OVERVIEW OF BIAS MOTIVATED CRIMES AND INVESTIGATIVE STRATEGIES

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Thank you to Barbara Kay Bosserman, Senior Legal Counsel, Civil Rights Division for use of her materials
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18 U.S.C. 249 was enacted on October 28, 2009

Matthew Shepard was murdered for being gay. His killers set out to rob him and after learning he was gay, they kidnapped and tortured him and left him for dead on a ranch in Laramie, WY.

James Byrd Jr. was murdered for being black; his killers, three white supremacist, chained him to a pickup truck and dragged him to his death in east Texas.
The story of Matthew Shepard began on December 1, 1976 when he was born to Judy and Dennis Shepard in Casper, Wyoming. He went to public school in Casper until his junior year of high school when he moved with his family to Saudi Arabia. Matt had to finish his high school education at The American School in Switzerland because there were no American high schools in Saudi Arabia at the time. In both high schools, he was elected by his peers to be a peer counselor. He was easy to talk to, made friends easily and actively fought for the acceptance of all people.

Matt had a great passion for equality. His experiences abroad fueled his love for travel and gave him the chance to make many new friends from around the world. Matt's college career eventually took him back to Wyoming where he studied political science, foreign relations and languages at the University of Wyoming in Laramie.

The horrific events that took place shortly after midnight on October 7, 1998 would become one of the most notorious anti-gay hate crimes in American history and spawned an activist movement that, more than a decade later, would result in passage of the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, a federal law against bias crimes directed at lesbian, gay, bisexual or transgender people. Two men, Aaron McKinney and Russell Henderson, abducted Matt and drove him to a remote area east of Laramie, Wyoming. He was tied to a split-rail fence where the two men severely assaulted him with the butt of a pistol. He was beaten and left to die in the cold of the night. Almost 18 hours later, he was found by a bicyclist who initially mistook him for a scarecrow.

Matt died on October 12 at 12:53 a.m. at Poudre Valley Hospital in Fort Collins, Colorado with his family by his side. His memorial service was attended by friends and family from around the world and garnered immense media attention that brought Matt's story to the forefront of the fight against bigotry and hate. The life and death of Matthew Shepard changed the way we talk about, and deal with, hate in America. Since his death, Matt’s legacy has challenged and inspired millions of individuals to erase hate in all its forms. Although Matt's life was short, his story continues to have a great impact on young and old alike. His legacy lives on in thousands of people who actively fight to replace hate with understanding, compassion, and acceptance.
On June 7, 1998, Byrd, age 49, accepted a ride from Shawn Berry (age 24), Lawrence Russell Brewer (age 31) and John King (age 23). Berry, who was driving, was acquainted with Byrd from around town. Instead of taking Byrd home, the three men took Byrd to a remote county road out of town, beat him severely, urinated on him and chained him by his ankles to their pickup truck before dragging him for approximately 1.5 miles (2.4 km). Brewer later claimed that Byrd’s throat had been slashed by Berry before he was dragged. However, forensic evidence suggests that Byrd had been attempting to keep his head up while being dragged, and an autopsy suggested that Byrd was alive during much of the dragging. Byrd died after his right arm and head were severed when his body hit a culvert.[11] Byrd’s brain and skull were found intact, further suggesting he maintained consciousness while being dragged.[12]

Berry, Brewer and King dumped the mutilated remains of the body in front of an African-American church on Huff Creek Road, then drove off to a barbecue. Along the area where Byrd was dragged, police found a wrench with "Berry" written on it. They also found a lighter that was inscribed with "Possum", which was King's prison nickname.[13] The following morning, Byrd's limbs were found scattered across a seldom-used road. The police found 81 places that were littered with Byrd's remains. State law enforcement officials, along with Jasper’s District Attorney, determined that since Brewer and King were well-known white supremacists, the murder was a hate crime. They decided to call upon the Federal Bureau of Investigation less than 24 hours after the discovery of Byrd's remains.[citation needed]

King had several racist tattoos: a black man hanging from a tree, Nazi symbols, the words "Aryan Pride," and the patch for a gang of white supremacist inmates known as the Confederate Knights of America.[14] In a jailhouse letter to Brewer that was intercepted by jail officials, King expressed pride in the crime and said that he realized while committing the murder that he might have to die. "Regardless of the outcome of this, we have made history. Death before dishonor. Sieg Heil!" King wrote.[11] An officer investigating the case also testified that witnesses said that King had referenced The Turner Diaries after beating Byrd.[15]

Berry, Brewer and King were tried and convicted for Byrd’s murder. Brewer and King received the death penalty, while Berry was sentenced to life in prison. Brewer was executed by lethal injection on September 21, 2011[3] while King remains on Texas’ death row.[4][5][6]
http://www.matthewshepard.org/matt-shepard-is-a-friend-of-mine/
TWO SIGNIFICANT CHANGES:

- Covers more groups:
  - Sexual orientation and gender identity are covered for the first time
  - Disability and Gender covered—previously only covered in the Fair Housing Act
- There is no requirement that bias motivation be linked to a specific federal right
THREE SUBSECTIONS:

- VIOLENT CONDUCT BECAUSE OF
  - Racial Bias -249(a)(1)
    - 13th Amendment
  - Other non-racial bias- 249(a)(2)
    - Commerce Clause
  - Racial & non-racial bias on federal land- 249(a)(3)
    - Special Maritime and Territorial Jurisdiction
      - Not automatic because federal installation on federal land.
PROHIBITED ACTS:

- Conduct prohibited by the Shepard-Byrd Act:
  - Intentionally causing bodily injury
  - Attempting to cause bodily injury with a deadly weapon
    - Examples of deadly weapons:
      - Fire
      - Firearm
      - Explosive or incendiary Device
        - Dynamite/high explosives
        - Explosive bomb, grenade, missile, similar device
        - Incendiary bomb or grenade, fire bomb, or similar device.
      - Any other deadly weapon
        - Not defined by statute; construed broadly in sentencing context; instrument capable of inflicting death or serious bodily injury.
        - Examples: baseball bat, firewood, rake, rubber boots, dog, clothes iron, concrete curbs, leather straps, etc.
FIRST SUBSECTION; RACIAL CRIMES:

- Committing violent conduct BECAUSE OF:
  - Actual or perceived
    - Race
    - Color
    - Religion
      - If considered a race at time 13th Amendment enacted: i.e. Judaism yes; Baptists no
    - National Origin
      - If considered a race at time 13th Amendment enacted: i.e. Arabs
  - No need to prove any other element
    - Why? Jurisdiction based upon 13th Amendment
SECOND SUBSECTION; NON-RACIAL CRIMES:

- Committing violent conduct because of:
  - Actual or perceived
    - National origin
    - Religion
    - Disability
    - Sexual orientation
    - Gender
    - Gender Identity
  - In or affecting interstate/Foreign Commerce.
THIRD SUBSECTION- HATE CRIMES ON FEDERAL LAND:

- Committing violent conduct BECAUSE OF:
  - Actual or perceived
    - Race
    - Color
    - National Origin
    - Religion
    - Disability
    - Sexual Orientation
    - Gender
    - Gender Identity
  - If committed in Special Maritime and Territorial Jurisdiction.
    - United States v. Davis 726 F.3d 357-67 (2d Cir. 2013)
      - One cannot assume that a federal installation on federal land “automatically comes within Federal jurisdiction.”
BODILY INJURY

Definition: a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body.

Bodily injury does not include solely emotional or psychological harm to the victim; statute requires some physical manifestation of the injury.
PROVING INTERSTATE COMMERCE

- Weapon manufactured outside of Kentucky or traveled in interstate commerce.
- Conduct occurring during or as the result of travel of defendant or victim across state lines.
- Defendant using a channel, facility, or instrumentality of interstate commerce in connection of conduct.
  - Train, interstate highway etc.
- Conduct interfering with commercial or other economic activity in which the victim was engaged at time of conduct.
- Crime closed down a business.
- Conduct otherwise affecting interstate or foreign commerce.
MOTIVE

- We must now prove “But-For” causation

- Much more difficult standard than “substantial motivating factor” or “significant motivating factor”
WHY IS THIS A PROBLEM?

- Most cases involve a mixed motive
- United States District Court Judge in *Mullet/Miller* stated during case “no one ever has only one motive for doing something”.
UNITED STATES V. MILLER
CONT’D

- Key issue at trial was whether the defendants committed the assaults “because of” the religion of the victims
- The district court rejected the defendants’ proposed instruction (that the faith of the victims must be a “but for” cause of the assaults) and adopted the government’s proposed instruction (that the faith of the victims must be a “significant factor” in the assaults).
- Court reversed and held statutes using the term “because of” require showing of ‘but for’ causality.”
- Makes it very difficult in cases where evidence of other motive presented.
HOW DID STANDARD CHANGE?

  - Drug overdose case involving meaning of “resulting in”
  - Analogized to “because of” in civil Title VII employment cases where plaintiff must prove discriminatory motive.
  - Held “because of” requires proof that discriminatory action would not have occurred “but for” the prohibited motive.
EXAMPLES CASES ADVERSELY AFFECTED:

- **Mullet/Miller**— “because of religion” 249
  - Method of attach *(violent beard and hair shearings)* was clearly religious
  - Lead defendant admitted attacks were “all about “religion” and “religious degradings”.
  - 6th Circuit refused to hold that use of “substantial motivating factor” motive standard was harmless error.
ANOTHER EXAMPLE:

- Pink poodle case: (9th Circuit)
  - Defendant attacked a gay couple walking a pink-dyed poodle with a metal tool while screaming anti-gay slurs.
  - 404(b) evidence of other anti-gay sentiments displayed by the defendant.
  - Hung jury in large part due to jury could not agree beyond reasonable doubt that the defendant would not have assaulted the victim had the victim had not been gay.
HOW DO WE MOVE FORWARD?

- Read majority opinion and dissent in *United States v. Miller*, 767 F.3d 585 (6th Cir. 2014)
- Focus Court on incident at hand and away from hypotheticals
- Use grand jury investigation to explore all other possible motives.
- Look closely at means of attack; did defendant do something to victim that would not make sense had it not been for victim’s race, religion, sexual orientation?
RECENT EDKY FEDERAL CASE:

- United States v. Smith (EDKY Southern Division of London) 2015 WL 4458891
- Defendant guilty of distributing oxycodone resulting in death of another.
- But-for causation does not require the government to prove that use of the distributed oxycodone alone would have caused the death of another. Rather, if the predicate act combines with other factors to produce the result, [the predicate act is the but-for cause] so long as the other factors alone would have not done so-if so to speak it was the straw that broke the camel’s back.
  - Oxycodone only substance no at therapeutic range
  - Defense argued could not be but-fore bcs death certificate listed cause of death as combined drug overdose.
As long as government demonstrates that the defendant committed the prohibited act in part because of the victim’s or someone else’s protected characteristics, the presence of other motives, such as personal dislike, anger, ongoing feud, will not make conduct any less a violation of 18 U.S.C. 249.

Very difficult in light of Burrage “but for” standard.
OTHER LEGAL ISSUES:

- Mistake of fact not a defense
  - If defendant intentionally punches victim because he perceives victim to be African-American, subject may be prosecuted even if victim is Caucasian
  - Prosecution appropriate if crime is committed because characteristics of any person
    - For example, if skinhead assaults white man for marrying woman of color, crime is prosecutable even though crime not motivated by race of person assaulted.
OTHER LEGAL ISSUES

- No need to prove animus as long as you can prove that the defendant committed the crime because of race, color, etc.
- Historically many prosecutors have shown racial motivation against people who targeted Latinos for thefts because the defendant assumed the victims were undocumented, would have cash in pockets on payday, and would not report thefts to police.
- Practice tip; be sure if suspects agree to interview you attempt to get them to admit they targeted victims based on race, religion, etc.
PENALTIES

- Maximum term of imprisonment 10 years.
- If death results, or if the defendant’s actions include kidnapping or sexual abuse, or attempted kidnapping, aggravated sexual abuse, or murder, the offense is punishable by any term of years up to life.
- Statute of limitations is 7 years unless death results and then no statute of limitations.
CRIMINAL FAIR HOUSING ACT

- 42 U.S.C. 3631
- Elements
  - The Defendant used force or
  - Threatened to use force
  - To willfully injure, intimidate or interfere with the victims (or attempting to do so)
  - Because of the victims’
    - Race, Color Religion, Gender, Handicap, Familial Status, or National Origin, AND
    - Because of an enumerated housing right
HOUSING RIGHTS

Statute Covers

- Selling, Renting, Purchasing, Financing, Occupying a dwelling
- Contracting/negotiating to do so
- Helping others to do so
- Associating with persons of another race in dwelling (created by case law)
PENALTIES FOR VIOLATION OF 42 U.S.C. § 3631:

- Same as 18 USC § 245 other than there is no potential death sentence for a violation of 42 USC § 3631 even if a violation of the statute results in the death of the victim.
- Statute of limitations is 5 years.
18 U.S.C. § 245

- Using force or
- Using a threat of force
- To willfully injure, intimidate or interfere with a person
- Because of that person’s race, color, religion, or national origin AND
- Because the person is or has been engaged in one of the following protected activities....
LIST OF PROTECTED ACTIVITIES:

- Enrolling in or attending public school/college
- Enjoying benefit, service, privilege, program, facility or activity provided by state/subdivision
- Enjoying benefit of employment/labor
- Serving as a grand or petit juror
- Traveling in or using any facility of interstate commerce
- Enjoying Public Accommodations
PENALTIES

- Maximum of ten years in prison if “bodily injury” results or if the acts committed in violation of statute include use, attempted use or threatened use of a dangerous weapon, explosives or fire.
- If the acts resulted in death, 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,” the defendant is subject to any term of years up to life or may be sentenced to death.
- In all other circumstances, the offense is a misdemeanor punishable by a maximum of one year in prison.
- Statute of limitations is 5 years unless death eligible and than no statute of limitations.
18 U.S.C. § 247: DAMAGE TO RELIGIOUS PROPERTY

- Acting intentionally,
  - The defendant defaced, damaged, or destroyed religious real property, and
  - The defendant acted either
    - Because of religious character of property and in interstate/foreign commerce OR
    - Because of the race, color, or ethnic characteristics of someone associated with property (No ICC)
18 U.S.C. § 247: OBSTRUCTION OF FREE EXERCISE

- Acting intentionally
- The defendant obstructed, by force or threat of force,
- a person’s enjoyment of their free exercise of religious beliefs
- The defendant's conduct was in or affected interstate or foreign commerce
INTERSTATE COMMERCE?

If *race-based* bias, there is no need to prove Interstate Commerce.

If non-racial bias, we need to prove link to ICC.
PENALTIES FOR VIOLATION OF
18 U.S.C. § 247

- Not more than 20 years imprisonment if violation results in bodily injury or includes the use or attempted use or threatened use of a dangerous weapon, explosives or fire.
- If bodily injury results and the violation is by means of fire or an explosive not more than 40 years imprisonment.
- If death or other aggravating circumstances included in 18 U.S.C. § 245, any term of years up to life.
- In all other cases a violation is a misdemeanor.
- Statute of limitations is 7 years unless death results and then no statute of limitations.

- Always a felony
- No overt act required
- Conspiracy must be to violate Civil Laws or Constitution (Not criminal statute)
- Purpose of agreement was to injure, oppress, threaten, intimidate a person in the free exercise or enjoyment of a right guaranteed by the constitution or federal law.
EXAMPLES

- Civil Fair Housing
- Right to Public Accommodations
- Travel in Interstate Commerce
- Vote
PROVING MOTIVE:

- Usually Motive is a significant issue in bias motivated crimes.
- Not over when you figure out who did the crime; just the beginning.
DEVELOPING MOTIVE:

- We talk to eye-witnesses and to the victims
- What did suspects say?
- What were they wearing?
- What seemed to set off the attack?
DEVELOPING MOTIVE:

- Examine the suspects Tattoos? Evidence of Racial clothing (neo Nazi or Klan attire)?
- In possession of intolerant or bigoted books, pamphlets, music, etc.? 
- History of admissions to others of being member of hate groups?
MOTIVE:

- We talk to friends and associates of the accused.
- Did they brag about it? With slurs?
- Do they generally express bias towards people like the victim?
MOTIVE:

- Search warrants- If we have probable cause, we search suspect’s homes and computers.
- Facebook and other social networking accounts
- Do they have racist literature, pamphlets, emails?
FIRST AMENDMENT DOES NOT PROTECT VIOLENT ACTS AND TRUE THREATS

- A “true threat” is a **serious communication** of an intent to commit an **act** of unlawful violence against a particular individual or group of individuals.
- It does not include jokes, or inelegant expressions of anger, or political hyperbole.
Factors courts have considered to determine whether a “true threat” was made include the following: (1) the reaction of those who heard the threat, (2) whether the threat was conditional, (3) whether the threat was communicated directly to its victim, (4) the history of the relationship between the defendant and the victim, and (5) the context in which the threat was made.

It is clear that the government need not prove that the defendant had the intent or ability to carry out a true threat. See Black, 503 U.S. at 359-60 (“The speaker need not actually intend to carry out the threat.”); United States v. Wheeler, 776 F.3d 736, 746 (10th Cir. 2015) (evidence not insufficient merely because the defendant had no followers to carry out threat to commit massacre at preschool); United States v. Ream, 506 F. App’x 842, 845 (10th Cir. 2013) (rejecting defendant’s argument that his statement was not a “True threat” because he “had no real intent or means to injure and had no physical contact with anyone.”); United States v. Stefanik, 674 F.3d 71, 75-76 (1st Cir. 2012) (“Even assuming, . . . that he did not intend to carry out the threat, and only made it in a misguided attempt to get information . . ., the statute only requires that the speaker knowingly communicates the threat . . . “).
The defendant in Elonis v. United States, 135 S.Ct. 2001 (2015), was convicted of violating 18 U.S.C. § 875(c). The jury was instructed that a "statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual." This was error, because it permitted conviction on a negligence standard. The Court noted, but did not decide, the issue of whether a recklessness standard would suffice. See also United States v. Houston, 2015 WL 4114604 (6th Cir. Jul. 09, 2015) (plain error); Elonis v. United States
In general, prosecutors should prove the intent element of Section 875(c) by showing that the defendant transmitted the communication "for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." Elonis, 135 S.Ct. at 2012.

Prosecutors may, in their discretion, pursue a theory of recklessness, i.e., proof that the defendant consciously disregarded a substantial and unjustifiable risk that his or her communication would be viewed as a threat. Prosecutors should recognize, however, that a recklessness theory carries significant litigation risk.

Prosecutors should argue that the reasonable-person standard, which asks whether a reasonable person would have understood the communication as a serious expression of an intention to do harm, remains relevant to support inferences about the defendant's subjective intent.
EXAMPLES OF TRUE THREATS

- **United States v. Vartanian, 245 F.3d 609 (6th Cir. 2001)**
  - Realtors showed home to African-American family. Afterwards, a white neighbor threatened the realtors, saying he could run check on their car and would by a house near them and rent it to blacks and that their neighbors would probably cut them up “into little pieces and bury them in back yard.”
  - Sufficient evidence even though African American buyers not threatened; words could have intended effect to intimidate buyers even though not spoken directly to them.

- **United States v. Cox, 957 F.2d 264 (6th Cir. 1992)**
  - D bank customer whose truck repossessed; D told bank ee “I tell you what, you all better have my personal items to me by 5 o’clock today or its going to be a lot of hurt people there”; when another ee called D, D was belligerent and threatened to kill caller and go to bank “to kill people there, stating only a bullet could stop him.”
  - Statement that D would hurt “people” sufficient; how could threat be perceived by victim; not state of mind of threatener.
EXAMPLES NO TRUE THREAT

- United States v. Houston, 792 F.3d 663 (6th Cir. 2015)
  - 18 U.S.C. 875(c); transmitting threats in interstate commerce
  - D’s father took out a deed of trust on his property to pay for D’s legal representation; D charged with murder; failed to pay attorney fees and attorney filed to foreclose on property; D learned of foreclosure while in prison and said in call with girlfriend “the only thing the atty is gonna get from me is a fucking bullet” also told family members to “kill SOB”; tried and convicted.
  - Insufficient bcs jury not instructed consistent with Elonis that it must find D subjectively intended to threaten attorney
OTHER INVESTIGATIVE STEPS:

- Obtain prior arrests and police contacts
- Talk with estranged family members
- Jail calls
- Trash pulls
- Prior acts of violence
- History between the subject(s) and the victim
- History of the victim
- Mixed Motive?
  - Property dispute and race
  - Drugs and sexual orientation
  - These are more difficult cases
CONTACT INFORMATION

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- **Civil Rights Division-** oversee all prosecutions involving 18 U.S.C. 249 and other Civil Rights Violations that are bias motivated
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QUESTIONS?????