



MUSLIM PUBLIC
AFFAIRS COUNCIL

Communities Under Assault:

IMPROVING FEDERAL
HATE CRIMES ENFORCEMENT

ABOUT US

The Muslim Public Affairs Council improves public understanding and policies that impact American Muslims by engaging our government, media, and communities.

OUR VISION

America is enriched by the vital contributions of American Muslims.

OUR MISSION

MPAC improves public understanding and policies that impact American Muslims by engaging our government, media, and communities.

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I. Executive Summary & Overview

Hate crimes have been on the rise in the U.S. During the winter of 2016-2017, over 1,370 hate crime and bias incidents were reported.¹ The Muslim community in the U.S. has suffered the greatest increase in reported hate crimes. The Federal Bureau of Investigation's (FBI) statistics on total hate crimes in the U.S. in 2016 show a near 200% increase in hate crime incidents toward Muslims since September 11, 2001.² Further, the number of anti-Muslim hate groups nearly tripled - from 34 in 2015 to 101 in 2016 - fueling a 67% increase in hate crimes since 2015 alone.³ Negative rhetoric from politicians and other public figures further drive hate and bias-related attacks on Muslim communities.⁴ Despite the increase in reported hate crimes in the U.S., the number of federal and state hate crime prosecutions remains low. Between January 2010 and August 2015, federal prosecutors filed hate crime charges for only 13% of reported hate crimes, and of those, only 11% led to a conviction.⁵ On a state level, a 2013 study found that only 4% of reported violent hate crimes led to an arrest.⁶

The staggering dearth of hate crime arrests and prosecutions reflects a larger challenge in fully vindicating the rights of victims. Despite hate crimes laws sending a message that as a society, the U.S. does not tolerate hate-motivated attacks, the lack of both federal and state hate crime enforcement sends the wrong message to perpetrators.

While federal hate crime prosecutions often garner the most media attention, hate crime enforcement most frequently falls to state and local prosecutors. Today, most states prosecute hate crimes under their own laws - some more diligently than others. Despite the fact that federal prosecutors often defer to states to prosecute hate crimes, five states either do not have hate crime laws, or their laws lack meaningful hate crime provisions.⁷ Furthermore, in many parts of the country, local prosecutors are ill-equipped to bring hate crime charges, while federal prosecutors seldom elect to bring hate crime charges against defendants, leaving victims with their rights not fully vindicated.

¹ Hatewatch Staff, *Post-Election Bias Incidents Up To 1,372; New Collaboration with ProPublica*, Southern Poverty Law Center: Hatewatch (February 10, 2017), <https://www.splcenter.org/hatewatch/2017/02/10/post-election-bias-incidents-1372-new-collaboration-propublica>.

² Hatewatch Staff, *Anti-Muslim Hate Crimes Surged Last Year, Fueled by Hateful Campaign*, Southern Poverty Law Center: Hatewatch (November 14, 2016), <https://www.splcenter.org/hatewatch/2016/11/14/anti-muslim-hate-crimes-surged-last-year-fueled-hateful-campaign>.

³ Phil McCausland, *Huge Growth in Anti-Muslim Hate Groups During 2016: SPLC Report*, NBC News (February 16, 2017, 6:07 AM), <https://www.nbcnews.com/news/us-news/huge-growth-anti-muslim-hate-groups-during-2016-splc-report-n721586>.

⁴ Brian Levin, *Special Status Report: Hate Crime in The United States, 20 State Compilation of Official Data*, Center for the Study of Hate & Extremism, California State University, San Bernardino (2016), <https://www.documentcloud.org/documents/3110202-SPECIAL-STATUS-REPORT-v5-9-16-16.html>.

⁵ *TracReports, Convictions in Federal Hate Crime Cases Since FY 2010*. <http://trac.syr.edu/tracreports/crim/393/>

⁶ *Hate Crime Victimization, 2003-2011*, U.S. Dept. of Justice. <https://www.bjs.gov/content/pub/pdf/hcv0311.pdf>

⁷ Arkansas, Georgia, Indiana, South Carolina and Wyoming rely solely on their general criminal laws to address bias-motivated violence and intimidation.

In order to analyze and understand the efficacy of existing legislation and the interplay between state and federal hate crimes laws, accurate data is necessary. There are serious deficiencies in reporting hate crimes, both by victims and government officials.

This white paper offers an overview of existing federal⁸ hate crime laws to provide a deeper understanding of the strengths and weaknesses in the federal U.S. criminal justice system with regard to addressing hate crimes. The paper also provides recommendations on how to improve the overall hate crimes legislative landscape. The aim of this paper is to encourage renewed conversation on how to address the shortcomings in federal hate crimes laws to better protect minority and marginalized communities throughout this country.

WHAT IS A HATE CRIME?

Generally, a hate crime occurs when there is a criminal offense targeting a victim because of their race, religion, ethnicity, sexual orientation, gender, gender identity, or disability. While there are varying state and federal definitions of what constitutes a hate crime,⁹ the most commonly used is the FBI's: "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."¹⁰ The Bureau of Justice Statistics, an office within the Department of Justice (DOJ), defines "hate crimes" as "crimes that manifest evidence of prejudice based on race, gender or gender identity, religion, disability, sexual orientation, or ethnicity."¹¹ Both of these definitions include the motivation or intent of the offender.

⁸ While this paper covers primarily federal legislation, it does provide a brief overview of state legislation as a guide to better develop sound policy at the federal level.

⁹ For state hate crime definitions, see, e.g., Alabama: AL ST § 13A-5-13 (1993); Alaska: AS § 12.55.155 (1996); Arizona: AZ ST § 13-701; California: CA PENAL § 422.55, CA PENAL § 422.7, CA PENAL § 422.75; Colorado: CO ST § 18-9-121 (1988); Connecticut: CT ST § 53a-40a, CT ST § 53a181(j-k); Delaware: DE ST TI 11 § 1304 (1995); DC: D.C. Code § 22-3703; Florida: FL ST § 775.085 (1992); Hawaii: HI ST § 706-662 (1972); Idaho: ID ST § 18-7902 (1983), ID ST § 18-7903 (1983); Illinois: IL ST CH 720 § 5/12-7.1 (1996); Iowa: IA ST § 792A.2; Kansas: KS ST 21-6815; Kentucky: KY ST § 532.031 (1998); Louisiana: LA R.S. 14:107.2 (B)(C); Maine: ME ST T. 17-A § 1151 (1995); Maryland: MD CRIM LAW § 10-304 (2002); Massachusetts: MA ST 265 § 39 (1997); Michigan: MI ST 750.147b (1989); Minnesota: MN ST § 609.2231 (1989); Mississippi: MS ST § 99-19-301 (1994); Missouri: MO ST 557.035 (1999); Montana: MT ST 45-5-222 (1982); Nebraska: NE ST § 28-111; Nevada: NV ST 193.1675 (1997), NV ST 207.185 (1995); New Hampshire: NH ST § 651:6 (1995); New Jersey: NJ ST 2C:16-1 (2008); New Mexico: NM ST § 31-18B-3 (1978); New York: NY PEN § 485.05, NY PEN § 485.10 (2000); North Carolina: NC ST § 14-3 (1993), NC ST § 14-401.14, NC ST § 99D-1; North Dakota: ND ST § 12.1-14-04; Ohio: OH ST § 2927.12 (1987); Oklahoma: OK ST T. 21 § 850 (1992); Oregon: OR ST § 166.165, OR ST § 166.155 (1989); Pennsylvania: 18 PA ST § 2710 (1982); Rhode Island: RI ST § 12-19-38 (1998); South Dakota: SD ST § 22-19B-1 (1993); Tennessee: TN ST § 40-35-114 (1989); Texas: TX PENAL § 12.47 (1993); Utah: UT Code § 76-3-203.3; Vermont: VT ST T. 13 § 1455 (1990); Virginia: VA ST § 18.2-57; Washington: WA ST 9A.

¹⁰ *Hate Crimes, What We Investigate*, FBI, <https://www.fbi.gov/investigate/civil-rights/hate-crimes>.

¹¹ *Hate Crime*, Bureau of Justice Statistics, <https://www.bjs.gov/index.cfm?ty=tp&tid=37>;

II. Federal Hate Crime Statutes

Over the past 30 years, federal hate crime legislation has been through a number of iterations and been subject to legislative amendments, judicial interpretation, and regulatory implementation. Federal hate crime legislation is often seen as a supplement to state criminal law. In fact, the majority of hate crimes prosecutions are pursued by state and local prosecutors.¹² Until October 2009, when the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (HCPA) was signed into law, federal hate crime prosecution occurred under a limited set of civil rights statutes, which are still in use today.

Generally, federal hate crime statutes can be broken into three distinct categories:

- Specific Acts: These federal statutes impose criminal liability for a “specific act” that was motivated by bias or bigotry. The majority of legislation analyzed in this paper falls into this category, including 18 U.S.C. §§ 241, 242, 245(b)(2), 247, 248, and 249.
- Reporting and Publication: These statutes pertain to federal data collection of hate-crime-related statistics by the FBI and other government entities, and the subsequent publication of that information. Reporting and publication legislation includes the Hate Crimes Statistics Act¹³ and parts of the Matthew Shepard Hate Crimes Prevention Act.¹⁴
- Enhancement Provisions: These federal statutes provide for sentencing enhancements when the crime is found to have been motivated by hate or bias. The Hate Crimes Sentencing Enhancement Act¹⁵ is archetypical of this category of legislation and is analyzed in greater detail below.

The following analysis takes a closer look at relevant federal statutes that can be used to prosecute hate crimes, including key considerations in their application and use by federal prosecutors.

A. 18 U.S.C. § 241: CONSPIRACY AGAINST RIGHTS

Given its broad scope, 18 U.S.C. § 241 is a key tool for federal prosecutors of hate crimes.

The primary aspect of section 241 that allows it to protect against hate crimes is the language requiring the conduct at issue be directed at the victim’s “free exercise or enjoyment of any right or privilege secured ... by the Constitution or laws of the United States.”¹⁶ The Supreme Court held in *U.S. v. Price* that the scope of rights protected by section 241 is broad, including, “presumably, all of the Constitution and laws of the United States.”¹⁷ Hence, constitutional

¹² Karen McLaughlin, Stephanie Malloy, Kelly Brilliant and Cynthia Lang, *Responding to Hate Crime: A Multidisciplinary Curriculum for Law Enforcement and Victim Assistance Professionals 71*, National Center for Hate Crime Prevention, Education Development Center, Inc (2000).

¹³ The Hate Crime Statistics Act, 28 U.S.C. § 534.

¹⁴ Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, Pub. L. No. 111-04, 123 Stat. 2835 (Oct. 28, 2009).

¹⁵ The Hate Crime Sentencing Enhancement Act, 28 U.S.C 994.

¹⁶ *Wilkins*, 376 F.2d at 562; *Redwine*, 715 F.2d at 319; *U.S. v. Hayward*, 764 F. Supp. 1305, 1307 (N.D. Ill. 1991).

¹⁷ *U.S. v. Price*, 383 U.S. 787, 797 (1966) (emphasis in original).

rights are included within the spectrum of those protected by section 241.¹⁸ In short, the government must show that the defendant acted with specific intent to interfere with an identified federal right.¹⁹

Interestingly, section 241 is often applied as a protection against unfair treatment under the Fair Housing Act (FHA), as the FHA provides the right to hold and occupy a dwelling without intimidation or interference on account of race, color, national origin, sex, handicap, or familial status. In the context of hate crimes, FHA is frequently invoked in section 241 prosecutions when the crime involves a victim's housing, which includes, for example, cross burnings, arsons, and vandalism. Nonetheless, section 241 is not strictly a "hate crime" or "anti-bias" law because a violation can be prosecuted regardless of whether the victim is a member of a minority group. The victim's race, religion or other protected category may play a role in the prosecution if, for instance, the protected right infringed is one that concerns race. However, group affiliation or affinity is not a requirement.

1. Elements of Section 241

18 U.S.C. § 241: Conspiracy against rights

Criminal Act Covered: Criminalizes conspiracy to "injure, oppress, threaten or intimidate" any person "in the free exercise or enjoyment of any right or privilege secured to him by the Constitution," not restricted to prosecuting crimes motivated by "hate" or "bias."

Elements: Prosecutor must prove that: (1) two or more persons entered into an agreement, (2) the purpose of the agreement was to injure, oppress, threaten, or intimidate; (3) the agreement was intended to affect an inhabitant of a state, district, or territory of the United States; and (4) the agreement was directed at the free exercise or enjoyment of a right or privilege secured by the Constitution or federal law.

Limitations: Some of the limitations of this provision are: (1) you must first prove the elements of a conspiracy between two or more persons; (2) the necessity to, in most cases, introduce evidence of an *overt act* to make/ strengthen the case; and (3) the requirement to establish that the defendant acted with *specific intent* to interfere with an identified federal right.

¹⁸ *Price*, 383 U.S. at 797-80.

¹⁹ 18 U.S.C. § 241 reads, in part: If two or more persons 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, or because of his having so exercised the same; or If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Section 241 requires the federal government to prove a number of elements to sustain a conviction. There are two prongs to the specific intent requirement: (i) the protected right must be “clearly delineated and plainly applicable under the circumstances of the case”; and (ii) the defendant must have committed the act in question with the purpose of depriving the victim of their protected right.²⁰

Section 241 thus turns on the defendant’s intent. Given this focus, a victim does not necessarily have to have been intimidated or injured. Many federal circuit courts measure “intimidation” by looking at “the totality of the evidence demonstrating the specific intent of the defendant” and not by the victim’s subjective reaction.²¹ Notably, the D.C. Circuit has gone even further and interpreted section 241 to apply to actions in which the victim is not aware of any injury or intimidation.²²

Like the general crime of conspiracy, a conspiracy under section 241 need not be successful to trigger liability.²³ To prove a section 241 conspiracy, the government must show that the members came to a mutual understanding to accomplish a common objective. However, a formal agreement is not required.²⁴

2. Benefits and Challenges of Section 241

A direct benefit of section 241 is its broad scope, which allows for prosecutions that might not otherwise be available. The DOJ has an incentive to use section 241 when the DOJ can prove that two or more persons agreed to participate in a civil rights violation. The statute is unusual in that it requires no overt act by the defendant, but proof of an overt act typically strengthens the prosecution’s case and can be cited as evidence by the prosecution.²⁵ The lower standard of proof combined with the fact that a violation of section 241 is always a felony drives prosecutorial decisions on whether to charge under section 241.

B. 18 U.S.C. § 242: DEPRIVATION OF RIGHTS UNDER COLOR OF LAW

Similar to section 241, 18 U.S.C. § 242 allows for federal prosecution of certain hate crimes but is not a conspiracy crime.²⁶ Specifically, section 242 allows for prosecution when a

²⁰ *Ehrlichman*, 546 F.2d at 921; *accord U.S. v. DiNome*, 954 F.2d 839, 845–46 (2d Cir. 1992).

²¹ *U.S. v. J.H.H.*, 22 F.3d 821, 828 (8th Cir. 1994).

²² *U.S. v. Liddy*, 542 F.2d 76 (D.C. Cir. 1976).

²³ *U.S. v. Morado*, 454 F.2d 167, 169 (5th Cir. 1972); *U.S. v. Bradberry*, 517 F.2d 498, 499 n.6 (7th Cir. 1975).

²⁴ *Gresser*, 935 F.2d 96.

²⁵ *E.g.*, *Conspiracy Against Rights*, Department of Justice, <https://www.justice.gov/crt/conspiracy-against-rights>; 18 U.S.C.S § 241; *see also United States v. Guillette*, 547 F.2d 743, 752 (2d Cir. 1976) (numerous overt acts proved in witness tampering prosecution).

²⁶ Section 242 reads, in part: Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects 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, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an

deprivation of a right “under color of law” occurs and when such deprivation is based on a victim’s race, color or alienage. Section 242 also specifies punishments and sentence enhancements for various aggravating factors, such as when the act includes kidnapping, use of a dangerous weapon, or fire.²⁷

While section 242 specifically applies to a deprivation of rights “under the color of law,” the statute is commonly applied to prosecute cases of police brutality or prisoner mistreatment involving the targeting of minorities.²⁸

1. Elements of Section 242

The vast majority of cases under section 242 have involved the Fourteenth Amendment right to due process of law.²⁹ Federal prosecutors must identify the following elements for prosecution under section 242:

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

Criminal Acts Covered: Criminalizes a deprivation of a right “under color of law,” when the deprivation is based on race, color or alienage.

Elements: To prosecute a person under this section, the government must prove that: (1) the defendant was acting “under color of law”; (2) the defendant acted willfully and on account of the victim’s race, color or alienage; (3) the victim was deprived of a right secured by the Constitution or laws of the US; and (4) the victim was an inhabitant of a state, territory or district.

Limitations: One of the limitations of this provision is that the prosecution must show *specific intent* to deprive a right. A general “bad purpose” is not sufficient; rather, it must be shown that the defendant acted “in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite.”

A critical element of this statute is that the perpetrator must have acted “willfully,” which has been interpreted to mean proof of specific intent to carry out what the statute prohibits (deprivation of a right). The Supreme Court has defined “willfully” in section 242 as requiring “an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.”²⁹ A general “bad purpose” is not sufficient;³⁰ rather, the government must prove that the defendant acted “in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite.”³¹

attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

²⁷ 18 U.S.C. § 242.

^{28, 29} Norman Abrams, Sara Beale and Susan Klein, *Federal Criminal Law and Its Enforcement* 620, 632 (5th ed. 2010); See Thomas J. Seess, *Convictions in Los Angeles Show Old Laws Retain Power*, Baltimore Sun (April 25, 1993), http://articles.baltimoresun.com/1993-04-25/news/1993115047_1_section-241-color-of-law-civil-rights (Section 242 was used to prosecute the police officers in the Rodney King beating).

²⁹ *Screws*, 325 U.S. at 104.

³⁰ *Screws*, 325 U.S. at 107.

³¹ *Screws*, 325 U.S. at 105.

2. Benefits and Challenges of Section 242

As with section 241, one of the highest hurdles prosecutors face is proving the “specific intent” of a given official to deprive a person of a protected right. State actors often have compelling policy reasons for their actions, and showing that they were motivated by a general “bad purpose” will not support a conviction under section 242. This gives the defendant officials a chance to express an alternative motive for their actions that does not implicate race or alienage.

Additionally, the FBI has the sole authority and wide discretion to investigate section 242 violations. This discretion, vested in a federal agency that is tasked with a wide variety of duties, may mean that a number of qualifying crimes may not be prioritized by the agency.³²

In the context of hate crimes, section 242 can be used to prosecute actions by police and prison officials.³³ These actions can include targeting, harassment, and humiliation on the basis of religion³⁴ and national origin.³⁵ Additionally, section 242 can extend to actions by prison officials, which may include the deprivation of rights in regard to the practice of religion.³⁶

C. 18 U.S.C. § 245(B)(2): FEDERALLY PROTECTED ACTIVITIES

Section 245(b)(2) was enacted as part of the Civil Rights Act of 1968 to address the deficiencies of sections 241 and 242 and to respond to the bias-motivated violence and intimidation that was taking place in the country at that time, particularly against African Americans.³⁷ Section 245(b)(2) prohibits the use of “force or threat of force” to interfere with a person’s participation in specifically enumerated “federally protected activities,” and requires that the actor be motivated by bias. The federal prosecutor must show that the force or threat of force was undertaken because of the victim’s race, color, religion or national origin.³⁸

The statute is also a useful tool in the prosecution of bias crimes against Muslims. Crimes such as forceful intimidation based on religion or race that do not fit under other statutes can be successfully prosecuted under section 245(b)(2).³⁹ In *U.S. v. Syring*, the government brought charges under section 245 when a man left threatening voicemails at offices of the Arab American Institute (AAI) in Washington D.C. The *Syring* indictment alleged that the defendant “by threat of force, attempt[ed] to and did willfully intimidate and interfere with

³² See Julian Hattem and Rebecca Savransky, *FBI Under Scrutiny for Handling of Past Investigation of Orlando Killer*, The Hill (June 13, 2016, 12:52 PM), <http://thehill.com/blogs/blog-briefing-room/news/283276-fbi-director-on-if-they-couldve-done-anything-differently-i> (suggesting that the FBI is so “overburdened and unmanned” that it cannot adequately address violent crimes).

³³ See generally *Screws, Culp v. U.S.*, 131 F.2d 93 (8th Cir. 1942).

³⁴ *Catlette v. U.S.*, 132 F.2d 902 (4th Cir. 1943).

³⁵ *Gowdy v. U.S.*, 207 F.2d 730 (9th Cir. 1953); *Lynch v. U.S.*, 189 F.2d 476 (5th Cir. 1951).

³⁶ See Arthur B. Caldwell; Sydney Brodie, Enforcement of the Criminal Civil Rights Statute, 18 U.S.C. Section 242, in *Prison Brutality Cases*, 52 GEO. L. J. 706 (1964).

³⁷ Pub. L. No. 90-284, Title I, § 101(a), 82 Stat. 73 (1968); S. Rep. No. 721, 90th Cong., 2d Sess. (1967), reprinted in 1968 U.S.C.C.A.N. 1837, 1839. See *United States v. Lane*, 883 F.2d 1484, 1495 (10th Cir. 1989) (stating the three elements of a criminal violation under § 245(b)(2)).

³⁸ 18 U.S.C. § 245.

³⁹ See *U.S. v. Allen*, 341 F.3d 870 (9th Cir. 2003); *U.S. v. Woodlee*, 136 F.3d 1399 (10th Cir. 1998).

[AAI] employees because of their race and national origin, that is because they were Arab and Lebanese Americans, and because they were and had been enjoying employment, and the perquisites thereof, by a private employer, [AAI]" in violation of 18 U.S.C. § 245(b)(2)(C).^{40 41}

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

Federal prosecutors must identify the following elements for prosecution under section 245(b)(2):

⁴⁰ *United States v. Syring*, 522 F. Supp. 2d 125, 127 (D.D.C. 2007).

⁴¹ Section 245(b)(2) reads, in part: Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with any person because of his race, color, religion or national origin and because he is or has been:

(A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments.

18 U.S.C. § 245(b)(2): Federally Protected Activated

Criminal Acts Covered: Criminalizes forceful interference with specified activities (such as public education, state benefits programs, private or state employment, jury service, travel by common carrier, enjoyment of hotel, restaurant, film, sports arena, or other public entertainment and exhibition facilities) because of the victim’s race, color, religion, or national origin.

Elements: To prosecute a person under this section, the government must prove that: (1) the defendant used force or threat of force (b) to willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, (3) a person because of his or her race, color, religion, or national origin, and (4) the victim was engaged in a set of specifically enumerated federally protected activities.

Limitations: The practical limitations of Section 245 are: (1) prosecution can only proceed with written certification of the Attorney General, the Deputy or Associate Attorney General, or a designee, (2) such certification can only be made when “in the public interest and necessary to secure substantial justice,” and (3) the scope is generally limited in that the law only applies to an explicitly enumerated set of activities.

Section 245(b)(2) prohibits the “threat of force,” even if there is no actual physical contact with person or property. Thus, the government may prosecute (and has prosecuted) defendants under section 245 if they mail threatening letters,⁴² place threatening phone calls,⁴³ or engage in symbolic intimidating acts such as cross burning⁴⁴ because of the victim’s race, color, religion, or national origin. The force or threat of force also includes overt violent acts, including murder,⁴⁵ assault,⁴⁶ shooting into homes or cars,⁴⁷ and bombing.⁴⁸

In addition to applying or threatening force, the defendant must have acted “willfully” with the intent to “injure, intimidate or interfere with” a person engaged in one of the prohibited purposes under the statute on account of race, color, religion or national origin. Courts have not been strict in requiring the government to prove that the defendant had a well-defined intent to willfully deprive the victim of the particular protected activity or that the defendant knew of the statutorily protected nature of the activity involved. Rather, courts have held that “a person intends the natural and probable consequences of acts knowingly does [sic] or

⁴² See, e.g., *U.S. v. Gilbert*, 813 F.2d 1523 (9th Cir. 1987) (civil case under 42 U.S.C § 3631).

⁴³ See, e.g., *Byrd*, 954 F.2d 586.

⁴⁴ See, e.g., *U.S. v. McDermott*, 29 F.3d 404 (8th Cir. 1994); see also, e.g., these cases under 42 U.S.C. § 3631: *U.S. v. Gresser*, 935 F.2d 96 (6th Cir. 1991); *U.S. v. Hayward*, 6 F.3d 1241 (7th Cir. 1993) (overruled on other grounds by *U.S. v. Colvin*, 353 F.3d 569 (7th Cir. 2003)); *U.S. v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994); *U.S. v. Skillman*, 922 F.2d 1370 (9th Cir. 1990).

⁴⁵ E.g., *U.S. v. Lane*, 883 F.2d 1484 (10th Cir. 1989); *U.S. v. Bledsoe*, 728 F.2d 1094 (8th Cir. 1984); *U.S. v. Franklin*, 704 F.2d 1183 (10th Cir. 1983).

⁴⁶ E.g., *U.S. v. Griffin*, 525 F.2d 710 (1st Cir. 1975); *U.S. v. Sowa*, 34 F.3d 447 (7th Cir. 1994); *U.S. v. Price*, 464 F.2d 1217 (8th Cir. 1972).

⁴⁷ E.g., *U.S. v. Johns*, 615 F.2d 672 (5th Cir. 1980).

⁴⁸ E.g., *U.S. v. Fine*, 413 F. Supp. 728 (W.D. Wis. 1976); see also *U.S. v. Byrd*, 954 F.2d 586 (9th Cir. 1992) (defendant convicted of conspiring to violate § 245 based upon threatening telephone calls).

knowingly omitted.”⁴⁹ Therefore, if an offender uses force or threatens force against a person engaged in a protected activity, it can typically be inferred that the offender was acting willfully, thus satisfying this statutory requirement.

Furthermore, under section 245(b)(2), the defendant must have targeted the victim because of the victim’s race, color, religion, or national origin. A defendant’s motive can be inferred circumstantially. In a number of cases, courts have held that the government presented sufficient circumstantial evidence showing motive, a key factor in using section 245(b)(2) in prosecuting hate crimes against Muslims.⁵⁰ These cases include: where the government demonstrated that the defendant was present during meetings of an organization where attendees of the meeting discussed killing the victim because of the victim’s religion,⁵¹ the existence of the defendant’s anti-Semitic statements,⁵² where the defendant had a history of violent attacks against members of a minority group,⁵³ or where the defendant is quoted as citing race as a factor.⁵⁴

2. Benefits and Challenges of Section 245(b)(2)

Section 245(b)(2) is a useful tool for federal prosecutors fighting the disturbing increase in violence and threats of violence against Muslims given that both overt and indirect threats of force may be prosecuted. Further, section 245(b)(2) is more comprehensive than the aforementioned statutes, as it is not limited to conspiracy or acts under color of law but addresses private conduct by persons acting alone or in concert – acts committed by “whoever, whether or not acting under color of law.”⁵⁵

In addition, unlike most other statutes, prosecution under section 245(b)(2) requires written certification of the attorney general, the deputy or associate attorney general, or any specially designated assistant attorney general. The certification can only be made when “in the public interest and necessary to secure substantial justice”⁵⁶ – a determination very much dependent on the views of the attorney general. This requirement certainly presents challenges for federal prosecutors.

⁴⁹ *Price*, 464 F.2d at 1218; *see also U.S. v. Franklin*, 704 F.2d 1183, 1192 (10th Cir. 1983) (jury could have inferred that defendant intended to deprive victims of opportunity to enjoy public facilities in violation of § 245(b)(2)(B)).

⁵⁰ *See infra* note 55- 58.

⁵¹ *Lane*, 883 F.2d at 1497.

⁵² *See id.* (holding that anti-semitic statements further evidenced defendant’s motivation for committing the crime).

⁵³ *Bledsoe*, 728 F.2d at 1098.

⁵⁴ *Id.*

⁵⁵ In *U.S. v. Ebens*, 800 F.2d 1422, 1429 (6th Cir. 1986) (*abrogated on other grounds by Huddleston v. U.S.*, 485 U.S. 681 (1988)), the Sixth Circuit noted that, unlike sections 241 and 242, section 245 does not require proof of a specific intent to deprive a person of a federal right made definite by decisions or other rule of law. Rather, section 245 itself, “by its plain statutory language,” spells out the federal “rights” protected.

⁵⁶ 18 U.S.C. § 245.

D. 18 U.S.C. § 247: DAMAGE TO RELIGIOUS PROPERTY; OBSTRUCTION OF PERSONS IN THE FREE EXERCISE OF RELIGIOUS BELIEFS

Section 247 prohibits several acts, including: “intentionally defacing, damaging or destroying, or attempting to intentionally deface, damage or destroy, religious real property because of the religious character of the property.”^{57 58} This statute became law in 1988 (Public Law no. 100-326)⁵⁹ and was later amended as part of the Church Arson Prevention Act in 1996. Section 247 was originally enacted after an outbreak of predominantly African American church burnings.⁶⁰ While the impetus for section 247 may have been to prosecute church burnings, the statute protects houses of worship regardless of religion.⁶¹

Given the recent uptick in anti-Muslim hate crimes targeting religious houses of worship, this particular statute is used often by federal prosecutors. The DOJ has stated that “Muslim mosques and schools are particularly vulnerable” to discriminatory actions⁶² and hate crimes against mosques have risen 87.5% since December 2015.⁶³

Section 247 has been used often by federal prosecutors in anti-Muslim bias crimes. For example:

- In 2016, Gill Parker Payne pleaded guilty in the District of New Mexico for using force or threat of force to intentionally obstruct a Muslim woman in the free exercise of her religious beliefs, when he told her to take her hijab off.⁶⁴ [18 U.S.C. § 247(a)(2)]

⁵⁷ 18 U.S.C. § 247(a)(1).

⁵⁸ Section 247 reads, in part: Whoever, in any of the circumstances referred to in subsection (b) of this section:

(1) intentionally defaces, damages, or destroys any religious real property, because of the religious character of that property, or attempts to do so; or

(2) intentionally obstructs, by force or threat of force, any person in the enjoyment of that person’s free exercise of religious beliefs, or attempts to do so; shall be punished as provided in subsection (d).

(b) The circumstances referred to in subsection (a) are that the offense is in or affects interstate or foreign commerce.

(c) Whoever intentionally defaces, damages, or destroys any religious real property because of the race, color, or ethnic characteristics of any individual associated with that religious property, or attempts to do so, shall be punished as provided in subsection.

⁵⁹ S.794 - A bill to amend chapter 13 of title 18, United States Code, to impose criminal penalties and provide a civil action for damage to religious property and for injury to persons in the free exercise of religious beliefs, Congress. gov. <https://www.congress.gov/bill/100th-congress/senate-bill/794/summary/00>

⁶⁰ H.Rep. No. 104-621.

⁶¹ U.S. v. Perez, 2017 U.S. Dist. LEXIS 171992 (S.D. Tex. Oct. 18, 2017) (defendant was charged under section 247 for destroying a community Islamic center and mosque); U.S. v. City of Lilburn

⁶² Update on the Justice Department’s Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010-2016, U.S. DEPARTMENT OF JUSTICE (July 2016), <https://www.justice.gov/crt/file/877931/download>.

⁶³ Statement of Prof. Brian H. Levin, “*Responses to the Increase in Religious Hate Crimes*,” SENATE COMMITTEE ON THE JUDICIARY (May 2, 2017), https://csbs.csusb.edu/sites/csusb_csbs/files/Statement%20by%20Prof.%20Brian%20Levin%20Responses%20to%20the%20Increase%20in%20Religious%20Hate%20Crime%20for%20the%20U.S.%20Senate%20-%20Committee%20on%20the%20Judiciary%20-%20May%202%2C%202017.pdf.

⁶⁴ U.S. v. Payne, No. 1:16-CR-02074-SCY (D.N.M. 2016).

- In 2017, Daniel George Fisher of Minneapolis was sentenced in the District of Minnesota to 12 months in prison and three years of supervised release for mailing a letter in which he threatened to blow up an Islamic center.⁶⁵ [18 U.S.C. § 247(a)(2) and (d)(3)]
- In 2016, Jedediah Stout of Missouri pleaded guilty in the Western District of Missouri to the arson of a mosque.⁶⁶ [18 U.S.C. § 247(a)(1)]

1. Elements of Section 247

To sustain a conviction under section 247, the government must prove the following elements:

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

Criminal Acts Covered: This provision prohibits, among other things, intentionally defacing, damaging or destroying, or attempting to intentionally deface, damage or destroy, religious real property because of the religious character of the property, and because of the race, color, or ethnic characteristics of any individual associated with the property.

Elements: The elements of the crime are intentionally defacing, damaging, or destroying any religious real property or attempting to do so because of the: (1) religious character of that property, where such property is in or affects interstate or foreign commerce, or (2) race, color, or ethnic characteristics of any individual associated with that religious property, regardless of its relationship to interstate commerce.

Limitations: The practical limitations of this section are: (1) prosecution can only be undertaken upon the notification in writing by the Attorney General or his designee that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, and (2) it does not cover threats, and more specifically, threats against religiously affiliated organizations.

Section 247 defines “religious real property” in a broad sense, which includes any church, synagogue, mosque, religious cemetery, or other religious real property, including fixtures or religious objects contained within a place of religious worship.⁶⁷ Section 247 was amended in 1996. The amendment removed the previous requirement that the loss to the real property exceed \$10,000, thus making it “easier to prosecute incidents of defacement and desecration, where the value of physical damage to the religious property was small.”⁶⁸ The revisions in 1996 also extend the reach of this statute beyond just covering damage to property caused

⁶⁵ *U.S. v. Fisher*, No. 16-CR-300 WMW (D.Minn. 2016)

⁶⁶ *U.S. v. Stout*, 2016 U.S. Dist. LEXIS 60356 (W.D. MO., Apr. 18, 2016), adopted in *U.S. v. Stout*, 2016 U.S. Dist. LEXIS 60170 (W.D. MO., May 6, 2016), decision reached on appeal *U.S. v. Stout*, 2017 U.S. App. LEXIS 21562 (8th Cir. Oct. 31, 2017).

⁶⁷ 18 U.S.C. § 247(f)

⁶⁸ H. Rep. No. 621, at 2.

because of the religious character of the property; it now covers attacks that are motivated by racial or ethnic characteristics of members of the house of worship.⁶⁹

Under the 1988 version of section 247, the defendant must have traveled in interstate commerce or used a facility or instrumentality of interstate or foreign commerce in interstate or foreign commerce in order to be charged under the statute. According to the DOJ, this requirement made it “virtually impossible to satisfy, thereby making the section relatively useless.”⁷⁰ The current version of section 247 replaces the double interstate commerce requirement with the mere requirement that the “offense is in or affects interstate or foreign commerce” as provided in subsection (b).⁷¹ In other words, the current section removed one “interstate commerce” requirement layer. For example, in *U.S. v. Doggart*,⁷² the defendant was convicted of soliciting others to destroy a mosque in New York. There, the government satisfied the subsection (b) requirement when it presented witnesses who testified that “people from outside New York state visit the mosque ... and make financial contributions to it,” and that the community has a summer camp that uses the mosque and “draws campers from other states.”⁷³

Defacement, damage, and destruction (collectively here, “harm”) can be satisfied by harm-in-fact, or proof of an intention to cause harm. Later amendments to the statute allow prosecutors to use the provision to respond to a wide range of conduct. For example, federal prosecutors have obtained convictions for solicitation of section 247 violations. Specifically, in *U.S. v. Doggart*, the defendant attempted to put together a “team” to attack and burn down a mosque near Hancock, New York, because, in his words, it was a “Muslim training camp.”⁷⁴ Doggart argued that because his plan never came to fruition and the statute requires harm, the statute “cannot support a solicitation conviction.”⁷⁵ The court in *Doggart* strongly rejected this argument, observing that it could see “no reasonable way to construe the statute other than as divisible, with one alternative element being bodily injury to any person, and the other being the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire.”⁷⁶

Similarly, threats to cause harm have formed the basis of section 247 convictions. In *U.S. v. Fisher*,⁷⁷ the defendant pleaded guilty to an indictment for sending a letter to the Tawfiq

⁶⁹ H. Rep. No. 621, at 2. See also, *U.S. v. Crimiel*, 547 F. App'x 633, 633 (5th Cir. 2013) (“In pleading guilty, Crimiel admitted to damaging two churches in Lafayette, Louisiana based on the race of the members of the congregation.”)

⁷⁰ H. Rep. No. 621, at 2.

⁷¹ H. Rep. No. 621, at 2. The specific mechanism at work here is the requirement in subsection (a) that the specified acts be “in any of the circumstances referred to in subsection (b) of this section.” Subsection (b) provides that “[t]he circumstances referred to in subsection (a) are that the offense is in or affects interstate or foreign commerce.”

⁷² *United States v. Doggart*, 2017 U.S. Dist. LEXIS 84549, at *8 (E.D. TN. June 2, 2017).

⁷³ *Id.*

⁷⁴ *United States v. Doggart*, 2017 U.S. Dist. LEXIS 84549, at *4.

⁷⁵ *Id.* at 15.

⁷⁶ *Id.* at 16.

⁷⁷ *Minnesota Man Pleads Guilty to Hate Crime for Mailing Threatening Letter to Islamic Center*, Dept. of Justice, (Nov. 30, 2016), <https://www.justice.gov/opa/pr/minnesota-man-pleads-guilty-hate-crime-mailing-threatening-letter-islamic-center>. Plea deal available at, <https://www.justice.gov/opa/file/914306/download>.

Islamic Center in Minneapolis that threatened to “blow up your building with all you immigrants in it.”⁷⁸

2. Benefits and Challenges of Section 247

While the revised section 247 addressed many shortcomings in the earlier version, advocates have sought to further amend 18 U.S.C. § 247 and enact legislation, such as HR 1730 (the Combating Anti-Semitism Act of 2017), to criminalize bomb threats and other violent threats against religiously affiliated organizations.⁷⁹

Furthermore, section 247(e) requires certification in writing by the attorney general or his designee that, in his judgment, a prosecution by the United States is in the public interest and necessary to secure substantial justice.⁸⁰ Section 247(e) is similar to the written certification provision of section 245(a)(1). Congress wanted 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.”⁸¹

Also of note: without proof of aggravating factors, a violation of section 247 is a misdemeanor. In a felony prosecution, a prosecutor must prove the presence of an aggravating factor, which usually comes directly from the circumstances surrounding the section 247 violation. These aggravating factors include the use of a dangerous weapon, kidnapping, aggravated sexual abuse, death resulting from the offense, or an attempt to kill, in which case there are graduated penalties up to and including life in prison or death.⁸²

E. 18 U.S.C. § 248: FREEDOM OF ACCESS TO CLINIC ENTRANCES

Section 248, or “The Freedom of Access to Clinic Entrances Act of 1994” (FACE), is perhaps best known for addressing violent, threatening, or obstructive conduct intended to interfere with persons seeking to obtain or provide reproductive health services, such as abortion. Congress passed this controversial law in response to violence surrounding the national debate over abortion rights. The stated purpose of section 248 is to protect and promote the public safety and health and activities affecting interstate commerce by establishing federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services.⁸³ However, in section 248(a)(2), the law also prohibits interference with religious exercise and damage to religious property (e.g., mosques, churches, and synagogues).

⁷⁸ Richard Chin, *Man charged with Threatening to Blow up a Minneapolis Islamic Center*, (Sept. 7, 2016, 8:13 PM), <https://www.twincities.com/2016/09/07/man-charged-with-threatening-to-blow-up-a-minneapolis-islamic-center/>.

⁷⁹ Testimony of Jonathan A. Greenblatt, CEO and National Director, Anti-Defamation League, before the Senate Judiciary Committee Hearings on Responses to Increase in Religious Hate Crimes, May 2 2017.

⁸⁰ 18 U.S.C. § 247(e)

⁸¹ S. Rep. No. 324, at 6.

⁸² 18 U.S.C. § 247(d).

⁸³ Pub. L. No. 103-259, § 2, 108 Stat. 694.

The case, *Zhang v. Chinese Anti-Cult World Alliance (CACWA)*,⁸⁴ demonstrates this specific protection for places of religious worship. In *Zhang*, the plaintiffs were practitioners of the Falun Gong religion, who practiced in several places throughout the New York City area.⁸⁵ The defendants were the organization CACWA and its members.⁸⁶ CACWA was an organization composed of loyalists to the Chinese Communist Party, and the organization's stated goal was the elimination of Falun Gong.⁸⁷ To that end, CACWA members consistently physically attacked, harassed, and threatened Falun Gong worshipers while the practitioners were at places of worship.⁸⁸ Falun Gong practitioners brought a claim under section 248, among other claims.⁸⁹ CACWA sought dismissal of that claim, arguing that the statute was inapplicable because the statute's sole purpose was protecting access to *abortion services*, not religious services.⁹⁰ The court disagreed.⁹¹ Pointing to the plain language of the statute, the court indicated that the statute on its face also sought to protect a plaintiff's ability to freely attend places of worship.⁹² The Court further concluded that the allegations of consistent harm and intimidation demonstrated that the Falun Gong practitioners were denied free access to their religious centers in violation of section 248.⁹³

Although section 248 addresses conduct similar to that already proscribed by section 247, section 248 does not require that "in committing the offense, the defendant travels in interstate commerce, or uses a facility or instrumentality of interstate or foreign commerce in interstate or foreign commerce" as section 247 does.⁹⁴ Therefore, when the intimidation, violence, or harassment happens at a mosque or Muslim community center, section 248 may be more useful than section 247.

⁸⁴ No. 15-CV-1046-SLT-VMS, 2016 WL 1128401, at *12 (E.D.N.Y. Jan. 28, 2016), report and recommendation adopted, No. 15-CV-1046-SLT-VMS, 2016 WL 1192670 (E.D.N.Y. Mar. 22, 2016).

⁸⁵ *Id.* at *2.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at *2-*3

⁸⁹ *Id.* at *12

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at *13.

⁹⁴ 18 U.S.C §247(b)(1).

1. Elements of Section 248

18 U.S.C. § 248: Freedom of Access to Clinic Entrances

Criminal Acts Covered: Among other things, Section 248 makes it unlawful for a person to use force, the threat of force, or physical obstruction to intentionally injure or intimidate a person because he or she is attempting to access reproductive health services, and also covers people lawfully exercising the right of religious freedom *at a place of worship*. In addition, Section 248 makes it unlawful for a person to intentionally damage or destroy the property of a facility because it is a place of worship.

Elements: Under Section 248(a)(2), prosecutors must show that there was: (1) use of force or threat of force or physical obstruction, (2) to intentionally injure, intimidate or interfere with or attempt to injure, intimidate or interfere (3) with a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship. Under Section 248(a)(3), prosecutors must show that a defendant intentionally damages or destroys the property of a place of religious worship.

Limitations: Limited scope in that a violation occurs only if the victim is exercising or seeking to exercise his or her right to religious freedom or if property is damaged or destroyed *at a place of religious worship*.

2. Benefits and Challenges of Section 248

As previously mentioned, unlike the other federal statutes discussed above, section 248 explicitly provides a private civil action for persons aggrieved by a violation of the law's provisions. Specifically, suit may be brought by "a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such religious place of worship."⁹⁵ Therefore, if federal prosecutors do not elect to bring hate crime charges, a private citizen or organization can nonetheless bring a private civil action against offenders. Thus, victims need not rely on the government alone to obtain justice. In addition, the United States or state attorneys general may bring a civil action to enforce section 248. Potential relief under either private or public civil actions include restraining orders and monetary damages.

Importantly, a true threat, use of force, or physical obstruction must be established to successfully bring a claim under section 248(a)(2).⁹⁶

⁹⁵ 18 U.S.C. §248(c)(1).

⁹⁶ The statute specifies that Section 248 shall not be construed:

- (1) to apply to expressive conduct protected by the First Amendment;
- (2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment occurring outside a facility, regardless of the point of view expressed, or to limit existing legal remedies for such interference;
- (3) to provide exclusive criminal penalties or civil remedies for the prohibited conduct or to preempt state or local laws; or

Section 248 is a narrowly tailored law that addresses specific conduct aimed at the infringement of religious freedom. If a hate crime occurs at a mosque, prosecutors and victims should consider whether the elements of section 248 have been satisfied. However, if American Muslims are threatened or harmed, but such threat or harm does not occur at a religious place of worship, then such victim(s) will not be able to pursue a claim under section 248.

F. 18 U.S.C. § 249: HATE CRIME ACTS

Section 249 is a central statute when it comes to prosecuting hate crimes and was enacted as part of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (HCPA) in 2009.⁹⁷ Prior to the HCPA, the federal government generally prosecuted hate crimes as civil rights violations (*i.e.*, under the Civil Rights Act of 1986).⁹⁸ However, since those statutes require an offense committed both because of the victim's race, color, religion, or national origin and that the victim had engaged in a statutorily listed activity,⁹⁹ prosecuting hate crimes under those provisions was limited.

The HCPA acknowledged that existing federal law was "inadequate" to address the "serious national problem of hate crimes," and Congress made several key "findings" of fact:¹⁰⁰

... A prominent characteristic of a violent crime motivated by bias is that it devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the traits that caused the victim to be selected.

... [I]n order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins...

*Federal jurisdiction over certain violent crimes motivated by bias enables Federal, State, and local authorities to work together as partners in the investigation and prosecution of such crimes.*¹⁰¹

In light of these "key findings of fact," the HCPA was enacted with the intent "to authorize Federal investigations and prosecutions of those hate crimes described to the fullest extent permitted by the Constitution."¹⁰² For anti-Muslim hate crimes, section 249 has been widely used to prosecute instances of violence and forceful intimidation.¹⁰³ These instances include

(4) to interfere with the enforcement of state or local laws regulating the performance of abortions or other reproductive health services.

⁹⁷ See Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, Pub. L. No. 111-04, §§ 4701-13, 123 Stat. 2835-2844 (Oct. 28, 2009).

⁹⁸ See 18 U.S.C. § 245(b)(2).

⁹⁹ See *id.*

¹⁰⁰ Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, Pub. L. No. 111-04, § 4702, 123 Stat. 2835 (Oct. 28, 2009).

¹⁰¹ 34 U.S.C. § 30501 (2009).

¹⁰² 155 Cong. Rec. S10,773 (daily ed. Oct. 27, 2009) (statement of Sen. Patrick Leahy).

¹⁰³ Pennsylvania Man Indicted for Hate Crime Assault, Dept. of Justice (March 6, 2017), <https://www.justice.gov/opa/pr/pennsylvania-man-indicted-hate-crime-assault>; Washington State Man

violent assaults against Muslims and individuals believed by the perpetrators to be Muslims.¹⁰⁴ One representative case involves that of George Thompson. In 2011, George Thompson, a former employee of the Transportation Security Administration in Minneapolis, pleaded guilty to violating section 249(a)(2)(B) by assaulting an 83-year-old Somali man.¹⁰⁵ Thompson targeted the man because he had a red beard, which caused Thompson to believe that the victim was a Muslim and an African immigrant. Thompson admitted that he assaulted the man solely because the victim was Muslim and Somali.

1. Elements of Section 249

The HCPA codified section 249, which created two separate substantive offenses for crimes committed because of animus, one under section 249(a)(1) and one under section 249(a)(2), both described below:

Sentenced in Federal Hate Crime Case for Attack on Sikh Man, FBI, Seattle Division (Dec. 10, 2013), <https://archives.fbi.gov/archives/seattle/press-releases/2013/washington-state-man-sentenced-in-federal-hate-crime-case-for-attack-on-sikh-man>; Members of White Supremacist Group Sentenced to Prison for Hate Crime Assault, FBI Newark Division (Aug. 7, 2013), <https://archives.fbi.gov/archives/newark/press-releases/2013/members-of-white-supremacist-group-sentenced-to-prison-for-hate-crime-assault>.

¹⁰⁴ See *supra* note 106.

¹⁰⁵ Former TSA Employee Sentenced for Federal Hate Crime First Case in The Nation Prosecuted Under Shepard-Byrd Act, Dept. of Justice (Nov. 29, 2011), https://www.oig.dhs.gov/assets/pr/oigpr_112911.pdf.

18 U.S.C. § 249: Hate crime acts

Criminal Acts Covered: This section criminalizes two different offenses:

Under Section (a)(1), wilfully causing or, through the use of certain weapons, attempting to cause, bodily injury because of the victim’s actual or perceived race, color, religion, or national origin with enhanced penalties for kidnapping, aggravated sexual abuse and murder; and

Under Section (a)(2), in circumstances involving interstate commerce, wilfully causing or, through the use of certain weapons, attempting to cause, bodily injury because of the victim’s actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability.

Elements: (a)(1) was enacted pursuant to the 13th Amendment, and applies only to bias based on race, color, religion, or national origin; whereas (a)(2)’s covered biases are broader and include religion, national origin, gender, sexual orientation, gender identity, or disability. While (a)(1) does not require a link with interstate commerce, (a)(2), which was enacted pursuant to the Commerce Clause, does require there to be a connection with interstate commerce.

Limitations: Federal government can only prosecute an offense under Section 249 if the Attorney General or a designee certifies in writing that either (1) the State does not have jurisdiction, (2) the State has requested that the Federal government assume jurisdiction, (3) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence, or (4) a prosecution by the United States is in the public interest and necessary to secure substantial justice.

Further, all prosecutions must be undertaken pursuant to guidelines issued by the Attorney General, and the DOJ has declared a policy pursuant to which they provide significant deference to the State.

2. Benefits and Challenges of Section 249

Although more expansive with respect to motive, section (a)(2) is narrower with respect to circumstances. Unlike section (a)(1), section (a)(2) generally requires that the defendant’s conduct occur in circumstances involving interstate commerce (since the section was enacted pursuant to the Commerce Clause).¹⁰⁶

Both sections refer to “actual or perceived” bias. In *United States v. Jenkins*, 909 F. Supp. 2d 758 (E.D. Ky. Oct. 15, 2012),¹⁰⁷ the court addressed a challenge to the use of the phrase “actual or perceived” as overly broad. The Court, in interpreting the meaning of “actual or perceived” (in the context of sexual orientation bias), held that adding “perceived” to the statute “merely operates to protect a victim who, for example, was assaulted by someone believing him to be a homosexual, when in fact he maintained a different sexual orientation.” Therefore, the statute covers bias-motivated hate crimes based on both the victim’s *actual* protected class, as well as the protected class to which the defendant *perceives* the victim to belong.

¹⁰⁶ See 18 U.S.C. § 249(a)(2)(B).

¹⁰⁷ In *Jenkins*, the government alleged that the defendants had lured the homosexual victim to a state park and beat the victim while shouting anti-homosexual comments. *U.S. v. Jenkins*, 909 F. Supp. 2d 758, 764 (E.D. Ky. Oct. 15, 2012).

One challenge under section 249(b) is the certification requirement, where no prosecution of any offense can be undertaken by the federal government except under the certification in writing of the attorney general (or a designee) that either:

- 1) the State does not have jurisdiction,
- 2) the State has requested that the federal government assume jurisdiction,
- 3) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence, or
- 4) a prosecution by the United States is in the public interest and necessary to secure substantial justice.¹⁰⁸

*United States v. Roof*¹⁰⁹ makes clear that the attorney general has significant discretion in deciding whether to prosecute under section 249, which can effectively leave the decision about whether to prosecute at the mercy of political agendas and the policies of the executive branch.

Further, section 249(a)(4) provides that all prosecutions conducted by the federal government shall be undertaken pursuant to guidelines issued by the attorney general (or a designee), to be included in the United States Attorneys' Manual, that shall establish neutral and objective criteria for determining whether a crime was committed because of the actual or perceived status of any person.¹¹⁰

In addition, the HCPA enacted 42 U.S.C. § 3716 (State assistance), which asserts "At the request of a State, local, or tribal law enforcement agency, the Attorney General may provide technical, forensic, prosecutorial, or any other form of assistance in the criminal investigation or prosecution of any crime that, (A) constitutes a crime of violence; (B) constitutes a felony under the State, local, or tribal laws; and (C) is motivated by prejudice based on the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim, or is a violation of the State, local, or tribal hate crime laws."¹¹¹

Finally, the DOJ has a "backstop policy" pursuant to which the agency "defers prosecution in the first instance to State and local law enforcement officials, except in highly sensitive cases ..."¹¹² The DOJ has indicated that the agency "would not bring a Federal prosecution arising from the same incident unless the matter involved a 'substantial Federal interest' that the State prosecution had left 'demonstrably unvindicated.'"¹¹³ Therefore, the DOJ defers to the state, and its policies limit the circumstances and frequency in bringing federal prosecutions.

¹⁰⁸ 18 U.S.C. § 249(b)(1).

¹⁰⁹ 225 F. Supp. 3d 438 (D. S.C. 2016).

¹¹⁰ 18 U.S.C. § 249(4).

¹¹¹ *United States Code, 2010 Edition Title 42 – The Public Health and Welfare*. Government Publishing Office. <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/html/USCODE-2010-title42-chap46.htm>

¹¹² Holder Testimony, *supra* note 92, at 171.

¹¹³ *Id.*

G. DATA COLLECTION PROVISIONS

1. 28 U.S.C. § 534: Hate Crime Statistics Act

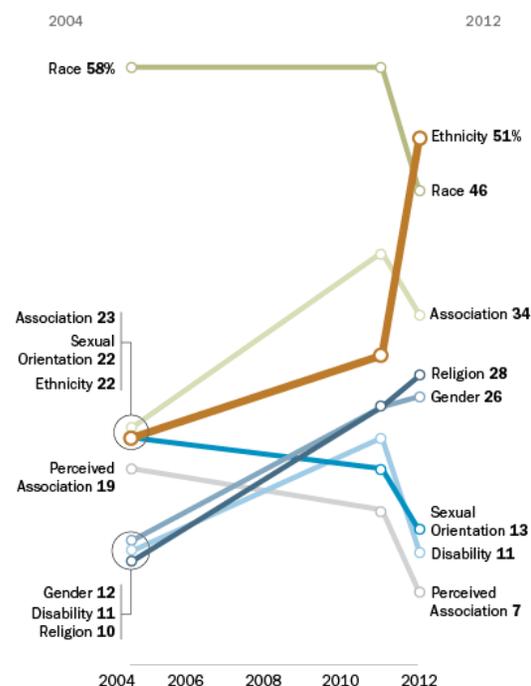
In 1988, the Uniform Federal Crime Reporting Act required all law enforcement agencies to send crime data to the FBI. In 1990, with the passage of the Hate Crime Statistics Act, passed in 1990 and modified in 2009 by the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, the attorney general and the Department of Justice were required to undertake nationwide data collection for each calendar year on “crimes that manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter, forcible rape, aggravated assault, simple assault, intimidation, arson, and destruction, damage or vandalism of property.”¹¹⁴ Gender and gender identity are also included in the requisite crime reporting requirements.

The aim of the Hate Crime Statistics Act is to help lawmakers, law enforcement agencies, and community groups shape and focus their responses to hate crime by providing information on the extent of the problem, as well as identifying the frequency, location, and other patterns through continued data collection.

The Act aims to help law enforcement officers to better respond to instances of hate crime by heightening their awareness of, and sensitivity to, hate-motivated violence. Other benefits of the Act, on a general level, are to raise public awareness of hate crimes and send a message that the federal government is concerned about this type of crime.¹¹⁵ The most recent hate crime statistics released by the FBI’s Uniform Crime Reporting program revealed that, in 2016, law enforcement agencies

Victims’ Perceptions of Offender Bias in Hate Crimes

Percent of victims who said the crime was motivated by their...



Note: Estimates were based on 2-year rolling averages centered on the most recent year. Detail does not sum to total due to victims reporting more than one type of bias motivating the hate-related victimizations. Figures for sexual orientation in 2011 and perceived association in 2011 and 2012 should be interpreted with caution as they are based on 10 or fewer cases or the coefficient of variation is greater than 50%.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 2003-2012

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¹¹⁴ 12 Pub. L. No. 101-275, Apr. 23, 1990, 104 Stat. 140, as amended Pub. L. No. 103-322, § 320926, Sept. 13, 1994, 108 Stat. 2131 (inserting “disability”); Pub. L. No. 104-155, § 7, July 3, 1996, 110 Stat. 1394 (reauthorizing the Act). The Act directs the attorney general to use authority granted under 28 U.S.C. § 534 to acquire hate crime data.

¹¹⁵ In 2016, there are a total of 15,254 participating agencies covering 289,814,003 populations. Out of the 15,254, only 1,776 submitted incident reports. Agencies include universities and colleges, state police agencies, and/or other agencies to which no population is attributed. See *2016 Hate Crime Statistics*, FBI: UCR, <https://ucr.fbi.gov/hate-crime/2016/tables/table-12>.

reported 6,121 criminal incidents motivated by bias towards race, ethnicity, ancestry, religion sexual orientation, disability, gender or gender identity. Of the 6,121 criminal incidents reported, 57.5% were motivated by race, ethnicity or ancestry bias.¹¹⁶

The Pew Research indicates that from 2004 to 2012, the number of hate crimes motivated by ethnicity jumped from 22% to 51%.¹¹⁷ “In addition to the big jump in ethnicity as a motivation, the percentage of hate crimes where the perceived cause was religious bias nearly tripled – from 10% in 2004 to 28% in 2012.”^{118 119}

H. SENTENCING ENHANCEMENT PROVISIONS

1. 28 U.S.C. § 994: The Hate Crime Sentencing Enhancement Act

Prior to the Violent Crime Control and Law Enforcement Act of 1994, hate crimes were prosecuted by the federal government primarily as violations of civil rights statutes. Under the previous federal civil rights law, such as 18 U.S.C. § 241 or § 242, hate crimes were punished not simply on the basis of violent or intimidating acts, but as a deprivation of federal civil rights. Thus, in order to prosecute under federal law, the government had to identify a federally protected right that was violated or with which the defendant intended to interfere, or seek a sentencing enhancement for violation of another federal law.

In 1994, Congress passed the Hate Crime Sentencing Enhancement Act. This legislation serves as a federal complement to state hate crime penalty-enhancement statutes. The statute required the United States Sentencing Commission to increase the penalties for crimes in which the victim was attacked “because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.”¹²⁰ In 1995, the United States Sentencing Commission announced a three-level sentencing guideline increase for hate crimes. In 2007, the sentencing enhancement extended to those victims attacked due to gender, sexual orientation, gender identity or disability under the hate-crime designation, which currently applies to people who are attacked because of their race, religion, color or national origin.

¹¹⁶ *2016 Hate Crimes Statistics Released*, FBI (Nov. 13, 2017), <https://www.fbi.gov/news/stories/2016-hate-crime-statistics>.

¹¹⁷ *More Hate Crimes Motivated by Victims’ Ethnicity*, Pew Research Center (Feb. 21, 2014), <http://www.pewresearch.org/fact-tank/2014/02/21/more-hate-crimes-motivated-by-victims-ethnicity/>

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Violent Crime Control and Law Enforcement Act of 1994 § 280003(a), 28 U.S.C. § 994, Note (West, WESTLAW through P.L. 109-279).

III. Shortcomings in Federal Hate Crime Legislation

As described above, deficiencies in federal hate crime statutes can leave minority communities vulnerable, especially American Muslim communities. Without proper recourse for violent acts aimed at Muslims, members of these communities live in a world shadowed by apprehension and fear of potential hate crimes. Below are highlighted specific deficiencies in the law:

1. PROSECUTORIAL CERTIFICATION

With regard to hate crimes, federal authority to step in and prosecute is limited, and a high level of deference is given to states. In various statutes, such as sections 245, 247, and 249, prosecution can only be undertaken by the federal government with written certification of the attorney general, the deputy or associate attorney general, or a designee that it is in the public interest and necessary to secure substantial justice. This curtails the ability of the federal government to prosecute hate crimes in the first instance. This added layer of certification before prosecution could prolong the time before an offense is prosecuted, if it is at all.

2. SPECIFIC INTENT

There is a requirement under sections 241, 242, and 245 to show that the crime be committed with “specific intent,” *i.e.*, the defendant must have committed the act with the purpose of depriving the victim of the protected right. This requirement of proving “specific intent” imposes a high burden of demonstrating that the act was deliberate and willful. Take, for example, a hypothetical burglary statute that requires that in order for a defendant to be convicted of burglary, the government must show 1) a breaking and entering 2) which must be committed with the “intent to take valuables.” A vagrant with the intent to break into the house and smash valuables, while certainly having a bad purpose and culpable mind, does not have the specific intent to take valuables, and therefore, is not liable for burglary under the hypothetical statute. Because 241, 242, and 245 are specific intent crimes, it is not enough to show general bad purpose; this bad purpose has to be shown to be directed specifically against Muslim Americans. This places a higher burden on prosecutors, making the statutes an undesirable tool for prosecutors or, at best, makes cases more difficult to prosecute.

3. REPORTING AND DATA GATHERING

As stated in the beginning of this paper, accurate data is necessary to understand the shortcomings of hate crime laws and the interplay of the government entities that address them. Accurate data can allow for appropriate allocation of valuable resources, from government and nonprofits, to counter the problem. However, there are serious deficiencies in reporting hate crimes, both by victims and by government officials. Some of these deficiencies are more pronounced for victims of anti-Muslim hate crimes given that many such victims are reluctant to report hate crime victimizations, because of fear or distrust of government officials who view the community through a national security lens, and/or because of strained relationships with local police or federal agents.

It is instructive to compare the statistics on hate crime victimizations from FBI's Uniform Crime Reporting program to those of the Bureau of Justice Statistics. The Bureau's statistics show that between 2004 and 2015, an average of 250,000 hate crime victimizations each year were not reported to the police. The most common reason victims do not report to law enforcement is that victimization was handled another way (41%), such as privately or through a non-law enforcement official.¹²¹

There is a compound effect on accurate hate crime reporting since both federal agencies and local police departments fail to report these crimes. The FBI identified 120 federal agencies that do not upload hate crime statistics, as required by the Hate Crime Statistics Act. Additionally, there are over 2,700 city police and county sheriff departments that repeatedly fail to report hate crimes to the FBI.¹²² Local law enforcement often does not report hate crimes, either from lack of knowledge on how to report or lack of willingness to do so.¹²³ There are a number of jurisdictions that report 0 hate crimes, despite known occurrences of hateful attacks.¹²⁴ Some additional complications relate to how states define hate crimes. Definitions vary from state to state, which causes confusion and underreporting. Many local police officers, as well, do not realize that a crime need not be prosecuted as a hate crime in order to be counted in the database as such.

¹²¹ Hate Crime Victimization (June 2017)

https://www.bjs.gov/content/pub/pdf/hcv0415_sum.pdf

¹²² Christine Cassidy, *Patchy Reporting Undercuts National Hate Crimes Count*, AP (June 5, 2016)

<https://apnews.com/8247a1d2f76b4baea2a121186dedf768/ap-patchy-reporting-undercuts-national-hate-crimes-count>

¹²³ Masood Farivar, *Hate Crimes Rise, Still Under-Reported*, Voice of America English News (July 15, 2017), <https://learningenglish.voanews.com/a/an-increase-in-hate-crimes-and-complaints-about-reporting-methods/3943122.html>

¹²⁴ See Id.

IV. Conclusions

For American Muslims living in a climate of increasing anti-Muslim rhetoric, the perceived and real threats of hate violence is an everyday reality. When a hate crime occurs, there is a significant impact on not just the victim, but the entire community, engendering feelings of vulnerability and isolation. Effective enforcement of hate crimes laws can serve as a deterrent to future offenders. Despite the federal hate crimes statutes described above, a number of shortcomings and hurdles exist. To repair these gaps in the law, Congress should consider:

1. Mandating hate crime reporting from federal law enforcement agencies.
2. Conducting a comprehensive study on gaps in federal and state hate crime reporting tools.
3. Comprehensive training of law enforcement agencies on investigating and reporting of hate crimes.
4. Modifying the prosecutorial certification of the attorney general in hate crime statutes.
5. Conducting a study on “specific intent” requirements and impact on hate crime prosecutions.

MPAC is committed to working with Congressional members, advocacy organizations, victims, and public policy professionals to ensure that the federal hate crimes laws are effective, comprehensive and protect minority and marginalized communities throughout this country.



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