

Overview of Recent Anti-Lynching Proposals

June 29, 2020

Following the death of George Floyd in [police custody](#) in May and the fatal [February shooting](#) of Ahmaud Arbery, interest has heightened in legislation that would criminalize lynching—often described as death or [bodily injury](#) caused by two or more individuals acting [without](#) legal authority. A number of [states](#) have enacted anti-lynching laws, as localized crimes like [murder](#) tend to be a subject of state, [rather](#) than [federal](#) law. Although the conduct criminalized under those state laws can implicate various federal laws, there is [no federal law](#) expressly governing lynching notwithstanding [decades](#) of [legislative proposals](#) on that front. In June, [Members](#) introduced two police reform bills—the [George Floyd Justice in Policing Act of 2020](#) (Justice in Policing Act) and the [Just and Unifying Solutions To Invigorate Communities Everywhere Act of 2020](#) (JUSTICE Act)—both of which include “substantively [identical](#)” sections that are described as anti-lynching provisions.

These sections build on earlier legislation from this and other Congresses. Indeed, the anti-lynching provisions contained in the JUSTICE Act and the Justice in Policing Act are largely [identical](#) to the proscribed conduct in two bills that had already gained significant [traction](#) in the 116th Congress. One, the Justice for Victims of Lynching Act of 2019 (H.R. 3536, S. 488), [passed](#) the Senate on February 14, 2019. A [nearly identical](#) anti-lynching bill titled the Emmett Till Anti-Lynching Act (H.R. 35) [passed](#) the House on February 26, 2020. Similar attempts to enact federal anti-lynching laws did not achieve bicameral [approval](#) in the 115th Congress—a fate for approximately [200](#) anti-lynching proposals in the last century. For example, in 1918 Representative Leonidas Dyer of Missouri [introduced](#) an anti-lynching bill to remedy the refusal of states to prosecute “the perpetrators of . . . lynchings” under their own laws. Although Dyer’s bill [eventually](#) “passed the House of Representatives in 1922 . . . it was ultimately blocked by filibuster in the Senate.”

[Title IV](#) of the Justice in Policing Act and [Title IV](#) of the JUSTICE Act would each “[create](#) a new section of the federal criminal code entitled ‘Lynching.’” Both bills [would make it](#) a federal crime to “conspire[] with another person to violate” one of the following four federal [hate crimes statutes](#):

- [18 U.S.C. § 245](#), which, among other things, prohibits interference with an individual’s participation in certain protected activity because of race, color, religion, or national origin;
- [18 U.S.C. § 247](#), which prohibits conduct including certain destruction of religious real property because of the religious character of the property, or because of the race, color, or ethnic characteristics of the people associated with that property;

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- [18 U.S.C. § 249](#), which, among other things, prohibits causing bodily injury to another because of that person’s actual or perceived race, color, religion, or national origin, or because of that person’s actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability where there is a sufficient interstate nexus;
- [42 U.S.C. § 3631](#), which, among other things, prohibits interference through threatened or actual force with housing rights because of race, color, religion, sex, handicap, familial status, or national origin.

Proponents of the legislation point to both its [substantive](#) and [symbolic](#) effects. Conspiring to violate the statutes listed above is already a crime under [18 U.S.C. § 371](#), a federal statute that broadly prohibits conspiracies to “commit any offense against the United States” when at least one person “do[es] any act to effect the object of the conspiracy” Ordinarily, to prove a § 371 conspiracy the government must demonstrate “(1) [an agreement](#) between two or more persons to pursue an unlawful objective; (2) the defendant’s knowledge of the unlawful objective and voluntary agreement to join the conspiracy; and (3) an overt act by one or more of the members of the conspiracy in furtherance of the objective of the conspiracy.” Federal [prosecutors](#) have used § 371 to prosecute hate crime conspiracies. A key distinction between § 371 and the anti-lynching provisions in the [Justice in Policing Act](#) and the [JUSTICE Act](#), however, is that the anti-lynching proposals would increase the maximum applicable prison term from [five](#) years under § 371 to ten years—or longer when authorized by the underlying statute. Moreover, the findings of the Justice in Policing Act and the JUSTICE Act note the symbolic value of creating a distinct anti-lynching statute that “[recognizes](#) the [history](#) of lynching in the United States” and thereby facilitates “reconciliation and . . . a [new understanding](#), on which improved racial relations can be forged.”

One criticism of the legislation has been that it could impose significant penalties for relatively minor offenses. Earlier this month, Senate consideration of a stand-alone House-passed anti-lynching proposal [stalled](#) following [objection](#) by Senator Rand Paul of Kentucky, who expressed concern that the bill would impose up to ten years of imprisonment for “any bodily injury, including a cut, an abrasion, or a bruise, physical pain, illness, or any other injury to the body no matter how temporary.” And, in fact, many of the hate crimes laws above cover [non-violent actions](#), and hate crimes conspiracies may be [established](#) with a showing of just an agreement, intent, and an overt act. However, conspiracies to violate hate crimes statutes are already subject to a five year penalty under an existing federal statute. In addition, the scope of the anti-lynching proposals contained in H.R. 35, S. 488, the JUSTICE Act, and the Justice in Policing Act depends in part on the underlying hate crimes statutes—which apply [to](#) offenses motivated by a specific bias when there is sufficient federal jurisdiction. Practically speaking, the scope of the hate crimes statutes is also limited by [prosecutorial discretion](#), which involves a “policy judgment” regarding whether “the fundamental interests of society require the application of federal criminal law to a particular set of circumstances.” In certain instances federal prosecutors have pursued hate crimes prosecutions of [shootings](#), [arsons](#), [assaults](#), and [murders](#) committed because of racial, religious, and other biases. Nevertheless, [states](#) “generally prosecute most hate crimes.”

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