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Overview of Federal Hate Crime Laws

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SUMMARY

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Peter G. Berris
Legislative Attorney

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Incidents such as the fatal shootings at Emanuel African Methodist Episcopal Church in Charleston, South Carolina in 2015, the killing of a counter-protester at the 2017 "Unite the Right Rally" in Charlottesville, Virginia, the 2018 shooting deaths of worshipers at a Pittsburgh synagogue, the 2020 killing of Ahmaud Arbery, and the fatal 2021 Atlanta spa shootings, among others, continuously renew interest in the scope and applicability of federal laws governing hate crimes. The Federal Bureau of Investigation (FBI) characterizes a hate crime as a criminal offense motivated, at least in part, by bias against the victim's "race, religion, disability, sexual orientation, ethnicity, gender, or gender identity." In 2020 (the most recent year for which statistics are available) there were 8,263 incidents of bias-motivated crimes (involving 11,472 victims) reported to the FBI.

The majority of bias-motivated crimes are prosecuted at the state and local level. Depending on the circumstances, federal prosecution of bias-motivated conduct also may be possible under a variety of statutes, including:

- 18 U.S.C. § 241: Prohibiting conspiracy to deprive another of federally-protected rights;
- 18 U.S.C. § 242: Prohibiting willful deprivation of federally-protected rights under color of law;
- 18 U.S.C. § 245: Prohibiting, among other things, willful injury to, intimidation of, or interference with an individual because of that person's race, color, religion, or national origin and because of that person's participation in certain enumerated protected activities;
- 42 U.S.C. § 3631: Prohibiting, among other things, willful injury to, intimidation of, or interference with an individual because that person's race, color, religion, sex, disability, familial status, or national origin and because of that person's enjoyment of certain federally-protected housing rights;
- 18 U.S.C. § 247: Prohibiting, among other things, intentionally damaging a religious real property because of the religious character of that property (assuming it affects interstate commerce), or because of the race, color, or ethnic characteristics of any individual associated with that religious property;
- 18 U.S.C. § 249: Prohibiting willfully causing bodily injury to another because of actual or perceived race, color, religion, or national origin, gender, sexual orientation, gender identity, or disability.

If the federal government decides not to prosecute a bias-motivated crime under the federal hate crime statutes, a defendant's bias may still be relevant at sentencing pursuant to the United States Sentencing Guidelines, which advise federal courts to impose an enhanced sentence where the fact finder (the judge or the jury) determines beyond a reasonable doubt that a defendant committed a crime because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, or sexual orientation of the victim.

As evidenced by the enactment of the Emmett Till Antilynching Act and the introduction of a variety of hate crimes legislation in the 117th Congress, Congress may consider ways to further legislate to punish acts of bias-motivated crimes, and its authority to do so depends in part on the constitutional provision on which it relies. Federal hate crime laws generally are premised on Congress's authority to legislate under some combination of the Commerce Clause and the Thirteenth, Fourteenth, and Fifteenth Amendments. The Thirteenth Amendment abolished slavery and involuntary servitude and permits Congress, in the Supreme Court's words, to abolish the "badges and incidents of slavery" through legislation. While it has been broadly interpreted by courts to afford protections for all races, courts have found that the Thirteenth Amendment does not prohibit discrimination based on factors such as gender or sexual orientation. Section 5 of the Fourteenth Amendment empowers Congress to enforce various constitutional rights through legislation, but only with respect to the conduct of government actors, as opposed to private individuals. The Fifteenth Amendment authorizes Congress to enforce through legislation the right to vote free from denial or abridgement "on account of race, color, or previous condition of servitude"; however, Congress's reach under this Amendment does not extend to federal rights that are unrelated to voting. Finally, the Commerce Clause (Art. I, sec. 8, clause 3) gives Congress broad authority to regulate interstate and foreign commerce, but the Supreme Court has held that this authority does not extend to purely local conduct that does not have a sufficient nexus to either interstate or foreign commerce.

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Hate, in and of itself, cannot be criminalized.[1] When hate motivates criminal conduct, however, such conduct may be classified as a hate crime—defined by the Federal Bureau of Investigation (FBI) as a "criminal offense 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."[2] According to the FBI, hate crimes are "traditional offenses like murder, arson, or vandalism with an added element of bias."[3]

In 2020, the FBI received reports of 8,263 incidents of bias-motivated crimes involving 11,472 victims.[4] Hate crime laws have garnered significant public attention, as evidenced by the widespread media coverage of the reported rise in hate crimes during the Coronavirus Disease 2019 (COVID-19) pandemic.[5] Over the years, Congress has maintained a perennial interest in hate crime laws, and a number of relevant proposals have been introduced in recent Congresses to either enact new or amend existing federal hate crime laws.[6]

Federal prosecutors have a number of statutory options for charging hate crimes depending on the nature a defendant's conduct.[7] Examples include:

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[1] *See* United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) ("[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."), *overruled in part by* Girouard v. United States, 328 U.S. 61, 66 (1946); *see also* United States v. Apfelbaum, 445 U.S. 115, 131 (1980) ("In the criminal law, both a culpable mens rea and a criminal actus reus are generally required for an offense to occur."); WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6:1 (3d ed. 2019) ("Bad thoughts alone cannot constitute a crime; there must be an act, or an omission to act where there is a legal duty to act.").

[2] *Hate Crimes*, FBI, https://www.fbi.gov/investigate/civil-rights/hate-crimes (last visited Mar. 15, 2022). The FBI has specified that this definition is for "the purposes of collecting statistics." *Id.*

[3] *Id.*

[4] These figures combine the FBI totals for single-bias and multiple-bias incidents. Press Release, Federal Bureau of Investigation, FBI Releases Updated 2020 Hate Crime Statistics (Oct. 25, 2021), https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-updated-2020-hate-crime-statistics. The FBI data is dependent on a number of factors such as individuals and agencies reporting hate crimes. *See generally* CRS Report R46318, *Federal Data on Hate Crimes in the United States*, by Nathan James and Emily J. Hanson. The FBI numbers are likely low, as "it is believed that violent hate crimes are significantly under-reported." H.R. REP. NO. 111-86, at 5 (2009).

[5] *See generally* CRS Legal Sidebar LSB10446, *An Overview of Federal Criminal Laws Implicated by the COVID-19 Pandemic*, by Peter G. Berris (discussing hate crimes committed against Asians and Asian Americans during COVID-19 pandemic, and media coverage of those incidents). In a January 26, 2021 memorandum, the Biden Administration announced that the Attorney General "shall explore opportunities to support, consistent with applicable law, the efforts of State and local agencies, as well as [Asian American and Pacific Islander] communities and community-based organizations, to prevent . . . hate crimes against [Asian American and Pacific Islander] individuals, and to expand collection of data and public reporting regarding hate incidents against such individuals." Memorandum from White House Condemning and Combating Racism, Xenophobia, and Intolerance Against Asian Americans and Pacific Islanders in the United States (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-condemning-and-combating-racism-xenophobia-and-intolerance-against-asian-americans-and-pacific-islanders-in-the-united-states/.

[6] *See infra* "Overview of Select Hate Crime Legislation in the 117th Congress."

[7] *See Laws and Policies: Federal Laws and Statutes*, U.S. Dep't of Justice (listing federal hate crime statutes), https://www.justice.gov/hatecrimes/laws-and-policies (last visited Mar. 15, 2022). Given the large number of federal criminal provisions, it is not possible to provide a comprehensive overview of generally-applicable federal laws that may apply to every example of bias-motivated conduct. *See, e.g.*, Van Buren v. United States, 141 S. Ct. 1648, 1669 (2021) (Thomas, J. dissenting) ("The number of federal laws and regulations that trigger criminal penalties may be as high as several hundred thousand."). It should be noted that the "vast majority" of hate crimes are prosecuted by state governments. ZACHARY J. WOLFE, HATE CRIMES LAW, § 2:2 (2019). Although beyond the scope of this Report, many

- 18 U.S.C. § 241: Prohibiting conspiracy to deprive another of federally-protected rights
- 18 U.S.C. § 242: Prohibiting deprivation of federally-protected rights under color of law
- 18 U.S.C. § 245: Prohibiting willfully injuring, intimidating, or interfering with another—or attempting to do so—by force or threat of force:
    - Because of the victim's race, color, religion, or national origin and because of the victim's participation in certain enumerated protected activities; or
    - Because the victim has been participating, without discrimination based on race, color, religion, or national origin, in certain protected activities, or in order to intimidate the victim or others from doing so; or
    - Because the victim has been aiding or encouraging others to participate, without discrimination based on race, color, religion or national origin, in certain enumerated protected activities
- 42 U.S.C. § 3631: Prohibiting willfully injuring, intimidating, or interfering with—or attempting to do so—by force or threat of force:
    - A victim's housing rights because of race, color, religion, sex, disability, familial status, or national origin; or
    - Any person because of that person's participation in protected housing rights, or because that person has afforded another person opportunity to participate in federal housing rights without discrimination based on race, color, religion, sex, disability, familial status, or national origin; or
    - Any citizen because that citizen has been aiding other persons in participating in protected housing rights without discrimination based on race, color, religion, sex, disability, familial status, or national origin, or to discourage others from doing so
- 18 U.S.C. § 247:

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states have enacted their own hate crime laws. *See, e.g.*, CONN. GEN. STAT. § 53a-181j (2019) ("A person is guilty of intimidation based on bigotry or bias in the first degree when such person maliciously, and with specific intent to intimidate or harass another person because of the actual or perceived race, religion, ethnicity, disability, sex, sexual orientation or gender identity or expression of such other person, causes physical injury to such other person or to a third person."). For a survey of state laws governing hate crimes, see, e.g., *Laws and Policies: State Laws, Codes, and Statutes*, U.S. Dep't of Justice, https://www.justice.gov/hatecrimes/laws-and-policies (last visited Mar. 15, 2022).

State governments may also elect to prosecute bias-motivated conduct under generally-applicable state criminal laws, such as those prohibiting murder. *See, e.g.*, MD. CODE ANN., CRIM. LAW § 2-201 (defining murder in the first degree and setting forth penalty for violations). Such statutes have been used by state or local prosecutors to charge, for example, the killing of a Black man by a White man where prosecutors argued that the defendant acted out of racial bias against the victim. Press Release, Prince George's Cty. State's Atty's Office, Sean Urbanski Found Guilty of First Degree Murder for Killing Lt. Richard Collins, III (Dec. 18, 2019), https://www.princegeorgescountymd.gov/CivicAlerts.aspx?AID=1574; *see also* Brakkton Booker, *White Man Gets Life in Prison for Killing Black Army 1st Lt. Richard Collins III*, NPR (Jan. 15, 2021) (detailing how state prosecutors believed defendant committed a hate crime, but proceeded with murder prosecution after judge rejected hate crime charge), https://www.npr.org/2021/01/15/957233388/white-man-gets-life-in-prison-for-killing-of-black-army-1st-lt-richard-collins-i.

    - Prohibiting intentional damage to religious real property because of the religious character of that property (assuming it affects interstate commerce); or because of the race, color, or ethnic characteristics of any individual associated with that religious property;
    - Prohibiting intentional obstruction of free exercise of religious beliefs by force or threatened force, affecting interstate commerce;
- 18 U.S.C. § 249: Prohibiting willful bodily injury to another:
    - Because of actual or perceived race, color, religion, or national origin; or
    - Because of actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability, and where it is established that there is an interest implicating interstate commerce.

Although all of these statutes have been used to prosecute hate crimes, not all of them are confined to that context. Some of these laws require that a defendant commit the prohibited conduct because of a specific characteristic—such as the race of a person.[8] In contrast, other statutes are more broadly applicable and impose criminal penalties for the deprivation of civil rights regardless of whether the defendant acts because of a specific characteristic of a person.[9] Still other statutes listed above may be characterized as hybrids—that is, they contain some provisions that require proof of a particular bias on the part of the defendant and provisions that protect civil rights regardless of a defendant's particular motivations.[10] Given the relevance of all of the statutes listed above to prosecuting bias-motivated crimes, this Report uses the phrases "federal hate crime statutes" and "federal hate crime laws" to refer to all of the statutes listed above, regardless of how they may otherwise be classified.

If a federal prosecutor elects not to charge a defendant under a federal hate crime statute, a defendant's bias-motivated conduct may still be relevant at sentencing. In particular, the United States Sentencing Guidelines (the Guidelines) include an enhancement advising federal courts to impose a lengthier sentence where the fact finder has concluded that the defendant acted because of certain biases against the victim.[11]

This Report begins with an overview of concepts key to understanding the applicability and scope of federal hate crime laws, and what it means for conduct to occur "because of" a factor such as race, religion, gender, or other characteristics of a victim or person. It then examines the substantive provisions of the federal hate crime statutes listed above, and summarizes statutorily authorized penalties and the hate crime enhancement contained in the Guidelines. The Report concludes by evaluating various sources of congressional authority to legislate in the hate crime arena and discusses hate crime legislation introduced in the 117th Congress.[12]

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[8] *E.g.*, 18 U.S.C. § 249.

[9] *E.g.*, *id.* § 241.

[10] *E.g.*, *id.* § 245.

[11] *See infra* "Sentencing Enhancements for Biased Motives."

[12] This Report does not discuss matters of policy with respect to hate crimes, as these topics are the subject of other CRS products. *See generally* James, *supra* note 4; CRS In Focus IF11312, *Department of Justice's Role in Investigating and Prosecuting Hate Crimes*, by Nathan James. Similarly, other CRS products discuss a number of Constitutional provisions that may restrict Congress's ability to legislate in the hate crime area—but which are largely beyond the scope of this Report—such as the Equal Protection Clause, and the First Amendment and its protection of

Federal Hate Crime Statutes

As described above, federal prosecutors may charge a defendant with bias-motivated conduct under a variety of federal hate crime statutes. This section summarizes two key concepts relevant to these statutes: (1) what it means for conduct to occur "because of" a specific characteristic—such as race, religion, gender, or national origin—of the victim or another person; and (2) the legal meanings of some characteristics protected by various hate crime statutes. The section also details the background, elements, and penalties of federal hate crime laws.

Key Concepts in Federal Hate Crime Statutes

Conduct Occurring "Because Of"

A number of the federal hate crime statutes discussed in this section apply only when the defendant acted *because of* certain factors.[13] For example, 18 U.S.C. § 249(a)(1) requires that a defendant willfully caused bodily injury to a victim (or attempted to do so) through the use of a dangerous weapon because of the "actual or perceived race, color, religion, or national origin" of any person.[14] 18 U.S.C. § 245(b)(2) applies only if the defendant injured, intimidated, or interfered with a victim (by actual, attempted, or threatened force) because of the victim's race, color, religion, or national origin and because the victim was participating in an enumerated protected right.[15] Other federal hate crime statutes are worded similarly.[16] Given that these statutes require prosecutors to establish that the defendant engaged in prohibited conduct because of a specific characteristic, the meaning of "because of" is crucial.

The exact definition of "because of" in the hate crime context is unresolved.[17] A 2014 Supreme Court case—*Burrage v. United States*—does provide broad guidance on the meaning of the phrase in the criminal law context.[18] In *Burrage*, the Court analyzed a provision of the Controlled

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speech and prohibition against the establishment of religion. *See generally* CRS Legal Sidebar LSB10524, *Racial Profiling: Constitutional and Statutory Considerations for Congress*, by April J. Anderson; CRS Report R46534, *The Civil Rights Act of 1964: An Overview*, by Christine J. Back; CRS Report R45481, *"Affirmative Action" and Equal Protection in Higher Education*, by Christine J. Back; CRS Report R45650, *Free Speech and the Regulation of Social Media Content*, by Valerie C. Brannon; CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion; CRS Legal Sidebar LSB10315, *No More Lemon Law? Supreme Court Rethinks Religious Establishment Analysis*, by Valerie C. Brannon; CRS Legal Sidebar LSB10259, *Supreme Court May Reconsider Establishment Clause Jurisprudence in Challenge to Cross Display: Part One*, by Valerie C. Brannon.

[13] *See infra* "Conduct Occurring Because of Specific Characteristics."

[14] 18 U.S.C. § 249(a)(1) (criminalizing "willfully caus[ing] bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempt[ing] to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person").

[15] *Id.* § 245(b)(2) (criminalizing "willfully injur[ing], intimidat[ing] or interfer[ing] with, or attempt[ing] to injure, intimidate or interfere with" any person "because of his race, color, religion or national origin" and because of his participation in, or enjoyment of, certain federally protected rights).

[16] *E.g.*, *id.* §§ 247(a)(1), 249; 42 U.S.C. § 3631(a).

[17] *Compare e.g.*, United States v. Maybee, 687 F.3d 1026, 1032 (8th Cir. 2012) (requiring only that race or national origin was a substantial motivating factor in attack under § 249), *with*, *e.g.*, United States v. Miller, 767 F.3d 585, 593 (6th Cir. 2014) (holding that "[t]he 'because of' element of a prosecution under the Hate Crimes Act [§ 249] requires the government to establish but-for causation").

[18] 571 U.S. 204 (2014).

Substances Act imposing a "20-year mandatory minimum sentence on a defendant who unlawfully distributes" a prohibited drug[19] when "death or serious bodily injury *results from* the use of such substance."[20] The question facing the Court was whether the mandatory minimum sentence should apply to a defendant who sold heroin to an individual, and the heroin contributed (along with other drugs not supplied by the defendant) to that individual's subsequent death.[21] Thus, the issue in *Burrage* was one of causation, which is the extent to which something (in this case, the use of heroin supplied by the defendant) produces an effect or outcome (i.e., death).[22] To determine whether the use of heroin was a sufficient cause of death to warrant application of the mandatory minimum sentence, the Court in *Burrage* looked to the language of the relevant statute and the degree of causality required by the inclusion of the phrase "results from."[23] In particular, the Court considered the ordinary meaning of "results from," explaining that "[a] thing 'results' when it '[a]rise[s] as an effect, issue, or outcome *from* some action, process or design,'" and concluding that "results from" imposes a "requirement of actual causality."[24] The Court also drew on the Model Penal Code approach,[25] which specifies that conduct causes a result if "it is an antecedent but for which the result in question would not have occurred."[26]

Based on this analysis, the Court in *Burrage* concluded that the use of the phrase "results from" in a statute requires, at a minimum, *but-for causation*, unless there is "textual or contextual indication to the contrary."[27] In general, but-for causation means that B would not have occurred if not for A.[28] As the Supreme Court explained through analogy in *Burrage*: if a baseball team wins a game 1 to 0 through a home run, the home run is a but-for cause of its victory.[29] In other words, but for the home run, the team would not have won.[30] Furthermore, a factor can be a *but-for* cause, even if other factors combined to produce the relevant result, so long as the relevant factor was necessary to that outcome.[31] As the Court explained continuing its use of the baseball analogy, "[i]t is beside the point that the victory also resulted from a host of *other* necessary causes, such as skillful pitching, the coach's decision to put the leadoff batter in the lineup, and the league's decision to schedule the game."[32]

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[19] *Id.* at 206.

[20] 21 U.S.C. § 841(a)(1), (b)(1)(A)-(C) (emphasis added).

[21] *Burrage*, 571 U.S. at 206-8.

[22] *Causation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[23] *Burrage*, 571 U.S. at 210-11.

[24] *Id.* (quoting THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2570 (1993)).

[25] *Id.* at 211.

[26] MODEL PENAL CODE § 2.03.

[27] 571 U.S. 204, 212 (2014); *see also* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1738-39 (2020) (interpreting prohibition against workplace discrimination "because of" sex as requiring but-for causation). Although *Burrage* focused primarily on the meaning of "results from," the court noted that the denotation of "because of" resembles "results from," and noted that "because" generally requires proof of but-for causation. 571 U.S. at 212.

[28] *See* LAFAVE, *supra* note 1, at § 6:4 (explaining that but-for causality "means that but for the conduct the result would not have occurred").

[29] *Burrage*, 571 U.S. at 211-12.

[30] *Id.*

[31] *Id.* at 212 ("[I]t makes little sense to say that an even resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event.").

[32] *Id.*

Although the Court in *Burrage* focused on the causation standard required by the inclusion of the phrase "results from" in the statute, the case could still influence how courts interpret "because of" in federal criminal laws (including hate crime statutes). This is because the Court observed that "results from" is a similar phrase to "because of," and it interpreted the phrases in relation to each other.[33] In particular, the Court looked to prior cases in which it had interpreted "because of" in other types of statutes—such as federal employment discrimination laws—to require but-for causation.[34] Based in part on its analogy to the meaning of "because of," the Court held that "a phrase such as 'results from' imposes a requirement of but-for causation."[35]

A possible inference drawn from *Burrage* is that, if "results from" imposes a but-for causation requirement when used in a federal criminal law, and if "because of" is interchangeable with "results from," then "because of" would also require but-for causation in the criminal law context (particularly since the Court has interpreted "because of" in that manner in other non-criminal contexts). Thus, *Burrage* arguably clarifies that "because of" typically requires but-for causation in the context of a federal criminal statute, including a hate crime law.[36]

At least one federal appellate court has held that, in light of *Burrage*, "because of" as used in 18 U.S.C. § 249 requires but-for causation.[37] In *United States v. Miller*, the United States Court of Appeals for the Sixth Circuit[38] observed that *Burrage* "made several points directly applicable" to its analysis of "because of" in § 249, including the point that, under Supreme Court precedent, "'results from' and 'because of' customarily mean the same thing and . . . both phrases require but-for causation."[39] Other lower courts have reached similar conclusions.[40] For example, the United States District Court for the Eastern District of Tennessee applied *Burrage* to 18 U.S.C. § 247 and determined that the use of "because of" in that statute "requires a showing of but-for causation as to [d]efendant's motivation."[41]

Despite the reasoning embodied in *Miller* and similar cases, it is at least possible that a federal court might interpret 'because of" as used in hate crime statutes in a manner that does not

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[33] *Id.* (explaining that "courts regularly read phrases like 'results from' to require but-for causality" and using "because of" and "based on" as examples).

[34] *Id.* at 212-13.

[35] *Id.* at 214.

[36] *See id.* at 216 (explaining that in criminal context, the Court "cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant").

[37] *See* United States v. Miller, 767 F.3d 585, 593 (6th Cir. 2014) (applying *Burrage* to 18 U.S.C. § 249 and holding that "[t]he 'because of' element of a prosecution under the Hate Crimes Act requires the government to establish but-for causation").

[38] This Report references decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this Report (*e.g.*, the Sixth Circuit) refer to the U.S. Court of Appeals for that particular circuit (*e.g.*, the U.S. Court of Appeals for the Sixth Circuit).

[39] *Miller*, 767 F.3d at 593.

[40] *See* United States v. Metcalf, No. 15-CR-1032-LRR, 2016 WL 1599485, at *3 (N.D. Iowa Apr. 20, 2016)) (citing *Miller* and *Burrage* and concluding that "[t]he 'because of' element of § 249(a)(1) requires proof that the victim's actual or perceived race was the but-for cause of the defendant's willful assault of the victim."), aff'd, 881 F.3d 641 (8th Cir. 2018). Another federal appellate court interpreted "because of" in the context of 42 U.S.C. § 3631(a) to require but-for causation, although it did not cite to *Burrage* in its opinion. United States v. Whitt, 752 F. App'x 300, 307 (6th Cir. 2018).

[41] United States v. Doggart, No. 1:15-CR-39-CLC, 2016 WL 6537675, at *1 (E.D. Tenn. Nov. 3, 2016).

implicate *Burrage*. In *United States v. Rodriguez*,[42] the Ninth Circuit analyzed 18 U.S.C. § 1959, which prohibits violent crimes committed, among other things, "for the purpose of gaining entrance to or maintaining or increasing position in" a criminal racketeering enterprise.[43] The defendant in *Rodriguez* argued that, pursuant to *Burrage*, the statute's use of the phrase "for the purpose of" required proof that the defendant's position in the criminal racketeering enterprise was a but-for cause of the violent crime.[44] The Ninth Circuit disagreed,[45] distinguishing the statute at issue in *Rodriguez* from the mandatory minimum sentence provision under consideration in *Burrage*.[46] The language in the statute considered in *Burrage*, the Ninth Circuit observed, concerned causation.[47] In contrast, the court determined that the statutory language at issue in *Rodriguez* concerned the defendant's motive[48]—that is, the defendant's reason for acting.[49] Notably, before *Burrage*, at least two federal appellate courts had interpreted "because of" in federal hate crime statutes to relate to a defendant's motive.[50] For example, the Eighth Circuit concluded that in order for a defendant's conduct to be "because of" the victim's "race, color, religion, or national origin" for the purposes of § 245, the attributes and activity must have been *a substantial motivating factor* for the defendant's conduct.[51] In order to apply a standard other than but-for causation after *Burrage*, federal courts potentially would need to similarly interpret "because of" as referring to *motive* in the context of federal hate crime statutes, as opposed to *causation*.[52]

Conduct Occurring Because of Specific Characteristics

A number of federal hate crime provisions apply to conduct only when committed because of specific characteristics such as race, religion, gender, or national origin.[53] Often, the relevant

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[42] 971 F.3d 1005 (9th Cir. 2020).

[43] 18 U.S.C. § 1959; *see Rodriguez*, 971 F.3d at 1009.

[44] *Rodriguez*, 971 F.3d at 1010.

[45] *Id.* at 1009.

[46] *Id.* at 1010.

[47] *Id.*

[48] *Id.*

[49] *See Motive*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "motive" as "[s]omething, esp. willful desire, that leads one to act").

[50] *See, e.g.*, United States v. Maybee, 687 F.3d 1026, 1032 (8th Cir. 2012) (requiring only that race or national origin was a substantial motivating factor in attack under § 249); United States v. McGee, 173 F.3d 952, 957 (6th Cir. 1999) (interpreting causation under § 245 to require that "racial animus is a substantial reason for a defendant's conduct"); United States v. Bledsoe, 728 F.2d 1094, 1098 (8th Cir. 1984) (affirming trial court jury instructions that clearly implied that under § 245, the victim's race must be a substantial motivating factor for the defendant's conduct).

[51] *See Maybee*, 687 F.3d at 1032; *accord McGee*, 173 F.3d at 957.

[52] Subsequent to *Burrage*, it does not appear that any federal courts have interpreted "because of" in a federal hate crime statute to mean anything other than but-for causation. For example, as of March 30, 2022, a search of the Westlaw database for reported federal cases citing to 18 U.S.C. § 245 yielded 15 results that included the phrase "because of" and that were issued subsequent to *Burrage* (that is, after April 23, 2014). Those cases either were false positives (for example, non-criminal cases), or did not expressly interpret "because of" at all, or interpreted it to mean "but-for causation." Identical searches for the other federal hate crime statutes that use the phrase "because of" (18 U.S.C. §§ 247, 249; 42 U.S.C. § 3631) also yielded no cases interpreting "because of" to mean something other than but-for causation subsequent to *Burrage*.

[53] *See infra* **Table 1**.

characteristic must be possessed by the victim.[54] For example, 18 U.S.C. § 245(b)(2) applies only where the victim is targeted because of "*his* race, color, religion or national origin"[55] In practice, many hate crime prosecutions involve instances where a defendant targeted the victim because of a characteristic—such as race—possessed by the victim.[56] However, some federal hate crime provisions are worded more broadly in a manner that encompasses instances where an individual's conduct occurs because of specific characteristics of any person, not just the victim.[57] This could occur, for instance, where a defendant is motivated by the race or other protected characteristic of one person, but actually attacks another person who does not possess the relevant characteristic—such as a bystander[58] or an acquaintance.[59] Still other hate crime statutes apply where the relevant characteristics belong to property—as in the case of vandalism of religious real property.[60]

Table 1 provides an overview of federal hate crime statutes conditioned on the underlying conduct occurring because of specific characteristics, and additional information about these characteristics is detailed below.

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[54] *Id.*

[55] 18 U.S.C. § 245(b)(2) (emphasis added).

[56] *See, e.g.*, Press Release, U.S. Dep't of Justice, Washington State Man Pleads Guilty to Federal Hate Crime in Attack on Sikh Man (June 27, 2013), https://www.justice.gov/opa/pr/washington-state-man-pleads-guilty-federal-hate-crime-attack-sikh-man; Press Release, U.S. Dep't of Justice, Colorado Man Sentenced to 16 Years in Federal Prison for Unprovoked Stabbing of Black Man (Sep. 9, 2021), https://www.justice.gov/opa/pr/colorado-man-sentenced-16-years-federal-prison-unprovoked-stabbing-black-man; Press Release, U.S. Dep't of Justice, Arkansas Jury Finds Man Guilty of Federal Hate Crime Related to the Assault of Five Hispanic Men (May 19, 2011), https://www.justice.gov/opa/pr/arkansas-jury-finds-man-guilty-federal-hate-crime-related-assault-five-hispanic-men; Press Release, U.S. Dep't of Justice, Two Atlanta Men Plead Guilty to Federal Hate Crime Against Gay Man (Apr. 18, 2013), https://www.justice.gov/opa/pr/two-atlanta-men-plead-guilty-federal-hate-crime-against-gay-man.

[57] *See, e.g.*, 18 U.S.C. § 249(a)(1) (prohibiting conduct that occurs because of the actual or perceived "race, color, religion, or national origin of *any person*" (emphasis added)). As discussed below, some federal hate crime provisions are specifically aimed at protecting individuals who are helping others participate in federal activities without discrimination based on a specific characteristic. *See infra* "Elements of a § 245(b)(4) Violation"; *see also* Press Release, U.S. Dep't of Justice, Alabama Man Pleads Guilty to Threatening African-American Man and a Restaurant Manager (Sep. 11, 2014), https://www.justice.gov/opa/pr/alabama-man-pleads-guilty-threatening-african-american-man-and-restaurant-manager (describing § 245(b)(4) prosecution of defendant for threats made to a restaurant employee who ordered defendant to leave restaurant after he made racially-motivated threats to a Black patron who was at the restaurant with a White woman); Indictment, United States v. Higgins, No. 2:14-cr-00143 (N.D. Ala. 2014).

[58] For example, in one prosecution, DOJ pursued federal hate crime charges against defendants who "punched and kicked a Black man" and who also assaulted "two other men who intervened to protect the victim from their attack." Press Release, U.S. Dep't of Justice, Four Men Indicted for Hate Crimes and False Statements After Racially Motivated Assault in Lynnwood, Washington (Dec. 18, 2020), https://www.justice.gov/opa/pr/four-men-indicted-hate-crimes-and-false-statements-after-racially-motivated-assault-lynnwood. In the resulting indictment, the defendants were charged with three hate crime counts: one for each victim. Indictment, United States v. Desimas et al., No. CR20-222-RAJ (W.D. Wash 2020). Notably, the indictment charged that the two intervening men who were assaulted were not attacked because of *their* race, but rather because of the *initial victim's* race. *Id.*

[59] *See, e.g.*, Press Release, U.S. Dep't of Justice, Third Defendant Pleads Guilty to Racially-Motivated Assault on White Man and African-American Woman in California (Mar. 11, 2014), https://www.justice.gov/opa/pr/third-defendant-pleads-guilty-racially-motivated-assault-white-man-and-african-american-woman (describing federal hate crime prosecution involving attack on a Black woman and the White man with whom she was with).

[60] *See infra* "Elements of a § 247(a)(1) Violation for Damage to Religious Property."

Table 1. Select Federal Hate Crime Provisions Limited to Conduct Occurring Because Of Specific Characteristics

Statutory Provision	Prohibited Conduct*	Specific Characteristic(s)
18 U.S.C. § 245(b)(2)	Willful intimidation of, injury to, or interference with an individual because of specific characteristics and victim's participation in enumerated protected activities	"Race, color, religion or national origin" of the victim"
42 U.S.C. § 3631(a)	Willful interference by actual or threatened force with victim because of specific characteristics and victim's enjoyment of housing rights	"Race, color, religion, sex, handicap, familial status, or national origin" of the victim"
18 U.S.C. § 247(a)(1)	Intentional damage to religious real property in or affecting interstate commerce	"Religious character of that property"
18 U.S.C. § 247(c)	Intentional damage to religious real property motivated by specific characteristics against individual associated with that property	"Race, color, or ethnic characteristics of any individual associated with that religious property"
18 U.S.C. § 249(a)(1)	Willful bodily injury to another, or attempted injury to another through dangerous weapon, motivated by specific characteristics	"Actual or perceived race, color, religion, or national origin of any person"
18 U.S.C. § 249(a)(2)	Willful bodily injury to another, or attempted injury to another through dangerous weapon, motivated by specific characteristics	"Actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person"

Source: 18 U.S.C. §§ 245(b)(2), 247(a)(1), 247(c), 249(a)(1), 249(a)(2); 42 U.S.C. § 3631(a).

Notes: * Brief descriptions of prohibited conduct are included in this table for convenience, but more detailed descriptions are provided below. *See generally* "Prohibited Conduct under Federal Hate Crime Statutes."

Race, Color, National Origin

As detailed in **Table 1**, a number of federal hate crime statutes prohibit conduct when it is motivated by race, color, or national origin. None of these statutes define race, color, or national origin,[61] and none contain language limiting their protections to particular races, colors, or national origins.[62] As one court explained in the context of § 245(b)(2), Congress did not intend to limit the "application [of the statute] exclusively to vindicate the rights of blacks," but rather to protect *any person* targeted "because of his race, color, religion or national origin."[63] A hate crime

[61] *Id.* §§ 245(b)(2), 247(c), 249(a)(1); 42 U.S.C. § 3631(a).

[62] 18 U.S.C. §§ 245(b)(2), 247(c), 249(a)(1); 42 U.S.C. § 3631(a).

[63] United States v. Ebens, 800 F.2d 1422, 1429 (6th Cir. 1986) (quoting 18 U.S.C. § 245(b)(2)), *abrogated on other grounds by* Huddleston v. United States, 485 U.S. 681 (1988).

statute that protects individuals of some races, colors, or national origins, but not others, would almost certainly violate Constitutional provisions mandating equal protection under the law.[64]

In practice, federal hate crime laws prohibiting conduct committed because of the race, color, and national origin of a victim have been used to prosecute defendants who have acted against individuals of various backgrounds including, among others,[65] Hispanics and Latinos/Latinas,[66] Blacks,[67] Native Americans,[68] Asian Americans,[69] and individuals of National Origin outside the United States.[70]

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[64] The Equal Protection Clause of the Fourteenth Amendment bars states from depriving anyone within their jurisdiction of the equal protection of the law. U.S. CONST. amend. XIV, § 1. Although that provision expressly applies only to the states, *id.*, the Supreme Court has held that the due process clause of the Fifth Amendment requires identical "[e]qual protection analysis . . . as that under the Fourteenth Amendment" with respect to the federal government. Buckley v. Valeo, 424 U.S. 1, 93 (1976); *see also* Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954), *supplemented sub nom.* Brown v. Bd. of Educ., 349 U.S. 294 (1955) (discussing interaction between the principles of due process and equal protection). In discussing equal protection requirements, the Supreme Court has expressed extreme skepticism of laws that draw distinctions "according to race" or ancestry. *E.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (explaining that at a minimum, "the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,'" and, "if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.") (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)); *see also* Bolling, 347 U.S. at 498-99 ("Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."). For a discussion of race-based classifications and equal protection, see generally Cong. Rsch. Serv., *Amdt14.S1.4.1.1 Race-Based Classifications: Overview*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-4-1-1/ALDE_00000816/ (last visited Mar. 29, 2022).

[65] Press Release, U.S. Dep't of Justice, Washington State Man Pleads Guilty to Federal Hate Crime in Attack on Sikh Man (June 27, 2013), https://www.justice.gov/opa/pr/washington-state-man-pleads-guilty-federal-hate-crime-attack-sikh-man (summarizing federal hate crime prosecution of defendant who assaulted a Sikh man from India "based upon the victim's actual and perceived race, color and national origin, which included Middle Eastern and Arab descent").

[66] *See* United States v. Piekarsky, 687 F.3d 134, 136 (3d Cir. 2012) (applying § 3631 where victims were Hispanic); United States v. Maybee, 687 F.3d 1026, 1029 (8th Cir. 2012) (affirming § 249(a)(1) conviction where defendant acted out of bias against victims he perceived as being of Mexican ancestry).

[67] *See* United States v. Metcalf, 881 F.3d 641, 643 (8th Cir.), *cert. denied*, 139 S. Ct. 412 (2018) (describing § 249(a)(1) prosecution where victim was Black); United States v. Cannon, 750 F.3d 492, 497 (5th Cir. 2014) (affirming § 249 conviction of defendant who attacked Black man); United States v. Mungia, 114 F.3d 1181, 1181 (5th Cir. 1997) (per curiam) (affirming § 245(b)(2)(B) conviction of defendants convicted of "shooting three African-American men"); United States v. Rogers, 45 F.3d 1141, 1143 (7th Cir. 1995) (describing conviction of defendant under § 3631(a) stemming from his racially-motivated home invasion of his "neighbors, a black couple and their infant child"); United States v. Henery, 60 F. Supp. 3d 1126, 1127 (D. Idaho 2014) (denying motion to dismiss § 249(a)(1) indictment of defendant who physically attacked Black man); Press Release, U.S. Dep't of Justice, New York Man Pleads Guilty to Federal Hate Crime Conspiracy (Jan. 26, 2009), https://www.justice.gov/opa/pr/new-york-man-pleads-guilty-federal-hate-crime-conspiracy (describing guilty plea of defendant for conspiring to "assault African-American residents in Staten Island, N.Y.).

[68] *See* United States v. Hatch, 722 F.3d 1193, 1200, 1209 (10th Cir. 2013) (affirming § 249(a)(1) conviction of defendant who "kidnapped a disabled Navajo man and branded a swastika into his arm").

[69] *See* United States Ebens v., 800 F.2d 1422, 1429 (6th Cir. 1986) (applying 18 U.S.C. § 245(b)(2) where victim was Chinese-American).

[70] *See supra* note 65; Information, United States v. Whedbee, No. JBK-12-0326, 2012 WL 13088980 (D. Md. June 11, 2012) (applying § 3631 where the victims were a family from Africa).

Religion

Several federal hate crime statutes criminalize conduct when it occurs because of the victim's religion or the religious character of property, as **Table 1** illustrates. As with race, color, and national origin, these statutes provide no textual guidance on what "religion" entails.[71] The statutes do not single out any particular religions for protections,[72] as a hate crime statute that protects some religions but not others may raise significant constitutional questions.[73] In practice, federal hate crime laws have been used to prosecute defendants who engage in prohibited conduct against individuals of a variety religious backgrounds, including members of the Jewish,[74] Islamic,[75] and Amish[76] faiths.

Gender/Sex

Two federal hate crime provisions contained in **Table 1**—42 U.S.C. § 3631(a) and 18 U.S.C. § 249(a)(2)—make it a crime to engage in prohibited conduct because of, among other characteristics, the gender or sex of the victim. Neither statute defines these terms,[77] and there is little if any published federal case law examining the contours of these terms in the context of either statute.[78] One unresolved question in examining 42 U.S.C. § 3631(a) is whether bias based

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[71] 18 U.S.C. §§ 245(b)(2), 247(a)(1), 249(a)(1), 249(a)(2); 42 U.S.C. § 3631(a).

[72] *Supra* note 71.

[73] *See* McCreary Cty., Ky. v. ACLU, 545 U.S. 844, 860 (2005) (explaining that when the government manifests "a purpose to favor one faith over another, or adherence to religion generally," it contravenes the "value of official religious neutrality" under the Establishment Clause of the First Amendment); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993) (striking down local ordinance on the grounds that it discriminated against specific religion in violation of the First Amendment protection of free exercise of religion); *see also generally* Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665 (2008) (evaluating the possible role of the Equal Protection Clause in the context of laws differentiating between religions). For discussion of First Amendment issues that might be relevant were a hate crime statute to give preference to a particular religion, see generally Cong. Rsch. Serv., *First Amendment: Amdt1.1 The Religion Clauses*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/amendment-1/ (last visited Mar. 29, 2022).

[74] *See, e.g.*, United States v. Sanders, 41 F.3d 480, 483 (9th Cir. 1994) (applying 42 U.S.C. § 3631 where victims were members of Jewish faith); United States v. Lane, 883 F.2d 1484, 1497 (10th Cir. 1989) (applying 18 U.S.C. § 245(b)(2) where victim was Jewish).

[75] *See* United States v. Perez, No. 18-40707, 2020 WL 7786934, at *1 (5th Cir. Dec. 30, 2020) (affirming conviction of defendant under § 247(a)(1) for destruction of religious real property in connection with his arson of an Islamic Center); Press Release, U.S. Dep't of Justice, Three Southwest Kansas Men Convicted of Plotting to Bomb Somali Immigrants in Garden City (Apr. 18, 2018), https://www.justice.gov/opa/pr/three-southwest-kansas-men-convicted-plotting-bomb-somali-immigrants-garden-city (describing federal hate crime prosecution where victims Somali/Muslim immigrants); Press Release, U.S. Dep't of Justice, Tampa Man Pleads Guilty to Hate Crime for Threatening to Burn Down a Home Being Purchased by Muslim Family (Feb. 27, 2018), https://www.justice.gov/opa/pr/tampa-man-pleads-guilty-hate-crime-threatening-burn-down-home-being-purchased-muslim-family (describing § 3631 prosecution where victims were Muslim); Press Release, U.S. Dep't of Justice, Former TSA Employee Pleads Guilty to Federal Hate Crime for Assaulting Elderly Somali Man (Aug. 10, 2011), https://www.justice.gov/opa/pr/former-tsa-employee-pleads-guilty-federal-hate-crime-assaulting-elderly-somali-man (describing § 249 prosecution where victim was Muslim and Somali).

[76] United States v. Mullet, 868 F. Supp. 2d 618, 624 (N.D. Ohio 2012) (applying § 249(a)(2) to intra-religion violence where victims were Amish).

[77] 18 U.S.C. § 249; 42 U.S.C. § 3631.

[78] As of March 30, 2022 running a Westlaw search of cases citing § 249 yields 263 federal cases. A search within those

on sex or also includes bias based on *sexual orientation*.[79] Case law concerning civil anti-discrimination laws may be of relevance in resolving that issue—particularly the 2020 Supreme Court opinion *Bostock v. Clayton County*.[80] In *Bostock*, the Court concluded that a prohibition against employment discrimination because of sex (contained in Title VII of the Civil Rights Act of 1964) also bars employment discrimination based on an "individual's homosexuality or transgender status."[81] In reaching that conclusion the Court reasoned that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[82] The Supreme Court declined to address whether its reasoning would apply outside of the Title VII context,[83] and no federal courts have addressed the applicability of *Bostock* to 42 U.S.C. § 3631(a).[84]

Disability

As **Table 1** illustrates, two federal hate crime provisions prohibit underlying conduct when committed because of—among other characteristics—disability or "handicap." Section 245(b)(2) uses the term "handicap," which it defines by reference to another statute as "a physical or mental impairment which substantially limits one or more of such person's major life activities . . . a record of having such an impairment, or . . . being regarded as having such an impairment."[85] Section 249(a)(2) has been used to prosecute bias-motivated conduct targeting individuals with mental and physical disabilities.[86]

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results for cases using the word "gender" within the same paragraph drops that number to 34 federal court cases. Of those, 18 include "United States" in the name, as would be expected in cases arising from federal criminal prosecutions. None of those cases interpreted the statutory meaning of gender in the context of § 249. As of March 30, 2022, running a Westlaw search of cases citing § 3631 yields 779 federal cases. Nevertheless, a number of targeted searches designed to yield cases interpreting the statutory meaning of "sex" in the context of § 3631 yielded no relevant results. Specifically, these queries included separately searching within all federal cases citing § 3631 for the following search terms within the same paragraph as a citation to § 3631: (sex /p gender); (sex /p identity); (sex /p male); (sex /p female); (sex /p defin!); (sex /p orientation).

[79] Unlike § 3631, § 249(a)(2) expressly includes sexual orientation and gender identity in its list of protected characteristics.

[80] 140 S. Ct. 1731 (2020). For a detailed examination of *Bostock* and its legal ramifications see generally CRS Legal Sidebar LSB10496, *Supreme Court Rules Title VII Bars Discrimination Against Gay and Transgender Employees: Potential Implications*, by Jared P. Cole.

[81] *Bostock*, 140 S. Ct. at 1741.

[82] *Id.*

[83] *Id.* at 1753.

[84] As of March 30, 2022 searching on Westlaw for the term "Bostock" within cases citing § 249 or § 3631 yields one result other than *Bostock* itself—but it is not a hate crime prosecution. *But cf.* People v. Rogers, 950 N.W.2d 48 (Mich. 2020) (remanding, in light of *Bostock*, a lower court opinion concluding that a *state* hate crime law prohibiting certain conduct committed because of gender bias excluded bias against transgender person).

[85] 42 U.S.C. §§ 3631, 3602(h). Courts have broadly interpreted this provision to protect, among others, "persons with AIDS, elderly residents of adult foster homes, developmentally disabled persons, the mentally ill, emotionally disturbed adolescents, . . . a tenant with multiple sclerosis," and "an amputee." WOLFE, *supra* note 7, § 5:5 (footnotes omitted).

[86] United States v. Woodard, No. CR 13-25-5, 2017 WL 11463711, at *1 (E.D. Pa. Dec. 15, 2017); Press Release, U.S. Dep't of Justice, Federal Charges Allege Captors Held Adults with Disabilities in Subhuman Conditions to Carry out Social Security Fraud (Jan. 23, 2013), https://www.justice.gov/opa/pr/federal-charges-allege-captors-held-adults-disabilities-subhuman-conditions-carry-out-social.

Additional Protected Characteristics

In addition to the protected characteristics discussed above—which recur in a number of statutes—the following characteristics are protected by a single statute:

- **Familial Status**: included as a protected characteristic in 42 U.S.C. § 3631 (criminal interference with right to fair housing), which defines it as "one or more individuals (who have not attained the age of 18 years) being domiciled with . . . a parent or another person having legal custody of such individual or individuals."[87]
- **Sexual Orientation**: included as a protected characteristic in § 249(a)(2) (Hate Crimes Prevention Act), which does not define the term.[88] Many of the § 249(a)(2) prosecutions undertaken to date for conduct that occurred because of a person's sexual orientation have involved instances where the victims were gay men.[89]
- **Gender Identity**: included in § 249(a)(2)'s list of protected characteristics, and defined by the statute as "actual or perceived gender-related characteristics."[90] Section 249(a)(2) prosecutions for conduct motivated by bias against gender identity have included that of a Mississippi man who assaulted and murdered a transgender woman.[91]
- **Ethnic Characteristics**: listed as a protected characteristic in § 247(c) (racially-motivated damage to religious property), but not defined by that statute.[92]

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[87] 42 U.S.C. §§ 3602(k); 3631(a).

[88] 18 U.S.C. § 249(a)(2).

[89] *See* Press Release, U.S. Dep't of Justice, Third Texas Man Pleads Guilty to Hate Crime for Assault Based on Victim's Sexual Orientation (Sep. 18, 2017), https://www.justice.gov/opa/pr/third-texas-man-pleads-guilty-hate-crime-assault-based-victim-s-sexual-orientation; Press Release, U.S. Dep't of Justice, Idaho Man Sentenced For Federal Hate Crime Based on Victim's Sexual Orientation (Apr. 27, 2017), https://www.justice.gov/opa/pr/idaho-man-sentenced-federal-hate-crime-based-victim-s-sexual-orientation; Press Release, U.S. Dep't of Justice, Texas Man Charged with Hate Crime for Assault Based on Victim's Sexual Orientation (Feb. 20, 2014), https://www.justice.gov/opa/pr/texas-man-charged-hate-crime-assault-based-victim-s-sexual-orientation; Press Release, U.S. Dep't of Just Portland, Ore. Couple Indicted on Charges Related to an Anti-gay Assault (June 27, 2013), https://www.justice.gov/opa/pr/portland-ore-couple-indicted-charges-related-anti-gay-assault; Press Release, U.S. Dep't of Justice, Two Atlanta Men Plead Guilty to Federal Hate Crime Against Gay Man (Apr. 18, 2013), https://www.justice.gov/opa/pr/two-atlanta-men-plead-guilty-federal-hate-crime-against-gay-man; Press Release, U.S. Dep't of Justice, Two Harlan County, Kentucky, Women Plead Guilty to Federal Hate Crime Against Individual Because of Sexual Orientation (Apr. 13, 2012), https://www.justice.gov/opa/pr/two-harlan-county-kentucky-women-plead-guilty-federal-hate-crime-against-individual-because; *but see* Press Release, U.S. Dep't of Justice, Charleston Man Indicted on Hate Crime Charge (June 21, 2018), https://www.justice.gov/opa/pr/charleston-man-indicted-hate-crime-charge (describing indictment of defendant for attack on woman because of woman's "actual and perceived sexual orientation").

[90] 18 U.S.C. § 249(c).

[91] Press Release, U.S. Dep't of Justice, Mississippi Man Pleads Guilty to Hate Crime for Murdering Transgender Victim Because of Her Gender Identity (Dec. 21, 2016), https://www.justice.gov/opa/pr/mississippi-man-pleads-guilty-hate-crime-murdering-transgender-victim-because-her-gender.

[92] 18 U.S.C. § 247.

Prohibited Conduct under Federal Hate Crime Statutes

Conspiracy Against Free Exercise or Enjoyment of Rights, 18 U.S.C. § 241

Section 241 of Title 18 of the United States Code contains a provision[93] that makes it a crime for "two or more persons [to] conspire 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."[94] The statute, which dates to the Reconstruction Era,[95] does not require that the defendant's conduct be motivated by any particular bias towards the victim.[96] Nevertheless, the law has been used to prosecute bias-motivated conduct[97] since its enactment,[98] particularly starting in the mid-twentieth century.[99] For example, the government has relied on § 241 to prosecute a variety of conspiratorial bias-motivated conduct including cross burnings,[100] vandalism,[101] acts of intimidation,[102] assault,[103] and murder.[104] Prosecutors also used § 241 to charge "some of the most notorious civil rights crimes of the 1960s,"[105] such as the murder of civil rights volunteer Viola

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[93] Section 241 also contains a provision that prohibits two or more persons "go[ing] in disguise on the highway, or on the premises of another" with the intent to "prevent or hinder" another's free exercise of rights or privileges provided by the Constitution or the laws of the United States. 18 U.S.C. § 241. The provision, which is seldom-used, was "prompted by concern over the terrorism practiced by 'nightriding' Ku Klux Klansmen wearing the Klan regalia of white robe, hood, and mask during the post-Civil War period." WOLFE, *supra* note 7, § 6:3.

[94] 18 U.S.C. § 241.

[95] United States v. Price, 383 U.S. 787, 789 (1966).

[96] 18 U.S.C. § 241.

[97] *See Laws and Policies: Federal Laws and Statutes*, U.S. Dep't of Justice (listing § 241 among the federal hate crime laws enforced by the Department of Justice), https://www.justice.gov/hatecrimes/laws-and-policies (last visited Mar. 15, 2022).

[98] For an extensive review of the legislative history of § 241, see, e.g., United States v. Williams, 341 U.S. 70, 83 (1951).

[99] WOLFE, *supra* note 7, § 6:2.

[100] United States v. Gresser, 935 F.2d 96, 98 (6th Cir. 1991); Press Release, U.S. Dep't of Justice, South Carolina Man Pleads Guilty to Burning Crosses Intimidating Worshipers At An African-American Church (Jan. 4, 2000), https://www.justice.gov/archive/opa/pr/2001/January/004cr.htm.

[101] Information, United States v. Calderhead, No. 1:12-00011, 2012 WL 12849111 (M.D. Tenn. Nov. 14, 2012); Press Release, U.S. Dep't of Justice, Two Tennessee Men Plead Guilty to Conspiring to Violate Civil Rights of African-american Residents (May 14, 2013), https://www.justice.gov/opa/pr/two-tennessee-men-plead-guilty-conspiring-violate-civil-rights-african-american-residents.

[102] Information, United States v. Whedbee, No. JBK-12-0326, 2012 WL 13088980 (D. Md. June 11, 2012); Press Release, U.S. Dep't of Justice, Two Women Plead Guilty in Maryland to Civil Rights Violations (June 26, 2012), https://www.justice.gov/opa/pr/two-women-plead-guilty-maryland-civil-rights-violations.

[103] Indictment, United States v. Nicoletti, No. 09-CR-00002 (E.D.N.Y. 2009); Press Release, U.S. Dep't of Justice, New York Man Pleads Guilty to Federal Hate Crime Conspiracy (Jan. 26, 2009), https://www.justice.gov/opa/pr/new-york-man-pleads-guilty-federal-hate-crime-conspiracy.

[104] Plea Agreement, United States v. Cowart, No. 08-10119, 2010 WL 2768822 (W.D. Tenn. Mar. 29, 2010); Press Release, U.S. Dep't of Justice, Tennessee Man Sentenced for Conspiring to Commit Murders of African-Americans (Oct. 22, 2010), https://www.justice.gov/opa/pr/tennessee-man-sentenced-conspiring-commit-murders-african-americans.

[105] WOLFE, *supra* note 7, § 6:2.

Liuzzo in March, 1965, following her participation[106] in the Selma to Montgomery march led by Martin Luther King, Jr.[107]

Elements of a § 241 Violation

To prove a § 241 violation, the government must establish four elements.[108] First, the government must show an agreement between two or more people, which requires proof that at least two individuals came to a common understanding with a shared purpose.[109] The agreement need not be formal[110] and instead can be established by proof of a mere "tacit understanding."[111] Without an agreement, however, § 241 is inapplicable, and the statute does not reach the conduct of a person acting alone to interfere with rights.[112]

Second, the government must prove that the purpose of the agreement was to injure, threaten, oppress, or intimidate, which only requires proof that the defendant specifically *intended* to injure, threaten, oppress, or intimidate,[113] not that the victim was *actually* injured, threatened, oppressed, or intimidated.[114] A variety of conduct ranging from vandalism to murder may "injure,

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[106] Press Release, U.S. Dep't of Justice, Civil Rights Are Everyone's Responsibility (Apr. 24, 2015), https://www.justice.gov/usao-edmi/civil-rights-are-everyone-s-responsibility.

[107] Martin Luther King, Jr. Research and Education Institute, *Selma to Montgomery March*, https://kinginstitute.stanford.edu/encyclopedia/selma-montgomery-march (last visited Mar. 15, 2022). In that case, the Fifth Circuit held that Liuzzo's murder violated § 241, because her killers conspired to interfere with her participation in the march, which itself was related to securing the federal right "to register to vote in federal elections." Wilkins v. United States, 376 F.2d 552, 561 (5th Cir. 1967).

[108] United States v. Hayward, 764 F. Supp. 1305, 1307 (N.D. Ill. 1991) (explaining that a § 241 violation requires the government to establish that (1) "two or more parties entered into an agreement;" (2) "the purpose of their agreement was to injure, oppress, threaten or intimidate;" (3) "the agreement was intended to affect" any person in the United States; and (4) "the agreement was directed towards the free exercise or enjoyment of rights and privileges secured by the Constitution and federal law"). In addition, at least one court requires that the government establish a fifth element: an overt act. United States v. Guillette, 547 F.2d 743, 751 (2d Cir. 1976). An overt act is the performance of "[a]n outward, physical manifestation" of the conspiracy. *Overt Act*, BLACK'S LAW DICTIONARY (11th ed. 2019). However, other courts have rejected that requirement. *See, e.g.*, United States v. Crochiere, 129 F.3d 233, 237 (1st Cir. 1997) (collecting cases opining on whether § 241 imposes an overt act requirement, and concluding that it does not); *see also* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS MANUAL 11 (1992), https://www.justice.gov/archive/usao/usam/1988/title8civilrightsdivision.pdf#page=55; WOLFE, *supra* note 7, § 6:3 ("The view imposing no overt act requirement is probably correct.").

[109] *See* United States v. Ellis, 595 F.2d 154, 160 (3d Cir. 1979) (discussing elements required to sufficiently prove § 241 violation).

[110] *See* United States v. Redwine, 715 F.2d 315, 320 (7th Cir. 1983) (examining § 241 claim and concluding that to establish conspiracy, "[t]he government need not establish that there existed a formal agreement to conspire"); United States v. Lewis, 644 F. Supp. 1391, 1405 (W.D. Mich. 1986) ("To find the existence of the agreement requisite to a criminal conspiracy [under § 241], one need not find from the evidence that the alleged members entered into an express or formal agreement."), *aff'd sub nom.* United States v. King, 840 F.2d 1276 (6th Cir. 1988).

[111] *Gresser*, 935 F.2d at 101.

[112] *See* 18 U.S.C. § 241 (requiring conspiracy between "two or more" individuals).

[113] United States v. J.H.H., 22 F.3d 821, 828 (8th Cir. 1994).

[114] *See, e.g.*, United States v. Bradberry, 517 F.2d 498, 499 n.6 (7th Cir. 1975) (explaining that the conspiracy need not be successful for a defendant to have violated § 241).

threaten, oppress, or intimidate."[115] Subject to First Amendment limitations,[116] threatening conduct such as cross-burning may also fit within this language and violate § 241.[117]

Third, the government must demonstrate that the agreement was intended to affect "any person in any State, Territory, Commonwealth, Possession, or District."[118] In establishing this element, the government need not prove that the defendant identified and intended harm to a *specific* victim or victims; rather, a § 241 violation can occur where the defendant interferes with the rights of "a broad class of potential victims."[119] As for the classes of victims encompassed by § 241, the statute includes not only citizens and residents of the United States, but also foreign visitors to the United States.[120]

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[115] *See supra* notes 100-104; *see also* Hayes v. United States, 464 F.2d 1252, 1254 (5th Cir. 1972) (affirming § 241 convictions of defendants who damaged unoccupied school buses with explosives in an attempt to derail busing and school integration); Catala Fonfrias v. United States, 951 F.2d 423, 424 (1st Cir. 1991) (affirming § 241 conviction of defendant for his involvement in conspiracy to interfere with civil rights that resulted in a murder).

[116] "The First Amendment generally prevents government from proscribing speech" or "even expressive conduct," because of "disapproval of the ideas expressed." R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992). However, the Supreme Court "has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Id.* at 382–83 (*quoting* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). For example, in *Virginia v. Black* the Supreme Court examined a state cross-burning statute and observed that the First Amendment permits prohibitions on "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 of individuals." 538 U.S. 343, 359 (2003). Subsequent to *Black*, at least one federal appellate court has interpreted the "threaten" language in § 241 to require proof of "threat of force," and in doing so concluded that jury instructions to the contrary were flawed. United States v. Magleby, 420 F.3d 1136, 1143 (10th Cir. 2005). Although the court reached that conclusion based on pre-*Black* circuit precedent (due to the posture of the appeal), it summarized *Black* to provide "the underlying First Amendment law" with respect to § 241. *Id.* at 1139. For additional analysis of the types of First Amendment issues implicated by the prosecution of threats, see generally CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion; Cong. Rsch. Serv., *Amdt1.2.3.2.1 Fighting Words, Hostile Audiences and True Threats: Overview*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-2-3-2-1/ALDE_00000742/ (last visited Mar. 30, 2022).

[117] *See* Magleby, 420 F.3d at 1138-39 (affirming denial of habeas petition challenging § 241 conviction related to a cross-burning conspiracy); United States v. Stewart, 65 F.3d 918, 921-22 (11th Cir. 1995) (affirming § 241 conviction of defendants who burned cross outside the home of Black family); *but see* United States v. Lee, 6 F.3d 1297, 1300, 1302 (8th Cir. 1993) (Gibson, J., concurring) (per curiam) (concluding that as applied in the context of a cross-burning prosecution, § 241 violated the First Amendment, because jury instructions defined "threat" to not require threat of physical force).

[118] 18 U.S.C. § 241.

[119] *See* United States v. Stewart, 806 F.2d 64, 67 (3d Cir. 1986) ("As the government points out, the courts have recognized that a § 241 violation may be predicated on interference with the rights of a broad class of potential victims.").

[120] 18 U.S.C. § 241. Previous iterations of § 241 were expressly limited to United States citizens, prompting courts to conclude that § 241 excluded non-citizens from protection. United States v. Gaggi, 811 F.2d 47, 58 (2d Cir. 1987). In 1988, Congress broadened § 241 to apply to any "inhabitant of any State, Territory, or District." Anti-Drug Abuse Act of 1988, P.L. 100-690, § 7018, 102 Stat 4181, 4396 (1988) ("Section 241 of title 18, United States Code, is amended by striking 'citizen' and inserting 'inhabitant of any State, Territory, or District.'"). Congress further amended the scope of § 241 in 1994 to protect "any person" in the United States as opposed to just "inhabitants," Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, § 320201, 108 Stat 1796, 2113 (1994) ("Section 241 of title 18, United States Code, is amended by striking 'inhabitant of' and inserting 'person in'"), a term in a related statute that prompted judicial disagreement over the status of temporary foreign visitors to the United States. *See generally* United States v. Maravilla, 907 F.2d 216, 223-28 (1st Cir. 1990) (interpreting "inhabitant" in the context of 18 U.S.C. § 242, and summarizing diverging case law on the applicability of that phrase to a "temporary foreign daytime visitor").

Fourth, there must be proof that the agreement was "directed towards the free exercise or enjoyment of rights and privileges secured by the Constitution and federal law,"[121] that is, a right "made specific either by the express terms of the Federal Constitution or laws or by decisions interpreting them."[122] Typically, § 241 prosecutions have involved deprivation of constitutional rights,[123] or rights created by statutes that are themselves aimed at enforcing constitutional rights.[124] Further, the defendant must have had the "specific intent" or "particular purpose" of interfering with the victim's enjoyment of the federal right.[125] This requires establishing only a defendant's intent to interfere with an *activity or interest* that is a right protected by federal statute or the Constitution,[126] not an understanding by the defendant that the activity or interest is legally protected as a federal right.[127]

Deprivation of Rights under Color of Law, 18 U.S.C. § 242

Pursuant to 18 U.S.C. § 242, it is unlawful "under color of any law, statute, ordinance, regulation, or custom, [to] willfully subject[] any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."[128]

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[121] 18 U.S.C. § 241.

[122] United States v. Kozminski, 487 U.S. 931, 941 (1988); *accord* United States v. Price, 383 U.S. 787, 800 (1966) ("As we have discussed, its language embraces all of the rights and privileges secured to citizens by all of the Constitution and all of the laws of the United States."). The Supreme Court read § 241 as imposing the requirement that the interference be with a federal right in order to prevent the statute from being unconstitutionally vague. *Kozminski*, 487 U.S. at 941.

[123] *See, e.g.*, United States v. Gonzalez, 906 F.3d 784, 790 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1568 (2019), *and cert. denied sub nom.* Luviano v. United States, 140 S. Ct. 159 (2019) (summarizing charges in § 241 prosecution, which included allegations of deprivation of constitutional rights to due process); Anderson v. United States, 417 U.S. 211, 226–27 (1974) (evaluating § 241 prosecution for interference with the voter's "right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes").

[124] *See* United States v. Salyer, 893 F.2d 113, 115–16 (6th Cir. 1989) (examining § 241 prosecution where federally protected right was "the right to hold and occupy a dwelling without injury . . . because of race and color" as "derived from the Fair Housing Act of 1968").

[125] United States v. Ehrlichman, 546 F.2d 910, 921 (D.C. Cir. 1976). This intent element is virtually identical to that contained in 18 U.S.C. § 242, discussed below. *See Price*, 383 U.S. at 806 n.20 (explaining that there is no "basis for distinction between" §§ 241 and 242 with respect to their respective requirements "that specific intent be proved"). As discussed below, in the context of § 242 the intent element has been interpreted inconsistently by courts. *See infra* "Elements of a § 242 Violation."

[126] *See Ehrlichman*, 546 F.2d at 922 ("[T]he specific intent required to violate section 241 is the purpose of the conspirators to commit acts which deprive a citizen of interests in fact protected by clearly defined constitutional rights.").

[127] *See Ehrlichman*, 546 F.2d at 922 (discussing specific intent under § 241 and concluding that "[t]here is no requirement under section 241 that a defendant recognize the unlawfulness of his acts"); *accord* United States v. Redwine, 715 F.2d 315, 319–20 (7th Cir. 1983) ("We note that while specific intent to interfere with a federally protected right must be shown, it is not necessary that the defendant be shown to have a legalistic appreciation of the federally protected nature of that right."); United States v. Nathan, 238 F.2d 401, 407 (7th Cir. 1956) (analyzing specific intent under § 241 and concluding that "it is immaterial that the defendants were without knowledge of the constitutional rights of citizens").

[128] 18 U.S.C. § 242. Section 242 also includes what could be described as a differential punishment provision, which prohibits, under color of law, willfully subjecting any person to "different punishments, pains, or penalties," because of a bias against that person's color, race, or citizenship status. *Id.* Although the differential punishment provision is a separate offense, United States v. Classic, 313 U.S. 299, 327 (1941), § 242 prosecutions have generally involved

Like its counterpart, 18 U.S.C. § 241, § 242 originated as a Reconstruction Era civil rights statute.[129] Also like § 241, § 242 does not require that the defendant's conduct be motivated by a specific bias against the victim, but has been used to prosecute bias-motivated crimes such as the "notorious murders of civil rights workers Michael Henry Schwerner, James Earl Chaney, and Andrew Goodman" by "Mississippi law enforcement officials" in 1964.[130]

Elements of a § 242 Violation

The elements of a § 242 violation for deprivation of federally-protected rights under color of law overlap considerably with those of a § 241 offense (described above),[131] and the statutes are often interpreted in relation to each other.[132] Both §§ 241 and 242 protect the same rights,[133] namely, all those "of the Constitution and laws of the United States."[134] In addition, § 242 protects the same individuals as § 241 does[135]—namely "any person in any State, Territory, Commonwealth, Possession, or District."[136]

There are some significant differences between the two statutes. Most fundamentally, because § 242 is not a conspiracy statute like § 241, prosecuting a defendant under this provision does not require proof of an agreement between two or more individuals, and can apply to an individual acting alone.[137] In addition, a prosecution under § 242 requires proof of two elements that § 241 does not require.

First, pursuant to § 242, the government must prove that the defendant deprived an individual of a federally-protected right acting "under color of law."[138] An action is taken "under color of law" when it involves the misuse of power by an individual "clothed" with legal authority.[139] Official authorization is not required to act under "color of law."[140] Instead, the Supreme Court has held

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deprivation of rights under color of law and this Report therefore focuses primarily on § 242 in the deprivation of rights context. The George Floyd Justice in Policing Act (H.R. 1280), passed by the House in 2021, would clarify the reach of the § 242 prohibition against willfully subjecting any person, under color of law, with "different punishments, pains, or penalties," on account of race, color, or on account of "such person being an alien." *See infra* "George Floyd Justice in Policing Act of 2021 (H.R. 1280)."

[129] *Price*, 383 U.S. at 789.

[130] WOLFE, *supra* note 7, § 6:14.

[131] United States v. Cobb, 905 F.2d 784, 787 (4th Cir. 1990) (explaining that to prove a § 242 violation, the government must establish four elements: (1) the defendant acted "under color of law;" (2) the defendant acted willfully; (3) the victim "was deprived of a right secured by the Constitution or laws of the United States;" and (4) the victim was a person in a state, territory, or district).

[132] *See* United States v. Lanier, 520 U.S. 259, 265 (1997) (discussing similarity of statutes); Saul A. Green & Gary M. Felder, *Uniting Against Hate: Michigan's Aggressive Effort to End Hate Crime Violations Through Community Partnerships*, 80 MICH. B.J. 58, 62 (2001) ("Aside from the element of conspiracy, or agreement . . . § 241 involves essentially the same analysis as its substantive counterpart, § 242.").

[133] *See Lanier*, 520 U.S. at 265 (describing rights protected by §§ 241 and 242).

[134] United States v. Price, 383 U.S. 787, 797 (1966).

[135] *See supra* notes 118-120 and accompanying text.

[136] 18 U.S.C. § 242.

[137] *Id.*

[138] *Id.*

[139] United States v. Classic, 313 U.S. 299, 326 (1941).

[140] *See, e.g.*, Screws v. United States, 325 U.S. 91, 111 (1945) (plurality opinion) ("If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words 'under color of any law' were hardly apt

that "under color of law" means "under 'pretense' of law."[141] Therefore, the phrase includes the acts of individuals "who undertake to perform their official duties" even if they overstep their authority.[142] The phrase *excludes* "personal pursuits,"[143] meaning that those who are "pursuing private aims *and* not acting by virtue of state authority" are not acting under color of law.[144] *United States v. Tarpley* offers an illustration.[145] In *Tarpley*, the Fifth Circuit concluded that a police officer acted "under color of law" when he assaulted his wife's romantic partner.[146] Although the officer argued that he did not act under color of law because the assault was motivated by jealousy and therefore a private aim, the court disagreed.[147] The court reasoned that the officer acted under color of law during the assault because, among other factors, he identified himself as an officer and claimed that his position gave him authority for the assault, telling the victim he could kill him because he was a police officer.[148]

Although cases interpreting "under color of law" generally focus on law enforcement and corrections personnel,[149] a broad range of individuals may act under color of law, including both federal and state officials.[150] For instance, courts have concluded that an aide at a state-run hospital,[151] state commissioners of elections,[152] and a county public defender,[153] among others,[154] have acted under color of law in the context of § 242 prosecutions. Private citizens may act under color of law as well, particularly when engaged in a typical governmental function—as in the case of private security guards employed in jurisdictions where they are "vested with policemen's

words to express the idea.").

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] United States v. Tarpley, 945 F.2d 806, 809 (5th Cir. 1991).

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.* In contrast, in *Butler v. Sheriff of Palm Beach Cty.*, the Eleventh Circuit distinguished *Tarpley* in the context of a federal civil lawsuit against an off-duty corrections officer who allegedly handcuffed, assaulted, and drew a gun on her daughter's romantic partner while he was in the corrections officer's house. 685 F.3d 1261, 1262, 1266-68 (11th Cir. 2012). The Eleventh Circuit concluded that the corrections officer did not act under color of law, because her conduct "was not accomplished because of her status as a corrections officer" but rather as an "irate mother." *Id.* In reaching that conclusion, the Eleventh Circuit looked at a variety of factors, including that the corrections officer "did not use her law enforcement position to strike up a relationship with the victim" or to "gain access to the house where the assault took place," and that she did not "purport to exercise her official authority" to subdue or arrest a criminal. *Id.* The Eleventh Circuit also discounted the fact that the corrections officer used her official handcuffs and firearm, noting that certain firearms and handcuffs are generally something that private citizens may also lawfully possess. *Id.*

[149] *See, e.g.*, United States v. Davis, 971 F.3d 524, 528 (5th Cir. 2020); *see also Statutes Enforced by the Criminal Section*, U.S. Dep't of Justice ("Those prosecuted under [§ 242] typically include police officers, sheriff's deputies, and prison guards."), https://www.justice.gov/crt/statutes-enforced-criminal-section (last visited Mar. 15, 2022).

[150] *See* Screws v . United States, 325 U.S. 91, 108 (1945) (plurality opinion) ("He who acts under 'color' of law may be a federal officer or a state officer.").

[151] *E.g.*, United States v. Dise, 763 F.2d 586, 588 (3d Cir. 1985).

[152] *E.g.*, United States v. Classic, 313 U.S. 299, 325-26 (1941).

[153] *E.g.*, United States v. Senak, 527 F.2d 129, 132 (7th Cir. 1975).

[154] *See, e.g.*, United States v. Dillon, 532 F.3d 379, 382 (5th Cir. 2008) (affirming conviction under 18 U.S.C. § 242 of assistant city attorney for depriving victims of right to bodily integrity under color of law).

powers."[155] In addition, private persons with no government functions or duties may act under color of law when they act in conjunction with government personnel.[156] For instance, in *United States v. Price*, the Supreme Court held that private citizens acted "under color of law" when they joined state officers in the assault and killing of three men.[157]

Second, to prove a § 242 violation, the government must show that the defendant's conduct was willful,[158] a requirement subject to some ambiguity.[159] The seminal authority on the statutory meaning of "willfulness" in § 242 is the four-justice Supreme Court plurality[160] opinion in *Screws v. United States*.[161] The *Screws* plurality interpreted "willfully" to require proof that the defendant acted with "a specific intent to deprive a person of a federal right," "open defiance," or "reckless disregard of a constitutional requirement."[162] Evidence that the defendant had a generally bad purpose may be insufficient to establish willfulness in § 242, absent proof of specific intent to deprive another of a federal right.[163] It is not entirely clear from *Screws*, however, what suffices as specific intent to deprive another of a federal right or to recklessly disregard constitutional requirements.[164] The plurality opinion in *Screws* notes that a defendant has the requisite intent if he has the "purpose to deprive the [victim] of a constitutional [or federal statutory] right," but it is immaterial whether he was "thinking in constitutional terms."[165] Taken in conjunction, it is possible to interpret these statements in several ways as application of the *Screws* willfulness analysis by lower courts varies.[166] For example, some courts have broadly interpreted the *Screws* intent language to mean that "[t]here is no requirement . . . that a defendant recognize the

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[155] Williams v. United States, 341 U.S. 97, 99 (1951).

[156] *See* United States v. Price, 383 U.S. 787, 794-95 (1966).

[157] *Id.* at 795 ("[T]hey were participants in official lawlessness, acting in willful concert with state officers and hence under color of law.").

[158] 18 U.S.C. § 242.

[159] *See Screws*, 325 U.S. at 101 ("We recently pointed out that 'willful' is a word 'of many meanings, its construction often being influenced by its context.'" (quoting Spies v. United States, 317 U.S. 492, 497, (1943)).

[160] Generally, plurality opinions lack the same precedential force as majority opinions. *See generally* CRS Legal Sidebar LSB10113, *What Happens When Five Supreme Court Justices Can't Agree?*, by Kevin M. Lewis. Although the Court has adopted some aspects of the *Screws* plurality opinion in later binding precedent, *see, e.g.*, United States v. Lanier, 520 U.S. 259, 267 (1997) (adopting *Screws* plurality analysis of the scope of rights protected by § 242), it has yet to do so for the "willfulness" analysis. As of March 30, 2022 a Westlaw search of citing references to *Screws* yields 90 Supreme Court cases. Of those, 25 contain variations of the word "willful" in the same paragraph as a citation to § 242. None of those cases have expressly adopted the *Screws* plurality's "willfulness" language in binding analysis, although the Court has on occasion quoted some of the relevant "willfulness" language in dicta. *E.g.*, Monroe v. Pape, 365 U.S. 167, 187 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658 (1978).

[161] 325 U.S. at 93. The Court in *Screws* interpreted a predecessor statute to current § 242. *Id.* For a thorough discussion of *Screws*, see, e.g., CRS Legal Sidebar LSB10495, *Federal Police Oversight: Criminal Civil Rights Violations Under 18 U.S.C. § 242*, by Joanna R. Lampe, from which this section draws heavily.

[162] *Screws*, 325 U.S. at 103, 105.

[163] *Id.* at 103.

[164] *See* Lampe, *supra* note 161 (discussing disagreement among federal courts concerning how to define specific intent for § 242 purposes in light of *Screws*).

[165] *Screws*, 325 U.S. at 106, 107 ("The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution.").

[166] Lampe, *supra* note 161.

unlawfulness of his acts."[167] In contrast, at least one federal court has narrowly interpreted *Screws* to mean that willfulness "implies conscious purpose to do wrong and intent to deprive another of a right guaranteed by the Constitution, federal statutes, or decisional law."[168] Legislation in the 117th Congress—the George Floyd Justice in Policing Act passed by the House in 2021—would resolve the judicial disagreement over *Screws* with respect to § 242.[169] In particular, the legislation would amend § 242 to require only a knowing or reckless mental state, in effect codifying the view of courts interpreting *Screws* more broadly.[170] According to several sponsors of the proposal, lowering the mental state requirement was intended to increase the accountability of law enforcement officers, as it is "extremely difficult to prosecute" officers under § 242 current willfulness requirement.[171]

Violent Interference with Federally Protected Rights, 18 U.S.C. § 245

Enacted in 1968, 18 U.S.C. § 245 is sometimes described as "[t]he first modern federal hate crimes statute."[172] Among other things, § 245 sought to combat "[a]cts of racial terrorism" and "brutal crimes" committed against Blacks and civil rights workers.[173] A Senate Report discussing the purpose of enacting § 245 noted concerns that state and local officials had either "been unable or unwilling to solve and prosecute" such crimes.[174] In addition, § 245 was designed to address limitations in §§ 241 and 242 that left those statutes "inadequate to deal with" the racially motivated crimes of the 1960s.[175] According to the report, §§ 241 and 242 lacked sufficient deterrent effect because they failed to "spell out clearly what kinds of conduct are prohibited."[176] In addition § 241 "applies only to conspiracies," and does not permit prosecution of "a single individual unless in some way another person ha[d] been involved."[177] To address these concerns, Congress drafted § 245 to allow prosecutions of an individual defendant for interference with specific activities, regardless of whether or not the defendant was acting under color of law.[178]

Section 245 includes several categories of offenses, but three subsections are particularly relevant to the hate crime context: § 245(b)(2), (b)(4), and (b)(5).[179] The three categories overlap

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[167] *See, e.g.*, United States v. Johnstone, 107 F.3d 200, 210 (3d Cir. 1997) (affirming use of jury instruction allowing a finding of willfulness even if the defendant "had no real familiarity with the Constitution or with the particular constitutional right involved"); *accord* United States v. McClean, 528 F.2d 1250, 1255 (2d Cir. 1976) (concluding that § 242 requires only proof of the defendant's specific intent to "engage in conduct having the effect of" depriving someone of a federal right, not specific intent to "deprive persons of federal rights").

[168] United States v. Garza, 754 F.2d 1202, 1210 (5th Cir. 1985).

[169] George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021).

[170] *Id.*

[171] *See* Karen Bass et al., *Justice in Policing Act*, HOUSE JUDICIARY COMM., https://judiciary.house.gov/uploadedfiles/justice_in_policing_act_of_2020_section_by_section.pdf?utm_campaign=2926-519 (last visited Mar. 15, 2022).

[172] Nicholas C. Erickson, *Hate Crimes*, 6 GEO. J. GENDER & L. 289, 291-92 (2005).

[173] S. REP. NO. 90-721, at 1839 (1967).

[174] *Id.*, at 1840.

[175] *Id.* at 1840-41.

[176] *Id.* at 1841.

[177] *Id.*

[178] *See id.* (explaining that § 245 "would prohibit forcible interference with any of the specified activities by individuals acting alone as well as by public officers or other persons acting under color of law").

[179] In addition, § 245 creates a separate offense that does not rely on bias or discriminatory motive. Specifically, under

considerably, but each subsection protects slightly different combinations of individuals from willful injury, intimidation, or interference with respect to certain federally-protected activities like voting, jury service, and public education.[180] Prosecutors have invoked all three of these § 245 categories in charging bias-motivated conduct, such as a racially-motivated assault aimed at interfering with the victim's enjoyment of federal recreational facilities,[181] an attack by a police officer on a Black janitor at a public tavern,[182] the fatal shooting of a Jewish man,[183] and the beating of a Black man to prevent the busing of Black students to public schools.[184] Prosecutors have also used § 245 to prosecute high-profile cases such as the 2020 killing of Ahmaud Arbery.[185]

Elements of a § 245(b)(2) Violation

Section 245(b)(2) prohibits interference with, intimidation of, or injury to, an individual because of his race, color, religion, or national origin and his participation in enumerated protected activities.[186] To establish a § 245(b)(2) violation, the government must prove several elements.[187] First, the government must show that the defendant used force or threat of force to injure, interfere with, or intimidate any person.[188] The Supreme Court has interpreted "force or threat of force" to include only violent actions or the threat of violence.[189] Courts have ruled that a range of conduct qualifies as violent, such as murders[190] and assaults.[191] Threats alone can also suffice, but

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§ 245(b)(1) it is a crime to use force, or threaten to use force, to willfully interfere with an individual because that individual has been engaged in certain enumerated federally protected activities. 18 U.S.C. § 245(b)(1). Those activities include (1) voting, campaigning or qualifying for elective office; (2) participating or enjoying any federal "benefit, service, privilege, program, facility or activity"; (3) applying for or enjoying federal employment; (4) participating in jury duty; or (5) participating in or enjoying "any program or activity receiving Federal financial assistance." *Id*. Based on both the plain language of the statute and legislative history, courts have concluded that § 245(b)(1) does not require that interference with federal rights occur due to a discriminatory motive. United States v. Pimental, 979 F.2d 282, 283 (2d Cir. 1992). Further discussion of §245(b)(1) is beyond the scope of this Report, as is discussion of § 245(b)(3), which "prohibits injuring or threatening someone engaged in interstate commerce during a riot." *Id.* at 284.

[180] 18 U.S.C. § 245.

[181] United States v. Price, 464 F.2d 1217, 1218 (8th Cir. 1972).

[182] United States v. Hearod, 499 F.2d 1003, 1004 (5th Cir. 1974).

[183] United States v. Lane, 883 F.2d 1484, 1487 (10th Cir. 1989).

[184] United States v. Griffin, 525 F.2d 710, 712 (1st Cir. 1975).

[185] Verdict Form, United States v. McMichael, No. 2:21-cr-22 (S.D. Ga. 2022); Press Release, U.S. Dep't of Justice, Federal Jury Finds Three Men Guilty of Hate Crimes in Connection with the Pursuit and Killing of Ahmaud Arbery (Feb. 22, 2022), https://www.justice.gov/opa/pr/federal-jury-finds-three-men-guilty-hate-crimes-connection-pursuit-and-killing-ahmaud-arbery.

[186] 18 U.S.C. § 245(b)(2).

[187] *See* United States v. Sandstrom, 594 F.3d 634, 654 (8th Cir. 2010) (explaining that establishing a violation of § 245(b)(2) requires proof that the defendant (1) used force or threat of force to injure, intimidate or interfere with, a person; (2) acted because of that person's race, color, religion, or national origin; (3) acted because that person was enjoying or participating in an enumerated protected right; and (4) acted willfully).

[188] *Id.*

[189] *See* Johnson v. Mississippi, 421 U.S. 213, 224 (1975) ("The provision on its face focuses on the use of force, and its legislative history confirms that its central purpose was to prevent and punish *violent* interferences with the exercise of specified rights and that it was not aimed at interrupting or frustrating the otherwise orderly processes of state law.").

[190] *E.g.*, United States v. Lane, 883 F.2d 1484, 1487 (10th Cir. 1989).

[191] *E.g.*, United States v. Sowa, 34 F.3d 447, 449 (7th Cir. 1994). For more information on the scope of "force or threat

First Amendment free speech concerns may complicate such prosecutions.[192] Specifically, threatening speech may be constitutionally protected unless it qualifies as a "true threat" under Supreme Court precedent[193]—which are statements conveying "an intent to commit an act of unlawful violence to a particular individual or group of individuals."[194] Accordingly, at least one court has construed threat of force in the context of § 245(b)(2) to mean that the defendant either intended to "threaten the use of force," or intended to cause the victims to "reasonably fear the imminent use of force or violence."[195]

Second, the government must establish dual intents on the part of the defendant. On the one hand, § 245(b)(2) requires proof that the defendant acted because of[196] the race, color, religion, or national origin of the victim.[197] On the other, the government must also show that the defendant acted because the victim was enjoying or participating in an enumerated protected right.[198] The rights protected by § 245(b)(2) are the enjoyment of or participation in:

- Public education;
- State or local "benefit[s], service[s], privilege[s], program[s], facilit[ies] or activit[ies]";
- State or local employment or labor organizations;
- State or local jury service;
- Interstate commerce or common carriers; and
- Public accommodations such as movie theaters and entertainment venues, hotels and other hospitality and travel providers, and restaurants and other businesses selling food and beverages.[199]

Third, the government must show that the defendant acted "willfully."[200] A number of courts have construed willfulness in the context of § 245(b)(2) to require "specific intent to interfere with a

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of force" see WOLFE, *supra* note 7, § 6:27 (collecting cases).

[192] WOLFE, *supra* note 7, § 6:27.

[193] *See, e.g.*, United States v. Syring, 522 F. Supp. 2d 125, 129 (D.D.C. 2007).

[194] Virginia v. Black, 538 U.S. 343, 359 (2003). For an examination of "true threats," see generally CRS Report R45713, *Terrorism, Violent Extremism, and the Internet: Free Speech Considerations*, by Victoria L. Killion.

[195] United States v. McDermott, 29 F.3d 404, 406 (8th Cir. 1994).

[196] *See supra* "Conduct Occurring "Because Of."

[197] 18 U.S.C. § 245(b)(2). Other motivations, such as biases against familial status, sexual orientation, sex, or disability fall outside the scope of § 245(b)(2). *Id.*; *accord* Kami Chavis Simmons, *Subverting Symbolism: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and Cooperative Federalism*, 49 AM. CRIM. L. REV. 1863, 1879 (2012).

[198] 18 U.S.C. § 245(b)(2); *accord* United States v. Nelson, 277 F.3d 164, 189 (2d Cir. 2002) ("Section 245(b)(2)(B), properly understood,. . . restricts its attention to acts of force or threat of force that involve two distinct kinds of discriminatory relationships with the victim—first, an animus against the victim on account of her race, religion, etc., that is, her membership in the *categories* the statute protects; and, second, an intent to act against the victim on account of her using public facilities, etc., that is, because she was engaging in an activity the statute protects.").

[199] 18 U.S.C. § 245(b)(2). The proprietors of lodging establishments that have five or fewer rooms for rent and that the proprietor resides in are excluded from this provision. *Id.* Notably, although the rights protected under § 245 are broad, they do not include housing-related activities, because those fall within the scope of 42 U.S.C. § 3631. WOLFE, *supra* note 7, § 6:29.

[200] 18 U.S.C. § 245(b)(2).

federally protected activity on the basis of" the victim's race, color, religion, or national origin.[201] In this sense, it is difficult to separate the willfulness requirement from other elements of § 245(b)(2) and courts sometimes combine the elements into a single discussion.[202]

Elements of a § 245(b)(4) Violation

As noted above, there appears to be considerable overlap between the various provisions of § 245, and §§ 245(b)(2) and 245(b)(4) are no exception.[203] Both provisions prohibit violent bias-motivated interference with any person because of that person's participation in a protected activity.[204] However, § 245(b)(4)—specifically 245(b)(4)(A)—also contains language prohibiting violent interference with individuals to discourage *others* from participating in or enjoying, without discrimination based on race, color, religion, or national origin, enumerated protected rights.[205] Although federal courts have had few opportunities to interpret § 245(b)(4), its core concern has been described as prohibiting conduct that could have a discriminatory "chilling effect" on participation in protected activities.[206] In *United States v. Griffin*, for example, the First Circuit upheld the § 245(b)(4)(A) conviction of a defendant who assaulted a Black man who had been driving by an anti-busing protest in Boston, and who had been forcibly removed from his car by some of the protestors.[207] The defendant, who pursued the victim as he sought to escape the crowd, beat the victim "with a club . . . [,] incapacitating [the victim] for several weeks."[208] Although the victim was "not a student, nor a parent, nor otherwise connected with any Boston public school," the court concluded that the defendant nonetheless violated § 245(b)(4)(A) because there was evidence to conclude that the "defendant intended the indiscriminate beating of an innocent [B]lack [person] on a public street near a school at school release time, with the police unable to prevent it, to have a chilling effect" on Black children attending that school and their parents.[209] In other words, the court found that the defendant violently interfered with the victim likely to intimidate a group of people from participating, without discrimination on account of their race, in their protected right to public education.

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[201] United States v. Makowski, 120 F.3d 1078, 1081 (9th Cir. 1997); *accord* United States v. Franklin, 704 F.2d 1183, 1188 (10th Cir. 1983) ("The statute proscribes willfully injuring 'any person because of his race' . . . . Thus the Government was required to prove not only that [the defendant] killed [the victims] but that he did so because of their race." (citation omitted) (quoting 18 U.S.C. § 245(b)); *see also* United States v. Griffin, 585 F. Supp. 1439, 1444 (M.D.N.C. 1983) ("Section 245 requires that the accused act wil[l]fully and with a specific intent to do what the law forbids. To constitute a violation of the statute . . . the government must show that the offender wil[l]fully sought to interfere with the enumerated activity.").

[202] *Makowski*, 120 F.3d at 1081; Franklin, 704 F.2d at 1188.

[203] *See supra* note 180 and accompanying text.

[204] 18 U.S.C. § 245(b)(4)(A) (protecting those who are, or have been, participating in various enumerated activities from certain types of interference); *see also supra* "Elements of a § 245(b)(2) Violation."

[205] *See* 18 U.S.C. § 245(b)(4)(A) (prohibiting certain interference "in order to intimidate such person or any other person or any class of persons from" participating in protected activities); United States v. Pimental, 979 F.2d 282, 284 (2d Cir. 1992) (explaining that § 245(b)(4) protects direct participants and also certain third parties).

[206] WOLFE, *supra* note 7, § 6:33; *see also* S. REP. NO. 90-721, at 1839 (1967) ("Also punishable would be violence directed against persons not involved in civil rights activity where such persons are selected as victims in order to intimidate others.").

[207] 525 F.2d 710, 712 (1st Cir. 1975).

[208] *Id.*

[209] *Id.*

Another provision, § 245(b)(4)(B), prohibits violent interference with an individual "affording another person or class of persons opportunity or protection" to participate in a protected activity, or to intimidate others from affording such opportunities.[210] This language suggests that § 245(b)(4)(B) is not focused on protecting individuals directly participating in protected activities, but rather third parties who provide opportunities for others to participate in protected activities. Nevertheless, due to a lack of interpretive case law, the exact contours of § 245(b)(4)(B) are uncertain.[211] However, a broad goal of enacting § 245 was to protect "persons who urge or aid participation in" protected activities, as well as those "who have duties to perform with respect to the protected activities" like public school or voter registration officials.[212] It is possible § 245(b)(4)(B) was intended to cover some or all of these groups. That interpretation appears consistent with one DOJ prosecution under § 245(b)(4)(B) connected to the 2009 shooting at the United States Holocaust Memorial Museum in Washington, D.C., which resulted in the death of a security guard.[213] In an indictment, the DOJ alleged that the defendant violated § 245(b)(4)(B) by shooting the security guard because the guard had been "affording opportunity and protection" to Jewish people and those associated with them in participating—without discrimination on account of race or religion—in the goods, services, and accommodations offered by the museum.[214] The indictment further alleged that the defendant sought to intimidate other employees, directors, and affiliates of the museum from affording such opportunity and protection.[215]

Another important distinction of § 245(b)(4) is the scope of the list of enumerated activities it encompasses.[216] Section 245(b)(4) protects all the activities that fall under § 245(b)(2), *as well as*:

- Voting, campaigning or qualifying for elective office;
- Participating or enjoying any federal "benefit, service, privilege, program, facility or activity";
- Applying for or enjoying federal employment;
- Participating in federal jury duty; and
- Participating in or enjoying "any program or activity receiving Federal financial assistance."[217]

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[210] 18 U.S.C. § 245(b)(4).

[211] As of March 30, 2022 a search of Westlaw yields 797 federal cases citing to § 245. A search within those results for opinions including "245(b)(4)" drops that number to 13 cases. A search within the 743 federal cases citing to § 245 for opinions that include "245(b)(4)" in the same paragraph as the phrase "without discrimination" (245(b)(4) /p "without discrimination") reduces the number of responses to four. At least one observer has also observed the scarcity of case law under § 245(b)(4)(B). Wolfe, *supra* note 7, § 6:33 (explaining that there "are no reported cases interpreting" § 245(b)(4)(B)).

[212] S. REP. NO. 90-721, at 1839 (1967).

[213] Indictment, United States v. Wenneker, No. 09CR00184, 2009 WL 2342906 (D.D.C. July 30, 2009).

[214] *Id.*

[215] *Id.* The court abated the prosecution of the case against the defendant upon notification of his death. *See* Liz Robbins, *J. W. von Brunn, Accused Museum Gunman, Dies at 89*, N.Y. TIMES (Jan. 6, 2010), https://www.nytimes.com/2010/01/07/us/07vonbrunn.html.

[216] 18 U.S.C. § 245.

[217] *Id.* § 245(2)(b)(1)(A)–(E).

Elements of a § 245(b)(5) Violation

Section 245(b)(5) prohibits violent interference with citizens who are targeted because they are helping others participate in a protected activity without discrimination on account of race, color, religion, or national origin.[218] The provision is in some ways similar to other provisions in § 245. In particular, § 245(b)(5) protects individuals who are assisting others in some way to participate in protected activities without discrimination[219] and it covers the same list of protected activities as § 245(b)(4).[220] Nevertheless, § 245(b)(5) embodies three notable distinctions. First, § 245(b)(5) expressly limits its protections to citizens, and therefore appears to exclude non-citizens such as temporary visitors or aliens.[221] It therefore protects a narrower class of individuals than §§ 245(b)(2) and (b)(4), which extend their protections to "any person."[222] Second, § 245(b)(5) protects participation "in speech or peaceful assembly opposing any denial of the opportunity to" participate in protected activities.[223] According to one federal court, this language "specifically addresses and protects parades in support of boycotts organized to fight racial discrimination, . . . or parades in support of school desegregation, or parades organized to promote voter registration drives," among other things.[224] The court concluded that it did not, however, extend to a general civil rights parade, where the purpose of that parade was to condemn a "clandestine racist organization," because any intention to use the parade to promote protected activities in § 245 was incidental.[225] Third, § 245(b)(5) protects only those who are *lawfully* engaged in protected activities or speech or assembly in support of those activities,[226] and seemingly would not protect, for example, "citizens engaged in or encouraging riot or civil disturbance."[227]

Although there is minimal case law interpreting § 245(b)(5),[228] one useful illustration is *United States v. Johns*.[229] In *Johns*, the Fifth Circuit upheld the convictions of several defendants under § 245(b)(5) for shooting into the home of a NAACP chapter president.[230] The court concluded that "in attacking the NAACP leaders the defendants intended forcibly to discourage the NAACP's

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[218] *Id.* § 245(b)(5) (criminalizing by actual or threatened force, willfully injuring, intimidating, or interfering with—or attempting to injure, intimidate, or interfere with—"any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin" in certain enumerated activities).

[219] United States v. Pimental, 979 F.2d 282, 284 (2d Cir. 1992) ("Thus, [§§ 245(b)(4) and (b)(5)] protect not only the direct participants in and beneficiaries of [protected activities], but also protect third persons whose involvement takes the form of aiding the activities or assisting others to participate when, in such indirect participation, they act according to federal law and policy, i.e., 'without discrimination on account of race, color, religion or national origin.'") (quoting 18 U.S.C. § 245).

[220] 18 U.S.C. § 245(b)(5).

[221] *See generally* WOLFE, *supra* note 7, § 6:34.

[222] *Id.*

[223] 18 U.S.C. § 245(b)(5).

[224] United States v. Griffin, 585 F. Supp. 1439, 1441 (M.D.N.C. 1983) (internal citation omitted).

[225] *Id.*

[226] 18 U.S.C. § 245(b)(5).

[227] Wolfe, *supra* note 7, § 6:34 (internal quotation marks omitted).

[228] As of March 30, 2022, a search on Westlaw within citing references to § 245, yielded eight cases that included the phrase "245(b)(5)."

[229] *See* United States v. Johns, 615 F.2d 672, 676 (5th Cir. 1980) (per curiam).

[230] *Id.*

efforts to secure better employment and housing opportunities for [Black people] and its efforts to ensure appropriate distribution of government revenues to the beneficiaries of various programs."[231]

Certification Requirement and Availability of State Prosecutions

State governments prosecute most hate crimes,[232] and § 245 contains a provision clarifying that the statute is not intended to "prevent any State . . . from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section."[233] In addition, federal prosecution pursuant to § 245 requires written certification from the Attorney General or certain designees[234] stating that "prosecution by the United States is in the public interest and necessary to secure substantial justice."[235]

Criminal Interference with Right to Fair Housing, 42 U.S.C. § 3631

Section 3631 of Title 42 of the United States Code includes three criminal provisions—42 U.S.C. § 3631(a), (b), (c)—that prohibit willfully interfering, by actual, attempted, or threatened force with housing rights because of "race, color, religion, sex, handicap," familial status, or national origin.[236] The three provisions often overlap, but each protects a somewhat different group of individuals, ranging from individuals who are themselves participating in housing rights, to individuals assisting others in enjoying those housing rights, to individuals who are targeted in order to discourage others from enjoying housing rights.[237] The statute closely resembles 18 U.S.C. § 245, and both were enacted as part of the Civil Rights Act of 1968.[238]

Section 3631 has been applied to a wide array of conduct targeting the enjoyment of housing.[239] For instance, federal prosecutors have successfully used § 3631 to prosecute two women who conspired to hang a noose outside the home of a family from Africa,[240] several individuals who attempted to burn a cross outside the dwelling of a biracial family,[241] and the perpetrators of a racially-motivated armed home invasion.[242]

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[231] *Id.*

[232] WOLFE, *supra* note 7, § 2:2.

[233] 18 U.S.C. § 245(a)(1).

[234] The Attorney General delegated his § 245 certification authority to the Assistant Attorney General for the Civil Rights Division. 28 C.F.R. § 0.50.

[235] 18 U.S.C. § 245 (footnote added).

[236] 42 U.S.C. § 3631.

[237] *Id.*

[238] Fair Housing Act, Pub. L. No. 90-284, Tit. VIII, 82 Stat. 81 (1968) (codified at 42 U.S.C. § 3631). For additional information on the history of this legislation, see generally WOLFE, *supra* note 7, § 5:3.

[239] *See, e.g.*, WOLFE, *supra* note 7, § 5:3 (collecting cases).

[240] *See supra* note 102 and accompanying text.

[241] Indictment, United States v. Wingo, No. 6:09CR60006-001, 2009 WL 6506510 (W.D. Ark. Apr. 22, 2009); Press Release, U.S. Dep't of Justice, Four Arkansas Men Sentenced on Civil Rights Charges in Cross Burning Conspiracy (Dec. 8, 2009), https://www.justice.gov/opa/pr/four-arkansas-men-sentenced-civil-rights-charges-cross-burning-conspiracy.

[242] United States v. Rogers, 45 F.3d 1141, 1143 (7th Cir. 1995). Some prohibited conduct under § 3631—such as cross burnings—may also amount to conspiracies against rights prohibited under § 241, and prosecutors have used both

Elements of a § 3631(a) Violation

Section 3631(a) prohibits the willful use of force or threat of force to injure, interfere with, or intimidate any person when it occurs because of two factors.[243] First, the conduct must be because of the victim's "race, color, religion, sex, handicap," familial status, or national origin.[244]

Second, the underlying conduct must also have occurred because the victim was enjoying or engaged in protected housing rights, which under § 3631(a) include "selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings."[245] Most § 3631(a) cases involve the right to occupy a dwelling, and courts have interpreted "occupy" and "dwelling" broadly.[246] For example, courts have concluded that "occupy" includes temporary occupation, such as visiting the dwelling of another.[247] "Dwellings," meanwhile, include any "building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof."[248]

Elements of a § 3631(b) violation

Section 3631(b) criminalizes the use of actual or threatened force to willfully injure, intimidate, or interfere with any person (or attempts to willfully injure, intimidate, or interfere with any person) because he or she has (1) been participating in a protected housing right, or (2) afforded "another person or class of persons opportunity or protection so to participate" in federal housing rights, "without discrimination" based on "race, color, religion, sex, handicap," familial status, or national origin.[249] Alternatively, such conduct is criminal when intended to intimidate others from engaging in such housing rights.[250] The housing rights covered by this provision are identical to those contained in § 3631(a), discussed above, as are the protected victim characteristics.[251] Although there is little case law interpreting § 3631(b), it seemingly not only protects individuals exercising their federal housing rights (in which sense it overlaps considerably with § 3631(a)),

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statutes in some instances. *See* Indictment, *Wingo*, 2009 WL 6506510 (charging defendants in indictment with violations of §§ 241 and 3631 for an attempted cross burning). It is also possible to imagine overlap between §§ 3631 and 242, assuming an action implicating enjoyment of housing rights taken under color of law. *See supra* "Deprivation of Rights under Color of Law, 18 U.S.C. § 242."

[243] 42 U.S.C. § 3631(a).

[244] *Id.*

[245] *Id.* (footnote added). The term "rent" means to "lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant." 42 U.S.C. § 3602(e).

[246] *See* United States v. Gilbert, 813 F.2d 1523, 1527 (9th Cir. 1987) (describing breadth of terms occupation and dwelling in context of § 3631 and collecting case law in support).

[247] *See Wood*, 780 F.2d at 961 ("'Occupation' includes more than mere physical presence within four walls; the term clearly incorporates the right to associate in one's home with members of another race.").

[248] 42 U.S.C. § 3602(b).

[249] *Id.* § 3631(b). Section 3631(b) it appears to be similar in structure and scope to 18 U.S.C. § 245(b)(4) discussed above. *See supra* "Elements of a § 245(b)(4) Violation."

[250] *Id.*

[251] 42 U.S.C. § 3631

but also victims who are selected to dissuade *others* from participating in those rights.[252] Section 3631(b) also protects *third parties* who provide others opportunities to participate in federal housing rights.[253] In practice, § 3631(b) has been used to prosecute, among others,[254] an individual who threatened real estate agents working with a Black family to purchase a home in a previously all-White neighborhood,[255] and individuals who burned crosses outside the home of a White family hosting Black guests to signal that "black people were unwelcome in [the community] and that association with blacks was not approved."[256]

Elements of a § 3631(c) violation

Section 3631(c) prohibits actual or threatened force to willfully injure, intimidate, or interfere with (or attempts to willfully injure, intimidate, or interfere with any person) "any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate," without discrimination based on "race, color, religion, sex, handicap," familial status, or national origin, in federally protected housing activities.[257] Section 3631(c) protects the same housing activities as § 3631(a) and (b), and *also* protects lawful participation in First Amendment activity directed at opposing denial of housing rights for discriminatory reasons.[258] One notable distinction between § 3631(c) and other provisions of § 3631, is that the protections of § 3631(c) extend exclusively to citizens.[259]

Section 3631(c) protects individuals who are targeted because they are helping others attain enjoyment of protected rights.[260] In that sense, § 3631(c) also appears to overlap with § 3631(b), as both protect individuals affording others the opportunity to participate, without discrimination on account of "race, color, religion, sex, handicap," familial status, or national origin, in housing activities.[261] Although there is limited case law interpreting § 3631(c),[262] *United States v. Gilbert* illustrates one way in which the provision has been applied.[263] In *Gilbert*, the Ninth Circuit considered whether § 3631(c) could properly reach the conduct of a defendant who "mailed racially derogatory and threatening correspondence to the director of an adoption organization

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[252] *Id.* § 3631(b); *see also* WOLFE, *supra* note 7, § 5:8 (describing § 3631(b) as focused on prohibiting a chilling effect on participation in housing activities).

[253] 42 U.S.C. § 3631(b); *see supra* "Elements of a § 245(b)(4) Violation."

[254] *See, e.g.*, United States v. Gilbert, 884 F.2d 454, 456 (9th Cir. 1989) (describing prosecution under § 3631(b) of defendant who among other things, drove car at Black child adopted by White family, harassed White step brother of Black child, and set his dog on Black child living with adoptive White family).

[255] United States v. Vartanian, 245 F.3d 609, 611 (6th Cir. 2001).

[256] United States v. Hayward, 6 F.3d 1241, 1250 (7th Cir. 1993), *overruled on other grounds by* United States v. Colvin, 353 F.3d 569 (7th Cir. 2003).

[257] 42 U.S.C. § 3631. Section 3631(c) closely resembles § 245(b)(5), discussed above. *See supra* "Elements of a § 245(b)(5) Violation."

[258] 42 U.S.C. § 3631(c).

[259] *Compare id.* § 3631(a), (b) (applying to "any person") *with* § 3631(c) (applying to "any citizen").

[260] *Id.* § 3631(c).

[261] *Id.* § 3631(b).

[262] As of March 30, 2022, a search conducted in Westlaw of citing references to § 3631 yielded only five cases including the term "3631(c)."

[263] 813 F.2d 1523 (9th Cir. 1987).

responsible for the placement and adoption of black and Asian children."[264] The court concluded that it could,[265] holding that the adoption agency director qualified as a citizen "lawfully aiding or encouraging other persons to participate, without discrimination" in housing activities, as required by § 3631(c).[266] The court further held that "the placement of minority children by the director of an adoption agency is a protected activity under section 3631(c) since the director is 'aiding or encouraging' minorities in the occupancy of dwellings."[267]

Damage to Religious Property or Obstruction of Free Exercise, 18 U.S.C. § 247

Section 247 of Title 18 of the United States Code, includes three main offenses. One offense is under § 247(c), which provides that it is a crime to "intentionally deface[], damage[], or destroy[] any religious real property[268] . . . or attempt[] to do so" because of "the race, color, or ethnic characteristics of any individual associated with that religious property."[269] A second offense, § 247(a)(1), prohibits the same conduct when committed because of the "religious character of that property" assuming it is "in or affects interstate or foreign commerce."[270] The third offense is under § 247(a)(2), which criminalizes "intentionally obstruct[ing], [or attempting to obstruct] by force or threat of force, including by threat of force against religious real property, any person in the enjoyment of that person's free exercise of religious beliefs," when that conduct is in or affects interstate commerce.[271]

Section 247 was originally enacted in 1988,[272] in response to an increase in arsons at places of religious worship, especially those "that serve predominantly African-American congregations."[273] With § 247, Congress sought to fill the gaps in preexisting hate crimes laws[274] and "mak[e] violence motivated by hostility to religion a Federal offense."[275] Since its enactment, § 247 has been used to prosecute a range of conduct motivated by religious bias, including the

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[264] *Id.* at 1525.

[265] *Id.* at 1527–28.

[266] *Id.* at 1527.

[267] *Id.* at 1528.

[268] In general, real property includes "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land." *Property*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[269] 18 U.S.C. § 247(c) (footnote added).

[270] *Id.* § 247(a)(1), (b).

[271] *Id.* § 247(a)(2), (b).

[272] Act of June 24, 1988, Pub. L. No. 100–346, §1, 102 Stat. 644 (prohibiting certain acts of destruction to religious property). Congress has amended § 247 on several occasions. *See generally* WOLFE, *supra* note 7, § 7:2; *see also*, *e.g.*, Church Arson Prevention Act of 1996, P.L. 104-155, § 3, 110 Stat. 1392; Protecting Religiously Affiliated Institutions Act of 2018, P.L. 115-249, § 2, 132 Stat. 3162.

[273] Church Arson Prevention Act of 1996, P.L. 104-155, § 2, 110 Stat. 1392.

[274] *See* H.R. REP. NO. 104-621, at 3(1996) ("If the perpetrator is acting alone, section 241 is not available as a means of prosecution."); 142 CONG. REC. 14472, 14578 (1996) (Statement of Assistant Att'y Gen., Deval Patrick) ("While we can get significant jail sentences under section 241, we can use section 241 only when we have a conspiracy of two or more persons."). "[P]rior to the enactment of Section 247, federal prosecutions for religiously motivated violence could be initiated only if the offense occurred under very limited circumstances: specifically, if the action was taken under color of law; if the violence involved arson and the perpetrator fled across state lines to avoid prosecution; and if the conduct involved was the damaging of religious property located in an area within the exclusive jurisdiction of the United States." WOLFE, *supra* note 7, § 7:2.

[275] S. REP. NO. 100-324, at 3–4 (1988).

plotted arson of a mosque,[276] the revenge killing of former members of a religious group who sought to dissociate from that religion,[277] a shooting at a synagogue,[278] and the fatal 2015 shooting at Emanuel African Methodist Episcopal Church in Charleston, South Carolina.[279]

Elements of a § 247(a)(1) Violation for Damage to Religious Property

Section 247(a)(1) requires the government to prove that the defendant intentionally[280] defaced, damaged, or destroyed religious real property, because of the religious character of the property.[281] Section 247 defines "religious real property" as "any church, synagogue, mosque, religious cemetery, or other religious real property, including fixtures or religious objects contained within a place of religious worship, or real property owned or leased by a nonprofit, religiously affiliated organization."[282] According to the legislative history, Congress meant for this definition to include not only buildings and grounds, but also objects such as "[T]orahs inside a synagogue."[283] Section 247(a)(1) has been used to prosecute a range of destructive conduct targeting such religious real property, including bombings,[284] vandalism,[285] and intentional fires.[286]

There is an important limitation to § 247(a)(1). The government must establish that the defendant's conduct is in or affects interstate commerce.[287] A broad range of activity may satisfy

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[276] United States v. Doggart, 947 F.3d 879, 881 (6th Cir. 2020).

[277] United States v. Barlow, 41 F.3d 935, 943 (5th Cir. 1994).

[278] Compl., United States v. Earnest, No. 19MJ1900 (S.D. Cal. May 9, 2009), https://www.justice.gov/opa/press-release/file/1161421/download.

[279] United States v. Roof, 10 F.4th 314, 331 (4th Cir. 2021).

[280] The statute does not define "intentional," but in general "one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts." Tison v. Arizona, 481 U.S. 137, 150 (1987) (quoting WAYNE LAFAVE & AUSTIN SCOTT, CRIMINAL LAW, § 28 (1972)).

[281] 18 U.S.C. § 247(a)(1).

[282] *Id.* § 247(f).

[283] 142 CONG. REC. 17139, 17212 (1996) (joint statement of Sen. Lauch Faircloth, Sen. Edward Kennedy, Rep. John Conyers, and Rep. Henry Hyde).

[284] *E.g.*, United States v. Hari, No. 18CR015001, 2019 WL 7838282, at *2 (D. Minn. Sept. 17, 2019), *report and recommendation adopted*, 2019 WL 6975425 (D. Minn. Dec. 20, 2019) (describing § 247 charges against defendant that bombed Islamic Center).

[285] *E.g.*, Press Release, U.S. Dep't of Justice, Man Sentenced in Connection with Arson at Planned Parenthood and Vandalism of Mosque in Madera, California (Jan. 9, 2012) (describing charge for destruction of religious property against individual who threw brick at mosque), https://www.justice.gov/opa/pr/man-sentenced-connection-arson-planned-parenthood-and-vandalism-mosque-madera-california.

[286] *E.g.*, United States v. Perez, No. 18-40707, 2020 WL 7786934, at *1 (5th Cir. Dec. 30, 2020) (describing § 247 charges against defendant that burned down Islamic Center); Press Release, U.S. Dep't of Justice, Louisiana Man Pleads Guilty to Burning Three Baptist Churches in St. Landry Parish (Feb. 10, 2020), (summarizing § 247 charge against defendant who burned churches), https://www.justice.gov/opa/pr/louisiana-man-pleads-guilty-burning-three-baptist-churches-st-landry-parish.

[287] 18 U.S.C. § 247. As originally enacted, § 247 required that the "defendant travel[] in interstate or foreign commerce, or use[] a facility or instrumentality of interstate or foreign commerce in interstate or foreign commerce." Act of June 24, 1988, Pub. L. No. 100–346, § 1, 102 Stat. 644. That requirement proved "virtually impossible to satisfy," so Congress amended § 247 to require only that the conduct is in or affects interstate commerce. H.R. REP. NO. 104-621, at 2 (1996).

the interstate commerce requirement. Although purely local activity lacking any substantial interstate commerce nexus will not suffice,[288] at least one court has held that § 247 may be satisfied even if the ultimate harm does not occur in or target interstate commerce.[289] According to that court all that is required is that an act *promoting* the ultimate harm, and not necessarily that the harm itself, implicates interstate commerce.[290] In this case, the court concluded that § 247's interstate commerce element had been met where a defendant set several churches ablaze in different states.[291] Although each church burning occurred in a single state, the defendant's conduct still affected interstate commerce because it "entailed weeks of travel in a van (an instrumentality of commerce) along interstate highways (a channel of commerce) and at least six separate interstate border crossings, all for the specific purpose of spreading the evil of church burning through four different states."[292] Other types of conduct may also satisfy the interstate commerce requirement. For instance, in an appeal stemming from the conviction of the perpetrator of the fatal 2015 shooting at Emanuel African Methodist Episcopal Church in Charleston, South Carolina, the Fourth Circuit rejected the defendant's argument that another provision of § 247(a) exceeded Congress's commerce power *as applied* to his conduct.[293] In so holding, the court emphasized a range of conduct that occurred in or affected interstate commerce including the defendant's use of a phone, GPS device, and interstate highway, and particularly his admitted use of "the internet to research a historic African American church as a target and to amplify the effect of his planned attack on Mother Emanuel's parishioners—a use that continued until shortly before the attack."[294]

Elements of a § 247(c) Violation for Racially-Motivated Damage to Religious Property

With two exceptions, the elements of a § 247(c) violation for racially-motivated damage to religious real property are identical to that of a § 247(a)(1) violation.[295] First, to prove a § 247(c) violation, the government must establish that the defendant acted "because of the race, color, or ethnic characteristics of any individual associated with that religious property."[296] Second, § 247(c) does not require the government to prove an interstate commerce nexus.[297]

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[288] *See, e.g.*, United States v. Ballinger, 395 F.3d 1218, 1226 (11th Cir. 2005) ("Congress'[s] power to regulate activities that 'affect' commerce enables it to reach wholly intrastate conduct—that is, conduct that utilizes neither the channels nor the instrumentalities of interstate commerce—but *only* when it has 'a substantial relation to' (meaning it 'substantially affect[s]') interstate commerce." (brackets in original) (quoting United States v. Lopez, 514 U.S. 549, 558–59 (1995)).

[289] *Ballinger*, 395 F.3d at 1227.

[290] *Id.*

[291] *Id.*

[292] *Id.*; *see also* United States v. Doggart, 947 F.3d 879, 887 (6th Cir. 2020) (noting that if he had raised interstate commerce challenge, defendant's conduct would have implicated interstate commerce for § 247 purposes, "[b]ecause [defendant] planned an attack in New York from his home in Tennessee and planned to use instrumentalities of interstate commerce to make the attack.").

[293] United States v. Roof, 10 F.4th 314, 389 (4th Cir. 2021).

[294] *Roof*, 10 F.4th at 386-87.

[295] 18 U.S.C. § 247.

[296] *Id.* For a discussion of these biases see *supra* "Conduct Occurring Because of Specific Characteristics."

[297] 18 U.S.C. § 247; *accord* WOLFE, *supra* note 7, § 7:7 n.3 ("Because it is not included in the definition of the offense

Elements of a § 247(a)(2) Violation for Obstruction of Free Exercise of Religion

Section 247(a)(2) prohibits the intentional obstruction of any person's enjoyment of the free exercise of religious beliefs by actual or threatened force, when such obstruction is in or affects interstate or foreign commerce.[298] Although § 247(a)(2) does not provide additional clarification on the meaning of obstruction of the enjoyment of the free exercise of religion, at least one federal appellate court has concluded that, in light of First Amendment precedent, the phrase broadly "encompass[es] both . . . active practice" as well as "passive disassociation," such as the choice "to be free from the practice of religion altogether."[299] In that case, the court affirmed the § 247(a)(2) convictions of several defendants who had killed three former members of their religious sect because the former members had "chosen to disassociate themselves from the church's teachings and its fellowship."[300] The court also broadly concluded that Congress intended § 247(a)(2) to cover "the entire panoply of activities" protected under the U.S. Constitution's Free Exercise Clause.[301] At least one federal appellate court has rejected the argument that § 247(a)(2) requires proof that the defendant was motivated by "hostility to religion."[302]

Certification Requirement in § 247

To encourage deference to state and local governments in prosecuting hate crimes,[303] the "Attorney General or his designee" must certify in writing that federal prosecution under § 247 is in the "public interest and necessary to secure substantial justice."[304] This requirement is similar to the mandatory certification provision in § 245.[305]

Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249.

The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009 (HCPA),[306] codified at 18 U.S.C. § 249, makes it a crime to "willfully cause[] bodily injury to any person or,

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at subsection (c), the requirement that conduct 'is in or affects interstate or foreign commerce,' contained in subsection (b), does not appear to apply to it.").

[298] 18 U.S.C. § 247 (a)(2).

[299] United States v. Barlow, 41 F.3d 935, 936, 943 (5th Cir. 1994) (emphasis omitted).

[300] *Id.* at 936-37. Another victim was the daughter of a former member who had witnessed the crime. *Id*.

[301] *Id.* at 943. For a recent examination of the scope of constitutional protections for the free exercise of religion, see generally CRS Legal Sidebar LSB10450, *UPDATE: Banning Religious Assemblies to Stop the Spread of COVID-19*, by Valerie C. Brannon.

[302] United States v. Roof, 10 F.4th 314, 389 (4th Cir. 2021) (internal quotation marks omitted).

[303] *See* S. REP. NO. 100-324, at 6 (1988) ("This certification requirement was added at the request of the Justice Department to '. . . ensure appropriate deference to state or local prosecution in most cases, while allowing Federal prosecution where state or local officials will not assume jurisdiction or for any reason are unable to secure a conviction.'" (quoting Letter from John Bolton, Assistant Att'y Gen., to Joseph R. Biden, Jr., U.S. Senator (Nov. 3, 1987)).

[304] 18 U.S.C. § 247(e).

[305] WOLFE, *supra* note 7, §§ 2:7, 7:4.

[306] The HCPA is named for the victims of two separate murders that garnered national attention. The first incident involved the fatal assault of Matthew Shepard, a gay college student. James Brooke, *Gay Man Dies From Attack, Fanning Outrage and Debate*, N.Y. TIMES (Oct. 13, 1998), https://www.nytimes.com/1998/10/13/us/gay-man-dies-

through the use of . . . a dangerous weapon," attempt to "cause bodily injury to any person" due to certain actual or perceived characteristics of any person.[307] Congress enacted § 249 due to the limitations of existing federal laws[308] in combatting the "serious national problem" of hate crimes.[309] Before the enactment of § 249, the "principal Federal hate crime statute" was § 245, which applied only when the victim had been participating in, or was helping others participate in, a "federally protected activity" (or if the victim was targeted to discourage such participation by others).[310] That requirement limited the scope of § 245 and prosecutions under the statute were rare.[311] Section 249 marked an expansion of federal jurisdiction over hate crimes in three important ways. First, § 249 does not require that the victim have any connection with any of the federally-protected rights that are enumerated in other statutes.[312] Second, § 249 includes language clarifying that its protections extend to individuals targeted because of a covered characteristic whether "actual or *perceived*";[313] thus expressly permitting prosecution where a defendant is motivated by a specific characteristic such as race, but is actually mistaken.[314] Third, § 249 extends protection to classes of individuals that fall outside other federal hate crime statutes, including providing protections to persons targeted because of actual or perceived sexual orientation or gender identity.[315]

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from-attack-fanning-outrage-and-debate.html?searchResultPosition=66. The other incident involved the racially-motivated assault and murder of James Byrd Jr. in Texas. Audra D.S. Burch, *In Texas, a Decades-Old Hate Crime, Forgiven but Never Forgotten*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/us/james-byrd-jasper-texas-killing.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer. Both crimes resulted in calls for additional federal hate crime laws. *See* Burch, *supra* note 306 (discussing HCPA as a legacy of Byrd's death); Brooke, *supra* note 306 ("In Washington, Mr. Clinton responded to news of Mr. Shepard's death by urging Congress to pass the Federal Hate Crimes Protection Act . . . ."). Both incidents also shaped the congressional discourse over the need for such legislation. *See, e.g.*, H.R. REP. NO. 111-86, at 10–11 (2009) (comparing the results of investigation and prosecution in the Byrd case, where the federal government had jurisdiction, with the results in the Shepard case where the federal government did not).

[307] 18 U.S.C. § 249.

[308] *See, e,g.*, H.R. REP. NO. 111-86, at 6–7 (2009) (explaining how limitations contained in § 245 have "limited the ability of Federal law enforcement officials to work with State and local officials in the investigation and prosecution of many incidents of brutality and violence motivated by prejudice."); *see also* James, *supra* note 12 ("Through the enactment of Section 249, Congress expanded federal jurisdiction over hate crimes to . . . address the limitations of existing federal hate crime statutes at the time.").

[309] Pub. L. No. 111–84, § 4702, 123 Stat 2190, 2835 (2010).

[310] H.R. REP. NO. 111-86, at 6 (2009); *accord* Simmons, *supra* note 197, at 1882-83 ("Section 245 required a victim not only be engaged in one of the protected activities, but also that the defendant chose the victim *because* of the victim's participation in one of the activities. This criterion greatly limited the circumstances in which the federal government could prosecute the perpetrator.").

[311] *See* Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1238 (2000) ("On average, there have been four to six prosecutions per year under § 245, and that section has never generated more than ten cases per year.").

[312] 18 U.S.C. § 249.

[313] *Id.*(emphasis added).

[314] For example, in one case, DOJ used § 249 to prosecute a man for attacking a victim who he mistakenly perceived to be Jewish. Press Release, U.S. Dep't of Justice, Ohio Man Convicted of Hate Crime in Attack Outside Cincinnati Restaurant (Dec. 17, 2018), https://www.justice.gov/opa/pr/ohio-man-convicted-hate-crime-attack-outside-cincinnati-restaurant.

[315] *Hate Crime Laws*, U.S. Dep't of Justice, https://www.justice.gov/crt/hate-crime-laws (last visited Mar. 15, 2022) ("The Shepard-Byrd Act is the first statute allowing federal criminal prosecution of hate crimes motivated by the victim's actual or perceived sexual orientation or gender identity.").

Since its enactment, § 249 has been used to prosecute a range of crimes with discriminatory motives, including a racially motivated assault,[316] a kidnapping and assault motivated by sexual orientation bias,[317] and the "abusive control and confinement" of disabled adults by private captors.[318] Federal prosecutors have also invoked § 249 in high profile cases such as the fatal shootings at Emanuel African Methodist Episcopal Church in Charleston, South Carolina in 2015,[319] and Tree of Life Synagogue in Pittsburgh, Pennsylvania in 2018.[320]

Elements of a § 249(a)(1) Violation

Section 249(a)(1) makes it a crime to "willfully cause[] bodily injury to any person or, through the use of . . . a dangerous weapon," attempt to "cause bodily injury to any person," because of the "actual or perceived race, color, religion, or national origin" of any person.[321] According to at least one court, conduct is willful in the context of § 249 when it occurs "voluntarily and intentionally and with the specific intent to do something which the law forbids. . . that is to say, with bad purpose either to disobey or disregard the law."[322] A defendant acts willfully when he knows "the pertinent fact[s]" and understands "the illegality of the pertinent charged conduct.'"[323]

"Bodily injury," includes only "an actual physical injury"[324] such as cuts, abrasions, bruises, burns, disfigurement, physical pain, illness, or an "impairment of the function of a bodily member, organ, or mental faculty."[325] It does not include emotional or psychological harm.[326]

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[316] Press Release, U.S. Dep't of Justice, California Man Convicted with Federal Hate Crime for Attempting to Stab Black Man (Apr. 9, 2021), https://www.justice.gov/opa/pr/california-man-convicted-federal-hate-crime-attempting-stab-black-man.

[317] Press Release, U.S. Dep't of Justice, Two Harlan County, Kentucky, Men Indicted for Federal Hate Crime Against Individual Because of Sexual Orientation (Apr. 12, 2012), https://www.justice.gov/opa/pr/two-harlan-county-kentucky-men-indicted-federal-hate-crime-against-individual-because-sexual.

[318] Press Release, U.S. Dep't of Justice, Federal Charges Allege Captors Held Adults with Disabilities in Subhuman Conditions to Carry out Social Security Fraud (Jan. 23, 2013), https://www.justice.gov/opa/pr/federal-charges-allege-captors-held-adults-disabilities-subhuman-conditions-carry-out-social.

[319] United States v. Roof, 225 F. Supp. 3d 438, 441 (D.S.C. 2016). For details on the underlying conduct, see, e.g., Robert Costa, et al., *Church shooting suspect Dylann Roof captured amid hate crime investigation*, WASH. POST (June 18, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/06/17/white-gunman-sought-in-shooting-at-historic-charleston-african-ame-church/. For an account of the resulting proceedings and sentencing, see Press Release, U.S. Dep't of Justice, Federal Jury Sentences Dylann Storm Roof to Death (Jan. 10, 2017), https://www.justice.gov/usao-sc/pr/federal-jury-sentences-dylann-storm-roof-death.

[320] Superseding Indictment, United States v. Bowers, No. 18-292, 2019 WL 720160 (W.D. Pa. Jan. 29, 2019). For details on the underlying conduct, see, e.g., Campbell Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts*, N.Y. TIMES (Oct. 27, 2018), https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html?searchResultPosition=11. For details on the prosecution, see Press Release, U.S. Dep't of Justice, Additional Charges Filed in Tree of Life Synagogue Shooting (Jan. 29, 2019), https://www.justice.gov/opa/pr/additional-charges-filed-tree-life-synagogue-shooting.

[321] 18 U.S.C. § 249(a)(1) (footnoted added); *accord* WOLFE, *supra* note 7, § 3:3 (listing elements).

[322] Glenn v. Holder, 690 F.3d 417, 422–23 (6th Cir. 2012) (internal quotation marks omitted) (quoting United States v. Brown, 151 F.3d 476, 486 (6th Cir. 1998)).

[323] Glenn v. Holder, 738 F. Supp. 2d 718, 727 (E.D. Mich. 2010) (internal quotation mark omitted), (quoting United States v. Carney, 387 F.3d 436, 442 (6th Cir. 2004)), *aff'd*, 690 F.3d 417 (6th Cir. 2012).

[324] United States v. Jenkins, 909 F. Supp. 2d 758, 777 (E.D. Ky. 2012).

[325] 18 U.S.C. §§ 249(c)(1), 1365(h)(4).

[326] *Id*. § 249(c)(1) (defining "bodily injury" to exclude "solely emotional or psychological harm").

However, bodily injury need not actually result so long as the defendant attempted to cause bodily injury through use of a weapon, firearm,[327] incendiaries, explosives,[328] or fire.[329]

Elements of a § 249(a)(2) Violation

Like § 249(a)(1), § 249(a)(2) prohibits willfully causing bodily injury to any person or, through the use of a dangerous weapon, attempting to do so, albeit because of a slightly different group of characteristics, namely the actual or perceived "religion, national origin, gender, sexual orientation, gender identity, or disability of any person."[330]

Section 249(a)(2) requires that the conduct at issue is in or affects interstate or foreign commerce,[331] and outlines a variety of ways in which that may occur.[332] The government may establish jurisdiction by showing that the conduct occurs during, or results from "travel of the defendant or the victim . . . across a state line or national border" or "using a channel, facility, or instrumentality of interstate commerce."[333] For example, in *United States v. Jenkins*, a federal court concluded that an intrastate kidnapping and beating satisfied the jurisdictional element of § 249(a)(2) where the defendant traveled on an interstate highway (a channel of interstate commerce) and used a car (an instrumentality of commerce).[334] Alternatively, the government may also satisfy the interstate commerce requirement by proving that the defendant "employ[ed] a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce."[335]

Hate Crimes in Special Maritime or Territorial Jurisdiction, § 249(a)(3)

Section 249(a)(3) expands the jurisdictional scope of § 249. It criminalizes willfully causing bodily injury to any person, or "through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempt[ing] to cause bodily injury to any person, because of the

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[327] Section 249 defines "firearm" by reference to 18 U.S.C. § 921, which in turn defines "firearm" to mean "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm." *Id.* § 249(c)(3), 921(a)(3).

[328] Section 249 defines "explosive or incendiary device" by reference to 18 U.S.C. § 232, which in turn defines "explosive or incendiary device" to mean "(A) dynamite and all other forms of high explosives, (B) any explosive bomb, grenade, missile, or similar device, and (C) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone." *Id.* § 232, 249(c)(2).

[329] *Id.* § 249(a)(1).

[330] *Id.* Both subsections overlap in that they both protect victims targeted based on national origin or religion, the other classes of individuals protected by § 249(a)(2) are unique to that subsection. *Id.* § 249(a)(1)–(a)(2). According to one federal appellate court, Congress repeated "religion" and "national origin" in § 249(a)(2) "presumably to cover circumstances in which a particular religion or national origin was not perceived as a distinct race in the 1860s," and thus potentially beyond the scope of Thirteenth Amendment protection. United States v. Hatch, 722 F.3d 1193, 1205 (10th Cir. 2013).

[331] *Id.* § 249(a)(2).

[332] *Id.* § 249(a)(2)(B).

[333] *Id.* § 249(a)(2)(B).

[334] 909 F. Supp. 2d 758, 771 (E.D. Ky. 2012).

[335] 18 U.S.C. § 249(a)(2)(B)(iv).

actual or perceived race, color, religion," national origin, gender, sexual orientation, gender identity, or disability of any person, if that conduct occurs in the "special maritime or territorial jurisdiction of the United States."[336] Section 7 of Title 18 of the United States Code defines "Special maritime or territorial jurisdiction of the United States" to include a variety of places such as the "high seas," "lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof," and certain ships and aircraft.[337]

Emmett Till Antilynching Act (§§ 249(a)(5) and (a)(6))

Lynching—often described as death or bodily injury caused by two or more individuals acting without legal authority[338]—has long been a recurring topic of proposed legislation in Congress.[339] On March 29, 2022, President Biden signed the Emmett Till Antilynching Act[340] into law.[341] The Emmett Till Antilynching Act added two new subsections to § 249. Both provisions criminalize conspiracies to violate §§ 249(a)(1)-(3).[342] The primary distinction between the two new subsections is that the first (§ 249(a)(5)), which is entitled "lynching," prohibits only conspiracies if they result in death or serious bodily injury.[343] Serious bodily injury is defined by reference to another statute as "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."[344] In contrast, the second new subsection (§ 249(a)(6)) prohibits not only conspiracies to violate §§ 249(a)(1)-(3) resulting in death and serious bodily injury, but also those involving an attempt to kill or actual or attempted kidnapping or aggravated sexual abuse.[345]

It remains to be seen how federal prosecutors will utilize the two new conspiracy provisions of § 249(a) created by the Emmett Till Antilynching Act. With the provisions, federal prosecutors now have at least four statutory options for charging hate crime conspiracies. In addition to §§ 249(a)(5) and 249(a)(6), prosecutors could utilize 18 U.S.C. § 371, a federal statute that broadly prohibits conspiracies to "commit any offense against the United States" when at least one person "do[es] any act to effect the object of the conspiracy . . . ."[346] Ordinarily, to prove a § 371 conspiracy the government must demonstrate "(1) an agreement between two or more persons to pursue an unlawful objective; (2) the defendant's knowledge of the unlawful objective and

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[336] *Id.* § 249(a)(1)-(a)(3).

[337] *Id.* § 7.

[338] *See, e.g.*, *Antilynching Law*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A statute that criminalizes any unjustified act of violence by two or more people against another, regardless of race."); *Lynch*, WEBSTER'S DICTIONARY, available at https://www.merriam-webster.com/dictionary/lynching (11th ed. 2019) ("To put to death (as by hanging) by mob action without legal approval or permission.").

[339] For a brief discussion of past legislative efforts to enact anti-lynching laws see generally CRS Legal Sidebar LSB10504, *Overview of Recent Anti-Lynching Proposals*, by Peter G. Berris.

[340] Emmett Till Antilynching Act, H.R. 55, 117th Cong. (2021).

[341] Press Release, The White House, Bill Signed: H.R. 55 (Mar. 29, 2022), https://www.whitehouse.gov/briefing-room/legislation/2022/03/29/bill-signed-h-r-55/.

[342] 18 U.S.C. § 249(a)(5)-(a)(6).

[343] *Id.* § 249(a)(5).

[344] *Id.*; *id.* § 2246(4).

[345] *Id.*

[346] *Id.* § 371.

voluntary agreement to join the conspiracy; and (3) an overt act by one or more of the members of the conspiracy in furtherance of the objective of the conspiracy."[347] Federal prosecutors have used § 371 to prosecute hate crime conspiracies.[348] Alternatively, if the conspiracy targets the free exercise of enjoyment of rights, it could potentially violate § 241, discussed above.[349] To the extent that these provisions overlap in a given case, the prison terms they authorize may be one relevant factor for prosecutors in determining which to utilize. Sections 249(a)(5) and 249(a)(6) authorize fines, up to 30 years of imprisonment, or both.[350] In contrast, § 371 is capped at a maximum prison term of five years,[351] and § 241 authorizes up to life imprisonment or the death penalty in some instances.[352]

Certification Requirement in § 249

Like §§ 245[353] and 247,[354] § 249 contains a certification requirement "intended to ensure that the Federal Government will assert its new hate crimes jurisdiction only in a principled and properly limited fashion."[355] Specifically, § 249 requires that before prosecution the Attorney General or a designee must certify that (1) the state where the offense occurred lacks jurisdiction or requested federal prosecution; (2) the verdict or sentence obtained by the state did not vindicate "the Federal interest in eradicating bias-motivated violence"; or (3) federal prosecution serves the public interest and is "necessary to secure substantial justice."[356] The requirement is likely intended to ensure that state and local governments continue to prosecute the majority of bias-motivated violent crime.[357]

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[347] *E.g.*, United States v. Nicholson, 961 F.3d 328, 338 (5th Cir. 2020).

[348] *E.g.*, United States v. Diggins, No. 218-CR-00122JDL001, 2020 WL 1066979, at *1 (D. Me. Mar. 5, 2020).

[349] *Supra* "Conspiracy Against Free Exercise or Enjoyment of Rights, 18 U.S.C. § 241."

[350] 18 U.S.C. § 249(a)(5)-(a)(6)

[351] *Id.* § 371.

[352] *Id.* § 241.

[353] *See supra* "Certification Requirement and Availability of State Prosecutions."

[354] *See supra* "Certification Requirement."

[355] H.R. REP. NO. 111-86, at 14 (2009).

[356] 18 U.S.C. § 249.

[357] *See* P.L. 111-84, § 4702(3), 123 Stat 2190, 2835 (2009) (asserting that "[s]tate and local authorities are now and will continue to be responsible for prosecuting the overwhelming majority of violent crimes in the United States, including violent crimes motivated by bias").

Penalties under Federal Hate Crime Statutes

Those convicted of violating the federal hate crime statutes face fines,[358] imprisonment, or both.[359] Each statute contains a graduated penalties structure that authorizes increased maximum penalties where the defendant's conduct results in particular harms such as bodily injury or death.[360] Most of the federal hate crime statutes authorize the death penalty in some situations,[361] although 18 U.S.C. § 249 and 42 U.S.C. § 3631 do not.[362] For a description of the maximum authorized prison terms under each federal hate crime statute, see **Table 2**.

Table 2. Overview of Maximum Prison Terms by Federal Hate Crime Statute

Section	Description	Without Special Conditions	With Special Conditions
18 U.S.C. § 241	Conspiracy Against Rights	10 Years	*Life** (in instances involving actual/attempted kidnapping, actual/attempted aggravated sexual abuse, an attempt to kill, or death)
18 U.S.C. § 242	Deprivation of Rights under Color of Law	1 Year	*10 Years* (in instances resulting in bodily injury or involving attempted, threatened, or actual use of a dangerous weapon, explosives, or fire) *Life** (in instances involving actual/attempted kidnapping or aggravated sexual abuse, or an attempt to kill, or that result in death)

[358] The maximum fines authorized by the federal hate crime statutes are set by 18 U.S.C. § 3571 based on the classification of the underlying offense, which itself depends on the maximum authorized prison term. 18 U.S.C. §§ 3559, 3571. For example, for hate crime offenses punishable by a maximum of one year of imprisonment (Class A Misdemeanors), the maximum authorized fine is generally $100,000. *Id.* §§ 3559(a)(6), 3571(b)(5). For hate crime offenses that are felonies (punishable by more than one year of imprisonment), the maximum authorized fine is generally $250,000. *Id.* §§ 3559(a)(1)-(5), 3571(b)(3). If, however, the defendant derives "pecuniary gain from the offense" or the "offense results in pecuniary loss to a person other than the defendant," then the defendant may instead be fined "twice the gross gain or twice the gross loss" if that amount is *greater* than the standard fines under the statute. *Id.* § 3571 (d).

[359] 18 U.S.C. §§ 241, 242, 245, 247, 249; 42 U.S.C. § 3631.

[360] *See infra* **Table 2**.

[361] For example, several of the hate crime statutes contain language authorizing the death penalty for offenses that result in death, or involve actual or attempted kidnapping or aggravated sexual abuse, or an attempt to kill. 18 U.S.C. §§ 241, 242, 245, 247. The Supreme Court's Eighth Amendment precedent on cruel and unusual punishment has limited the class of offenders who are eligible for the death penalty to those "who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" Kennedy v. Louisiana, 554 U.S. 407, 420, *modified on denial of reh'g*, 554 U.S. 945 (2008) (quoting Roper v. Simmons, 543 U.S. 551, 568 (2005)). In the context of crimes against individuals, the death penalty may not be imposed in "instances where the victim's life was not taken." *Id.* at 437; *see also id.* at 438 (stating that non-homicide crimes, including child rape, "may be devastating in their harm . . . but in terms of moral depravity and of the injury to the person and to the public, they cannot be compared to murder in their severity and irrevocability") (internal quotation marks and citation omitted). Thus, Supreme Court precedent would seemingly foreclose application of the death penalty to non-fatal or non-homicide violations of federal hate crime statutes. For a thorough discussion of the Eighth Amendment and capital punishment, see, e.g., CRS Legal Sidebar LSB10357, *Federal Capital Punishment: Recent Developments*, by Michael A. Foster.

[362] 18 U.S.C. § 249; 42 U.S.C. § 3631.

Section	Description	Without Special Conditions	With Special Conditions
18 U.S.C. § 245	Violent Interference with Federally Protected Rights	1 Year	*10 Years* (in instances resulting in bodily injury or involving attempted, threatened, or actual use of a dangerous weapon, explosives, or fire) *Life** (in instances involving actual/attempted kidnapping or aggravated sexual abuse, or an attempt to kill, or that result in death)
18 U.S.C. § 247	Damage to Religious Property or Obstruction of Free Exercise	1 Year	*3 Years* (if violation results in damage/destruction of property totaling more than $5,000) *20 Years* (in instances resulting in bodily injury or involving attempted, threatened, or actual use of a dangerous weapon, explosives, or fire) *40 Years* (if violation results in bodily injury caused by fire or explosives) *Life** (in instances involving actual/attempted kidnapping or aggravated sexual abuse, or an attempt to kill, or that result in death)
18 U.S.C. § 249(a)(1)-(a)(3)	The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009	10 Years	*Life* (in instances involving actual/attempted kidnapping or aggravated sexual abuse, or an attempt to kill, or that result in death)
18 U.S.C. § 249(a)(5)-(a)(6)	Emmett Till Antilynching Act	30 Years	*N/A*
42 U.S.C. § 3631	Criminal Interference with Right to Fair Housing	1 Year	*10 Years* (in instances resulting in bodily injury or involving attempted, threatened, or actual use of a dangerous weapon, explosives, or fire) *Life* (in instances involving actual/attempted kidnapping or aggravated sexual abuse, or an attempt to kill, or that result in death)

Source: 18 U.S.C. §§ 241, 242, 245, 247, 249; 42 U.S.C. § 3631.

Notes: * Statute also authorizes the death penalty in these circumstances, although as discussed above, Supreme Court precedent likely forecloses imposition of the death penalty for non-fatal violations.

Hate Crimes Sentencing Enhancement

Congress has not only criminalized certain bias-motivated conduct through the hate crime statutes discussed in the previous sections, but has also sought to modify the federal sentencing regime to allow stiffer penalties for individuals who are motivated by bias when they violate federal criminal statutes.[363] Known as sentencing enhancements, the purpose of these increased penalties is both to deter and to punish.[364]

[363] Erickson, *supra* note 172, at 293-94.

[364] United States v. Armstrong, 620 F.3d 1172, 1176 (9th Cir. 2010).

In general, "[s]entencing for all serious federal noncapital crimes begins" with the United States Sentencing Guidelines (Guidelines).[365] The United States Sentencing Commission (USSC)—an independent judicial branch agency—promulgates the Guidelines.[366] The Guidelines include 43 different offense levels that correspond to a suggested sentencing range, which may be increased or decreased based on other sentencing factors.[367] In determining the applicable length of sentence appropriate under the Guidelines, sentencing courts look to factors such as the base offense level,[368] the defendant's criminal history, and circumstance-dependent sentencing enhancements or subtractions.[369]

Congress authorized sentencing enhancements for bias-motivated conduct in the Guidelines when it passed the Hate Crimes Sentencing Enhancement Act (HCSEA) as part of the Violent Crime Control and Law Enforcement Act of 1994.[370] Pursuant to the HCSEA, the USSC amended the Guidelines to include sentencing enhancements where "the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally" targeted "any victim . . . because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person."[371] Thus, in general terms, the Guidelines provide for more stringent penalties where the fact finder—that is, the judge or jury, depending on the nature of the proceeding—concludes that the defendant acted because of "actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person."[372] More specifically, if the fact finder concludes that the defendant's conduct occurred because of these characteristics, then his sentence may be increased by three levels, resulting in a higher sentencing range.[373]

The hate crime enhancements are available for virtually any serious federal offense, even for violations of statutes generally not considered hate crime laws.[374] For example, in one 2020 prosecution, a court affirmed the application of the hate crime enhancement to the sentence of a defendant who was convicted for "influencing, impeding, or retaliating against a federal official,"

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[365] CRS Report R41696, *How the Federal Sentencing Guidelines Work: An Overview*, by Charles Doyle.

[366] *Id.*

[367] *Id.*; *see also* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing table (U.S. SENTENCING COMM'N 2018).

[368] The USSG assign most serious offenses a base offense level (or levels). U.S. SENTENCING GUIDELINES MANUAL § 1B1.2 (U.S. SENTENCING COMM'N 2018); *see also* Doyle, *supra* note 365.

[369] U.S. SENTENCING GUIDELINES MANUAL § 1B1.1, Application Instructions (U.S. SENTENCING COMM'N 2018).

[370] Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, § 380003, 108 Stat 1796 (1994).

[371] U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(a) (U.S. SENTENCING COMM'N 2018). The sentencing enhancement is also available for property-based crimes motivated by the same biases. *Id.*

[372] *Id.*

[373] *See generally* U.S. SENTENCING COMM'N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES (discussing function of sentencing enhancements), https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf (last visited Mar. 15, 2022). For a thorough explanation on the mechanics of the hate crime enhancement, see, e.g., THOMAS W. HUTCHISON, FEDERAL SENTENCING LAW AND PRACTICE, § 3A1.1 (ed. Jan. 2020).

[374] *See* WOLFE, *supra* note 7, § 2:21 ("New U.S.S.G. Section 3A1.1(a) provides a victim-related adjustment under which presumably any federal offense, even a non-civil rights offense can be punished as a hate crime."). Certain low-level offenses are an exception, as the Guidelines (and by extension the hate crime enhancement) do not apply to "any count of conviction that is a Class B or C misdemeanor or an infraction." U.S. SENTENCING GUIDELINES MANUAL § 1B1.9 (U.S. SENTENCING COMM'N 2018).

"transmitting a threat in interstate commerce," and "threatening a former President," where there was substantial evidence that the defendant "was motivated by race."[375]

In general, the Guidelines are considered advisory and not binding on federal courts due to *Apprendi v. New Jersey* and its progeny.[376] In *Apprendi*, the Supreme Court held that the Sixth Amendment right to a jury trial compels that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[377] Subsequently, in *United States v. Booker*, the Court applied *Apprendi* to the Guidelines and invalidated a statute that made application of the guidelines mandatory.[378] *Booker* did not rule directly on hate crime enhancements,[379] and there is reason to think that the enhancements may satisfy *Apprendi* and remain mandatory.[380] That is because, with narrow exceptions, the imposition of a hate crime enhancement requires that the *jury* determine beyond a reasonable doubt that the defendant acted because of "actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person."[381] Thus, the hate crime enhancement does not implicate the *Apprendi* Court's concern that "the Sixth Amendment requires juries, not judges, to find facts relevant to sentencing."[382]

Constitutional Authority Considerations

The Constitution reserves "general police power" to the states rather than the federal government.[383] As a result, Congress can only enact federal hate crime statutes pursuant to "one

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[375] United States v. Taubert, 810 F. App'x 41, 43 (2d Cir. 2020).

[376] 530 U.S. 466, 490 (2000); *see also* United States v. Booker, 543 U.S. 220, 226 (2005). For a more detailed explanation of this line of cases, see Doyle, *supra* note 365.

[377] *Apprendi*, 530 U.S. at 490.

[378] 543 U.S. 220, 245, (2005).

[379] *See generally id.* As of March 30, 2022 a search of citing references to *Booker* in Westlaw yielded ten reported federal decisions that include "3A1.1"—the citation to the Guidelines hate crime enhancement—in the same paragraph as a citation to *Booker*, as might be expected of a case analyzing the impact of *Booker* on that USSG provision. These ten opinions appear to be false positives—a review of each yielded no language discussing whether *Booker* impacted the hate crime enhancement.

[380] *See* WOLFE, *supra* note 7, § 2:21 ("The hate crime enhancement is mandatory and survives *Apprendi*-line cases on sentencing guidelines."); *contra* Erickson, *supra* note 172, at 305 ("[T]he mandatory application of the enhancement is no longer valid. Instead, the sentencing judge may now take discriminatory motive into consideration when formulating the appropriate sentence.").

[381] As noted above, the exceptions are for the "case of a plea of guilty or nolo contendere." U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (U.S. SENTENCING COMM'N 2018); *accord* United States v. Allen, 364 F. Supp. 3d 1234, 1244 (D. Kan. 2019) ("[T]he guideline . . . allows the Court to make th[e] determination [of motivation due to hate] only in cases involving a guilty plea or a plea of no contest. But in cases where criminal defendants put the government to its burden of proof, it is the prerogative of 'the finder of fact at trial' to make this finding. . . .That determination is instead left to the wisdom of the jury."), *aff'd*, 985 F.3d 1254 (10th Cir. 2021).

A judge may also be the fact finder, rather than a jury, where a defendant waives his Sixth Amendment right to a jury trial, but in such instances *Apprendi* may not be implicated. *See* Blakely v. Washington, 542 U.S. 296, 310 (2004) (nothing prevents a defendant from waiving his *Apprendi* rights); Sheard v. Burt, No. 1:18-CV-657, 2018 WL 3120628, at *7 (W.D. Mich. June 26, 2018) (finding no *Apprendi* violation where defendant waived Sixth Amendment rights).

[382] *Booker*, 543 U.S. at 245.

[383] Beale, *supra* note 311, at 1230; *accord* United States v. Lopez, 514 U.S. 549, 561 n.3, 566 (1995) (explaining that "States possess primary authority for defining and enforcing the criminal law" and that the "Constitution withold[s]

or more of its powers enumerated in the Constitution."[384] Although a thorough Constitutional analysis of Congress's legislative authority is beyond the scope of this Report—and is the subject of other CRS products[385]—this section provides an abbreviated overview of several important sources of congressional authority to enact hate crime laws along with their respective doctrinal limitations.

Commerce Clause Power

The Commerce Clause, found in Article I, Section 8, Clause 3, of the Constitution, grants Congress the power to "regulate Commerce with foreign Nations, and among the several States."[386] This provision gives Congress broad authority, and many federal criminal statutes rely on Congress's commerce power.[387]

There are limits to the power. In *United States v. Lopez*, the Supreme Court held that Congress's power to regulate pursuant to the commerce power is limited to "three broad categories of activity:"[388]

1. "Channels of interstate commerce,"[389] such as highways and telecommunications networks;[390]
2. "Instrumentalities of interstate commerce, or persons or things in interstate commerce,"[391] such as "automobiles, airplanes, boats . . . shipment[s] of goods . . . 'pagers, telephones, and mobile phones;'"[392] and
3. "Those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."[393]

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from Congress a plenary police power") (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)).

[384] United States v. Morrison, 529 U.S. 598, 607 (2000).

[385] *See generally* CRS Report R43023, *Congressional Authority to Enact Criminal Law: An Examination of Selected Recent Cases*, by Charles Doyle; CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview*, coordinated by Andrew Nolan and Kevin M. Lewis.

[386] U.S. CONST. art. I, § 8, cl. 3. The Commerce Power also extends to "Commerce . . . with the Indian Tribes." *Id.*

[387] *E.g.*, 18 U.S.C. § 33(a) (imposing fines, imprisonment, or both for certain act of destruction to "any motor vehicle which is used, operated, or employed in interstate or foreign commerce"); *id.* § 1030(a)(6) (prohibiting computer password trafficking if "such trafficking affects interstate or foreign commerce" or if it impacts a federal government computer); *id.* § 1201(a)(1) (proscribing kidnapping when a "person is willfully transported in interstate of foreign commerce"); *id.* § 1343 (criminalizing intentional participation in schemes to defraud involving wire, radio, or television communications transmitted in interstate or foreign commerce); *see also* United States v. DiSanto, 86 F.3d 1238, 1244 (1st Cir. 1996) ("Congress has often invoked its authority under the Commerce Clause to federalize criminal activity.").

[388] 514 U.S. at 558.

[389] *Id.*

[390] United States v. Roof, 225 F. Supp. 3d 438, 451 (D.S.C. 2016).

[391] *Lopez*, 514 U.S. at 558.

[392] United States v. Ballinger, 395 F.3d 1218, 1226 (11th Cir. 2005) (internal citations omitted) (quoting United States v. Pipkins, 378 F.3d 1281, 1295 (11th Cir. 2004), *vacated*, 544 U.S. 902 (2005)).

[393] *Lopez*, 514 U.S. at 558–59 (citation omitted).

Under the third category, Congress may regulate intrastate conduct if it involves an economic activity and substantially affects interstate commerce when viewed in the aggregate.[394] For example, even purely local conduct, such as an individual's "production of [a] commodity meant for home consumption," may fall within Congress's commerce power if Congress has a rational basis to conclude that in the aggregate such conduct substantially affects "supply and demand in the national market for that commodity."[395]

In *United States v. Morrison*, the Supreme Court subsequently outlined four relevant considerations in determining whether the conduct prohibited by a statute substantially affects interstate commerce.[396] The first consideration is whether the prohibited activity is commercial or relates to an economic enterprise.[397] Second, courts look to whether the statute at issue contains "express jurisdictional elements" limiting its reach to conduct affecting interstate commerce through case-specific inquiry.[398] The presence of an express jurisdictional factor weighs significantly in favor of a statute being an appropriate exercise of Congress's interstate commerce authority.[399] Third, courts examine whether the statute's "express congressional findings" concern the effect of the prohibited conduct on interstate commerce.[400] According to at least one federal district court, "[c]ongressional findings may weigh in favor of the validity of a statute," but their absence "cannot weigh against the validity of a statute."[401] The fourth consideration is the degree of attenuation between the prohibited conduct and its effect on interstate commerce.[402]

In a variety of cases, federal courts have relied on the *Morrison* factors in upholding hate crime statutes against Commerce Clause challenges. Some of these cases emphasize the relevance of the express jurisdictional factors contained in some hate crime statutes.[403] For example, the Fourth Circuit held that § 249(a)(2) was constitutionally applied to a defendant's bias-motivated assault

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[394] Taylor v. United States, 579 U.S. 301, 306 (2016).

[395] Gonzales v. Raich, 545 U.S. 1, 19, 22 (2005).

[396] 529 U.S. 598, 610-12 (2000). For an example of how lower courts apply these factors in practice, see generally United States v. Roof, 225 F. Supp. 3d 438, 452 (D.S.C. 2016).

[397] *Morrison*, 529 U.S. at 610.

[398] *Id.* at 611-12; *Roof*, 225 F. Supp. 3d at 452; *accord* United States v. Gibert, 677 F.3d 613, 625 (4th Cir. 2012) ("We next consider . . . whether the statute at issue contains an express element limiting the statute's reach to activities having an explicit connection with or effect on interstate commerce.").

[399] *See* United States v. Coleman, 675 F.3d 615, 620 (6th Cir. 2012) ("Where a statute lacks a clear economic purpose, the inclusion of an explicit jurisdictional element suffices to 'ensure, through case-by-case inquiry, that the [violation] in question affects interstate commerce.'" (brackets in original) (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)); *see also* United States v. Hill, 927 F.3d 188, 204 (4th Cir. 2019), *cert. denied*, 2020 WL 5882402 (U.S. Oct. 5, 2020) ("Notably, Defendant has not identified any case—nor have we found any such case—in which a federal criminal statute including an interstate commerce jurisdictional element has been held to exceed Congress's authority under the Commerce Clause.").

[400] *Morrison*, 529 U.S. at 612 (quoting *Lopez*, 514 U.S. at 562).

[401] *Roof*, 225 F. Supp. 3d at 454.

[402] *Morrison*, 529 U.S. at 612 (2000).

[403] *See, e.g.*, United States v. Mason, 993 F. Supp. 2d 1308, 1317 (D. Or. 2014) ("[T]he jurisdictional element of the HCPA . . . is sufficient to satisfy the requirements of the Commerce Clause."); United States v. Mullet, 868 F. Supp. 2d 618, 622-23 (N.D. Ohio 2012) (noting that the inclusion of jurisdictional elements in an offense, as in § 249(a)(2), generally protects statutes from Commerce Clause challenges); United States v. Jenkins, 909 F. Supp. 2d 758, 770-71 (E.D. Ky. 2012) (explaining significance of inclusion of jurisdictional element in § 249(a)(2)).

on a coworker at a package processing facility[404] in large part because of § 249(a)(2)'s jurisdictional element, which "authorizes prosecution of only those bias-motivated violent crimes that interfere with or otherwise affect ongoing economic or commercial activity."[405] Further, according to the Fourth Circuit, the application of § 249(a)(2) to the defendant's conduct did not exceed Congress's commerce power, because his workplace assault "interfered with ongoing commercial activity by preventing [the victim] from continuing to prepare packages for interstate sale and shipment."[406] In an appeal stemming from the conviction of the perpetrator of the fatal 2015 shooting at Emanuel African Methodist Episcopal Church in Charleston, South Carolina, the Fourth Circuit rejected a facial Commerce Clause challenge to § 247(a) (prohibiting damage to religious real property or interference with free exercise of religion), in part because of its express jurisdictional element limiting the statute's reach to conduct that occurs in or affects interstate commerce.[407]

Federal courts have also upheld hate crime statutes against Commerce Clause challenges even when those statutes do not contain express jurisdictional elements. For example, in *United States v. Nicholson*, the United States District Court for the Eastern District of Wisconsin rejected a challenge that § 3631 (prohibiting bias-motivated interference with housing rights) exceeds Congress's Commerce Clause power where "the only link to interstate commerce is a person's 'occupation' of a dwelling."[408] Despite that provision's lack of an express jurisdictional element, the court concluded that § 3631 does not exceed Congress's commerce power based on other *Morrison* considerations.[409] Namely, the court concluded that § 3631 prohibits conduct that is economic in nature, because it affects the housing market which is "both commercial and interstate."[410] In addition, the court concluded that the legislative history of § 3631 evidenced a link to interstate commerce, and that the link between bias-motivated conduct affecting housing rights and interstate commerce is not too attenuated.[411] Courts have reached similar conclusions with respect to § 245.[412]

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[404] *Hill*, 927 F.3d at 193–94.

[405] *Id.* at 204.

[406] *Id.* at 205.

[407] *See* United States v. Roof, 10 F.4th 314, 383 (4th Cir. 2021) (agreeing "that the statute's jurisdictional element, that is, its explicit requirement that there be a tie to interstate commerce, along with the possibility of conduct that would satisfy that requirement, saves it from facial invalidity").

[408] 185 F. Supp. 2d 982, 986 (E.D. Wis. 2002).

[409] *Id.* at 989.

[410] *Id.* at 988.

[411] *Id.* at 989-90.

[412] *See, e.g.*, United States v. Allen, 341 F.3d 870, 883 (9th Cir. 2003) (concluding that "§ 245(b)(2)(B) was a constitutional exercise of Congress's Commerce Clause power," because it prohibits conduct that interferes with "federally-recognized and protected civil rights" and "criminal interference with them" affects interstate commerce); United States v. Furrow, 125 F. Supp. 2d 1178, 1182, 1184 (C.D. Cal. 2000) (rejecting commerce clause challenge to § 245 despite lack of an express jurisdictional element because "violent conduct that interferes with [federal civil rights] necessarily implicates commerce"); *see also* United States v. Lane, 883 F.2d 1484, 1492–93 (10th Cir. 1989) (concluding, based on legislative history, that Congress validly enacted § 245 pursuant to its commerce power).

The Thirteenth Amendment

The Thirteenth Amendment is one of the Reconstruction Era amendments adopted during the period following the Civil War.[413] The Amendment provides that "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction" and grants Congress the power to enforce this guarantee "by appropriate legislation."[414] The Thirteenth Amendment does not contain language limiting its prohibition of slavery or involuntary servitude to a particular race.[415] The Supreme Court has interpreted the Thirteenth Amendment as a "denunciation" of the condition of slavery in general—"not a declaration in favor of a particular people"—and therefore "reaches every race and every individual."[416]

The Supreme Court has also held that the Thirteenth Amendment permits Congress to pass laws necessary to abolish not only the institution of slavery itself, but also "all badges and incidents of slavery in the United State[s]."[417] Moreover, the Court has held that Congress has the authority to rationally "determine what are the badges and the incidents of slavery" and to legislate accordingly.[418] As a result, courts generally defer to Congress's determinations regarding the scope of badges and incidents of slavery, so long as the legislation "bears a rational relationship to the subject matter of the Amendment."[419] Courts have concluded that badges and incidents of slavery include "most forms of racial discrimination."[420] Some courts have determined that discrimination based on other factors, such as sexual orientation, falls outside Congress's authority under the Thirteenth Amendment.[421]

A number of hate crime statutes are seemingly premised at least in part on Congress's authority to enact legislation under the Thirteenth Amendment.[422] For example, in *United States v. Hatch*, the

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[413] United States v. Cannon, 750 F.3d 492, 509 (5th Cir. 2014).

[414] U.S. CONST. amend. XIII, §§ 1, 2.

[415] *Id.*; *see also* WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW, § 18:1 (3rd ed.) ("Although originally enacted to abolish slavery of African Americans, the Amendment uses more inclusive language.").

[416] *See* Hodges v. United States, 203 U.S. 1, 16–17 (1906), *overruled in part by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); *accord* United States v. Hatch, 722 F.3d 1193, 1208 (10th Cir. 2013) (quoting this language in support of proposition that Thirteenth Amendment protects all races).

[417] Civil Rights Cases, 109 U.S. 3, 20 (1883).

[418] *Jones*, 392 U.S. at 440.

[419] RICH, supra note 415, § 18:10; *accord Jones*, 392 U.S. at 440 ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."); United States v. Cannon, 750 F.3d 492, 500(5th Cir. 2014) ("The Supreme Court explained that courts should only invalidate legislation enacted under the Thirteenth Amendment if they conclude that Congress made an irrational determination in deciding what constitutes 'badges' and 'incidents' of slavery in passing legislation to address them.").

[420] *Hatch*, 722 F.3d at 1200, 1208. At least one federal appellate court has also concluded that the protections of the Thirteenth Amendment also extend to some faiths. *See* United States v. Nelson, 277 F.3d 164, 178 (2d Cir. 2002) ("[T]he Thirteenth Amendment . . . extend[s] to protect the Jewish 'race.'").

[421] *See* Rice v. New England Coll., 676 F.2d 9, 11 (1st Cir. 1982) ("[T]he thirteenth amendment . . . does not prohibit sex discrimination."); Washington v. Finlay, 664 F.2d 913, 927 (4th Cir. 1981) ("[I]t appears that the [Thirteenth Amendment's] independent scope is limited to the eradication of the incidents or badges of slavery and does not reach other acts of discrimination.").

[422] *See, e.g.*, Pub. L. No. 104–155, § 2, 110 Stat 1392 (1996) (codified at 18 U.S.C. § 247) ("Congress has authority, pursuant to section 2 of the 13th amendment to the Constitution, to make actions of private citizens motivated by race,

Tenth Circuit rejected a Thirteenth Amendment challenge to § 249(a)(1),[423] which among other things prohibits violence motivated by racial bias.[424] The Tenth Circuit focused on three "connected considerations" in concluding that §249(a)(1) fit within Congress's Thirteenth Amendment authority to eliminate badges and incidents of slavery.[425] First, the court emphasized that § 249(a)(1) is "confined" to "aspects of race as understood in the 1860s when the Thirteenth Amendment was adopted," namely race, color, religion, or national origin.[426] The Tenth Circuit drew support for that conclusion in part from congressional findings supporting the HCPA, such as one finding that "'members of certain religious and national origin groups were [historically] . . . perceived to be distinct 'races.'"[427] Further, the court inferred additional support for this conclusion from the fact that "Congress placed non-racial classifications—gender, sexual orientation, gender identity, and disability," which fall outside the scope of the Thirteenth Amendment, in a separate paragraph of § 249.[428] Second, the court noted that Congress "did not seek to punish all violence against those who embody a trait that equates to 'race,'" but "only those who act 'because of the [victim's] actual or perceived race.'"[429] According to the court, this limitation "further confines the statute's reach."[430] Third, the court, surveying the historical relationship between violence and slavery, held that "Congress could rationally conclude that physically attacking a person of a particular race because of animus toward or a desire to assert superiority over that race is a badge or incident of slavery."[431] Other courts have employed similar reasoning to reach the same conclusion with respect to § 249(a)(1)[432] and other federal hate crime statutes.[433] For instance, the Second Circuit held that § 245(b)(2)(B) "falls comfortably" within

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color, or ethnicity that interfere with the ability of citizens to hold or use religious property without fear of attack, violations of Federal criminal law."); *Cannon*, 750 F.3d at 498 ("[Section] 249(a)(1) rests solely on Congress's authority under § 2 of the Thirteenth Amendment."); *Hatch*, 722 F.3d at 1209 ("The portion of the Hate Crimes Act under which Hatch was charged and convicted—18 U.S.C. § 249(a)(1)—is a lawful exercise of the powers granted to Congress by Section 2 of the Thirteenth Amendment.").

[423] 722 F.3d at 1206.

[424] *See supra* "Elements of a § 249(a)(1) Violation."

[425] *Hatch*, 722 F.3d at 1205.

[426] *Id.*

[427] *Id.* (quoting 18 U.S.C. § 249 note (reprinting Pub. L. No. 111–84, § 4702(8))).

[428] *Id.* (noting that Congress's placed non-racial classifications in a paragraph that "explicitly linked those classifications to the Commerce Clause or Congress's power over federal territories").

[429] *Id.* at 1206 (quoting 18 U.S.C. § 249(a)(1)).

[430] *Id.*

[431] *Id.*

[432] United States v. Metcalf, 881 F.3d 641, 645 (8th Cir. 2018) (citing *Hatch* with approval and concluding that with § 249(a)(1), "Congress rationally determined that racially motivated violence constitutes a badge and incident of slavery"); United States v. Cannon, 750 F.3d 492, 502 (5th Cir. 2014) (reviewing congressional findings supporting § 249, observing that "racially motivated violence was essential to the enslavement of African–Americans and was widely employed after the Civil War in an attempt to return African–Americans to a position of de facto enslavement," and holding that in "light of these facts, we cannot say that Congress was irrational in determining that racially motivated violence is a badge or incident of slavery"); United States v. Earnest, 536 F. Supp. 3d 688, 717 (S.D. Cal. 2021) (citing *Hatch* with approval, reviewing Congressional findings, and joining "the other courts in concluding that Congress rationally determined racially motivated violence is a badge and incident of slavery, and translated that determination into the HCPA pursuant to its powers under Section 2 of the Thirteenth Amendment").

[433] *See, e.g.*, United States v. Allen, 341 F.3d 870, 884 (9th Cir. 2003) (collecting cases holding that "the enactment of § 245(b)(2)(B) was a constitutional exercise of Congress's authority under the Thirteenth Amendment" and agreeing); United States v. Nelson, 277 F.3d 164, 178, n.14 (2d Cir. 2002) ("Congress'[s] power to enforce the Thirteenth

Congress's Thirteenth Amendment power to determine badges and incidents of slavery, since it prohibits racially-motivated violence which has a "long and intimate historical association with slavery and its cognate institutions."[434]

The Fourteenth Amendment

The Fourteenth Amendment dates to the Reconstruction era.[435] In relevant part, the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[436] Section Five of the Fourteenth Amendment grants Congress the power to "enforce, by appropriate legislation, the provisions of this article."[437]

The scope of Congress's authority to enforce the Fourteenth Amendment has varied over time due to the Supreme Court's evolving interpretation of whether the Amendment reaches private conduct or just state action.[438] However, in 2000, the Supreme Court in *Morrison* concluded that "the Fourteenth Amendment, by its very terms, prohibits only state action."[439]

State action may come in a number of forms. For example, official state conduct, such as the enactment of legislation, qualifies.[440] State action may also occur when the conduct of a private individual or company involves state activity.[441] As Justice Frankfurter explained in the context of the Fifteenth Amendment, state action requires, at minimum, that "somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme" denying protected rights.[442]

Amendment by enacting § 241 . . . is clear and undisputed.").

[434] *Nelson*, 277 F.3d at 189-90.

[435] *Cannon*, 750 F.3d at 509.

[436] U.S. CONST. amend. XIV, § 1.

[437] *Id.* § 5.

[438] *Compare* Civil Rights Cases, 109 U.S. 3, 11 (1883) (rejecting the power of Congress to regulate private conduct under the Fourteenth Amendment and concluding that the Amendment governs only State action), *with* United States v. Guest, 383 U.S. 745, 782 (1966) (Brennan, J., concurring) ("A majority of the members of the Court expresses the view today that [Section 5 of the Fourteenth Amendment] empowers Congress to enact laws punishing all conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy.") (footnote omitted). For an examination of the development of the Court's Fourteenth Amendment precedent, see generally United States v. Morrison, 529 U.S. 598, 620-27 (2000) (chronicling history of Fourteenth Amendment jurisprudence).

[439] *Morrison*, 529 U.S. at 621.

[440] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493, 495 (1954), *supplemented by* 349 U.S. 294 (1955) (holding that state-mandated school segregation violated the Fourteenth Amendment); *see also* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW-SUBSTANCE & PROCEDURE § 16.1(a) (May 2020 Update) ("When a legislature, executive officer, or a court takes some official action against an individual, that action is subjected to review under the Constitution, for the official act of any governmental agency is direct governmental action and therefore subject to the restraints of the Constitution.").

[441] Burton v. Wilmington Parking Auth., 365 U.S. 715, 716 (1961) (holding that state action occurred within the context of the Fourteenth Amendment when a private coffee shop refused to serve an African American customer, and that coffee shop was situated in a government-run parking garage, and a lessee of a government authority).

[442] Terry v. Adams, 345 U.S. 461, 473 (1953) (Frankfurter, J., concurring).

Congress has seemingly used its authority under Section Five of the Fourteenth Amendment, sometimes in conjunction with other sources of authority, to pass numerous hate crime provisions.[443] Case law examining the limits of Congress's Fourteenth Amendment power in the context of these statutes is scarce, however.[444] This may be because federal courts have sometimes declined to address Fourteenth Amendment challenges to hate crime statutes and have instead resolved them under other constitutional provisions such as the Thirteenth Amendment.[445] It could also be because the government has sometimes avoided Fourteenth Amendment arguments in defending federal hate crime statutes from constitutional challenges, seemingly due to the difficulty of satisfying the state action requirement with respect to conduct undertaken by private individuals.[446]

The Fifteenth Amendment

Like the Thirteenth and Fourteenth Amendments, the Fifteenth Amendment was enacted during Reconstruction.[447] The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[448] Section Two of the Fifteenth Amendment grants Congress the "power to enforce this article by appropriate legislation."[449]

The Fifteenth Amendment was traditionally limited to state action,[450] but the rigorousness of that standard appears to have relaxed somewhat, and state action under the Fifteenth Amendment may include governmental conduct as well as that of private individuals or entities in certain circumstances.[451] There is, however, a lack of case law challenging the limits of Congress's

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[443] *See, e.g.*, Screws v. United States, 325 U.S. 91, 98 (1945) (plurality opinion) (explaining that predecessor to § 242 "was enacted to enforce the Fourteenth Amendment"); Lampe, *supra* note 161 (discussing origins of § 242); S. REP. NO. 90-721, at 1841-43 (1967) (discussing sources of constitutional authority for § 245).

[444] With respect to § 249(a)(2), there is little case law in general. *See supra* note 78. As for §§ 242 and 245, additional targeted searches yielded little if any relevant material on this issue. With respect to § 245 these searches entailed searching within results on Westlaw of federal cases citing to § 245 for the following terms and connector searches: TI(United States) AND (245 /p fourteenth /p congress); TI(United States) AND (245 /p fourteenth /p enact!); TI(United States) AND (245 /p fourteenth /p legislat!). With respect to § 242, these searches entailed searching within results on Westlaw of federal cases citing to § 242 for the same terms and connector searches (with "242" swapped with "245").

[445] *See, e.g.*, United States v. Sandstrom, 594 F.3d 634, 660 (8th Cir. 2010) ("Because we hold that § 245 is a valid exercise of Congress's power under the Thirteenth Amendment, we need not address the remaining constitutional challenges to § 245."); *see also* United States v. Furrow, 125 F. Supp. 2d 1178, 1180 (C.D. Cal. 2000) (declining to discuss Fourteenth Amendment challenge to § 245 and instead resolving challenge with respect to commerce power).

[446] *See, e.g.*, United States v. Nelson, 277 F.3d 164, 174 (2d Cir. 2002) (noting that the government avoided argument under the Fourteenth Amendment and speculating on its reasoning).

[447] United States v. Cannon, 750 F.3d 492, 509 (5th Cir. 2014).

[448] U.S. CONST. amend. XV, § 1.

[449] *Id.* § 2.

[450] *See, e.g.*, James v. Bowman, 190 U.S. 127, 139 (1903) ("These authorities show that a statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the 15th Amendment upon Congress to prevent action by the state through some one or more of its official representatives."); *accord* RICH, supra note 415, § 12:20 (3rd ed.) ("The Fifteenth Amendment was, by traditional construction, limited to state action.").

[451] *See* Terry v. Adams, 345 U.S. 461 (1953) (plurality opinion). In *Terry*, a three-Justice plurality of the Supreme Court held that the exclusion of African Americans from a primary election violated the Fifteenth Amendment,

Fifteenth Amendment authority to legislate in the context of hate crime laws.[452] Congress has seemingly relied on this authority to enact several hate crime provisions (often in conjunction with other sources of authority).[453] For instance, Congress invoked its Fifteenth Amendment authority in enacting § 245.[454] Section 245 appears to closely track the Fifteenth Amendment's goal of protecting the right to vote, for example, by prohibiting interference with any person affording others an opportunity to vote without discrimination on account of race.[455] Congress has also invoked its authority under the Fifteenth Amendment to enact hate crime laws such as §§ 241[456] and 242,[457] which focus generally on deprivation of federal rights broadly.[458]

Overview of Select Hate Crime Legislation in the 117th Congress

As legislation proposed in the 117th Congress illustrates, Congress has a number of legislative tools to address hate crimes, including creating grant programs, directing responses by federal agencies, facilitating data gathering, and creating task forces, among others.[459] For example,

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although the primary was unofficial, unregulated by state government and run by a "self-governing voluntary club." *Id.* at 463. According to the plurality, the primary contravened the Fifteenth Amendment because it was still integral to the elective process and the outcome of the general election. *Id.* at 469 (discussing how private primary relates to official primary and general election overseen by government). As the Supreme Court explained in a subsequent case, "state action [is] present in the exercise by a private entity of powers traditionally exclusively reserved to the State." Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) (citing, inter alia, *Terry*, 345 U.S. at 461).

[452] For example, as of March 31, 2022, a search of citing references to § 241 within Westlaw yielded 22 federal cases using the phrase "Fifteenth Amendment" in the same paragraph as a citation to § 241. Of those, 12 had "United States" in the title, as would be expected in a federal criminal case. Identical searches for §§ 242 and 245 produced even fewer results.

[453] *See infra* notes 454–458.

[454] S. REP. NO. 90-721, at 1841–43 (1967).

[455] 18 U.S.C. § 245.

[456] *See, e.g.*, United States v. Comstock, 560 U.S. 126, 136 (2010) (citing to *Ex parte* Yarbrough, 110 U.S. 651 (1884)); *accord* United States v. Price, 383 U.S. 787, 805 (1966) ("We cannot doubt that the purpose and effect of § 241 was to reach assaults upon rights under the entire Constitution, including the Thirteenth, Fourteenth and Fifteenth Amendments, and not merely under part of it.").

[457] *See* United States v. Otherson, 637 F.2d 1276, 1280 (9th Cir. 1980) (chronicling historical relationship between § 242 and the Fifteenth Amendment); United States v. Boone, 110 F. Supp. 3d 909, 916 (S.D. Iowa 2015) (describing origins of § 242 and its relationship to the Fifteenth Amendment); United States v. Solomon, 419 F. Supp. 358, 368 (D. Md. 1976) (explaining that "[p]ursuant to its power to regulate interstate commerce and to enforce, by appropriate legislation, the provisions of the thirteenth, fourteenth, and fifteenth amendments, Congress has enacted numerous enforcement schemes involving the Attorney General" such as § 242), *aff'd*, 563 F.2d 1121 (4th Cir. 1977).

[458] *See supra* "Conspiracy Against Free Exercise or Enjoyment of Rights, 18 U.S.C. § 241" and "Deprivation of Rights under Color of Law, 18 U.S.C. § 242."

[459] *See, e.g.*, Prevention of Anti-Immigrant Violence Act of 2021, H.R. 2536, 117th Cong. (2021) (proposing responses to hate crimes including modifying laws governing visas and authorizing DOJ to award grants to "eligible entities to assist non-citizen victims of hate crimes); Domestic Terrorism and Hate Crimes Prevention Act of 2021, S. 963, 117th Cong. (2021) (establishing interagency task force to "analyze and combat White supremacist and neo-Nazi infiltration of the uniformed services and Federal law enforcement agencies," requiring Attorney General to "assign a special agent or hate crimes liaison to each field office of the" FBI, among other things); Disarm Hate Act, S. 2090, H.R. 3929, 117th Cong. (2021) (restricting firearms access for those convicted of certain hate crime misdemeanors or who received enhanced sentences based on prohibited biases); Hate Crimes Commission Act of 2021, S. 1235, H.R. 1834, 117th Cong. (2021) (establishing federal hate crime commission to investigate and report on, among other things, hate crimes

Congress selected several of these mechanisms in the COVID-19 Hate Crimes Act (S. 937), which was signed into law in 2021 and that—among other things—establishes grants for hate crime hotlines and requires DOJ to take various actions like designating an employee to facilitate expedited review of hate crimes.[460] In addition to such options as illustrated in S. 937, Congress may also seek to enact or amend federal legislation criminalizing hate crimes.[461] This section provides an overview of selected legislative proposals introduced in the 117th Congress adopting this latter approach.[462]

George Floyd Justice in Policing Act of 2021 (H.R. 1280)

Among other things, the George Floyd Justice in Policing Act of 2021 (H.R. 1280), which passed the House in 2021, would clarify the reach of the 18 U.S.C. § 242 prohibition against willfully subjecting any person, under color of law, to "different punishments, pains, or penalties," on account of race, color, or "such person being an alien . . . ."[463] Specifically, that provision would define certain law enforcement tactics including "the application of any pressure to the throat or windpipe, use of maneuvers that restrict blood or oxygen flow to the brain, or carotid artery restraints which prevent or hinder breathing or reduce intake of air [a]s a punishment, pain, or penalty."[464] In other words, pursuant to the proposal, such actions by law enforcement would amount to a prohibited punishment under § 242 when imposed based on race, color, or citizenship status.

Stop Hate Crimes Act of 2021 (H.R. 2416)

The Stop Hate Crimes Act of 2021 (H.R. 2416) seeks to amend 18 U.S.C. § 249 with the aim of facilitating federal hate crime prosecutions.[465] Currently, § 249 applies only where a defendant's conduct occurs *because of* certain characteristics of another person, such as their race, gender, sexual orientation, or gender identity.[466] As noted, the exact contours of "because of" are somewhat unclear, but at least one federal appellate court has interpreted the phrase to require a showing of but-for causation in the context of § 249.[467] H.R. 2416 would change § 249 so it applies "if" one of the specific characteristics listed in § 249 is "a contributory motivating factor

statistical trends, contributing factors to any increase in hate crimes, and law enforcement policies to reduce hate crimes); Hate Crime Victim Assistance Act of 2021, H.R. 2541, 117th Cong. (2021) (creating grant programs for local hate crime hotlines, among other things); Education Against Hate Crimes Act of 2021, H.R. 2539, 117th Cong. (2021) (requiring Department of Education to award competitive grants aimed at hate crime prevention).

[460] COVID-19 Hate Crimes Act, Pub. L. 117–13, 135 Stat 265 (2021) (codified at 18 U.S.C. § 249(e); 34 U.S.C. §§ 10101 NOTE, 30501 NOTE, 30507).

[461] *See, e.g.*, David's Law, H.R. 133, 117th Cong. (2021).

[462] This section does not provide a comprehensive overview of all federal hate crime legislation introduced in the 117th Congress, but rather selects various examples for illustrative purposes.

[463] 18 U.S.C. § 242.

[464] George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021).

[465] Press Release, Congressman Ted Lieu, Reps Lieu and McBath Introduce Bill to Stop Hate Crimes (April 8, 2021), https://lieu.house.gov/media-center/press-releases/reps-lieu-and-mcbath-introduce-bill-stop-hate-crimes.

[466] 18 U.S.C. § 249.

[467] *See generally supra* "Conduct Occurring "Because Of""

for causing or attempting to cause [the victim's] injury."[468] This is a lower standard than but-for causation since it would seemingly be satisfied whenever one of the specific characteristics contributed to any degree to a defendant's motives.[469] In the context of § 249, at least one federal appellate court has raised First Amendment concerns with adopting "[a]ny standard that requires less than but-for causality" because it "treads uncomfortably close to the line separating constitutional regulation of conduct and unconstitutional regulation of beliefs."[470] According to that court, "[r]equiring a causal connection between a defendant's biased attitudes and his impermissible actions ensures that the criminal law targets conduct, not bigoted beliefs that have little connection to the crime."[471] This language suggests that it is at least possible that some federal courts might be wary of the "contributory motivating factor" standard contained in H.R. 2416.[472]

Preventing Antisemitic Hate Crimes Act (S. 1939; H.R. 3515)

As noted above, 18 U.S.C. § 249 currently authorizes life imprisonment where death results or where the offense involves an attempt to kill or actual or attempted kidnapping or aggravated sexual abuse.[473] If enacted, the Preventing Antisemitic Hate Crimes Act would—among other things—expand life imprisonment under § 249 to permit its imposition where the defendant has a prior conviction under § 249 or under a state law for a "hate crime felony."[474] The bill defines a hate crime felony as a crime under state law "punishable by more than one year" that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another because of any actual or perceived characteristic listed" in § 249.[475]

Emmett Till and Will Brown Justice for Victims of Lynching Act of 2021 (H.R. 1727)

The Emmett Till and Will Brown Justice for Victims of Lynching Act of 2021 (H.R. 1727), would create a new statute entitled "Lynching," which would prohibit conspiring with "another person to violate various hate crime statutes.[476] There are at least three notable differences between H.R. 1727 and the Emmett Till Antilynching Act enacted in 2022.[477] First, while the Emmett Till Antilynching Act focused specifically on conspiracies to violate § 249, H.R. 1727 would also criminalize conspiracies to violate "section 245, 247, or 249 of [Title 18] or section 901 of the

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[468] Stop Hate Crimes Act of 2021, H.R. 2416, 117th Cong. (2021).

[469] *Id.*

[470] United States v. Miller, 767 F.3d 585, 592 (6th Cir. 2014).

[471] *Id.*

[472] It is also possible that by lessening the required connection between the defendant's prohibited biases and his conduct, H.R. 2416 could face potential federalism challenges, since the defendant's prohibited biases represent one of the federal jurisdictional hooks under § 249 (pursuant to the 13th Amendment). *See supra* "Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249."

[473] *See supra* **Table 2**.

[474] Preventing Anti-Semitic Hate Crimes Act, H.R. 3515, 117th Cong. (2021).

[475] *Id.*

[476] Emmett Till and Will Brown Justice for Victims of Lynching Act of 2021, H.R. 1727, 117th Cong. (2021).

[477] *Supra* "Emmett Till Antilynching Act (§§ 249(a)(5) and (a)(6))"

Civil Rights Act of 1968 (42 U.S.C. 3631)."[478] Second, H.R. 1727 is not limited to conspiracies resulting in specific harms such as serious bodily injury or death.[479] Third, the penalties authorized by H.R. 1727 differ: it provides for fines and up to ten years of imprisonment—or longer when authorized by the underlying statute.[480] Given the enactment of the Emmett Till Antilynching Act, if H.R. 1727 were enacted as is, it could create nested conspiracy charges—that is it would conceivably criminalize conspiracies to violate § 249, which itself now includes provisions prohibiting conspiracies to violate various provisions of § 249. This outcome could be avoided by striking the references to § 249, or specifying that the legislation applies only to § 249(a)(1)-(a)(3) and not to the new subsections of § 249 created by the Emmett Till Antilynching Act.

[478] Emmett Till and Will Brown Justice for Victims of Lynching Act of 2021, H.R. 1727, 117th Cong. (2021).

[479] *Id.*

[480] *Id.*

Author Information

Peter G. Berris
Legislative Attorney

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