions in cases where the traffickers paid the victims.⁵²

C. What harm did the trafficker intend the victim to fear?

The central component of a trafficker's scheme is instilling in the victim a fear of serious harm. The broad definition of serious harm means that a wide range of harms can be sufficient to compel a victim's labor, including reputational harm, economic harm, physical harm, harm to others, deportation, arrest, emotional harm, and psychological harm. The "linchpin" of this analysis is not just that the defendant threatened serious harm, but that the defendant *intended* the victim to believe that serious harm would come.⁵³

That a victim initially agreed to work for the trafficker does not negate a fear of serious harm later.⁵⁴ Even when victims initially

⁵² See *Rivera*, 799 F.3d at 186 (affirming convictions despite victims' statements that the defendant paid them and they "earned more money [with the defendants] than they would at their next-best employment option."); *United States v. Sabhnani*, 599 F.3d 215, 225 (2d Cir. 2010) (affirming convictions despite the fact that the defendants had sent \$100 per month to the victim's daughter in Indonesia); *United States v. Calimlim*, 538 F.3d 706, 709 (7th Cir. 2008) (affirming conviction although the defendants paid the victim approximately \$19,000 over 19 years); *United States v. Maynes*, 880 F.3d 110, 112 (4th Cir. 2018) (affirming conviction even though at least one victim kept some of her earnings from coerced commercial sex acts); *Farrell*, 563 F.3d at 369 (affirming convictions despite the fact that the victims, for some time, earned minimal income and routinely sent earnings to family members); *Bradley*, 390 F.3d at 148–49 (affirming forced labor convictions even though the defendants paid the victims \$7 or \$8 per hour), *vacated and remanded on other grounds*, 545 U.S. 1101 (2005).

⁵³ *Dann*, 652 F. 3d at 1170.

⁵⁴ *Id.* at 1164 (affirming forced labor conviction even though victim initially agreed to illegally enter the United States and work for the defendants); *United States v. Marcus*, 628 F.3d 36, 40 n.3 (2d Cir. 2010) (holding that the

consent to some amount of work or commercial sex, traffickers can still target the victims' vulnerabilities and instill a fear of serious harm such that the victims no longer feel they have any choice but to work for, and obey, the traffickers' demands. Indeed, many victims of trafficking initially consent to the work itself but later feel compelled to work out of fear of serious harm.⁵⁵

*United States v. Dann*⁵⁶ illustrates a scenario where a trafficker intended the victim to fear a variety of nonviolent harms and exploited those fears to compel the victim's labor. Dann was a divorced mother living with her three children and her own mother. She arranged for the victim to obtain a fraudulent visa to travel from Peru to the United States to serve as a nanny and housekeeper. Upon arrival, Dann required the victim to perform housekeeping and childcare duties from 6 a.m. to 10 p.m. daily. Dann kept the victim's passport, forbade her from speaking to anyone outside the home, and did not pay her for two years. When Dann feared that the victim might leave, she begged the victim to stay, making the victim believe that, if she left, the government would take Dann's children. Dann also insulted and belittled the victim and falsely accused her of theft four times. Dann repeatedly threatened to send the victim back home, but when she finally said she wanted to return home, Dann told her

“mere fact that defendant's interaction with [the] woman whom he forced, through threats and torture, to work...may have begun as consensual . . . did not remove defendant's conduct from [the] scope of [the] forced labor statute.”); *United States v. Kaufman*, 546 F.3d 1242, 1263–64 (10th Cir. 2008) (affirming conviction because, although the victim initially told police he “enjoyed” the work, the jury could have reasonably found that, after the victim left the place of employment and spoke with a therapist, his “changed” view presented at trial (that the work was involuntary) was the “more accurate description of the work.”); *United States v. Bibbs*, 564 F.2d 1165, 1167 (5th Cir. 1977) (affirming conviction even though victims initially agreed to work for the defendants, including with limitations on their salary, their housing, and where they could purchase food and supplies); *United States v. Nichols*, No. 15 CR 756-1, 2019 WL 398775, at *11–12 (N.D. Ill. Jan. 31, 2019) (finding defendant guilty of sex trafficking because, although the victims initially voluntarily agreed to let him be their pimp, he later coerced them with physical beatings, confiscated their earnings, and monitored their behavior, compelling them to continue).

⁵⁵ 2020 HTI REPORT, *supra* note 1, at 28 (“[I]t is rare that perpetrators kidnap complete strangers off the street.”).

⁵⁶ 652 F.3d 1160.

she owed Dann \$8,000 because she only worked off \$7,000 of the \$15,000 of “expenses” Dann incurred employing the victim.⁵⁷ A jury convicted Dann of forced labor and related crimes.⁵⁸

On appeal, Dann argued that there was insufficient evidence to support three of the convictions, including forced labor. The Ninth Circuit disagreed, recognizing and highlighting the various forms of nonviolent coercion that Dann employed to compel the victim’s labor. Viewing the facts from the victim’s perspective, the court noted that Dann instilled in the victim a fear of financial harm, reputational harm, immigration harm, and harm to Dann’s children. While Dann argued that she did not *explicitly* threaten these harms, the court found that there was sufficient evidence to infer that Dann, through her words and actions, nonetheless intended the victim to fear those harms.⁵⁹

Other courts have also held that a wide range of harms satisfy this element. As in *Dann*, fear of economic harm, deportation, reputational harm, and harm to others can be sufficient to compel a victim’s labor.⁶⁰ As noted in the discussion of *Mack* above, fear of withdrawal sickness also constitutes fear of psychological harm that is sufficiently serious to compel a victim’s labor or commercial sex.⁶¹ Furthermore, courts have upheld convictions when traffickers coerced victims’ labor through emotional manipulation and preying on the victims’ fear of abandonment. One court found that a defendant’s manipulation of a romantic relationship rose to the level of coercion under section 1591.⁶²

⁵⁷ *Id.* at 1162–66.

⁵⁸ *Id.* at 1168.

⁵⁹ *Id.* at 1170–73.

⁶⁰ *Calimlim*, 538 F. 3d at 712, 714 (finding threat to stop paying victim’s poor family members constituted serious harm); *Sabhnani*, 599 F.3d at 226 (upholding forced labor conviction where defendant subjected the victim to beatings and threatened the lives of the victim’s children).

⁶¹ *Mack*, 808 F. 3d at 1080; *see also* *United States v. Fields*, No. 13-cr-198, 2013 WL 5278499, at *1 (M.D. Fla. 2013) (finding that fear of withdrawal symptoms constitutes psychological harm sufficiently serious to compel a victim to continue performing commercial sex acts).

⁶² *See United States v. Bell*, 761 F.3d 900, 908 (8th Cir. 2014) (finding that defendant “adopted a pattern of convincing [his victims] that he loved them and would take care of them at the exclusion of all others. He convinced them that they would be financially secure, emotionally secure, and loved.”).

Because the inquiry is partly subjective, a multitude of possible harms could be sufficiently serious to compel a specific victim's labor. The question is not whether the harm is sufficiently serious to compel a reasonable juror or judge to continue performing labor or services. Instead, the question is whether the harm is sufficiently serious to compel a reasonable person with the same specific background as the victim, under the same specific circumstances, to continue performing labor or services. Accordingly, while a defendant's conduct might not of placed a person similarly situated to the juror or judge in fear, it may nonetheless be reasonable that the same conduct placed the victim in fear. For this reason, a wide range of harms could be serious enough under the statutory language and the case-specific facts to compel a person to continue to labor or engage in commercial sex. The list of potential harms is, therefore, just as long as the list of potential victim vulnerabilities—practically endless.

D. Conclusion

The totality of these three categories will answer the question central to any trafficking matter: did the trafficker, through his conduct, intend to convey a threat of harm that was sufficiently serious to compel a specific victim with a specific background and under specific circumstances to continue working? In other words, when you can identify (1) a victim's vulnerabilities, (2) the trafficker's conduct that weakened the victim and communicated a threat, and (3) the type of harm the trafficker intended the victim to fear, then you can resolve the question of whether and how the trafficker coerced the victim's work.

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Securing Restitution for Victims of Human Trafficking¹

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I. Introduction

Advocating for mandatory restitution for victims² is a core component of the Department of Justice's (Department) victim-centered approach to combating human trafficking.³ The Trafficking Victims Protection Act (TVPA)⁴ mandates that a defendant convicted of a crime under Title 18, chapter 77, pay restitution to the victim.⁵ The most important aspect of this restitution is that it is mandatory.⁶

¹ This article updates and expands on the Department's victim-centered approach to seeking restitution presented in William E. Nolan, *Mandatory Restitution: Complying with the Trafficking Victims Protection Act*, 65 U.S. ATT'Y'S BULLETIN, Nov. 2017, at 95.

² This article uses the terms "victim" and "survivor" to refer to individuals who were trafficked. Both terms are important and have different implications when used in the context of victim advocacy and service provision. For example, the term "victim" has legal implications within the criminal justice process and refers to an individual who suffered harm as a result of criminal conduct. The laws that give individuals particular rights and legal standing within the criminal justice system use the term "victim." Federal law enforcement uses the term "victim" in its professional capacity. "Survivor" is a term used widely in service providing organizations to recognize the strength and courage it takes to overcome victimization. In this article, both terms are used in the context of victim identification, outreach, and service strategies.

³ DEPT OF JUST. NATIONAL STRATEGY TO COMBAT HUMAN TRAFFICKING (2022).

⁴ Trafficking Victims Protection Act of 2000, Pub. L. No. 196-386, 114 Stat. 1464.

⁵ See 18 U.S.C. § 1593(a) ("the court *shall* order restitution for any offense under this chapter") (emphasis added).

⁶ See, e.g., *United States v. Culp*, 608 F. App'x 390, 392 (6th Cir. 2015) (not precedential) ("Courts must award restitution to victims of sex trafficking."); *United States v. Robinson*, 508 F. App'x 867, 870 (11th Cir. 2013) (not precedential) ("based on the plain language of § 1593, an award of restitution was mandatory"); *In re Sealed Case*, 702 F.3d 59, 66 (D.C. Cir. 2012)

While a restitution order may seem like a far-off concern after conviction and not as urgent as preparing for a sentencing hearing, a trafficking victim has the right to “full and timely restitution as provided by law,”⁷ and the money associated with a restitution order can be life changing. Restitution can be a catalyst to independence and a critical factor in a survivor’s efforts to avoid re-victimization. It can fund much-needed transportation, which opens doors to employment, school, and childcare; help pay for housing, food, and tuition; and allow the victim to access counseling for trauma or addiction.⁸

II. What is recoverable under 18 U.S.C. § 1593?

Section 1593(b) provides “[t]he order of restitution. . . shall direct the defendant to pay the victim. . . the full amount of the victim’s losses” and defines those losses as the sum of two distinct types of compensation: (1) personal losses, and (2) the economic value of the victim’s services, which are described as *unjust enrichment* or *opportunity loss*.⁹ The court has “no discretion to award restitution for anything less than the full amount of the victim’s losses.”¹⁰

(“Because the appellant pleaded guilty to 18 U.S.C. § 1591, the district court was required to impose restitution under 18 U.S.C. § 1593”).

⁷ 18 U.S.C. § 3771(a)(6).

⁸ *See, e.g.*, United States v. Rockett, 752 F. App’x 448, 450 (9th Cir. 2018) (not precedential) (educational and occupational expenses); United States v. Speights, 712 F. App’x 423, 427 (5th Cir. 2018) (not precedential) (social support and transportation costs); United States v. Romero-Medrano, No. 14-CR-050, 2017 WL 5177647, at *3 (S.D. Tex. Nov. 8, 2017), *aff’d*, 899 F.3d 356 (5th Cir. 2018) (education and vocational losses); United States v. Laraneta, 700 F.3d 983, 990 (7th Cir. 2012) (stating that section 1593 might also cover costs related to schooling, including uniforms and snacks; alternative learning programs to help child victims gain education that was lost; and the costs guardians of child victims incurred by providing care).

⁹ 18 U.S.C. § 1593(b)(1),(3); *see also* United States v. Cortes-Castro, 511 F. App’x 942, 947 (11th Cir. 2013) (not precedential); *In re Sealed Case*, 702 F.3d at 66.

¹⁰ United States v. Whitley, 354 F. Supp. 3d 930, 933 (N.D. Ill. 2019) (quoting United States v. Desnoyers, 708 F.3d 378, 389 (2d Cir. 2013); United States v. Walker, 353 F.3d 130, 131 (2d Cir. 2003)) (internal quotations omitted).

A. Personal losses

The first part of the definition, which calculates the victim's personal losses, has the same meaning as the phrase "the full amount of the victim's losses" in 18 U.S.C. § 2259(c)(2),¹¹ the restitution statute applicable to victims of child sexual exploitation. That statute defines such losses to include "any costs incurred by the victim for" medical services (physical, psychiatric, or psychological); rehabilitation (physical and occupational therapy); necessary transportation, temporary housing, and childcare expenses; lost income; attorneys' fees and other legal costs incurred; and any other losses suffered by the victim "as a proximate result" of the offense.¹²

"Section 2259(c)(2) is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse."¹³ Similarly, section 1593 "sets no numeric limits on the amount of restitution that can be ordered"¹⁴ because Congress gave district courts "broad discretion in ordering restitution."¹⁵ Accordingly, a prosecutor's restitution request should include the potential lifetime of rehabilitation and healing.¹⁶ Even a short period of exploitation in commercial sex can cause significant psychological harm to the victim.¹⁷

¹¹ 18 U.S.C. § 1593(b)(3).

¹² 18 U.S.C. § 2259(c)(2)(A)–(F).

¹³ *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999).

¹⁴ *See Whitley*, 354 F. Supp. 3d at 933–34 (quoting *United States v. Dillard*, 891 F.3d 151, 158 (4th Cir. 2018)).

¹⁵ *Id.* (quoting *Laney*, 189 F.3d at 966); *see, e.g., In re Sealed Case*, 702 F.3d at 62 (ordering restitution of up to \$800,000 per victim based off of a psychologist's mental health assessment for each victim).

¹⁶ *See Whitley*, 354 F. Supp. 3d at 938 (emphasizing that courts must consider the lifetime of rehabilitation and healing when calculating restitution); *see also United States v. Pearson*, 570 F.3d 480, 486 (2d Cir. 2009) ("Three of our sister circuits have considered this language and concluded that § 2259 authorizes compensation for future counseling expenses.") (citing *United States v. Doe*, 488 F.3d 1154, 1159–60 (9th Cir. 2007); *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001); *United States v. Julian*, 242 F.3d 1245, 1247 (10th Cir. 2001)).

¹⁷ *See In re Sealed Case*, 702 F.3d at 67 (rejecting the defendant's argument that the victims he trafficked for a shorter time should not receive similar restitution for PTSD as the victims he trafficked for longer).

In addition to recovering for prospective costs, victims are also entitled to recover relevant costs incurred before commencement of the case and during the investigation and prosecution, even if the victims did not pay for the services themselves.¹⁸ Despite this broad discretion, however, pain and suffering are not recoverable;¹⁹ only quantifiable pecuniary losses are recoverable.²⁰

How personal losses are calculated differs among the circuits. For instance, the D.C. Circuit recognized a “sufficient causation” standard in *In re Sealed Case*, when child sex-trafficking victims experienced prior psychological harm in addition to the trauma of the offenses.²¹ The defendant argued he should not pay for a lifetime of treatment because he did not cause all of the harm.²² The D.C. Circuit rejected the defendant’s argument, citing to expert testimony stating that the defendant was the “most significant cause” of the victims’ harm and that they would have needed identical treatment even if they had had “no previous trauma.”²³ The D.C. Circuit held that a defendant does not have to be the sole cause of harm: “entire liability for harm may be imposed . . . if two or more causes produce [a] single result and either one cause would be sufficient alone to produce [the] result or each cause is essential to [the] harm.”²⁴

Conversely, in *United States v. Anthony (Anthony I)*, the Tenth Circuit rejected the D.C. Circuit’s sufficient causation standard and held that strict but-for causation is required for restitution under the TVPA.²⁵ The Tenth Circuit stated, “the obligation to make victims

¹⁸ See *Whitley*, 354 F. Supp. 3d at 935–37 (finding the defendant owed restitution for a minor victim’s past health treatment, participation in residential programs, and expenses incurred during her involvement in the investigation and prosecution of the case, even if she had not paid for those expenses).

¹⁹ See *United States v. Fu Sheng Kuo*, 620 F.3d 1158, 1166 (9th Cir. 2010) (stating victims could sue civilly to recover damages for pain and suffering).

²⁰ See *United States v. Toure*, 965 F.3d 393, 395 (5th Cir. 2020); *United States v. Saddler*, 789 F. App’x 952, 952 (4th Cir. 2019) (not precedential).

²¹ *In re Sealed Case*, 702 F.3d at 66.

²² See *id.* at 66.

²³ See *id.* at 67.

²⁴ See *id.* at 66 (citing *United States v. Monzel*, 641 F.3d 528, 538 (D.C. Cir. 2011)).

²⁵ See *United States v. Anthony (Anthony I)*, 942 F.3d 955, 964–68 (10th Cir. 2019).

whole does not obviate the need to limit restitution to losses resulting from the defendant's convicted conduct."²⁶ The Tenth Circuit held that the TVPA limits restitution to losses that the defendant "directly and proximately caused," especially where it is possible to attribute the amount of a trafficking victim's losses to the trafficker.²⁷ While the prosecution need not calculate restitution with "exact precision," it must set an amount that is "rooted in a calculation of actual loss."²⁸ Thus, according to the Tenth Circuit, the prosecution must disaggregate the losses that the defendant caused through the offenses charged as distinct from other causes of harm, such as a victim's prior abuse.²⁹ In a second appeal, the Tenth Circuit affirmed

²⁶ *Id.* at 968.

²⁷ See 18 U.S.C. §§ 1593, 3663A; *Anthony I*, 942 F.3d at 965–66 (citing 18 U.S.C. § 2259, the Mandatory Restitution for Sexual Exploitation of Children Act, and the Supreme Court's interpretation of it in *Paroline v. United States*, 572 U.S. 434, 458 (2014) that the MVRA imposes a proximate-cause limitation but not a "strict but-for causation" test). *Cf. Paroline*, 572 U.S. at 450 (finding child pornography possession a "special context" where the court could not attribute a victim's losses to a single possessor when there were multiple, unconnected possessors).

²⁸ *Anthony I*, 942 F.3d at 967, 970 (quoting *United States v. Ferdman*, 779 F.3d 1129, 1133 (10th Cir. 2015)) (finding that the prosecution did not attempt to disaggregate the victim's harms from the defendant from a past trafficker because it reused the same victim impact statement and same expert witness calculation for the harm caused by the second trafficker); see *Fu Sheng Kuo*, 620 F.3d at 1164 (emphasizing that restitution under section 3663 is limited to the victim's actual losses).

²⁹ See, e.g., *Anthony I*, 942 F.3d at 959 (vacating and remanding on the issue of restitution "to ensure that no restitution is awarded for the harms [the victim] suffered during the earlier sex-trafficking offense"). On remand, the United States filed an amended second motion for restitution. See *United States v. Anthony*, No. cr-15-126-c, 2020 WL 6468166, at *5 (W.D. Okla. 2020). And while the government's expert report asserted the victim would need identical treatment for defendant's offenses even if she had never sustained prior traumas, the district court found the report failed to explain what led to the expert's conclusion. See *id.* at *5. The district court consequently found that the government failed to prove defendant's acts justified the requested restitution. See *id.* Even though restitution is mandatory under section 1593, the district court concluded that no restitution could be calculated in accordance with the Tenth Circuit's instructions, and it denied the government's amended second motion for restitution. See *id.* The government subsequently appealed, and the Tenth

the lower court's decision not to order any restitution on remand and reiterated its holding from *Anthony I* that the harms the defendant caused must be disaggregated from the harms other defendants caused or from harms the trafficking victim suffered over the course of his or her life.³⁰

The approach in the Tenth Circuit has not been followed by other courts at the time of this publication. One criticism of the *Anthony* opinions is that such an attempt to disaggregate the expenses associated with mental health treatment caused by the defendant's infliction of trauma, from the expenses associated with treatment for other traumatic events in the victim's life, is a near impossible task from a social science perspective. And because of that, the practical application of the *Anthony* "but-for" approach leaves open the very real possibility that the trafficker who victimized vulnerable persons with pre-existing trauma (a common scenario in human trafficking cases) cannot be ordered to pay restitution for the treatment associated with the trauma that he or she inflicted upon that victim, as that victim was already in a position of needing mental health treatment from prior traumatic experiences.

At present, prosecutors within the Tenth Circuit are working with the Human Trafficking Prosecution Unit (HTPU), the Criminal Division's Child Exploitation and Obscenities Section ("CEOS"), and psychology experts to determine how to comply with the Tenth Circuit's holding to meet the burden in presenting evidence to support a restitution order. We encourage prosecutors within that jurisdiction to continue reaching out to HTPU and CEOS for support on these matters.

B. Economic value of victim's services

The second part of the "the full amount of the victim's losses" compensates the victim for the value of the services the defendant caused the victim to perform, or to restore to the survivor the profits and wages that the trafficker stole during the commission of the

Circuit affirmed. See *United States v. Anthony* (Anthony II), 22 F.4th 943 (10th Cir. 2022).

³⁰ *Anthony II*, 22 F.4th at 951–52 (explaining that the expert "needed to show that, had [the victim] never encountered [the defendant], she would not have needed the requested therapy and medications" and finding that [b]ecause [the expert] failed to do so, [the court could not] find error in the district court's denial of restitution").

trafficking offense.³¹ The statute entitles the victim to the *greater* of (1) the value to the defendant of the victim’s services or labor (calculated as the income generated by the victim while trafficked), or (2) the value of the victim’s labor under the Fair Labor Standards Act (FLSA).³² The difference can be substantial.³³ For purposes of this article, we refer to the first of these calculations as “unjust enrichment” and the second as “opportunity loss.”

Courts have used various methods to calculate “the gross income or value to the defendant of the victim’s services or labor,” including victims’ accounts of the work they performed and prices charged for such work, as well as evidence gathered during the government’s investigation to demonstrate that value. The defendant must pay the victim(s) either what the victim would have earned in minimum wages and overtime pay under the FLSA or, if the work performed was valued higher than minimum wage, what the victim would have earned at that rate.³⁴ The below sections walk through the “unjust enrichment” and “opportunity loss” calculations to calculate the economic value of the victim’s services.

1. Unjust enrichment

As stated above, the prosecution can calculate the value of a victim’s services to a defendant in two ways. In sex trafficking cases, however, the most common way that often permits the larger restitution award is to calculate the defendant’s gross income from the commercial sex

³¹ 18 U.S.C. § 1593(b)(3).

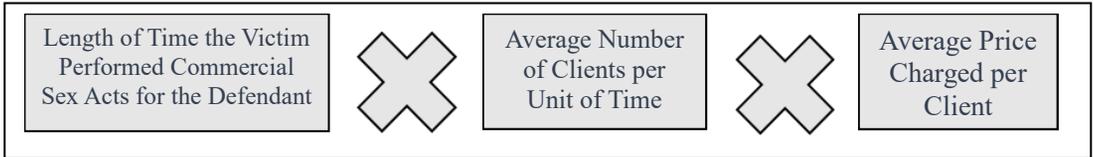
³² *Id.* (“the greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act”); see Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219.

³³ See *United States v. Hamilton*, No. 17-cr-89, 2018 WL 2770638 (E.D. Va. June 8, 2018) (holding that, per the TVPA, the defendants had to pay “the greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage” when the minimum wage calculation was \$6,102 but the gross income to the defendant was \$119,300).

³⁴ Prevailing wage data may be found at FOREIGN LABOR CERTIFICATION DATA CENTER, www.flcdatcenter.com (last visited Feb. 14, 2022). See U.S. Department of Labor Office of Foreign Labor Certification, *Online Wage Library*, FOREIGN LABOR CERTIFICATION DATA CTR, www.flcdatcenter.com (last visited Feb. 14, 2022).

acts performed by the victim—the “unjust enrichment” calculation. The defendant must pay restitution to victims equal to the sum of the defendant’s earnings from that victim’s acts, regardless of whether such acts were legal.³⁵

An example of the unjust enrichment calculation in the sex trafficking context looks something like this:



Estimates of earnings need only be calculated with reasonably certainty; they need not be mathematically precise.³⁶ For example, if a trafficker hypothetically trafficked a victim for 10 days, and during that time the victim engaged in commercial sex with approximately five clients per day, and each client paid on average \$200 for the commercial sex act, then the gross income or value to the defendant or the defendant’s unjust enrichment would amount to \$10,000 (10 x 5 x 200).

In addition, because the statute defines losses by the “gross income or value to the defendant,” prosecutors should not offset the proceeds generated by expenses the defendant incurred or shared with the victims. For example, in most trafficking cases, traffickers pay for the hotel rooms where the victims engage in commercial sex and for their food, clothing, hair styling, and even “gifts,” all with the proceeds of the victims’ commercial sex acts. These are not deductible in the restitution calculation.³⁷

³⁵ See *Cortes-Castro*, 511 F. App’x at 947; *United States v. Mammedov*, 304 F. App’x 922 (2d Cir. 2008) (not precedential).

³⁶ See *Lewis*, 791 F. Supp. 2d at 92–94 (calculation based upon daily quotas imposed by trafficker multiplied by number of days victim was held); see also *United States v. Nash*, 558 F. App’x 741, 742 (9th Cir. 2014) (not precedential) (finding the district court “appropriately ‘estimate[d], based upon facts in the record,’ the victims’ losses ‘with some reasonable certainty’”) (quoting *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007)).

³⁷ See *United States v. Williams*, 5 F.4th 1295, 1304–08 (11th Cir. 2021) (holding that, when calculating “the greater of the gross income or value to the defendant of the victim’s services or labor,” the TVPA does not require that the award be offset for any benefits received or earnings kept by victim).

2. Opportunity loss

“Opportunity Loss” is shorthand for “the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the [(FLSA)] (29 U.S.C. § 201 et seq.)”³⁸ In short, the goal is to calculate how much money the victim would have earned if paid minimum wage.

The FLSA calculation is derived by multiplying the number of hours worked by the applicable minimum or prevailing wage rate in effect at the relevant time and place; one can then add overtime pay, if applicable, and subtract any money actually paid to the victim.³⁹

The FLSA also provides that an employer who violates the FLSA’s minimum wage and overtime provisions will be liable for liquidated damages in an amount equal to double the amount of back wages owed.⁴⁰ Specifically, liquidated damages “are awarded to provide employees full compensation for violations of the FLSA and are therefore part of ‘the value of the victim’s labor as guaranteed’ by the FLSA.”⁴¹ Therefore, liquidated damages must be included when calculating restitution under the TVPA according to “the value of the victim’s labor.”⁴²

In a 2021 appeal overturning the district court’s denial of liquidated damages, the Fourth Circuit found that:

it would be inconsistent with the TVPA’s requirement of providing restitution in ‘the full amount of the victim’s losses’ not to compensate a victim for losses incurred as

³⁸ 18 U.S.C. § 1593(b)(3).

³⁹ The U.S. Department of Labor’s Wage and Hour Division often plays an invaluable role in performing this calculation by reviewing the evidence, interviewing the victim, and computing lost wages in accordance with the FLSA. *See Wage and Hour Division*, DEPT OF LABOR, <https://www.dol.gov/whd> (last visited Feb. 14, 2022).

⁴⁰ 29 U.S.C. § 216(b); *see also* *United States v. Edwards*, 995 F.3d 342, 354–47 (4th Cir. 2021) (finding that that the “TVPA expressly incorporates by reference all of the FLSA’s minimum wage and overtime guarantees, including the liquidated damages provisions in Section 216(b)”; *Sabhnani*, 599 F.3d at 258–61 (finding liquidated damages under FLSA “exclusively tied to violations of the minimum wage and overtime rules in §§ 206 and 207” and appropriately applied as compensation for delay in receiving wages in timely fashion).

⁴¹ *Edwards*, 995 F.3d at 346 (citing 18 U.S.C. § 1593(b)(3)).

⁴² *See id.*

a result of the delay in paying required wages and overtime compensation. And failing to compensate for delay would be particularly egregious in this case, where [the victim] was not paid for many years.”⁴³

III. How to seek restitution

A. Generally

The United States bears the burden of proving the proper amount of restitution by a preponderance of the evidence.⁴⁴ Because some courts are unfamiliar with the mandatory nature of section 1593 and with the methods of calculating the victim’s losses under the statute, filing a written restitution motion that cites pertinent authorities and attaches relevant evidence can significantly enhance the likelihood of securing a restitution order that properly accounts for the full scope of the victim’s losses. This can be done as part of a sentencing memorandum or separately as an independent motion.

The restitution amount requested need not be exact, but it must be supported with “sufficient indicia of reliability”⁴⁵ and “some reasonable certainty.”⁴⁶ While the defendant must have proximately caused all costs for which restitution is sought, the defendant need not be the sole cause.⁴⁷ In addition, in cases with multiple defendants, the

⁴³ *Id.* at 346–47 (citations omitted). The Second Circuit, however, held that victims used as live-in domestic servants could not receive restitution based on overtime pay because, under the FLSA, 29 U.S.C. § 213(b)(21), overtime provisions do not apply to employees working in domestic service for a household when they reside in that household. *See United States v. Sabhnani*, 599 F.3d 215, 256–57 (2d Cir. 2010).

⁴⁴ *See* 18 U.S.C. § 3664(e); *see, e.g., Anthony I*, 942 F.3d at 964 (citing *United States v. Galloway*, 509 F.3d 1246, 1253 (10th Cir. 2007)).

⁴⁵ *See In re Sealed Case*, 702 F.3d at 67.

⁴⁶ *See United States v. Williams*, 319 F. Supp. 3d 812, 816 (E.D. Va. 2018) (quoting *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007)); *United States v. Monzel*, 641 F.3d 528, 540 (D.C. Cir. 2011).

⁴⁷ *In re Sealed Case*, 702 F.3d at 66 (citing *Monzel*, 641 F.3d at 538 and stating, “In other words, the defendant should not be required to pay restitution for harm he did not cause. This does not mean, however, that the defendant must be the sole cause of the harm.”). *But see Anthony I*, 942 F.3d at 969–70 (holding defendant must pay restitution only for the harm that he caused when the victim had been previously trafficked by another defendant).

defendants can be held jointly and severally liable for the full amount of the restitution even if the defendants kept different amounts of the illicit profits.⁴⁸ It is critical that, during the investigation, at trial, and in plea agreements, prosecutors develop evidence that can support a defensible estimation of the amount of the victim's loss.

Eliciting this evidence can be challenging, however, particularly when trauma symptoms or substance abuse issues complicate victims' ability to recount chronology or when sex traffickers keep victims unaware of how much customers are charged. Prosecutors should aim to develop the necessary evidence for a restitution calculation from the earliest stages of the investigation. While much of the evidence relevant to calculating the value of the victim's labor or services likely will be obtained through the investigative process, the restitution analysis can benefit from additional specifics on dates, hours, prices, and volume of customers served to aid in calculating the monetary value of the labor or services performed. The victim's account of dates and times can be corroborated by hotel receipts, travel reservations, text messages, or internet advertisements. Similarly, prices, average numbers of clients, and quotas can often be corroborated, at least circumstantially, by text messages between the trafficker and the victim.

Victim statements given to law enforcement or memorialized in grand jury transcripts, along with corroborating evidence, can form the basis for the restitution calculation and be sufficient to meet the government's burden of proving the victim's losses.⁴⁹ In establishing proof for the restitution calculation, the government may rely on the evidence presented at trial, including expert testimony;⁵⁰ items presented to the grand jury;⁵¹ testimony elicited by hearsay;⁵² or evidence obtained during the government's investigation. A victim is

⁴⁸ See *Hamilton*, 2018 WL 2770638, at *4 (finding four defendants jointly and severally liable for the full \$119,300 even though two had pleaded guilty for aiding and abetting the others and had passed most of the victims' prostitution profits to the others).

⁴⁹ See, e.g., *Williams*, 319 F. Supp. 3d at 816.

⁵⁰ See *United States v. Baston*, 818 F.3d 651, 665 (11th Cir. 2016); *United States v. Palmer*, 643 F.3d 1060, 1068 (8th Cir. 2011).

⁵¹ See *In re Sealed Case*, 702 F.3d at 67.

⁵² See *United States v. Hairston*, 888 F.2d 1349, 1354 n.7 (11th Cir. 1989).

not required to testify at a restitution hearing.⁵³ Additionally, a defendant cannot object to the sufficiency of the government's evidence when the defendant failed to keep records regarding the hours worked by the victim or caused such records to be destroyed.⁵⁴

Because restitution is mandatory, prosecutors have a duty to advocate for restitution even if the dollar amount of the economic value of the victim's labor or services is extremely low. In such cases, they should present arguments, as necessary, to establish that the economic value of the victim's labor or services is a statutory measure of the defendant's unjust enrichment or the victim's lost opportunity and emphasize that the amount, while possibly low, does not purport to account for the pain and suffering associated with the degrading and dehumanizing experience of being compelled into forced labor or commercial sex. While the calculation of the value of the victim's services may produce a small dollar amount, when they are added to other losses listed in section 2259(c)(2), particularly future mental health care expenses, the final amount may be more proportionate to the defendant's sentence and more accurately reflect the survivor's victimization.

Sometimes, especially in plea agreements, there may not be enough evidence available at the time of sentencing to calculate restitution. District courts have been permitted to take longer than the 90-day statutory period to calculate restitution amounts as long as the sentencing court "made clear prior to the deadline's expiration that it would order restitution" and only left open the amount.⁵⁵

Because the restitution order is mandatory, a defendant's inability to pay is irrelevant.⁵⁶ The defendant's ability to pay, however, is

⁵³ See *Sabhani*, 599 F.3d at 258–59 (stating district courts have broad discretion in choosing the procedures to employ at a restitution hearing "so long as the defendant is given an adequate opportunity to present his position").

⁵⁴ See *Fu Sheng Kuo*, 620 F.3d at 1167.

⁵⁵ See *Dolan v. United States (Dolan I)*, 560 U.S. 605, 607–08 (2010); *Fu Sheng Kuo*, 620 F.3d at 1162–63; *United States v. Dolan (Dolan II)*, 571 F.3d 1022, 1030 (10th Cir. 2009).

⁵⁶ See 18 U.S.C. § 1593(a); *Lewis*, 791 F. Supp. 2d at 92 (awarding restitution despite defendant's inability to pay).

relevant to the court's duty to order a payment schedule.⁵⁷ The Second Circuit held that, when the defendant lacks the ability to pay, a court imposing restitution without a payment schedule, thereby implicitly ordering the amount be paid immediately, is an abuse of discretion that constitutes plain error.⁵⁸

Finally, restitution is mandatory, even when the forced labor occurred outside of the United States. The Eleventh Circuit held, as a matter of first impression, that section 1593 requires international sex traffickers tried in the United States to pay restitution to their victims even if the sex trafficking occurred exclusively in another country.⁵⁹

B. Who is entitled to restitution

Section 1593 requires that a defendant pay restitution to all "victims," defining a "victim" as "the individual harmed as a result of a crime under this chapter [(chapter 77)]."⁶⁰ Questions have arisen as to whether section 1593 mandates restitution to victims the defendant harmed whom the prosecution did not name in the indictment or whom were named in the indictment for charges the defendant was not convicted of. For forced labor (section 1589) or sex trafficking charges (section 1591), prosecutors generally identify the affected victim in each substantive count.

For other TVPA offenses, however, there is less consistency among prosecutors on whether the victim is identified in the counts. For example, if the prosecution charges the defendant with section 1591 and section 1594(c) (conspiracy to commit sex trafficking), prosecutors do not always identify each victim in the conspiracy charge. Sometimes the evidence at trial will show that the victims of the conspiracy are identical to those listed in the substantive charged counts, but in other cases, a trafficker's conspiracy affects more victims than the prosecution may choose to charge with substantive counts. In those cases, the prosecution should seek restitution for all

⁵⁷ See *Mammedov*, 304 F. App'x at 926–28 (vacating the restitution order and remanding because the sentencing judge did not consider the defendant's inability to pay in "symbolic[ally]" ordering restitution payable immediately).

⁵⁸ See *id.* at 927.

⁵⁹ See *Baston*, 818 F. 3d at 666, 671 (vacating the order of restitution and remanding to increase the award of restitution to cover the victim's sex trafficking that occurred in Australia).

⁶⁰ 18 U.S.C. § 1593(b)(1), (c).

victims of the conspiracy that is supported by the evidence admitted at trial and during the restitution hearing.

Similarly, in some cases, a jury may convict a defendant of the trafficking conspiracy but acquit the defendant of the substantive counts. There are some examples of courts having awarded mandatory restitution even to trafficking victims whom the prosecution did not name in the section 1594(c) count.⁶¹

Because restitution is such a critical component of survivor empowerment and recovery, prosecutors should standardize the language used for victims in indictments and consistently state the victims associated with each count of the indictment. There is no single way prosecutors name or refer to victims in trafficking indictments. Some list the relevant victims' names or initials in each count of the indictment.⁶² Others include one list of victim names or initials at the introduction of the indictment and refer to the group of names as persons affected by some or all of the charges.⁶³ While in a few cases courts have awarded restitution to victims not named in the

⁶¹ See, e.g., Judgment as to Jorge Estrada-Tepal at 1–2, 6, *United States v. Estrada-Tepal*, No. 14-cr-00105 (E.D.N.Y. Dec. 15, 2015), ECF No. 136 (defendant pled guilty to section 1594(c), was convicted of additional trafficking charges, and judge ordered restitution for four Jane Does numbering up to Jane Doe 5); Superseding Indictment (S-2) at 1–4, *Estrada-Tepal*, No. 14-cr-00105, ECF No. 90 (section 1594(c) count referred to “one or more persons” and other trafficking counts named three Jane Does); Second Superseding Indictment at 2, 4–13, *United States v. Mendez-Hernandez*, No. 13-cr-00004 (S.D. Ga. Aug. 7, 2013), ECF No. 517 (section 1594(c) charge referred to “a person and persons, known and unknown, to the Grand Jury,” and the alleged overt acts committed in furtherance of the conspiracy related to Jane Doe victims 1, 2, 4, 7, 8, 9, 10 11, and 15); Judgment as to Joaquin Mendez-Hernandez at 1, 5, *Mendez-Hernandez*, No. 13-cr-00004, ECF No. 775 (two defendants pled guilty to section 1594(c) alone, and judge ordered \$705,000 in restitution apportioned among Jane Doe victims 1, 4, 6, 9, and 17).

⁶² Indictment at 2, *United States v. Saddler*, No. 16-cr-00251 (E.D.N.C. Oct. 5, 2016), ECF No. 1 (the indictment named victim “T.W.” in the section 1591(a)(1) and section 1594(c) charges); Amended Judgment as to William Maurice Saddler at 1,7, *Saddler*, No. 16-cr-00251, ECF No. 431 (judge convicted the defendant of both charges and ordered him to pay T.W. \$477,618.20 in restitution).

⁶³ Indictment at 8–9, *United States v. Medeles-Arguello*, No. 13-CR-628 (S.D. Tex. Oct. 9, 2013), ECF No. 1.

indictment at all, the theory has not been widely tested. In the closest issue heard, whether a judge could order restitution to a victim not named in the Pretrial Investigation Report (PSR), the Fifth Circuit affirmed the district court's restitution order to three victims of a human trafficking conspiracy under § 1594(c), holding "there is no requirement that a victim of the charged offense be identified in the PSR."⁶⁴ Prosecutors should bring uniformity to these practices to ensure their language does not preclude a victim from receiving mandatory restitution upon conviction.

When a victim becomes uncommunicative with the prosecution team after the conviction, it is still necessary to seek restitution, to the extent possible, based on the evidence in the record because the court is still required to order restitution. In addition, the government must make reasonable efforts to contact the victim and provide the restitution recovered. In such cases, the record may not contain enough information to calculate losses under section 2259(c)(2) or an "unjust enrichment" estimate. In most cases, however, there is enough evidence to at least put forth an "opportunity loss" estimate under the FLSA.

C. Restitution as part of the plea agreement

A plea agreement is another way to secure restitution for a victim prosecutors did not name in a substantive count or the indictment at all. When entering into a plea agreement, the government and a defendant may agree to a restitution order for specifically identified victims, to a stipulated amount of restitution, or that restitution will be calculated in accordance with section 1593, even in cases where the defendant is not pleading guilty to a chapter 77 offense. Similarly, prosecutors can require that the defendant agree to pay restitution to, for example, "the victim(s) regardless of the count(s) of conviction"⁶⁵ or to "every identifiable victim who may have been harmed by [defendant's] scheme or pattern of criminal activity."⁶⁶

⁶⁴ United States v. Batres, 731 F. App'x 341, 343 (5th Cir. 2018) (not precedential).

⁶⁵ See Plea Agreement as to Adelio De Jesus Batres at 10, United States v. Melendez-Gonzalez, No. 14-cr-497 (S.D. Tex. 2016), ECF No. 156; Judgment as to Adelio De Jesus Batres at 1, 5, *Melendez-Gonzalez*, No. 14-cr-497, ECF No. 269.

⁶⁶ See, e.g., Government's Response to Defendants' Motion for Clarification Regarding Restitution at 2, United States v. Simmons, No. 15-cr-00695

For example, a provision of the plea agreement may read:

The defendant understands and agrees that, as a result of pleading guilty to violating 18 U.S.C. § 1591, an order of restitution is mandatory pursuant to 18 U.S.C. § 1593. The defendant agrees to pay restitution to victims 1, 2, and 3 in the following amounts:

Victim 1: \$10,000

Victim 2: \$2,000

Victim 3: \$100,500

If the parties cannot agree to a specific amount of restitution, but can agree to include restitution to specific victims, then the plea agreement might read:

The defendant understands and agrees that, as a result of pleading guilty to violating 18 U.S.C. § 1591, an order of restitution is mandatory pursuant to 18 U.S.C. § 1593. The defendant agrees to pay restitution to Victims 1, 2, and 3 despite the fact that he is only pleading guilty to Count 2 of the Indictment (Sex Trafficking of Victim 1). There is no agreement as to the amount of restitution. Defendant understands and agrees that, if an amount of restitution is not agreed upon by the date of sentencing, then government will present the Court with evidence in support of a restitution request at the sentencing hearing, and the Court will determine a restitution amount to be ordered within 90 days of the sentencing hearing.

The parties do not need to agree on the exact amount of restitution in the plea agreement, but if the agreement does not specify the exact

(D.S.C. Oct. 4, 2017), ECF No. 147 (quoting Dkt. 108, p. 3–4; Dkt. 105, p. 3–4 (The defendant pled guilty to violating section 1594(c) and several firearm charges. The section 1594(c) charge referred to “minor victims and young women” generally, and the defendant agreed “to make full restitution to every identifiable victim who may have been harmed by [his] scheme or pattern of criminal activity.”); Amended Judgment as to Ashford James Simmons at 1, 5, *Simmons*, No. 15-cr-00695, ECF No. 200 (the court ordered \$14,480 in restitution to two victims not named in the indictment).

amount, the defendant has the right to appeal the restitution ordered.⁶⁷

Further, even when the parties do agree in the plea agreement to the exact restitution amount, to who will receive restitution, or to how the restitution shall be calculated, unless the parties are proceeding under Federal Rule of Criminal Procedure 11(c)(1)(C), the court likely retains the authority to veer from the restitution provisions of the plea agreement and order restitution in accordance with the applicable statutory procedure as if the parties had not agreed to an exact dollar amount, to specified victims, or to a calculation formula.

D. Seeking restitution under other statutes

Trafficking cases brought under a chapter 77 offense, including section 1589 (forced labor) and section 1591 (sex trafficking), are often brought alongside other charges outside of chapter 77, such as Mann Act charges involving interstate transportation for the purposes of prostitution.⁶⁸ Sometimes, either as the result of plea negotiations or acquittal, the defendant is not convicted of the charged chapter 77 offense. Unless set forth in the plea agreement, prosecutors in these instances cannot use section 1593 to calculate restitution.⁶⁹ Instead, unless provided otherwise by statute, restitution for all other Title 18 offenses is calculated under 18 U.S.C. §§ 3663 (discretionary restitution) or 3663A (mandatory restitution for certain offenses that cause bodily harm, or “MVRA”).⁷⁰ For this reason, prosecutors must

⁶⁷ See *United States v. Tosie*, 639 F.3d 1213, 1217 (9th Cir. 2011) (“appeal waiver was not knowing because [defendant] was not afforded notice of the amount of restitution to be ordered”).

⁶⁸ See 18 U.S.C. § 2421. As of December 2018, the Mann Act has its own mandatory restitution provisions. See 18 U.S.C. § 2429.

⁶⁹ See *Fu Sheng Kuo*, 620 F.3d at 1160–61, 1164 (when the defendants pled guilty to 18 U.S.C. § 241, conspiracy to violate civil rights, and the district court calculated restitution using the “unjust enrichment” calculation under section 1593, the Ninth Circuit reversed, holding that because the defendants were not convicted of a Chapter 77 crime, “the restitution provisions of the Trafficking Act simply do not apply. Instead, the restitution provisions of § 3663 apply. And the calculation methods under § 3663 do not include a defendant’s ill-gotten gains.”).

⁷⁰ See 18 U.S.C. § 2259 (mandatory restitution for Chapter 110 offenses).

understand how restitution works for each charge included in an indictment and plea agreement.⁷¹

And, in cases in which the defendant is pleading guilty to an offense not included in chapter 77, and therefore not covered by section 1593, a provision in a plea agreement to use the formula set forth in section 1593 to calculate restitution is beneficial for trafficking victims because the loss calculations are generally broader under section 1593's "unjust enrichment" measure than section 3663 (restitution for most other offenses), and restitution awarded pursuant to section 1593 is not taxable.⁷² The plea agreement must expressly stipulate that restitution will be calculated pursuant to section 1593; otherwise, applying section 1593 to calculate restitution for non-trafficking offenses (statutes not codified under chapter 77) constitutes reversible error.⁷³

1. Differences between the TVPA and MVRA

TVPA (18 U.S.C. § 1593)	MVRA (18 U.S.C. § 3663A)
<ul style="list-style-type: none">• Actual past/future losses + (greater of unjust enrichment or value under FLSA)• No bodily injury required for psychological counseling costs• Forfeited assets must go toward restitution• Restitution not subject to tax	<ul style="list-style-type: none">• Only actual past/future losses• Requires bodily injury for psychological counseling• Forfeited assets may be applied to restitution• Unclear whether restitution is taxable

⁷¹ See, e.g., *Fu Sheng Kuo*, 620 F.3d at 1165–66 (remanding a restitution order that was erroneously based on the defendant's ill-gotten gains because the defendant was charged with a civil rights conspiracy (18 U.S.C. § 241) rather than a human trafficking violation under Chapter 77).

⁷² I.R.S. Notice 2012-12, 2012-6 I.R.B.

⁷³ See *Fu Sheng Kuo*, 620 F.3d at 1164.

IV. Conclusion

Restitution can be a life-changing resource for trafficking survivors. It serves to restore a victim's losses, both the personal losses enumerated in section 2259(c)(2) and those losses measured either by the unjust enrichment the defendant derived from exploiting the victim or by the lost opportunity to the victim in obtaining legitimate work. The mandatory nature of the TVPA's restitution provision highlights the significance of restitution, both as a means of stabilizing and empowering a trafficking survivor and as a means of deterring trafficking conduct. Advocating effectively for restitution is, therefore, a critical component of prosecuting a trafficking case. Effective enforcement of the mandatory restitution provision requires that prosecutors investigate evidence related to the victim's losses from the earliest stages of the investigation, file motions or memoranda setting forth the applicable calculations, and present evidence of the victim's losses at contested restitution hearings. Federal prosecutors encountering restitution-related issues are encouraged to contact the Civil Rights Division's Criminal Section, Human Trafficking Prosecution Unit, for assistance in pursuing restitution orders.

About the Author

Brandy Wagstaff is currently serving as Legal Counsel for Litigation in the Criminal Section's HTPU at the U.S. Department of Justice, Civil Rights Division. In this capacity, she provides legal and strategic analysis in support of HTPU-led enforcement activities and initiatives. Before joining the HTPU, Ms. Wagstaff served for seven years as an Attorney with the Civil Rights Division's Disability Rights Section, where she engaged in litigation and developed regulations to enforce the Americans with Disabilities Act. Ms. Wagstaff is also an adjunct professor who teaches courses in appellate writing, appellate advocacy, legislative and regulatory drafting, and civil rights prosecutions at George Mason University School of Law (GMU). She received her J.D., magna cum laude, from GMU and served as a judicial law clerk to the Honorable Alan Kay on the U.S. District Court for the District of Columbia.

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Note from the Editor-in-Chief

This issue on criminal civil rights issue is the second of two issues dealing with civil rights. As the esteemed Assistant Attorney General for the Civil Rights Division, Kristen Clarke, wrote in the Introduction, civil rights crimes “are particularly suited to federal redress because, left unchecked, they undermine the very core of the rights and liberties guaranteed by the Constitution and civil rights laws.”

The DOJ Journal staff would like to again acknowledge the great job by Jessica Ginsburg, our point of contact for this issue, and the work of the Civil Rights Division in pulling everything together. Additionally, without the work of Robby Monteleone, these issues would not have come together. These wonderful individuals recruited subject-matter experts and put together the list of topics. And thanks, of course, to our slate of authors, all outstanding in their respective areas of expertise.

In-house here at Office of Legal Education Publications, I’d like to acknowledge the hard work of Addison Gantt, Managing Editor, and our law clerks, Rachel Buzhardt, Kyanna Dawson, Rebekah Griggs, Lilian Lawrence, and William Pacwa. This issue is bittersweet for us because it’s Addison’s last one. He’s done a brilliant job for over two-and-a-half years as our first DOJ Honors Program attorney. We’ll miss his dedication to Publications, calm demeanor, and sense of humor, but we wish him the best of luck in his career path.

To all our readers, we hope that this “double feature” on civil rights fulfills your needs. Stay safe and well.

Chris Fisanick
Columbia, SC
March 2022

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Appendix: Hate Crime Cases by Circuit¹

First Circuit

***United States v. Jacques*, 744 F.3d 804 (1st Cir. 2014)**

The court of appeals affirmed convictions for violating 18 U.S.C. § 241, 18 U.S.C. § 247(c), and 18 U.S.C. § 844(h)(1) regarding an arson of an African American church. The issues on appeal were unrelated to federal hate crimes.

***United States v. Sharp*, No. 95-2040, 1996 WL 156683 (1st Cir. Apr. 4, 1996) (not precedential)**

The defendant was convicted of violating 42 U.S.C. § 3631 for burning a cross near the home of an African American couple. On appeal, the defendant challenged the application of a two-level sentencing adjustment for his leadership role in the offense. The court upheld the enhancement, noting that the determination of one's role in the offense is "fact-specific and may be based on circumstantial evidence and on a view of the whole of the defendant's pertinent conduct."

***United States v. Page*, 84 F.3d 38 (1st Cir. 1996)**

Defendants pleaded guilty to two counts of violating 18 U.S.C. § 245 after they accosted several Hispanic men attempting to enter a convenience store, called them racial epithets, and made violent threats. As the victims attempted to drive away, the defendants gave chase and fired a gun at their car, injuring one of the victims. On appeal, the court held that, although only one victim was wounded, both counts of conviction were subject to the penalty enhancement for bodily injury.

We find nothing in the statutory language to support reading the penalty provision of § 245(b) to permit enhancement only in cases of bodily injury to the

¹ These summaries contain abbreviated recitations of the facts and legal decisions and are provided solely as a reference aid. Attorneys intending to cite these cases in court filings should independently confirm the facts and ensure that the holdings remain valid statements of applicable law.

intended victim of the particular offense. Nor is there anything indicating an intent to restrict penalty enhancement to a single count when multiple counts aimed at several individuals end up causing but a single bodily injury.

***United States v. Griffin*, 525 F.2d 710 (1st Cir. 1975)**

The defendant was convicted of violating 18 U.S.C. § 245(b)(4)(A) for his assault on an African American during a protest against enforced busing in South Boston public schools. The defendant argued on appeal that there was “no direct evidence that by the act of beating [the victim the] defendant intended to prevent black students from attending school.” The court held that, given the circumstances, it was for the jury to find that the “defendant intended the indiscriminate beating of an innocent black on the public street near a school . . . to have a chilling effect upon other Blacks, parents or children. The general inculcation of fear in order to further a specific objective is a familiar practice.” The government was not required to prove that the defendant “knew he was violating a federal statute. It was enough under 18 U.S.C. § 245 that he purposely sought to interfere with the right of black children to go to school; he need not know the exact extent, or the federal character of that right.”

***United States v. Diggins*, No. 18-cr-00122, 2020 WL 1066979 (D. Me. Mar. 5, 2020)**

Defendant attacked two Black men in separate incidents in Portland, Maine, and was convicted on two counts of section 249(a)(1). The defendant challenged the admission of photographs of his tattoos, which included a swastika and other white supremacist markings, because they were not visible during the assaults and thus not relevant. The court rejected the defendant’s argument because the racially charged tattoos were relevant to determining whether he acted with racial animus. The defendant also argued that the prejudicial effect of the evidence substantially outweighed its probative value. The court again disagreed, holding that the evidence was prejudicial but not unfairly so. Finally, the defendant argued that the photographs, which were taken during the booking process, were compelled in violation of his Fifth Amendment right. The court held there was no Fifth Amendment violation provided the government

demonstrated that it had prior knowledge of the tattoos and could independently prove their existence.²

***United States v. Diggins*, 435 F. Supp. 3d 268
(D. Me. 2019)**

The district of Maine upheld the constitutionality of 18 U.S.C. § 249(a)(1) as a valid exercise of Congress's Thirteenth Amendment authority to identify and eradicate badges and incidents of slavery. The court also held that section 249(a)(1) did not violate the Tenth Amendment by transferring the police power—which was reserved to the states—to the federal government because the Thirteenth Amendment delegated to the federal government the power encompassed by the section and, thus, was not reserved to the states under the Tenth Amendment.

The court also rejected the defendant's substantive and procedural challenges to the departmental certification requirement. First, the court held the certification valid without an oath or affirmation as to the truthfulness of its contents where, as here, no evidence of misrepresentation existed. The court further held, in a matter of first impression, that the Attorney General's determination that the matter was in the public interest and necessary to secure substantial justice was unreviewable because it was a decision within the parameters of prosecutorial discretion.

***United States v. Three Juveniles*, 886 F. Supp. 934
(D. Mass. 1995)**

The defendants, juvenile skinheads who believed that their city had become overrun by Black and Jewish residents and who favored the adoption of abusive tactics to scare them into leaving, were convicted of violating 18 U.S.C. § 241 and 18 U.S.C. § 371 (general conspiracy) for conspiring to intimidate local citizens in violation of 18 U.S.C. §§ 245(b)(2)(B) and (F). The court held, with no discussion, that the streets and sidewalks of Brockton were facilities administered by Brockton, a subdivision of the Commonwealth of Massachusetts, within the meaning of section 245(b)(2)(B). The court also held that a mall and its garage were facilities within the meaning of section 245(b)(2)(F) for two reasons. First, the mall held itself out as serving

² See *Fisher v. United States*, 425 U.S. 391 (1976), *United States v. Doe*, 465 U.S. 605 (1984), *United States v. Hubbell*, 530 U.S. 27 (2000).

the patrons of all the stores it contained, including eight restaurants, which were facilities under the plain language of section 245(b)(2)(F). Second, the mall sponsored entertainment events, such as home shows, car shows, fashion displays, and Santa Claus exhibitions, and any establishment that presents a performance for the amusement of a viewing public is covered by section 245(b)(2)(F). Moreover, the court held that, because the mall was a covered facility by virtue of its presentation of performances, a bookstore was covered by section 245(b)(2)(F) because it held itself out as serving the patrons of the mall and was located within the premises of the mall.

Second Circuit

***United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002)**

The defendants were convicted of violating 18 U.S.C. § 245(b)(2)(B) after they violently beat a Jewish man following a car accident involving a different Jewish man and two African American children. Although the court of appeals ultimately vacated and remanded because of an error in impaneling the jury, the court upheld the constitutionality of 18 U.S.C. § 245, approved the “streets theory” of prosecution, and held that the second “because of” element in the statute required only an activities-based intent, not motive. The court further approved a jury instruction that permitted the jury to infer, from an attack that occurred on the street, a specific intent to interfere with the victim’s use of the street.

***United States v. Tuffarelli*, 111 F.3d 124 (2d Cir. 1997) (unpublished)**

The defendant was convicted of two misdemeanor counts of violating 42 U.S.C. § 3631 after threatening both a white woman in his neighborhood who was considering selling her home to a Black couple and the Black couple who had toured the home. On appeal, he argued that the district court erred at sentencing by not grouping the two counts of conviction because the white home seller was only an “indirect or secondary” victim and the main victims were the Black home buyers. The court of appeals disagreed, finding that both the Black home buyers and the white home seller were equal victims who were both “directly and seriously affected by the defendant’s threats of force.”

***United States v. Anzalone*, 555 F.2d 317 (2d Cir. 1977)**

The defendant was convicted of violating 42 U.S.C. § 3631 for shooting out the windows of a Black couple's home, splashing paint on their front door, and attempting to burn down their house. The convictions were reversed because of a violation of *Kastigar v. United States*.³

***Munger v. United States*, 827 F. Supp. 100 (N.D.N.Y. 1992)**

After pleading guilty to one count of violating 42 U.S.C. § 3631 for burning a cross in front of an interracial couple's home, the defendant argued on appeal that applying the vulnerable victim enhancement when sentencing him was inappropriate. According to the defendant, the victim's race was a "necessary prerequisite to the commission of his offense," thereby precluding application of the enhancement. The court disagreed, holding that the underlying guideline did not specifically incorporate race. The court declined to find that "black Americans are per se vulnerable victims" to cross burnings. Instead, the court found that the victim's race, his interracial marriage, and the presence of his young daughter in the home all meant that the defendant knew or should have known that his victim was particularly vulnerable.

Third Circuit

***United States v. Piekarsky*, 687 F.3d 134 (3d Cir. 2012)**

The defendants were convicted of violating 42 U.S.C. § 3631 following a fatal beating of an immigrant. The defendants argued the jury instructions were inadequate because they failed to properly instruct on motive. The court of appeals first explained that section 3631(a) criminalizes intimidating or interfering with any person "because of his race . . . and because he is or has been . . . occupying . . . any dwelling." The court rejected the defendant's contention that the word "because" required proof that the sole or primary motivation for the assault was race and occupancy and that the jury should have been instructed accordingly. Relying on

³ 406 U.S. 441 (1972) (holding that "[t]he United States can compel testimony from an unwilling witness who invokes the Fifth Amendment privilege . . . by conferring immunity . . .").

decisions of other circuits, the court held that, if a section 3631 crime is based *in part* on racial animus, it falls within the scope of the statute. This holding has been partially overturned by *Burrage v. United States*.⁴

The court also held that the statute's protections applied to *any* person (regardless of immigration status) because of his race, color, or national origin and that the statute did not require the victim to be a resident (or future resident). Rather, it noted that, under section 3631(b), it was sufficient that an individual is victimized "in order to intimidate . . . any other person or any class of persons" from exercising their federally guaranteed housing rights. Thus, all the government needed to prove at trial was that the victim was injured to send a message to others that they were not welcome in the neighborhood on account of their race, color, or national origin.

***United States v. Stewart*, 806 F.2d 64 (3d Cir. 1986)**

The defendant was convicted of violating 18 U.S.C. § 241 for his role in the arson of a home that was owned by an African American family but unoccupied on the night of the fire. On appeal, the court rejected the defendant's argument that he could not interfere with the owners' right to occupy their house unless someone was actually exercising his right to occupy the house at the time of the offense. The court held that the evidence showed the defendant was motivated by an intent to interfere with the owners' rights because he wanted to prevent them from moving back into the house, as well as to prevent other African American families from moving in.

***United States v. Bowers*, 495 F. Supp. 3d 362 (W.D. Pa. 2020)**

Defendant was charged in connection with the massacre of 11 worshippers at the Tree of Life Synagogue in Pittsburgh, Pennsylvania. He was indicted for violating, *inter alia*, 18 U.S.C. § 247 and 18 U.S.C. § 249.

The court upheld the constitutionality of 18 U.S.C. § 249(a)(1) as a valid exercise of Congress's Thirteenth Amendment authority to identify and eradicate badges and incidents of slavery. The court also rejected the defendant's as-applied constitutional challenge, contending that Jews were not a distinct race before the enactment of

⁴ 571 U.S. 204 (2014).

the Thirteenth Amendment. To the contrary, the court confirmed Congress’s intent in enacting section 249 was to prohibit violence on the basis of real or perceived religions, like Judaism, that “were regarded as races at the time of the adoption of the [Reconstruction] amendments.” The court also held that section 249(a)(1) did not violate the Tenth Amendment by transferring the police power—which was reserved to the states—to the federal government, because the Thirteenth Amendment delegated to the federal government the power encompassed by the section and thus was not reserved to the states under the Tenth Amendment.

The district court likewise upheld the constitutionality of section 247(a) as a valid exercise of congressional power under the Commerce Clause, including under the third prong of *Lopez*.⁵ In so doing, the court stated that: “[e]very court to consider the issue has found § 247(a) to be a valid exercise of Congressional power under the Commerce Clause.”⁶

Fourth Circuit

United States v. Roof, 10 F.4th 314 (4th Cir. 2021)

The defendant was convicted of numerous hate crime and firearms counts and sentenced to death after he entered the historic “Mother Emanuel” church in Charleston, joined 12 parishioners and church leaders gathered for a weekly Bible study, prayed with them, and then opened fire on the worshippers, killing nine. He later admitted that he hoped his actions would lead to a race war.

Roof appealed, raising numerous issues, including challenges to the constitutionality of 18 U.S.C. § 247 and 18 U.S.C. § 249. The court rejected both arguments, holding that Roof’s crime fell “within the bounds of federal jurisdiction,” based on his use of the internet, a phone, a GPS, and an interstate highway. The court also concluded that Congress has the authority to determine what a badge or incident of slavery is, that racially motivated violence is obviously a badge or

⁵ *United States v. Lopez*, 514 U.S. 549 (1995).

⁶ *Bowers*, 495 F. Supp. at 371 (citing *United States v. Ballinger*, 395 F.3d 1218 (11th Cir. 2005); *United States v. Grassie*, 237 F.3d 1199 (10th Cir. 2001); *United States v. Roof*, 225 F. Supp. 3d 438, 452 (D.S.C. 2016); *United States v. Hari*, Cr. No. 18-150, 2019 WL 7838282 (D. Minn. Sept. 17, 2019), *adopted*, 2019 WL 6975425, at *1 (D. Minn. Dec. 20, 2019).

incident of slavery, and section 249 is appropriate legislation under the Thirteenth Amendment to address it.

***United States v. Hill*, 927 F.3d 188 (4th Cir. 2019)**

The Fourth Circuit upheld the constitutionality of 18 U.S.C. § 249(a)(2) as applied to the defendant’s bias-motivated assault of a gay co-worker. The victim had been packaging boxes for shipping in interstate commerce when he was assaulted. The district court below found that

18 U.S.C. § 249(a)(2) was unconstitutional as applied.⁷ The court recognized that section 249(a)(2) incorporated a jurisdictional element and noted that the government had argued that the victim had been engaged in quintessentially economic activity when he was assaulted, which resulted in an estimated 1,710 packages not being delivered because of the assault. The court held, however, that, if the court accepted this as a basis for jurisdiction, then “the reach of [section 249(a)(2)] would barely have an end, as the statute would cover any conduct that occurs at any commercial establishment.” The court found that this would “effectively federalize commercial property and allow Congress to regulate conduct occurring on commercial premises, even when the conduct—here, violence based on discriminatory animus—has no connection to the commercial nature of the premises.” The court thus dismissed the indictment. As noted above, the Fourth Circuit reversed. While the court of appeals acknowledged that the regulated activity—the physical violence—was not itself economic, it relied on the assault’s limited effect on ongoing interstate commerce to uphold the defendant’s conviction under section 249(a)(2).

***United States v. Hill*, 700 F. App’x 235 (4th Cir. 2017) (not precedential)**

The court of appeals reviewed the district court’s decision that 18 U.S.C. § 249(a)(2) was unconstitutional as applied to a homophobic assault on an Amazon worker who was assaulted while preparing packages for interstate transport. The court did not decide whether the factors were sufficient to support the legislation; instead, it found that the facts had not been sufficiently developed. It stated that the face of the indictment sufficiently laid out a constitutional exercise of congressional power by alleging that the defendant’s conduct affected

⁷ *United States v. Hill*, 182 F. Supp. 3d 546, 546 (E.D. Va. 2016).

commerce. It then held that, because the defendant raised an as-applied challenge,

whether [the defendant's] conduct sufficiently affects interstate commerce as to satisfy the constitutional limitations placed on Congress' Commerce Clause power may well depend on a consideration of facts, and because the facts proffered here may or may not be developed at trial, it is premature to determine the constitutional issues.

It reinstated the indictment and remanded the case.

***United States v. Shifler*, 340 F. App'x 846
(4th Cir. 2009) (not precedential)**

The defendant pleaded guilty to violating 18 U.S.C. § 245(b)(2)(A) and 42 U.S.C. § 3631 for interfering with attendance at public schools and with housing rights. The court of appeals' short opinion concluded that the defendant's plea was knowing and voluntary.

***United States v. Hobbs*, 190 F. App'x 313
(4th Cir. 2006) (not precedential)**

Defendants were convicted of violating 18 U.S.C. § 241 after they conspired to drive an African American family to leave town by shouting racial epithets and throwing trash while driving past the family's home, hanging a noose on their door, leaving a dead animal on their doorstep, and burning a cross in their yard. The appeal raised issues unrelated to the scope or constitutionality of section 241.

***United States v. Nichols*, 149 F. App'x 149
(4th Cir. 2005) (not precedential)**

The defendant was convicted of two counts of violating 42 U.S.C. § 3631 and one count of 18 U.S.C. § 241 after he and a co-conspirator—deceased at the time of trial—targeted three homes in their neighborhood whose occupants were either Latino or African American. Specifically, they physically assaulted one victim and committed various acts of property destruction, including using steel pipes to smash the windows of a house and a vehicle. On appeal, the court held that sufficient evidence supported the conviction and found that the defendant was not entitled to a misdemeanor instruction.

***United States v. May*, 359 F.3d 683 (4th Cir. 2004)**

The defendant was convicted of violating 42 U.S.C. § 3631 for burning a cross to intimidate an interracial couple. The district court granted downward departures at sentencing based on victim conduct, aberrant behavior, and acceptance of responsibility. The court of appeals found all these departures unwarranted and noted that “even highly provocative behavior does not justify a downward departure if the defendant’s response is disproportionate.”

***United States v. Crook*, 198 F.3d 238 (4th Cir. 1999)
(not precedential)**

The defendant pleaded guilty to violating 18 U.S.C. § 245(b)(2)(A) after he placed flyers containing racially offensive and violent statements on numerous bulletin boards at a college and in the mailboxes of 16 African American students at the college. His 12-month sentence was affirmed on appeal.

***United States v. Smith*, 161 F.3d 5 (4th Cir. 1998)
(not precedential)**

Defendants were convicted of violating 18 U.S.C. § 241, 42 U.S.C. § 3631, and 18 U.S.C. § 844(h)(1) after burning a cross at the home of a bi-racial couple. In this short per curiam opinion, the court of appeals dismissed the defendants’ argument that section 844(h)(1) (use of fire to commit a felony) does not apply to underlying conspiracy statutes, such as section 241.

***United States v. Sheldon*, 107 F.3d 868 (4th Cir. 1997)
(not precedential)**

The defendant appealed his convictions for violating 18 U.S.C. § 241 and 42 U.S.C. § 3631 for building and burning a cross in front of a home occupied by an interracial couple. The defendant argued that his convictions violated his First Amendment rights and that the district court improperly permitted evidence of his racial animus. The court found no First Amendment violation (finding that the instructions were consistent with *Brandenburg v. Ohio*)⁸ and also found no abuse of discretion in the evidentiary rulings. The court held that the enhancements in sentencing for hate crime motivation (section 3A1.1(a)) and vulnerable victim (section 3A1.1(b)) were not duplicative

⁸ 395 U.S. 444 (1969).

because the latter enhancement was based not solely on race but also on the isolated location of the victims' home.

***United States v. Wildes*, 120 F.3d 468 (4th Cir. 1997)**

The defendants were convicted of violating 18 U.S.C. § 241, 18 U.S.C. § 844(h), and 42 U.S.C. § 3631(a) for burning a cross in the front yard of an African American family's home. The defendants appealed their section 844(h)(1) conviction on grounds that the statute only applies to the predicate felony of arson and cannot be applied to cross burning. The court disagreed and affirmed the conviction.

***United States v. Brown*, 121 F.3d 700 (4th Cir. 1997)
(not precedential)**

The defendant pleaded guilty to violating 18 U.S.C. § 245(b)(2)(F) after he filled a two-liter soda bottle with gasoline and set it on fire in front of the Capital Lounge, a bar frequented by African Americans. The defendant's apparent motivation in setting the fire had been his belief that African Americans were "trying to take over." The court of appeals vacated his sentence and remanded for the district court to determine whether the defendant's acceptance of responsibility was exceptional enough to warrant a downward departure.

***United States v. Ramey*, 24 F.3d 602 (4th Cir. 1994)**

The defendants were convicted of violating 18 U.S.C. § 241, 42 U.S.C. § 3631, and 18 U.S.C. § 844(h)(1) after they burned down the home of an interracial couple. The case contains a Commerce Clause analysis which is no longer good law. The defendants' convictions were vacated when the Supreme Court decided *Jones v. United States*, holding that section 844(i) does not reach an owner-occupied private residence.⁹

***United States v. Piche*, 981 F.2d 706 (4th Cir. 1992)**

The defendant was convicted on eight counts of violating 18 U.S.C. §§ 241 and 245(b)(2)(F) after he and his brother, who was convicted of a state murder charge, harassed and assaulted a group of Vietnamese men at a bar in Raleigh, killing one. The defendant appealed his conviction, and the government appealed his sentence of 48 months' imprisonment. The court rejected defendant's challenge to the "death

⁹ 529 U.S. 848 (2000).

resulting” instruction and upheld the district court’s instruction regarding whether the bar was a place of public accommodation. The court affirmed the conviction but vacated the sentence and remanded because the district court improperly departed from the Guidelines.

***United States v. Roof*, 225 F. Supp. 3d 438
(D.S.C. 2016)**

A district court in South Carolina upheld the constitutionality of 18 U.S.C. § 249(a)(1) in the case involving Dylann Roof’s mass shooting at Mother Emanuel Episcopal Church. The district court held that section 249(a)(1) was a constitutional exercise of Congress’s Thirteenth Amendment authority, holding that the provision “is an attempt to abolish what is rationally identified as a badge or incident of slavery.”

***United States v. Hill*, 182 F. Supp. 3d 546
(E.D. Va. 2016)**

The district court found that 18 U.S.C. § 249(a)(2) was unconstitutional as applied. The case involved an assault of a gay individual at an Amazon warehouse. The victim had been packaging boxes for shipping in interstate commerce when he was assaulted. The court recognized that section 249(a)(2) incorporated a jurisdictional element and noted that the government had argued that the victim had been engaged in quintessentially economic activity when he was assaulted, which resulted in an estimated 1,710 packages not being delivered because of the assault. The court held, however, that if the court accepted this as a basis for jurisdiction, then “the reach of [section 249(a)(2)] would barely have an end, as the statute would cover any conduct that occurs at any commercial establishment.” The court found that this would “effectively federalize commercial property and allow Congress to regulate conduct occurring on commercial premises, even when the conduct—here, violence based on discriminatory animus—has no connection to the commercial nature of the premises.” The court thus dismissed the indictment. As noted above, the Fourth Circuit reversed.

***United States v. Griffin*, 585 F. Supp. 1439
(M.D.N.C. 1983)**

Defendants, who were allegedly members of the KKK and National Socialist Party of America who had conspired to heckle and disrupt an anti-Klan parade and cause bodily injury to the parade participants, were indicted on charges of conspiracy to violate 18 U.S.C.

§§ 245(b)(2)(B) and (b)(4)(A). The defendants moved to dismiss the indictment, arguing that the anti-Klan parade was neither an “activity” within the meaning of section 245(b)(2)(B) nor had it been “administered” by the city of Greensboro. The district court denied the motion, holding that the parade had been “administered” by the city of Greensboro because the city had taken an active role in controlling and managing the parade.

The court also held that the anti-Klan parade was an “activity” within the meaning of the statute, rejecting the defendants’ argument that section 245(b)(2)(B) was intended to reach only violent interference with tangible benefits and services of the city, such as fire and police protection and public housing. Looking to the plain language of the statute, the court found that the term “activity” was an inclusive term that expressed Congress’s intent to encompass state administered activities within the protection of the statute. The court determined that such activities encompassed events too transient in nature and too ephemeral to be designated services or programs, which quite reasonably included state-regulated parades. Additionally, the court found that the statute’s legislative history did not contradict the plain language of the statute. The statute’s history indicated that it had a broad remedial purpose and was intended to strengthen the government’s capability to meet the problem of civil rights violence. Accordingly, the court held that the attack on parade participants by the KKK epitomized the type of violence sought to be addressed by section 245.

Fifth Circuit

***United States v. Perez*, 839 F. App'x 870 (5th Cir. 2020) (not precedential)**

The defendant was convicted of violating 18 U.S.C. § 247(a)(1) and 18 U.S.C. § 844(h), among other offenses, for burning down and stealing certain items from a mosque. The court of appeals affirmed the defendant's convictions after rejecting various challenges unrelated to civil rights statutes.

***United States v. Cannon*, 750 F.3d 492 (5th Cir. 2014)**

Defendants were convicted of violating 18 U.S.C. § 249(a)(1) after violently beating an African American man at a bus stop. On appeal, the court upheld the constitutionality of section 249(a)(1) as a valid exercise of Congress's Thirteenth Amendment authority to identify and eradicate badges and incidents of slavery. A concurring opinion suggested that the Supreme Court should grant certiorari and consider its Thirteenth Amendment standard in light of the standards it articulated for evaluating Fourteenth Amendment claims in *City of Boerne v. Flores*¹⁰ and for evaluating Fifteenth Amendment claims in *Shelby County, Alabama v. Holder*.¹¹

***United States v. Crimiel*, 547 F. App'x 633 (5th Cir. 2013) (not precedential)**

The defendant pleaded guilty to violating 18 U.S.C. § 247 and making false statements after he damaged two Louisiana churches. The court of appeals affirmed his above-Guidelines sentence, which included an upward variance, as reasonable.

***United States v. Mathis*, 476 F. App'x 22 (5th Cir. 2012) (not precedential)**

The defendant pleaded guilty to violating 42 U.S.C. § 3631 and 18 U.S.C. § 924(c) after he fired into, and then set fire to, a home where three Hispanic men lived. The court of appeals upheld the defendant's sentence after determining that the trial court did not commit procedural error.

¹⁰ 521 U.S. 507 (1997).

¹¹ 570 U.S. 529 (2013).

***United States v. Scott*, 202 F.3d 265 (5th Cir. 1999)
(not precedential)**

The defendant pleaded guilty to violating 18 U.S.C. § 247(a)(1) but appealed her conviction, arguing that the statute violates the Establishment Clause. Citing the *Lemon* test,¹² the defendant alleged that section 247 does not have a secular legislative purpose and has the primary effect of advancing or inhibiting religion. The court of appeals disagreed, holding as follows:

[section 247] has a valid secular purpose, namely redressing the specific harms set out in the legislative history: the increasing violence and vandalism directed at houses of worship, the resulting interference with the free exercise of religion, and the absence of existing federal laws to prevent and address such violence and destruction . . . Furthermore, the protection afforded religious real property does not have the primary effect of advancing religion, as it constitutes neither an “endorsement” nor “promotion” of religion. The primary effect of § 247(a)(1) is on individuals who are prosecuted for engaging in criminal acts involving religion. Any benefit that inures to religious institutions as a result of § 247 is indirect and, therefore, does not endorse or promote religion.

***United States v. LeBaron*, 156 F.3d 621 (5th Cir. 1998)**

The defendant was extradited from Mexico and convicted of violating 18 U.S.C. § 247(a)(2), among other charges, for his role in ordering the murders of individuals who had left his religious group. He appealed on several grounds, including the admission at trial of his role in ordering another murder. The court affirmed his conviction.

***United States v. Sealed Appellant*, 123 F.3d 232
(5th Cir. 1997)**

Two juveniles were convicted of violating 42 U.S.C. § 3631 after burning a cross near the home of an African American couple. The appeal raised issues unrelated to the scope or constitutionality of section 3631.

¹² *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

***United States v. Barlow*, 41 F.3d 935 (5th Cir. 1994)**

Defendants were convicted under the original 1988 version of 18 U.S.C. § 247 for the murders of former cult members. On appeal, the defendants argued that section 247 did not apply because their “Church of the Lamb of God” was not a religion and that they did not “obstruct the victims’ ‘free exercise of religion’ as contemplated by the drafters of that statute.” The court first concluded that the defendants’ church, a splinter Mormon sect, was a religion.

The mere fact that the beliefs of the Church may have derived from a perverse distortion of early Mormon beliefs or that it is a creed not practiced by multitudes does not prevent it from being classified as a “religion” for the purpose of determining whether it is entitled to protection under the Free Exercise Clause.

As for the second claim, the jury was instructed that the “free exercise of religion” means “the victims’ voluntary choice to discontinue their membership in the Lamb of God.” The court found that the defendants “actions in assassinating their former co-religionists fall squarely within the ambit of § 247.”

***United States v. Pierce*, 5 F.3d 791 (5th Cir. 1993)**

Defendant, a former Grand Dragon of the KKK, pleaded guilty to violating 18 U.S.C. § 241, 18 U.S.C. § 245(b)(2)(A), and 42 U.S.C. § 3631 after he planned with co-conspirators who then burned crosses at nine locations the day he began his sentence for a prior firearms conviction. The appeal raised issues unrelated to the scope or constitutionality of federal hate crimes.

***United States v. Greer*, 939 F.2d 1076 (5th Cir. 1991), *reh’g en banc granted* 948 F.2d 934 *opinion reinstated* *in part on reh’g* 968 F.2d 433 (5th Cir. 1992)**

Defendants, members of the Confederate Hammerskins, were convicted of violating 18 U.S.C. § 241 for conspiring to deprive Black and Hispanic citizens of rights guaranteed by 42 U.S.C. § 2000a and conspiring to deprive Jewish citizens of rights guaranteed by 42 U.S.C. § 1982 after they conducted “park patrols” to clear a public park in Dallas of minorities. During the patrols, they “chased, beat, and assaulted any nonwhites they found.” The evidence also showed that they vandalized Temple Shalom in Dallas and the Jewish

Community Center by spray-painting the walls with anti-Semitic graffiti, shooting out the glass on the windows and doors of the temple and breaking windows and doors with baseball bats. The court of appeals held that the evidence properly established that the defendants engaged in two separate conspiracies. In addition, the court, reasoning that, “to hold” property can also mean “to use” property, rejected defendants’ argument that the temple and community center were not “citizens” within the meaning of the Constitution and thus not covered by section 241.

***United States v. Johns*, 615 F.2d 672 (5th Cir. 1980)**

Defendants, all Klan members, were convicted of violating 18 U.S.C. § 245(b)(5), 18 U.S.C. § 371 (general conspiracy), and 42 U.S.C. § 3631 after shooting into the homes of African American families during a campaign to discourage interracial dating and to disrupt NAACP activities promoting affirmative action. The court of appeals upheld their convictions, noting that the “evidence adduced at trial demonstrates that in attacking the NAACP leaders the defendants intended forcibly to discourage the NAACP’s efforts to secure better employment and housing opportunities for blacks.” The statute “clearly warrants prosecuting individuals who attempt to interfere with such efforts.” The court also concluded that the “presence of other motives, given the existence of the defendants’ motive to end interracial cohabitation, does not make [the defendants’] conduct any less a violation of 42 U.S.C. § 3631.”

***Hayes v. United States*, 464 F.2d 1252 (5th Cir. 1972)**

Defendants were convicted of violating 18 U.S.C. §§ 241 and 1509 (obstruction of court order) for their role in setting off explosive charges in the parking lot of a school to prevent desegregation. The court of appeals ruled that the right of Black students to attend school without regard to race or color is secured by Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c(b), and, thus, the conspiracy count stated an offense, even though it did not include an allegation of state action. “Because the right of black students to attend public schools without regard to race or color is secured by[] federal statute, Count 1 of the indictment stated an offense against the United States.” The court did not reach the United States’ claim that the right to attend school was also protected by the Thirteenth Amendment.

***Wilkins v. United States*, 376 F.2d 552 (5th Cir. 1967)**

The court of appeals recognized a conspiracy among purely private individuals who assaulted those marching for voting rights between Selma and Montgomery, Alabama. Although the acts of the defendants did not implicate a pending federal election, the court held that “any citizen of the United States participating in the march was exercising an attribute of national citizenship, guaranteed by the United States.” For this reason, the court explained, “a conspiracy against those participating [in the march] would be a violation of 18 U.S.C. § 241.”

***United States v. Harris*, 128 F. Supp. 3d 957 (N.D. Miss. 2015)**

The defendant pleaded guilty to violating 18 U.S.C. §§ 245(b)(2)(A) and (C) after he and two other men, all members of a fraternity at the University of Mississippi, drank late into the evening and then, desiring to “create a sensation on campus using a Confederate flag,” draped an old Georgia state flag (which contained a Confederate battle flag) over and hung a rope around the neck of the statue of James Meredith, the first African American student to be admitted to the then-segregated university. The court of appeals remanded the case for re-sentencing after determining that the hate-crime-motivation adjustment constituted “double counting” when applied to the hate crime offense set forth at section 245(b)(2).

Sixth Circuit

***United States v. Doggart*, 947 F.3d 879 (6th Cir. 2020)**

The defendant was convicted by a jury of solicitation to commit a civil rights violation under 18 U.S.C. § 247(a)(1), solicitation to commit arson, and making threats in interstate commerce after he solicited and discussed with others plans to damage and destroy a mosque, school, and other facility in an Islamic community in New York. The district court below granted defendant’s motion for acquittal with respect to the threat charges but held that sufficient evidence supported his solicitation convictions. The defendant appealed his remaining convictions. The court of appeals affirmed the section 247 solicitation conviction but reversed the solicitation to commit federal arson conviction. In affirming the section 247 solicitation conviction, the court of appeals rejected the defendant’s

contention that section 247 did not constitute a predicate crime of violence because it did not involve the use of physical force; to the contrary, the court held that fire, itself a physical force that causes physical damage, necessarily has “as an element the use, attempted use, or threatened use of physical force.” The court reversed the defendant’s solicitation to commit federal arson conviction, however, because “the target of the crime—a mosque—[was] not ‘used in’ interstate commerce or in any activity affecting interstate commerce” as required under 18 U.S.C. § 844(i).

***United States v. Whitt*, 752 F. App’x 300 (6th Cir. 2018)
(not precedential)**

The defendant was convicted for spray-painting racial epithets directed at the interracial landlords of an apartment from which he had been evicted. At trial, the district court excluded evidence of the defendant’s prior misdemeanor convictions for racially charged vandalism because the prior acts were not sufficiently distinctive to be probative of the defendant’s identity, nor probative of motive because the defendant’s eviction motivated his conduct. The court also held the evidence inadmissible under Federal Rule of Evidence 403.

The court of appeals reversed, holding the defendant’s prior convictions were improperly excluded. Although the court agreed that the defendant’s convictions were not probative of identity, it held the evidence was probative of motive and admissible under Rule 403. As to identity, the court agreed that the prior acts were not sufficiently similar: Swastikas (drawn backwards in both incidents) and generic racial hate speech failed to justify the inference that the same person was responsible for drawing them. As to motive, however, the court held the prior convictions probative, particularly where racial animus is an element of the charged crime. Moreover, that the defendant could have damaged the property in retaliation for his eviction was immaterial to the probative value of the government’s alternative, race-based motive. Finally, the court held the defendant’s prior convictions properly admissible under Fed. R. Evid. Rule 403 with the inclusion of a limiting instruction.

***United States v. Miller*, 767 F.3d 585 (6th Cir. 2014)**

The court of appeals reversed conviction in the *Mullet* case, described below, finding that the district court did not apply the intervening Supreme Court case, *Burrage v. United States*,¹³ which required that the jury be instructed that it must find “but for” causation, and that, to find a defendant guilty of violating 18 U.S.C. § 249, the jury must find that, without religious motivation, the defendant would not have acted.

***Glenn v. Holder*, 690 F.3d 417 (6th Cir. 2012)**

Ministers and pastors brought a civil action seeking to enjoin enforcement of 18 U.S.C. § 249(a)(2). The ministers and pastors claimed that the law would have a chilling effect on their ability to preach against homosexuality. The court of appeals held that they did not have standing to challenge the law because they stated that they did not intend to engage in violent acts or encourage others to do so.

***United States v. Mardis*, 600 F.3d 693 (6th Cir. 2010)**

The defendant was indicted for violating 18 U.S.C. § 245 for murdering an African American on account of the victim’s race and color as well as the victim’s employment by a governmental entity. The appeal raised issues unrelated to the scope or constitutionality of federal hate crimes.

***United States v. Vartanian*, 245 F.3d 609 (6th Cir. 2001)**

Three real estate agents had finalized the sale of a home to an African American family when the defendant, a white neighbor, approached and threatened to kill the realtors. He was convicted of violating 42 U.S.C. §§ 3631(a) and (b)(2). The defendant argued on appeal that he was improperly convicted because he did not directly threaten the African American family. The court held that section 3631 also reaches threats to real estate agents.

The fact that a threat or act of intimidation was not addressed directly to the protected individual does not mean that those words or conduct cannot or will not have the effect desired by the defendant. . . . In this case, where the obvious intent of the defendant was also to protest the action of the individual buyers, not just of the agents

¹³ 570 U.S. 204 (2014).

themselves, we conclude that a rational trier of fact would be justified in inferring that the import of the threat would be transmitted to the buyers.

The court rejected the defendant's argument that his two convictions on two grounds for one act were multiplicitous. The court held that section 3631(a) and section 3631(b)(1) require proof of distinct elements.

***United States v. McGee*, 173 F.3d 952 (6th Cir. 1999)**

The defendant was convicted of violating 18 U.S.C. § 245(b)(4)(A) after assaulting a Black man who was trying to enter a bar. The defendant raised several sufficiency of the evidence issues on appeal, including that, because the victim was drunk, there was a legitimate reason to deny him entrance. In upholding his conviction, the court reasoned that the defendant "appears to believe that so long as there was a legitimate reason to exclude [the victim], [the defendant's] true motivations in excluding [the victim] were not relevant. This is not an accurate statement of the law. Instead, the law provides that so long as racial animus is a substantial reason for a defendant's conduct, other motivations are not factors to be considered."

***United States v. Mahan*, 190 F.3d 416 (6th Cir. 1999)**

The defendant was convicted of violating 42 U.S.C. § 3631 after he littered the yard of an African American family with about 100 copies of a hate flyer that threatened physical violence. The appeal raised issues unrelated to the scope or constitutionality of section 3631.

***United States v. Sauer*, No. 98-6066, 1999 WL 1021582 (6th Cir. Nov. 1, 1999) (not precedential)**

The defendant, a priest, pleaded guilty to violating 18 U.S.C. § 247 after he set fire to the curtains behind his church's altar. The court of appeals affirmed the defendant's sentence because the district court recognized its opportunity to depart downward from the sentencing Guidelines but chose not to do so under the circumstances of the case.

***United States v. Johnson*, 152 F.3d 553 (6th Cir. 1998)**

The defendant, who is Black, pleaded guilty to one count of damaging religious property in violation of 18 U.S.C. § 247(c) after he drove a stolen automobile up to a church which had a predominantly white congregation and set the vehicle on fire; the fire spread to the church. In his confession, the defendant stated that, "he was doing the

will of Satan by burning the church which would cause racial tension between blacks and whites.” The court of appeals remanded the case for resentencing after concluding that an upward departure was inappropriate.

***United States v. Bakenhus*, No. 96-5193, 1997 WL 345957 (6th Cir. June 19, 1997) (not precedential)**

The defendant pleaded guilty to violating 18 U.S.C. §§ 241, 924(c), 844(i), and 42 U.S.C. § 3631(a) after he and others threw explosives at, and fired into, the home of an African American family; broke into, damaged, and set fire to the home of another African American family; and set fire to a building housing an historic African American fraternal organization. He appealed his sentence, arguing in part that the race of his victims was an element of the underlying charge and thus using race to characterize the victims as vulnerable amounted to double counting. Citing *United States v. Salyer*,¹⁴ the court held that “the minority status of the victims in Clarksville, a predominantly white community, and [the defendant’s] purposeful attack against them because of their minority status, justifies the district court’s determination that these victims were uncommonly vulnerable to the defendant’s acts.”

***United States v. Brown*, 49 F.3d 1162 (6th Cir. 1995)**

The defendant was convicted of violating 18 U.S.C. § 241 for his role in the drive-by shooting of a synagogue. On appeal, he argued that because the synagogue was owned by a corporation and not by citizens, there could be no violation of 42 U.S.C. § 1982. The court held that the United States “need not prove that the defendant actually knew it was a constitutional right being conspired against or violated.” Following *Greer*, the court concluded that to “hold” property includes the right to “use” property. “[N]on-owners of property who nevertheless have an interest in using or holding that property have a viable property interest protected under Section 1982.”

¹⁴ 893 F.2d 113 (6th Cir. 1989) (section 241 case).

***United States v. Wiegand*, No. 93-1735, 1994 WL 714347 (6th Cir. Dec. 22, 1994) (not precedential)**

The defendant appealed his 42 U.S.C. § 3631 conviction and sentence for setting fire to a house and causing injury to a firefighter. An issue on appeal was whether the penalty provision of section 3631 was limited to a particular group of individuals—that is, those who are exercising housing rights. The court, citing *United States v. Hayes*,¹⁵ held that “injury to a firefighter is a foreseeable result of arson, which is the criminal conduct at issue here.” Nor did it matter that section 844(i) already provided identical protection for firefighters because, the court reasoned, “it is well within Congress’s discretion to afford persons the same protection in more than one statutory provision.”

***United States v. Gresser*, 935 F.2d 96 (6th Cir. 1991)**

The defendants were convicted of violating 18 U.S.C. § 241, 42 U.S.C. § 3631, and 18 U.S.C. § 844(h)(1) after they and their accomplices burned a cross following an altercation with African American youths. One defendant argued on appeal that the evidence was insufficient to support his conviction because his “rage was directed at his attackers and not blacks in general.” The court held the evidence was sufficient, stressing that the defendants expressed their rage in entirely racial terms. The court also rejected the argument that section 844(h) applied only to arson and not to other uses of fire.

***United States v. Salyer*, 893 F.2d 113 (6th Cir. 1989)**

The defendant pleaded guilty to violating 18 U.S.C. § 241 after burning a cross in the yard of an African American family’s home. He appealed the district court’s decision to increase his sentence by two points for victim vulnerability. The court held that, because the victims were particularly susceptible to the crime, and because race is not incorporated into the definition of the civil rights conspiracy statute, they could be considered vulnerable victims for the purposes of sentencing the defendant.

¹⁵ 589 F.2d 811, 821 (5th Cir. 1979) (section 242 case).

***United States v. White*, 788 F.2d 390 (6th Cir. 1986)**

The defendant was convicted of violating 18 U.S.C. § 241 and 42 U.S.C. § 3631 after conspiring with others to burn down the home of an African American family, which was under construction across the street from the defendant's home. The court of appeals upheld the conviction against a challenge to the sufficiency of the evidence.

***United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986),
abrogated on other grounds by Huddleston v. United States, 485 U.S. 681 (1988)**

The defendant was convicted of violating 18 U.S.C. § 245(b)(2)(F) after violently killing a Chinese man following an altercation that began at a topless bar and continued outside after they were ejected from the club. The court of appeals rejected the defendant's claims that there was insufficient evidence to establish that he was motivated because of the race, color, and national origin of the victim or that his purpose was to injure, intimidate, and interfere with the victim's right to enjoy a place of public accommodation. The court, however, reversed the defendant's conviction and remanded for a new trial because of evidentiary errors.

***United States v. Fruit*, 507 F.2d 194 (6th Cir. 1974)**

Defendants, who planned to dynamite school buses and to fire at the buses with a weapon, were convicted of violating 18 U.S.C. § 241 for conspiring to injure, oppress, threaten, and intimidate Black students in Michigan in their right to attend school without regard to race. Defendants argued on appeal that there was no state involvement, which is required for a Fourteenth Amendment violation. Relying on the Fifth Circuit's decision in *Hayes*, the court of appeals held that the acts of the defendants violated Title IV of the Civil Rights Act of 1964.

***United States v. Doggart*, No. 15-cr-39, 2017 WL 2416920 (E.D. Tenn. June 2, 2017)**

The defendant was convicted by a jury of violating 18 U.S.C. § 247(a)(1), solicitation to commit arson, and making threats in interstate commerce after he solicited and discussed with others plans to damage and destroy a mosque, school, and other facility in an Islamic community in New York. The district court granted defendant's motion for acquittal with respect to the threat charges but held that sufficient evidence supported his section 247 and solicitation to commit arson convictions.

***United States v. Jenkins*, No. 12-cr-15, 2012 WL 4887389 (E.D. Ky. Oct. 15, 2012)**

The defendants were indicted for violating 18 U.S.C. § 249(a)(2) after they lured their victim into a vehicle and drove him to a deserted location to assault him based upon his sexual orientation. The district court, while critical of section 249(a)(2), held that the indictment was constitutional on its face because Congress validly passed it pursuant to its Commerce Clause authority. It also found that the statute was constitutional "as applied" to the allegations in the indictment, which alleged that the crime was committed using a motor vehicle and interstate highways. These allegations, the court held, were sufficient to bring the defendants' conduct within the scope of the Commerce Clause.

***United States v. Mullet*, 868 F. Supp. 2d 618 (N.D. Ohio 2012)**

Defendants, members of an Amish sect, were charged with violating 18 U.S.C. § 249(a)(2) after they violently broke into the homes of other members of the Amish community whom they deemed were not faithfully following the religion and forcefully sheared the hair of their victims, causing bodily injury. In response to the defendants' constitutional challenge to the indictment, the district court held that section 249(a)(2) was constitutional *on its face* because Congress passed the statute pursuant to a valid exercise of its Commerce Clause authority. It also found the statute was constitutional *as applied* to the allegations in the indictment. It held that the fact that the crime was alleged to have been committed with weapons that had traveled in commerce, with hired vehicles, and by luring victims through the mail was sufficient to bring the defendants' conduct

within the scope of the Commerce Clause. The court also held that section 249 applied to acts of intra-religious violence and that it did not infringe on the defendants' First Amendment rights.

***United States v. Fredericy*, No. 06-CR-00035
(N.D. Ohio 2007)**

Defendants pleaded guilty to violating 18 U.S.C. § 241, 42 U.S.C. § 3631, and to making false statements after they conspired to injure and intimidate African American residents into leaving their neighborhood in Cleveland, Ohio. Specifically, one of the defendants, with the other's encouragement, released mercury onto the front porch of the home of an interracial couple and their four children.¹⁶

Seventh Circuit

***United States v. Milbourn*, 600 F.3d 808 (7th Cir. 2010)**

The defendant was convicted of conspiring to deprive a family of their right to occupy a dwelling free from intimidation based on race, in violation of 18 U.S.C. § 241, 42 U.S.C. § 3631, and other statutes after he and another man built a cross, transported it to the home of a couple with three bi-racial children living in a predominantly white neighborhood, dug a hole in the front yard, planted the cross, doused it with gasoline, set it on fire, and then laughed while they watched it burn. The family, terrified and concerned for the children's safety, eventually moved from the neighborhood. The court of appeals held that the evidence was sufficient to prove that the defendant's actions were motivated by the race of the victims and was intended to intimidate and interfere with their housing rights. "Of all the things to burn in someone's yard, [defendants] chose a cross. Of all the places to burn that cross, they chose the front yard of a rented house that served as the home for three bi-racial children." After reciting the history and meaning of cross burning, the court concluded that the evidence was sufficient to establish all elements of the crime.

¹⁶ Plea Agreement, *Fredericy*, No. 06-cr-00035, ECF No. 52.

***United States v. Dropik*, 476 F.3d 471 (7th Cir. 2007)**

The defendant pleaded guilty to two counts of violating 18 U.S.C. §§ 247(c) and 247(d)(3) for a racially motivated arson that damaged religious property. The appeal raised issues unrelated to the scope or constitutionality of section 247.

***United States v. Craft*, 484 F.3d 922 (7th Cir. 2007)**

The defendant was convicted of violating 18 U.S.C. § 844(h) (use of fire to commit a felony) when the underlying felony was 42 U.S.C. § 3631 after burning several buildings and homes in Indiana. On appeal, the defendant argued that there was insufficient evidence to support a finding that the fires were motivated by racial animus. He contended that he set fire to one of the homes because the owner owed him money. The court ruled that “[t]he government was not required to prove, however, that racial animus was [the defendant’s] sole motivation in setting the fire. Rather, it was only required to prove that the victims’ race or ethnicity partially motivated [the defendant’s] crimes.” The defendant also argued that he did not interfere with the victims’ housing rights because one family was not living at the residence at the time of the arson and the other family had moved out before the actual arson. The court disagreed, noting that section 3631 could be violated before owners physically reside in a property and that, by its terms, it prohibits interfering with a person who “is or has been renting a dwelling.” Some of the decision’s rationale was vitiated by *Burrage v. United States*.¹⁷

***United States v. Flowers*, 389 F.3d 737 (7th Cir. 2004),
overruled by *United States v. Wahi*, 850 F.3d 296
(7th Cir. 2017)**

The defendant, who participated in a cross burning, pleaded guilty to violating 42 U.S.C. § 3631. The appeal raised issues unrelated to the scope or constitutionality of section 3631.

***United States v. Colvin*, 353 F.3d 569 (7th Cir. 2003)
(en banc)**

The defendant was convicted of violating 18 U.S.C. § 241, 18 U.S.C. § 844(h)(1), and 42 U.S.C. § 3631 after burning a cross in front of the home of a Puerto Rican man and, carrying a firearm during the

¹⁷ 571 U.S. 204 (2014).

incident. The defendant asserted on appeal that his conviction under section 844(h)(1) (using of fire to commit a felony) violated the Double Jeopardy Clause to the extent that it was based on his conviction under section 3631 (which itself prescribes a greater punishment when fire is used). The court concluded that Congress intended such cumulative punishment in a 1988 amendment to section 844(h)(1). The court, however, ruled that a conspiracy conviction under section 241 could not be used as a predicate felony to support a conviction for committing a felony by using fire. This portion of the court's decision overruled *United States v. Hartbarger*¹⁸ and *United States v. Hayward*.¹⁹

***United States v. Hartbarger*, 148 F.3d 777
(7th Cir. 1998), overruled in part by
United States v. Colvin, 353 F.3d 569 (7th Cir. 2003)**

The defendants were convicted of violating 18 U.S.C. § 241, 42 U.S.C. § 3631, and 18 U.S.C. § 844(h)(1) for burning a cross on the property of an interracial couple and their children. The court of appeals ruled that the district court did not abuse its discretion when it limited testimony that the defendants did not understand the historical significance of cross burning because, as children, they lived in isolation from people and the media. The court also held that evidence of the victims' reaction to the cross burning could be introduced as evidence of the defendants' intent so long as the jury is instructed that it is not conclusive evidence.

***United States v. Rogers*, 45 F.3d 1141 (7th Cir. 1995)**

The defendant was convicted of violating 18 U.S.C. § 241, 42 U.S.C. § 3631, and other statutes after terrorizing an African American family by shooting at them, ripping out their telephone line, yelling racial epithets, breaking an awning post to their home, and brandishing brass knuckles and a knife. The appeal raised issues unrelated to the scope or constitutionality of federal hate crimes.

¹⁸ 148 F.3d 777 (7th Cir. 1998) (see below).

¹⁹ 6 F.3d 1241 (7th Cir. 1993) (see below).

***United States v. Montgomery*, 23 F.3d 1130
(7th Cir. 1994)**

The defendant was convicted of violating 18 U.S.C. § 241 and 42 U.S.C. § 3631 after burning a cross in front of a shelter for homeless veterans, of whom 60% were African American. The court of appeals summarily rejected arguments that there was insufficient evidence to support a conviction and that the defendant received ineffective assistance of counsel.

***United States v. Sowa*, 34 F.3d 447 (7th Cir. 1994)**

The defendant was convicted of violating 18 U.S.C. § 371 (general conspiracy) and 18 U.S.C. § 245(b)(2)(B) after he conspired to interfere with the rights of two African American men to use the streets and sidewalks of the city because of their race and then used a baseball bat to brutally bludgeon them. The appeal raised issues unrelated to the scope or constitutionality of section 245(b)(2)(B).

***United States v. Hayward*, 6 F.3d 1241 (7th Cir. 1993),
overruled in part by *United States v. Colvin*, 353 F.3d
569 (7th Cir. 2003)**

The defendants were convicted of violating 18 U.S.C. § 241, 42 U.S.C. § 3631, 18 U.S.C. § 844(h)(1), and other statutes after burning a cross in front of the home of a white couple who entertained African American visitors. The court of appeals rejected the defendants' argument that cross burning was protected speech.

***United States v. Myers*, 892 F.2d 642 (7th Cir. 1990)**

Defendants were convicted of violating 18 U.S.C. § 241 and 42 U.S.C. § 3631 after firebombing an African American family's car in a successful attempt to force them to move from the area. The conviction was vacated and remanded for a hearing by the district court on the question of whether a defendant's counsel was ineffective at trial. On remand, the district court rejected the defendant's claim of ineffective counsel, and the court of appeals affirmed his conviction.²⁰

²⁰ *United States v. Myers*, 917 F.2d 1008 (7th Cir. 1990).

***United States v. Redwine*, 715 F.2d 315 (7th Cir. 1983)**

The defendants were convicted of violating 18 U.S.C. § 241, 42 U.S.C. § 3631, and other statutes after firebombing the house of an African American family a month after they moved into the neighborhood. The court of appeals rejected defendants' contention that they were convicted on insufficient, circumstantial evidence. The court also held that the defendants' acts of throwing rocks through the victims' windows and pronouncing that the family should be "burned out" were sufficient to sustain their convictions for willfully intimidating and interfering with the family because of their race and occupation of the home. Finally, the court held that a proven conspirator is responsible for the substantive offenses based on the overt acts of fellow conspirators, thus upholding the conviction of one defendant for aiding and abetting the firebombing.

***United States v. Nix*, 417 F. Supp. 2d 1009 (N.D. Ill. 2006)**

The defendant was charged with violating 42 U.S.C. § 3631 after detonating an explosive device inside a vehicle parked in front of the home of a family of Arab descent. The parties submitted conflicting jury instructions on the issue of the amount of racial motivation required for a section 3631 conviction. The court rejected the idea that only incidental racial motivation was required. The court proposed to define the "because of" element as follows:

[T]he government must prove that the defendant acted "because of" the race or national origin of [the victim] and "because" [the victim was] occupying a dwelling. This means that the government must prove that both [the victim's] race or national origin, and her occupancy of a dwelling, were substantial motivating factors in the defendant's actions. The government is not required to prove that these were the defendant's sole motivations.

***United States v. Nicholson*, 185 F. Supp. 2d 982 (E.D. Wis. 2002)**

The defendant, charged with violating 18 U.S.C. § 241, 42 U.S.C. § 3631, and 18 U.S.C. § 844(h)(1) for his role in the firebombing of a house occupied by a Hmong family, filed a motion to dismiss, arguing that section 241 and section 3631 exceeded the scope of Congress's

power under the Commerce Clause and the Thirteenth Amendment. The defendant argued that Congress is without authority to criminalize activity when the only link to interstate commerce is “occupation” of a dwelling. The court rejected the defendant’s argument, relying on the aggregate effects on a national housing market. The court also found that the Fair Housing Act was an “exercise of congressional power under the thirteenth amendment to eliminate the badges and incidents of slavery.”

***United States v. Bronk*, 604 F. Supp. 743
(W.D. Wis. 1985)**

The defendants were charged with violating 18 U.S.C. § 245(b)(2)(F) and 18 U.S.C. § 371 (general conspiracy) and moved to dismiss their indictment on the ground that the tavern in which the acts alleged in the indictment were said to have occurred was not a facility that serves the public within the meaning of that term in section 245(b)(2)(F) because the tavern was not open to people younger than the state drinking age pursuant to Wisconsin law. With no discussion, the court agreed with the magistrate’s common sense construction of the word “public” to include all persons of the community not otherwise precluded by law from entering the premises. The court, however, dismissed the indictment without prejudice for failure to comply with the certification requirement.

Eighth Circuit

***United States v. Metcalf*, 881 F.3d 641 (8th Cir. 2018)**

The defendant was charged with violating 18 U.S.C. § 249 for assaulting an African American man in a bar. After getting into an argument with the victim’s female friends, the defendant directed racial slurs at the victim and his friends, told other patrons that he hated Black people, bragged to the bar’s owner about being involved in cross burnings, and flashed his swastika tattoo. Later that night, after hours of taunting, the defendant attacked the victim’s female friend. When the victim intervened to protect her, the defendant’s friends knocked him out. As the victim lay barely conscious on the floor of the bar, the defendant walked over to him and repeatedly kicked and stomped on his head. The district court upheld section 249(a)(1) as a valid exercise of Congress’s Thirteenth Amendment authority after canvassing all other cases previously issued. On appeal, the Eighth Circuit upheld the constitutionality of 18 U.S.C. § 249(a)(1) as a valid

exercise of Congress's Thirteenth Amendment authority to identify and eradicate badges and incidents of slavery. The court of appeals also summarily dismissed the defendant's argument that insufficient evidence existed to sustain his conviction, citing the defendant's repeated racially based comments and surveillance camera footage documenting the "viciousness of his racially based initial attack."

***United States v. Maybee*, 687 F.3d 1026 (8th Cir. 2012)**

The defendant was convicted of violating 18 U.S.C. § 249(a)(1) after he and his companions confronted a group of Mexican Americans at a convenience store, calling them racial slurs. Upon seeing the victims drive away in a sedan, the defendant and his companions pursued them in the defendant's pickup truck. Ultimately, the defendant rammed the victim's sedan with his pickup truck and then executed a "pit maneuver" designed to cause the driver of the sedan to lose control. The sedan crashed through a fence and burst into flames, seriously injuring all five victims. The court of appeals upheld the constitutionality of 18 U.S.C. § 249(a)(1), finding that Congress had Thirteenth Amendment authority to enact it. The court rejected the defendant's argument that Congress could not pass legislation under the Thirteenth Amendment except to enforce some other federally protected right (for example, the right to vote or the right to fair housing).

***United States v. Sandstrom*, 594 F.3d 634 (8th Cir. 2010)**

The defendants were convicted of violating 18 U.S.C. § 245(b)(2)(B) and other offenses for shooting, on two separate occasions, and eventually killing an African American man who was walking down a public street. The court of appeals rejected defendants' constitutional challenge to section 245, holding that in enacting the statute, Congress acted well within its authority under both section two of the Thirteenth Amendment and the Commerce Clause. The court also rejected several arguments raised by defendants that were unrelated to civil rights issues.

***United States v. Weems*, 517 F.3d 1027 (8th Cir. 2008)**

Defendants were convicted of violating 18 U.S.C. § 241 for their involvement in burning a cross outside the home of one of the defendant’s African American neighbor. On appeal, the court ruled that, “because the jury found beyond a reasonable doubt that [the defendants] selected the victim because of his race, the district court should have applied the three-level [hate crime] enhancement when calculating the correct guidelines range” and that applying a hate crime sentencing enhancement for the violation of a hate crime statute “is not duplicative because the race of the victim is not an element of section 241, and it is not incorporated in the applicable base offense level.”

***United States v. Corum*, 362 F.3d 489 (8th Cir. 2004)**

The defendant was convicted of violating 18 U.S.C. § 247(a)(2) and other offenses after leaving threatening voice mail messages at three synagogues. The court of appeals held that the Church Arson Prevention Act was constitutional under the three-part Establishment Clause test in *Lemon*²¹ and further held that the statute was enacted pursuant to a valid exercise of Congress’s Commerce Clause authority. The court also held, without analysis, that the record “reveals that the government presented sufficient evidence for the jury to have determined the offense (threatening telephone calls) affected interstate commerce.”

***United States v. Pospisil*, 186 F.3d 1023 (8th Cir. 1999)**

Defendants were convicted of violating 18 U.S.C. § 241, 42 U.S.C. § 3631, and other statutes after they burned a cross in the front yard of a Cape Verdean family—whom the defendants thought were African American—and also fired shots into the air and shouted racial epithets. Their convictions were affirmed, and the court of appeals rejected an argument that the district court impermissibly refused to allow the defense to peremptorily strike African American citizens from the jury. The court held that there is no exception to *Batson v. Kentucky*²² in racial hatred cases. One defendant’s sentencing enhancement for “vulnerable victim” was upheld because he was

²¹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

²² 476 U.S. 79 (1986) (forbidding the discriminatory use of peremptory strikes in jury selection).

aware that children lived in the house and that the family was new to town. The enhancement was stricken for the other defendant, however, because the government had not established that he was aware of these facts.

***United States v. Dunnaway*, 88 F.3d 617
(8th Cir. 1996)**

The defendants were convicted of violating 18 U.S.C. § 245(b)(2)(B) after they left a party to assault any Black man they could find. They found the victim in a public park talking with his wife, who was white. The defendants attacked the victim, kicking him repeatedly in the head and body. During the attack, the defendants used racial slurs, and one of the defendants identified himself as a skinhead. After returning to the party, the defendants boasted that they had beaten a Black man because he had been sitting in a park with a white woman. The court of appeals held that it was proper for the court to admit testimony that one of the defendants identified himself as a skinhead because the crime involved elements of racial hatred. The court also held that evidence of a defendant's racist views, behavior, and speech were relevant and admissible to show discriminatory purpose and intent. The court disagreed with defendants' argument that the aggravated assault guideline used at sentencing was inapplicable and that the bottle and boots used in the assault were not dangerous weapons.

***United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994)**

The court of appeals affirmed the convictions, based on violations of 18 U.S.C. § 241 and 42 U.S.C. § 3631, of three juvenile men who burned crosses near an African American family's home four months after they moved in. The court rejected the contention that section 3631 violated the First Amendment and held that there was sufficient evidence to find that cross burnings were meant to be threatening and cause fear of the imminent use of force. The court also held that admitting expert testimony about skinhead organizations was harmless because there was other ample evidence to support conviction.

***United States v. McDermott*, 29 F.3d 404
(8th Cir. 1994)**

The defendant was convicted of violating 18 U.S.C. § 245(b)(2)(B) after he and a group of teenagers attempted, for approximately a year, to keep Black individuals out of a public park by brandishing weapons, veering cars towards individuals, chasing individuals, spitting on children, and ultimately, burning a 15-foot cross in the park. The indictment charging the defendant with section 245(b)(2)(B) specified only the cross burning. On appeal, the court recognized that burning a cross may be protected expression under the First Amendment; however, the court explained that the defendant could be convicted for the protected activity of burning a cross if it was done either to incite unlawful violence or to threaten. The court held that the challenged jury instruction failed to explain the difference between protected expressive activity and unprotected threats or incitement to imminent lawless action. Moreover, the instruction failed to mention that the defendant must have acted with specific intent to threaten the use of force. The court explained that the trial judge permitted the jury to conclude that a threat of force was used if it found that the defendant “burned a cross in order to threaten.” The court reasoned that, by wording the instruction in permissive terms, the trial judge allowed the jury to convict without finding that the defendant burned the cross with the intent to threaten *the use of force* or at least cause Blacks to reasonably fear the imminent use of force or violence. Accordingly, the court reversed and remanded.

***United States v. Lee*, 935 F.2d 952 (8th Cir. 1991),
reh’g en banc, 6 F.3d 1297 (8th Cir. 1993)**

The defendant was charged with violating 18 U.S.C. § 241, 42 U.S.C. § 3631, and 18 U.S.C. § 844(h)(1) for constructing and burning a cross on a hill near an apartment complex occupied by numerous African Americans. The defendant was convicted of violating sections 241 and 844(h)(1) but acquitted of the section 3631 charge. On appeal, the defendant argued that section 844(h)(1) was not intended to apply to the conduct at issue and a panel of the court of appeals reversed his conviction on this count. Specifically, the panel held that section 844(h) only applied to the underlying crime of arson and not to a cross burning.

***United States v. Bledsoe*, 728 F.2d 1094 (8th Cir. 1984)**

The defendant, who regularly went to a public park with his companions to harass homosexuals, was convicted of violating 18 U.S.C. § 245(b)(2)(B) after he struck a white man, who eventually ran away, and then struck a Black man with a baseball bat. That Black man also ran away, but the defendant gave chase, caught up to him, and repeatedly struck the man on the top of his head, crushing his skull and killing him. On appeal, the court rejected the defendant's argument that the jury instructions suggested that a violation of section 245 could be based on actions that were motivated only incidentally by race. The court also rejected the defendant's claim that the evidence supported a finding that he attacked the victim because of his sexual orientation rather than race. The court held that the evidence sufficiently established that the defendant had a history of violently attacking Blacks and, further, that this attack was particularly motivated by racial hatred. Importantly, the record contained admissions by the defendant boasting about the murder in racially derogatory terms, and the government introduced circumstantial evidence that the white man, whom the defendant believed to be a homosexual, could escape after a single strike, but the Black victim was beaten, pursued, caught, and killed.

***United States v. Metcalf*, No. 15-CR-1032, 2016 WL 827763 (N.D. Iowa Mar. 2, 2016)**

The defendant was charged with violating 18 U.S.C. § 249 for assaulting an African American man in a bar. After getting into an argument with the victim's female friends, the defendant directed racial slurs at the victim and his friends, told other patrons that he hated Black people, bragged to the bar's owner about being involved in cross burnings, and flashed his swastika tattoo. Later that night, after hours of taunting, the defendant attacked the victim's female friend. When the victim intervened to protect her, the defendant's friends knocked him out. As the victim lay barely conscious on the floor of the bar, the defendant walked over to him and repeatedly kicked and stomped on his head. The district court upheld section 249(a)(1) as a valid exercise of Congress's Thirteenth Amendment authority, after canvassing all other cases previously issued.

Ninth Circuit

***United States v. Whittington*, 721 F. App'x 713 (9th Cir. 2018) (not precedential)**

In a short opinion, the court of appeals, reviewing for plain error, held that 42 U.S.C. § 3631 was a predicate crime of violence that properly supported the defendant's conviction for using a firearm during a crime of violence under 18 U.S.C. § 924(c)(3).

***United States v. Cazares*, 788 F.3d 956 (9th Cir. 2015)**

Between 1995 and 2001, several members of the Avenues 43, a Latino street gang operating in the Highland Park neighborhood of Los Angeles, directed racial slurs, threats, assaults, and general harassment toward African American residents of the neighborhood; ultimately, they murdered an African American resident—all with the intent to drive African American residents from their homes. Four defendants were charged, tried, and convicted of conspiring to intimidate African American citizens in the Highland Park neighborhood and to deprive them of their right to occupy a dwelling free from intimidation based on race, a right protected by 42 U.S.C. § 3631, in violation of 18 U.S.C. § 241; three of the four defendants were also convicted of violating 18 U.S.C. § 245(b)(2)(B) and weapons charges. The appeal raised issues unrelated to federal hate crimes.

***United States v. Silva*, 428 F. App'x 737 (9th Cir. 2011) (not precedential)**

The defendants, a married couple, were convicted of violating 18 U.S.C. § 245(b)(2)(B) after they verbally harassed and physically assaulted beachgoers of Indian descent. The appeal raised issues unrelated to the scope or constitutionality of section 245.

***United States v. Smith*, 365 F. App'x 781 (9th Cir. 2010) (not precedential)**

The defendant was convicted of violating 42 U.S.C. § 3631 after he made repeated threats over a CB radio to go to the home of an African American victim, burn a cross, hang the victim in a tree, and rape the victim's wife. At some point, the victim told the defendant to “come on over,” and the defendant did so; he arrived with several other men and began verbally harassing the victim. The victim called the police, who

broke up the incident before any violence occurred. The conviction was upheld on appeal. The appellate court opinion dealt with criminal procedure and sentencing issues. Significantly, the court held that, to obtain a sentencing enhancement for racial motivation, the government need not prove that race was a primary motivating factor but, instead, it is sufficient to show the same level of motive required for conviction in the first instance (the jury had been instructed that, to convict, it must determine that race was a substantial—not a primary—motivating factor). The court’s decision is likely vitiated by *Burrage v. United States*.²³

***United States v. Armstrong*, 620 F.3d 1172
(9th Cir. 2010)**

The defendant was convicted of violating 18 U.S.C. § 245(b)(2)(F) after he and others brutally assaulted an African American man outside of a shopping center. The court of appeals upheld an upward adjustment to the defendant’s sentence calculation, pursuant to U.S.S.G. § 3A1.1(a), because the victim was selected based on race.

***United States v. Allen*, 341 F.3d 870 (9th Cir. 2003)**

The defendants, white supremacists, were convicted of violating 18 U.S.C. § 245(b)(2)(B) and 18 U.S.C. § 241 after engaging in a “park patrol” intended to drive minorities out of a local park. The court of appeals rejected defendants’ arguments that the park did not satisfy elements of section 245 because it was closed at the time of the attack and that it was not a public accommodation because it did not provide sources of entertainment. The court disagreed, finding that there was ample evidence that the park was a place for performances, exhibitions, and other sources of entertainment. The court also upheld the admission at trial of skinhead and white supremacist evidence, including color photographs of their tattoos, Nazi-related literature, group photographs, and skinhead paraphernalia, holding that, although the evidence was prejudicial, it was not unfairly so, and it properly had been admitted to prove racial animus.

²³ 571 U.S. 204 (2014).

***United States v. Machado*, 195 F.3d 454 (9th Cir. 1999)**

The defendant was convicted of violating 18 U.S.C. § 245(b)(2)(A) after twice sending a racist, profane email message from the computer lab at a university to approximately 60 Asian American students. The appeal raised issues unrelated to the scope or constitutionality of section 245.

***United States v. Baird*, 189 F.3d 475 (9th Cir. 1999)
(not precedential)**

The defendant, a white supremacist, was convicted of violating 18 U.S.C. § 241 and 18 U.S.C. § 245(b)(2)(F) after he and several friends beat two men, one Black and one Hispanic, in the parking lot of a 7-11 store. On appeal, the court held that there was sufficient evidence to establish that the defendant specifically intended to prevent the victims from using the services and facilities of the 7-11 because of the victims' race, and that the store and its facilities constituted a public accommodation within the meaning of the statute.

***United States v. Makowski*, 120 F.3d 1078
(9th Cir. 1997)**

The defendant was convicted of violating 18 U.S.C. § 245(b)(2)(B) after he physically assaulted and injured a Hispanic man at a public park while the victim watched his daughter play on a playground. Before, during, and after the assault, the defendant used racial epithets. In holding that section 245(b)(2)(B) was not void for vagueness, the court of appeals stated that the statute requires proof of the specific intent to interfere with a federally protected activity on the basis of race.

According to the court, racial animus must be a motivating factor in the use or threat of force. Because the statute requires that an individual act willfully, the statute clearly excludes situations involving the incidental use of racial epithets during an altercation.

***United States v. Sanders*, 41 F.3d 480 (9th Cir. 1994)**

The defendant was convicted of violating 42 U.S.C. § 3631 and of sending threatening communications after mailing letters replete with racial epithets to a local chapter of the NAACP, which also housed the chapter president's home. The court of appeals held that it was not error for the district court to hold the defendant ineligible for a

reduction of sentence because his activities were but a “single instance” of conduct “evidencing little or no deliberation.”

***United States v. Black*, 995 F.2d 233 (9th Cir. 1993)
(not precedential)**

The defendant was convicted of aiding and abetting a violation of 18 U.S.C. § 245(b)(2)(F), in violation of 18 U.S.C. § 2, after he approached an African American man near a convenience store and gasoline station, uttered racial slurs, forced him toward the street, and then stabbed the victim several times. On appeal, the defendant argued that there was insufficient evidence to support his conviction because the government did not prove that he intended to deprive the victim of the use of a public facility. The court disagreed, citing the testimony of four witnesses and a note from the defendant to another inmate in prison, which all indicated that the defendant attacked the victim because he was African American and because he was in the defendant’s neighborhood. The court held that this evidence was sufficient for a rational jury to infer that the defendant intended to deprive the victim of the use of the convenience store and gasoline station.

***United States v. McInnis*, 976 F.2d 1226 (9th Cir. 1992)**

The defendant was convicted of violating 42 U.S.C. § 3631 after he twice fired a single-action rifle into the home of an African American family who lived next door. The shots pierced two walls and struck one occupant’s stomach, requiring surgery. The defendant appealed, claiming that the evidence was insufficient to prove that he had the specific intent to injure, intimidate, or interfere with the victim because of her race and because of the victim’s occupation of her home. The court rejected this argument based on the defendant’s numerous racial remarks immediately before the shooting.

Furthermore, the police found numerous items of racist paraphernalia in the defendant’s home. The defendant challenged the admission into evidence of these items as unduly prejudicial because each bore swastikas, but the court rejected the argument. The court also accepted the government’s argument that the district court improperly sentenced the defendant by failing to correctly calculate the base offense level using assault as the underlying crime.

***United States v. Skillman*, 922 F.2d 1370
(9th Cir. 1990)**

The defendant was convicted of violating 18 U.S.C. § 241, 42 U.S.C. § 3631(a), and other statutes after burning a cross outside the home of an African American family. On appeal, the defendant claimed there was insufficient evidence to convict him because he was merely present at the scene of the crime. The court, however, held that the requisite “slight connection” existed in that the defendant carried a can of gasoline to the scene of the crime. The court also rejected the defendant’s contention that he was unduly prejudiced by discussion of his status as a skinhead at trial; the evidence was deemed relevant, given that the racial implications were part of the elements of the section 3631 charge. The court also upheld the application of a vulnerable victim sentencing enhancement, reasoning that the defendant “knew or should have known that a black family . . . would be terrified and particularly susceptible to this criminal conduct.”

***United States v. Gilbert*, 884 F.2d 454 (9th Cir. 1989),
overruled by *United States v. Hanna*, 293 F.3d 1080
(9th Cir. 2002)**

The defendant was convicted of violating 42 U.S.C. § 3631 for interfering with the adoptive placement of African American children in homes. The defendant appealed, arguing that his racist letters to an adoption agency were not threatening, but instead were political discussions. The court held that the jury could find that there were threats in the letter, especially given that the defendant was a leader of an extremist hate group and that, per section 3631, the threats were intentionally made.

***United States v. Gilbert*, 813 F.2d 1523 (9th Cir. 1987)**

The district court dismissed with prejudice an indictment charging defendant with violating 42 U.S.C. § 3631 for failing to state an offense after the defendant mailed racially derogatory and threatening correspondence to the director of an adoption agency that placed African American and Asian children in homes. The district court reasoned that “adoption efforts focus on placement of a child with a family and not on placement of a child in a dwelling.” On appeal, the government argued that the district court construed too narrowly the definitions of dwelling and occupation. The court of appeals sided with

the government, finding that both dwelling and occupation had traditionally been accorded a broad interpretation.

[I]t is unnecessary for a dwelling to be in existence or occupied. A prospective dwelling is sufficient. Second, the occupation of a dwelling does not need to be permanent or associated with property rights. . . . Applying these principles here, we hold that the placement of minority children by the director of an adoption agency is a protected activity . . . since the director is “aiding or encouraging” minorities in the occupancy of dwellings . . . The relationship between an adoption agency and the occupancy of a dwelling is not “too remote.”

***United States v. Henery*, 60 F. Supp. 3d 1126
(D. Idaho 2014)**

The defendant was charged with violating 18 U.S.C. § 249(a)(1) for attacking an African American man at a club while yelling gang calls and racial slurs. The district court upheld Congress’s authority under the Thirteenth Amendment to enact section 249(a)(1).

***United States v. Gardner*, 993 F. Supp. 2d 1294
(D. Or. 2014)**

The defendant was charged with violating the Victim and Witness Protection Act for misleading police officers about a federal hate crime. The defendant argued that the hate crime (18 U.S.C. § 249(a)(2)) underlying her substantive offense was an unconstitutional exercise of Congress’s Commerce Clause authority and that, for that reason, her substantive charge should likewise be dismissed. The district court held that section 249(a)(2) was a constitutional exercise of Congress’s Commerce Clause authority.

***United States v. Mason*, 993 F. Supp. 2d 1308
(D. Or. 2014)**

The defendant was charged with violating 18 U.S.C. § 249(a)(2) for assaulting a man because of his sexual orientation. The district court held that section 249(a)(2) was a constitutional exercise of Congress’s Commerce Clause authority.

***United States v. Crawford*, 66 F. Supp. 3d 1311
(D. Or. 2014)**

The defendant was charged with violating 18 U.S.C. § 247(c) for setting fire to a mosque. The district court admitted defendant’s anti-Muslim statements into evidence over objection that such evidence was impermissible “propensity” evidence. The court found that the evidence was “offered for a permissible purpose and not simply to show propensity” and noted that the government was required under the statute to prove that the defendant set fire to the mosque because of his feelings about Muslims. For this reason, the court explained, the government sought “to admit defendant’s comments to show his intent and state of mind—not’ [sic] his propensity to commit arson or damage religious property generally.”

***United States v. Furrow*, 125 F. Supp. 2d 1178
(C.D. Cal. 2000)**

The defendant filed a motion to dismiss the indictment charging him with violating 18 U.S.C. §§ 245(b)(2)(F) and (b)(4)(A), arguing that the statute was unconstitutional. The district court held that Congress validly enacted section 245 pursuant to its Commerce Clause authority.

Tenth Circuit

***United States v. Stein*, 985 F.3d 1254 (10th Cir. 2021)**

The defendants were convicted of section 241 and other offenses for his role in a scheme to bomb an apartment complex and mosque in Garden City, Kansas. The court of appeals affirmed the defendants’ convictions after rejecting various challenges unrelated to section 241.

***United States v. Porter*, 928 F.3d 947 (10th Cir. 2019)**

Defendant assaulted an African American man while the victim and his son were walking to their home. Defendant appealed conviction, and the government cross-appealed sentence. Defendant argued, *inter alia*, that the district court allowed a constructive amendment to the indictment by inducing the jury to convict him for his verbal assault of the victim’s son, rather than his physical assault of the victim. The court of appeals, reviewing for plain error, rejected the defendant’s argument, citing unambiguous identification of the correct victim in

the government's opening statement, witness testimony, and jury instructions.

The government argued on appeal that the district court erred by using "assault" rather "aggravated assault" as the underlying offense when calculating the defendant's Guidelines range. Alternatively, the government contended that the district court erred in applying a base offense level of 7 rather than 10 under U.S.S.G. § 2H1.1 because the offense involved "the use or threat of force against a person." The court rejected the government's "aggravated assault" argument as the lower court's determination that the defendant lacked the requisite intent to injure the victim was not clearly erroneous. The court agreed, however, that the government's alternative calculation was correct as the lower court had failed to apply a base offense level of 10 where, as here, "the offense involved . . . the use or threat of force against a person." Accordingly, the court of appeals reversed and remanded for resentencing.

***United States v. Hatch*, 722 F.3d 1193 (10th Cir. 2013)**

The defendant pleaded guilty to violating 18 U.S.C. § 249(a)(1) after kidnapping a disabled Native American man and burning a swastika into his arm. The court of appeals upheld the constitutionality of 18 U.S.C. § 249(a)(1) as a valid exercise of Congress's Thirteenth Amendment authority.

***United States v. Egbert*, 562 F.3d 1092 (10th Cir. 2009)**

The defendants, members of a white supremacist organization, were convicted of violating 18 U.S.C. § 241 and 18 U.S.C. § 245(b)(2)(C) after they assaulted, while uttering racist slurs, a Mexican American bartender who had asked them to leave the bar after other patrons complained that they had distributed white supremacist literature. A few months later, one of the defendants, along with other white supremacists, lured three men, one of whom they suspected to be Native American, from a bar and then beat one of the victims until he stopped moving. The defendants did not challenge their convictions, but successfully argued on appeal that they were entitled to a sentence reduction because (1) the evidence did not support a finding that the victim suffered serious bodily injury, and (2) one of the defendants had not played a leadership role in the offense.

***United States v. Magleby*, 420 F.3d 1136
(10th Cir. 2005) (affirming denial of habeas relief)
and *United States v. Magleby*, 241 F.3d 1306 (10th
Cir. 2001) (affirming convictions)**

The defendant was convicted of violating 18 U.S.C. § 241, 42 U.S.C. § 3631, and other statutes after he burned a cross on the lawn of an interracial family's home. The court of appeals rejected his argument that there was insufficient evidence for a conviction. The court rejected the defendant's argument that the jury instructions were flawed in that they would allow the jury to convict him because one of the victims was Black, but without finding that the defendant was motivated based on the victims' occupation of their home. The court also held that there was no error in instructing the jury that it could consider the reaction of the victims in determining the defendant's intent. The court questioned the government's use of an expert on hate groups and an avowed racist who knew the defendant but held any error in doing so was harmless. The court permitted the introduction of racist song lyrics the defendant listened to shortly before the crime. On appeal from a denial of habeas corpus relief, the court agreed that the section 241 instruction was flawed because it never defined "threat" as "requiring a threat of force." "Many acts short of unlawful violence may constitute oppression or intimidation in the everyday sense of these words." Nevertheless, the court did not find it objectively unreasonable for appellate counsel not to raise this challenge.

***United States v. Grassie*, 237 F.3d 1199
(10th Cir. 2001)**

The defendant was convicted of violating 18 U.S.C. § 247 after burning one church and defacing and damaging four others. The court of appeals rejected defendant's challenge to the constitutionality of section 247, holding that the evidence at trial showed "the extensive use of these church buildings for a broad range of religious, cultural, social, recreational, welfare, educational, and financial activities." In addition, the defendant had stipulated that the churches were "engaging in activities affecting interstate commerce." The court also upheld the district court's jury instruction that a finding of "any effect at all on interstate commerce" was enough to satisfy a statutory element, and alternatively ruled that the jury "necessarily made its decision in light of an unqualified 'affecting commerce' stipulation."

The court also rejected the defendant's argument that his convictions under both sections 247 and 844(h)(1) (use of a fire to commit a felony) violated double jeopardy.

***United States v. Whitney*, 229 F.3d 1296
(10th Cir. 2000)**

The defendants were convicted of violating 18 U.S.C. § 241 and 42 U.S.C. § 3631 after burning a cross on the lawn of an African American family's home. The court of appeals found the evidence sufficient to sustain both convictions.

***United States v. Woodlee*, 136 F.3d 1399
(10th Cir. 1998)**

The defendants were convicted of violating 18 U.S.C. § 245(b)(2)(F) after making racial comments and threats toward African American men in a bar, following them from the bar, following them in a high-speed car chase, and then firing a rifle into the victims' car, hitting one of the victims. On appeal, the defendants argued that the government needed to show that they had intended to injure a victim rather than merely intimidate or interfere with a right in a manner that resulted in injury. The court disagreed, holding that section 245(b) expressly provides that the government need only show that the defendant's illegal conduct resulted in bodily injury; the standard is one of causation, not state of mind. One defendant also challenged the admission of witness testimony, under Federal Rule of Evidence 404(b), regarding his racist attitudes. The court disagreed, explaining that, under section 245(b)(2)(F), the government was required to prove that the defendant had acted because of the victims' race. The court held that evidence of past racial animosity was relevant to establish this element of the offense, and therefore, it fell squarely within the motive and intent purposes delineated in 404(b).

***United States v. Lane*, 883 F.2d 1484 (10th Cir. 1989)**

The defendants, who had participated in the formation of an anti-Semitic group known as the Order, were convicted of violating 18 U.S.C. § 245(b)(2)(C) after shooting and killing a Jewish radio talk show host who had criticized the KKK on his show. The court of appeals rejected defendants' argument that section 245(b)(2)(C) was unconstitutional and held that Congress validly enacted the statute pursuant to its Commerce Clause authority. Defendants also argued

that there was insufficient evidence to establish that their participation in the victim's murder was motivated by the fact that the victim had been enjoying employment or any prerequisite thereof. The court disagreed, holding that the government had introduced sufficient evidence from which a rational jury could have found beyond a reasonable doubt that, among other things, the victim came to defendants' attention because of his employment as a radio talk show host and his comments criticizing right-wing extremist groups.

***United States v. Franklin*, 704 F.2d 1183
(10th Cir. 1983)**

The defendant was convicted of violating 18 U.S.C. § 245(b)(2)(B) after he shot and killed two Black men who had been jogging with white women at a public park. The defendant argued on appeal that there was insufficient evidence to support his conviction, suggesting that the government had failed to establish that the Black victims had been killed because they had been enjoying a public facility. The court disagreed, stating that several witnesses had testified that the defendant had disapproved of racial mixing at the public park; specifically, two witnesses testified that the defendant had told them he had shot two Black joggers "to do something about it." The court found that the jury could have inferred that the defendant intended to deprive the victims of the opportunity to enjoy public parks.

***United States v. Beebe*, 807 F. Supp. 2d 1045
(D.N.M. 2011)**

Defendants were charged with violating 18 U.S.C. § 249(a)(1) after kidnapping a disabled Native American man and burning a swastika into his arm. The district court upheld the constitutionality of 18 U.S.C. § 249(a)(1) as a valid exercise of Congress's Thirteenth Amendment authority. The defendants had argued that it was irrational for Congress to determine that physical violence was a badge and incident of slavery. The district court, after a review of history, held "[a] cursory review of the history of slavery in America demonstrates that Congress'[s] conclusion is not merely rational, but inescapable."

Eleventh Circuit

***United States v. Ballinger*, 395 F.3d 1218 (11th Cir. 2005) (en banc)**

The defendant was convicted of violating 18 U.S.C. § 247 after burning several churches in several states. The en banc court upheld the constitutionality of section 247, holding that it was a valid exercise of Congress’s Commerce Clause authority to regulate the channels and instrumentalities of interstate commerce. The court also held that section 247 applied to the defendant’s conduct, reasoning that, “[i]f § 247’s prohibition on destroying religious property in commerce does not reach [the defendant’s] four-state church arson spree, there is implausibly little, if any, conduct it actually proscribes.” Given this finding, the court did not address whether the defendant’s conduct *affected* interstate commerce.

***United States v. Odom*, 252 F.3d 1289 (11th Cir. 2001)**

Defendants were convicted of various offenses in connection with a church arson. In reversing their 18 U.S.C. § 844(i) conviction, the court of appeals held that the church was not sufficiently used in interstate commerce. Evidence of a church’s relationship to interstate commerce must establish that this relationship relates to its “business” as a church. Even activities that more closely resemble commerce—such as the purchase of hymnals—do not necessarily constitute the “requisite nexus” between the building’s function and interstate commerce. Here, materials for the church and its Sunday School had been purchased across state lines, gas purchased in Alabama—where the church is located—was originally from Mississippi, and the church paid dues for its membership in an intrastate church association that sent delegates to a national convention. No evidence indicated that the church here had been selected to attend the national convention or that an interstate traveler had visited the church. These activities did not establish the “requisite nexus” because they were “too passive, too minimal[,] and too indirect.”

***United States v. Stewart*, 65 F.3d 918 (11th Cir. 1995)**

The defendants, KKK members, were convicted of violating 18 U.S.C. § 241, 42 U.S.C. § 3631, and 18 U.S.C. § 844(h)(1) after they burned a cross in the yard of the first African American family to live

in a “virtually all-white community.” The appeal primarily concerned the district court’s *Batson* process, but defendants also argued that they had been convicted of three counts involving the same conduct—burning a cross—in violation of the Double Jeopardy Clause. “The Double Jeopardy Clause does not bar cumulative punishments stemming from a single incident when Congress intends to prescribe cumulative punishments.” The court found clear legislative intent to allow multiple punishments. The court also found that the statutes were facially valid and not unconstitutional as applied.

“Notwithstanding the fact that some Klan cross burnings may constitute protected expression, these defendants did not burn their cross simply to make a political statement.”

***United States v. Long*, 935 F.2d 1207 (11th Cir. 1991)**

After being charged with violating 18 U.S.C. § 241, 42 U.S.C. § 3631, and 18 U.S.C. § 844(h)(1) for having constructed a cross and burned it on the front lawn of an African American family that moved into a rural white neighborhood, the defendants pleaded guilty to violating section 241. They appealed various sentencing issues, many propositions of which are no longer good law due to changes in the Guidelines.²⁴

***United States v. Worthy*, 915 F.2d 1514 (11th Cir. 1990)**

Defendants pleaded guilty to violating 18 U.S.C. § 241 for their involvement in a cross burning at the residence of a Black family and stipulated that they burned the cross to intimidate the family. On appeal, the court held that burning a cross constitutes the use of fire in the commission of a felony for purposes of applying the Sentencing Guidelines.

***United States v. White*, 846 F.2d 678 (11th Cir. 1988)**

The defendant, a member of the KKK who allegedly clashed with Black marchers led by the Southern Christian Leadership Conference, was charged with conspiracy to violate 18 U.S.C. § 245(b)(2)(B). The district court granted the defendant’s motion for judgment of acquittal, finding that the government had failed to prove that the

²⁴ See *United States v. Yount*, 960 F.2d 955 (11th Cir. 1992) (“The current version [of the Sentencing Guidelines] appears to require that the victim of the offense must have been unusually vulnerable and specifically targeted in the offense.”).

parade was “provided or administered by the city . . . within the meaning of [s]ection 245(b)(2)(B).” The court of appeals reversed, holding that protestors who lack a parade permit are not outside the coverage of section 245(b)(2)(B), and that the city “administered” the parade and “provided” the police protection and the streets on which the parade occurred. The court also concluded that, based on the legislative history of section 245, racially motivated violence during parades, marches, and demonstrations was precisely what section 245 was designed to redress.

***United States v. Wood*, 780 F.2d 955 (11th Cir. 1986)**

The defendants, KKK members, were convicted of violating 18 U.S.C. § 241 and 42 U.S.C. § 3631 after they broke into a home while armed with guns, ransacked it, and beat its occupants because they were in an interracial relationship. On appeal, the defendants argued that they had no intent to force the victim to move. The court responded:

The distinction which they seek to draw between conduct designed to force a victim to move from his home (such as firebombing or a direct order to leave) and actions intended to intimidate the occupant into giving up a federally protected right to associate in his home with members of another race as a condition of safe occupancy is without merit.

D.C. Circuit

***United States v. Syring*, 522 F. Supp. 2d 125 (D.D.C. 2007)**

The defendant was charged with violating 18 U.S.C. § 245(b)(2)(C) for sending threatening voicemail and email messages to employees of the Arab American Institute. Before trial, the defendant moved to dismiss the indictment, arguing that section 245 violated his First Amendment rights by criminalizing protected speech. The district court rejected the defendant’s claim, explaining that the First Amendment does not protect “true threats,” that whether a statement is a true threat is a jury question, and that a reasonable jury could conclude that defendant’s communications amounted to a true threat.