

The Hangman's Noose and the Lynch Mob: Hate Speech and the Jena Six

*Jeannine Bell**

I. INTRODUCTION

The controversy in Jena, Louisiana began innocently enough. On August 30, 2006, administrators at Jena High School held an assembly to discuss rules and policies for the upcoming year. According to reports, at the end of the assembly one Black student asked the assistant principal whether Black students were allowed to sit under the tree in the center of campus.¹ In a description of the events, a reporter from *The Jena Times* noted that the question was asked in a joking manner and that all students, both Black and White, recognized the question as a joke and laughed.² The vice principal told them that they could sit where they want.³ The next day, nooses were found hanging from a tree in the center of the high school's campus.⁴

The nooses hung in the high school yard in Jena did not go unacknowledged by the Black high school students. On September 1, the day after the nooses appeared, a group of Black high school athletes held a silent protest by sitting under the tree where the nooses had been hung.⁵ Meanwhile, the

* Professor of Law, Maurer School of Law, Indiana University Bloomington. A.B. Harvard College, 1991; J.D. University of Michigan Law School, 1999; Ph.D. (Political Science), University of Michigan, 2000. Many thanks to Carol Stelker and to Andrew Taslitz for their comments, especially to "Taz" for organizing this Symposium. I would also like to thank Aviva Orenstein, Christy Ochoa, Leandra Lederman, Ajay Mehrotra, Kevin Collins, David Williams, Susan Williams, Don Gjerdingen, Kevin Brown, Carolyn Shapiro, Valerie Hans, Steven Heyman, Richard Wright, Steve Shriffrin, and Kathy Baker for insights on drafts of this paper. Special thanks as well to the participants at Emory Law School, U.C. Davis Law School, the University of Wisconsin Law School, Cornell Law School, and Chicago Kent College of Law faculty workshops where I presented a draft of this work. I am grateful to Brittany Francis, Shannon Mason, Mallory McClure, and Julie Miller for research assistance. Grateful thanks to Rita Eacls for secretarial assistance. Many thanks to the editors at the *Harvard Civil Rights–Civil Liberties Law Review* for editorial assistance.

¹ Susan Roesgen & Elliott C. McLaughlin, *Residents: Nooses Spark School Violence, Divide Town*, CNN.COM, Sept. 5, 2007, <http://www.cnn.com/2007/US/law/09/04/bell.jena.six/index.html>.

² Craig Franklin, *Media Myths About the Jena 6: A Local Journalist Tells the Story You Haven't Heard*, CHRISTIAN SCI. MONITOR, Oct. 24, 2007, at 2, available at <http://www.csmonitor.com/2007/1024/p09s01-coop.html>.

³ Roesgen & McLaughlin, *supra* note 1; Pierre Tristam, *Lynching for Want of Seat in the Shade*, DAYTONA BEACH NEWS-J., Aug. 28, 2007, at 5A.

⁴ Some dispute exists regarding whether this was, as widely reported, a "white tree." Compare Tristam, *supra* note 3 (claiming the shade provided by the tree on the Jena High School campus belonged only to White students), with Franklin, *supra* note 2 (insisting that students of all races sat beneath the tree).

⁵ *All Things Considered: Beating Charges Split La. Town Along Racial Lines* (NPR radio broadcast July 30, 2007), available at <http://www.npr.org/templates/story/story.php?storyid=12353776> [hereinafter *All Things Considered*].

three White students who had hung the nooses were identified. A school committee gave the students the following punishment: nine days at an alternative facility, followed by two weeks of in-school suspension, a number of Saturday detentions, as well as attendance at discipline court.⁶ Finally, the committee mandated that the White students undergo psychological evaluations.⁷ The school committee investigating the incident ruled that there was no racial motivation behind the placing of the nooses.⁸

This decision highlights one of the key tensions concerning hate speech—whether the perpetrator’s intent should play a role in determining whether a particular slur or epithet constitutes hate speech. Related to this issue is whether the act of hanging a noose *per se* constitutes hate speech. Whether a noose is hate speech may depend, at least in part, on whom you ask.

Consider the following two statements regarding the meaning of nooses. The first selection is from the Petitioner’s Brief in *R.A.V. v. St. Paul*:

[W]e ask the Court to reflect on the ‘content’ of the ‘expressive conduct’ represented by a ‘burning cross.’ It is no less than the first step in an act of racial violence. It was and unfortunately still is the equivalent of [the] waving of a knife before the thrust, the pointing of a gun before it is fired, the lighting of the match before the arson, the hanging of the noose before the lynching. It is not a political statement, or even a cowardly statement of hatred. It is the first step in an act of assault.⁹

The petitioner, the City of St. Paul, Minnesota, was defending *R.A.V.*’s conviction for a cross burning under the St. Paul bias motive ordinance. In so doing, the City argued that the use of the hangman’s noose is indisputably a sign of hatred.

Now consider the following statement made by child welfare supervisor Melinda Edwards to characterize a conversation she had with the White teenagers who hung nooses in Jena: “We discussed this in great detail with those students . . . They honestly had no knowledge of the history concerning nooses and [B]lack citizens.”¹⁰ The differing approaches represented in these two statements suggest that people do not necessarily interpret the hanging of a noose uniformly.

⁶ This was the punishment reported by a Jena reporter and husband of a Jena High teacher in Franklin, *supra* note 2.

⁷ *Id.*

⁸ *Id.*

⁹ Brief for Petitioner, Appendix C, *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (No. 90-7675), 1991 WL 11003958.

¹⁰ Craig Franklin, *DA/School Officials Grant Exclusive Interviews*, JENA TIMES, Oct. 3, 2007, http://www.amren.com/mtnews/archives/2007/10/daschool_offici.php (LPSB Child Welfare Supervisor Melinda Edwards, describing conversation with students who hung the nooses at their high school in Jena, Louisiana on August 31, 2006).

This Article will address issues of hate speech raised by symbols like the nooses hung from a tree at the high school in Jena. Part II of the Article will contextualize the placement of nooses by describing both the historical roots of the noose and contemporary situations in which individuals displayed nooses in the workplace or elsewhere. Part III will explore the possible social meanings that the noose holds by contrasting the views of perpetrators and the experiences of victims. Part IV will evaluate existing legal responses to noose hanging and suggest new alternatives. The Article concludes in Part V, which advocates a victim-based approach to civil and criminal regulation of noose hanging in light of First Amendment doctrine.

II. CONTEXTUALIZING THE NOOSE

A. *Historical Roots*

The hangman's noose has historical roots in the practice of lynching—the vicious mob execution of an individual.¹¹ Though lynching existed in this country at least as early as the American Revolution, the practice has become associated with its use to control Black people throughout the southern and border states from Reconstruction to the mid-twentieth century:¹² “Lynching was employed to maintain dominance whenever it suited [W]hites to reaffirm their mastery or [B]lacks challenged or seemed about to test the contours of their subordination.”¹³ Lynch mobs classically involved “hundreds of men, women, and children in ritualized murder, sometimes advertised and advanced to the public media.”¹⁴ Records show that 4,743 people were lynched between 1882, the year of the earliest recorded lynching, and 1968.¹⁵ Most of these victims—over 70%—were Black.

The close association between the hangman's noose and lynching is best explained by the social construction of lynching that has developed. Neither

¹¹ See JESSIE DANIEL AMES, *THE CHANGING CHARACTER OF LYNCHING* 22 (1942); ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950*, at 3 (1980). Congressional anti-lynching legislation proposed in the 1930s defined lynching as:

Any assemblage of three or more persons which shall exercise or attempt to exercise by physical violence and without authority of law any power of correction or punishment over any citizen or citizens or other person or persons in the custody of any peace officer or suspected of, charged with, or convicted of the commission of any offense, with the purpose or consequence of preventing the apprehension or trial or punishment by law of such citizen or citizens, person or persons, shall constitute a “mob” within the meaning of this act. Any such violence by a mob which results in the death or maiming of the victim or victims thereof shall constitute “lynching” within the meaning of this Act.

AMES, *supra*, at 22 (citation omitted).

¹² ZANGRANDO, *supra* note 11, at 3.

¹³ *Id.* at 9.

¹⁴ *Id.* at 4.

¹⁵ *Id.* As Zangrando notes, these numbers do not capture all the individuals who were lynched, as they only represent *recorded* lynchings.

historians' writings nor contemporary understandings of lynching account for this connection. The word "lynching" and the statistics gathered on the practice thereof identify the term to mean murder that might be committed in a variety of ways—shooting, flogging, drowning, and, of course, hanging. One author, writing for the Association of Southern Women for the Prevention of Lynching in the 1940s, examined accounts of lynching in the southern press and acknowledged: "The basis of the attacks lies in the interpretation of what constitutes a lynching. The public mind throughout fifty years has been shaped to accept certain conditions as characteristics of lynching—a huge mob of maddened citizens . . . execution with a rope and a faggot."¹⁶

Public association of the rope and the noose with lynching most likely had to do with the activities of the Ku Klux Klan ("Klan" or "KKK"), a White supremacist organization first organized in 1865 in Pulaski, Tennessee.¹⁷ The organization, which continues in some form today, was at its strongest in the mid-1920s. At that time, the organization was dedicated to using cross burnings, lynchings, and other forms of violent harassment to diminish, if not eliminate, the presence of Blacks and others it considered to be threats to White Protestant Americanism.¹⁸ The noose became indelibly linked to the image of Klan terror. Even as late as the 1960s, the hangman's noose was a symbol of the Klan and racial violence: "The popular perception of the Klansman is the image of the southern racial terrorist, the midnight raider with the lash or club in hand and the hangman's noose or shotgun within easy reach . . ."¹⁹ The image of the Klan was so tied to the noose that experts were able to identify KKK "signature" knots. Describing the events leading up to the 1981 Klan hanging of Michael Donald in Mobile, Alabama, Morris Dees notes, "Knowles tied a hangman's noose in the rope. There were 13 loops in the knot—*standard* Klan operating procedure."²⁰

The violence and terror wrought by lynching by the Klan and others achieved its intended psychological effect, inflicting terror on the entirety of the community in which the lynching took place.²¹ Lynching occurred sometimes randomly, without explanation, or for the most trivial of reasons.²² Other times, lynch mobs were formed to commit acts of vigilante

¹⁶ AMES, *supra* note 11, at 17.

¹⁷ Historians indicate that what we call the Ku Klux Klan has had three separate incarnations. The Reconstruction-era Klan began in 1865, the second began in the 1920s after World War I, and the third began after World War II. See Michael Lewis & Jacqueline Serbu, *Kommemorating the Ku Klux Klan*, 40 Soc. Q. 139, 139 (1999).

¹⁸ *Id.* at 141-42.

¹⁹ *Id.* at 148 (citation omitted).

²⁰ MORRIS DEES WITH STEVE FIFFER, *A SEASON FOR JUSTICE: THE LIFE AND TIMES OF CIVIL RIGHTS LAWYER MORRIS DEES* 212 (1991) (emphasis added).

²¹ See WALTER WHITE, *ROPE AND FAGGOT* 152-70 (1969).

²² LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* 290 (1998).

justice, executing Blacks without ascertaining their guilt.²³ Lynching functioned as a terroristic act aimed at the entire Black community and "southern [B]lacks lived with the knowledge that any one of them could be a victim at any time."²⁴

B. Contemporary Manifestations of the Noose

Although it received significantly more attention than most such incidents, the appearance of the nooses in Jena was not a singular event. More than twenty years have passed since the last Klan lynching,²⁵ but the legacy and menace of the noose lingers. The prevalence of noose hanging in the workplace and the rash of copycat incidents following that in Jena highlight the strength the symbol retains in our society.

i. When Nooses Appear in the Workplace

In 2000, a reporter interviewed officials at the Federal Equal Employment Opportunity Commission ("EEOC") about the agency's handling of dozens of allegations of workplace discrimination cases involving nooses from around the country. At that time, noose-related lawsuits represented a high number of EEOC racial harassment cases.²⁶ Employment lawyers who worked in the private sector had also noticed an increase in noose incidents in both small and large companies.²⁷ Asked about the increase in EEOC court filings, the chairwoman of the agency, Ida L. Castro, attributed it to increasing defensiveness on the part of employers, some of whom treated such incidents "almost flippantly."²⁸ "What I see as alarming is not just that employers are now fighting us in courts," Castro continued, "but that they're also making statements implying that such incidents are just horseplay."²⁹

A survey of recent employment discrimination cases reveals that White workers have hung nooses in their own personal workplaces for Black workers to see,³⁰ left nooses or pictures of nooses in Black workers' workstations,³¹ and placed nooses in common areas.³² With respect to cases in which

²³ *Id.*

²⁴ Lu-in Wang, *The Complexities of "Hate,"* 60 OHIO ST. L.J. 799, 836 (1999).

²⁵ The last lynching attributed to the Ku Klux Klan was the March 1981 abduction and murder of Michael Donald in Mobile, Alabama. See DEES, *supra* note 20, at 211-13 (description of events surrounding Donald's death).

²⁶ Sana Siwolop, *Noose, Symbols of Race Hatred, at Center of Workplace Suits*, N.Y. TIMES, July 10, 2000, at A1. EEOC cases represent only a small fraction of the employment cases filed privately each year. *Id.*

²⁷ *Id.*

²⁸ *Id.* (quoting Ida L. Castro, chairwoman of the EEOC).

²⁹ *Id.*

³⁰ See, e.g., *Williams v. N.Y. City Hous. Auth.*, 154 F. Supp. 2d 820, 821 (S.D.N.Y. 2001) (noose hanging on wall of supervisor's office when Black plaintiff entered).

³¹ See, e.g., *Vance v. S. Bell & Tel. Co.*, 863 F.2d 1503, 1506 (11th Cir. 1989) (two nooses hung by employee's workstation); *Henderson v. Int'l Union*, 263 F. Supp. 2d 1245, 1250 (D. Kan. 2003) (tubing in the shape of a noose found near an African American's workstation).

lawsuits are eventually brought, many of the nooses appear in blue collar workplaces—among service workers,³³ in warehouses,³⁴ and within construction³⁵ and trucking³⁶ companies. Often, the noose is just one of a series of allegedly racially charged incidents occurring in a workplace.³⁷ In some cases, those placing the noose make explicit the connection between their own actions and the noose’s racist legacy. For instance, in *EEOC v. Crowder Construction*, a White supervisor displayed a noose to a Black worker explaining, “You know noose, how we used to hang you people back in the day.”³⁸ In another recent case, *Jackson v. T & N Van Service*,³⁹ White employees made clear in an even more graphic way the connection between their own actions and the noose’s racist legacy. A Black employee of T & N Van Service was subjected to a “mock lynching” when a White coworker forced the loop of a hangman’s noose’s over his head and shouted to two White coworkers watching, “[S]kin him!”⁴⁰

ii. *Jena and Copycat Nooses*

Publicity regarding the hanging of nooses in Jena spurred not only introspection and outrage, but also numerous copycat noose hangings in locations around the United States. Press attention, focused on the noose hanging as well as the events that followed in Jena, led to a huge civil rights rally where tens of thousands protested the prosecution of six Black Jena High students accused of beating a White teenager. In the two months after

³² See, e.g., *Allen v. Mich. Dep’t of Corr.*, 165 F.3d 405, 408 (6th Cir. 1999) (picture of a stick figure hung at the end of a noose); *Little v. Nat’l Broad. Corp.*, 210 F. Supp. 2d 330, 355, 359 (S.D.N.Y. 2002) (noose hanging on the wall in studio with African American coworker’s name taped to it); *Carson v. Giant Food, Inc.*, 187 F. Supp. 2d 462, 474 (D. Md. 2002) (multiple nooses displayed in warehouse where plaintiff worked).

³³ See, e.g., *Henderson v. OS Rest. Serv.*, No. 1:06-cv-0896, 2008 U.S. Dist. LEXIS 5435, at *5 (S.D. Ind. Jan. 24, 2008) (restaurant); *Rosemond v. Stop & Shop Supermarket*, 456 F. Supp. 2d 204, 206 (D. Mass. 2006) (grocery store); *Williams v. Asplundh Tree Expert Co.*, No. 3:05-cv-479-J-33MCR, 2006 U.S. Dist. LEXIS 52197, at *7 (M.D. Fla. July 27, 2006) (landscaping company).

³⁴ See, e.g., *Carson*, 187 F. Supp. 2d at 474 (multiple nooses displayed in warehouse).

³⁵ See, e.g., *EEOC v. Crowder Constr.*, No. 3:00-CV-186, 2001 WL 1750843, at *5 (W.D.N.C. Oct. 26, 2001) (noose display and racial slurs in construction company).

³⁶ See, e.g., *Burns v. Winroc Corp.*, 565 F. Supp. 2d 1056, 1061 (D. Minn. 2008) (trucking company).

³⁷ See, e.g., *Allen*, 165 F.3d at 408 (noose drawing and racially derogatory language); *West v. Phila. Elec. Co.*, 45 F.3d 744, 750-52 (3d Cir. 1995) (noose, racially offensive black dolls, and racially derogatory bulletin board posting); *Burns*, 565 F. Supp. 2d at 1064 (noose display and racially hostile comments, including (1) a “fetch, boy” comment; (2) racist jokes; and (3) multiple uses of the word “nigger”); *Carson*, 187 F. Supp. 2d at 474 (multiple nooses displayed as well as racist graffiti and statements); *Crowder Constr.*, 2001 WL 1750843, at *5 (noose display and racial slurs); *Jackson v. Del. River & Bay Auth.*, No. 99-3185, 2001 WL 1689880, at *5 (D.N.J. Nov. 26, 2001) (noose coupled with racially offensive photographs).

³⁸ *Crowder Constr.*, 2001 WL 1750843, at *5 (quotation omitted).

³⁹ *Jackson v. T & N Van Serv.*, 117 F. Supp. 2d 457, 460 (E.D. Pa. 2000).

⁴⁰ *Id.*

the rally, as many as fifty copycat noose incidents were reported.⁴¹ Though the number of incidents in such a short period of time was unusual, the onset of copycat incidents in the wake of publicity was not. According to Brian Levin, a hate crimes expert and executive director of the Center for the Study of Hate and Extremism at California State University, San Bernardino, “[a]ny time you have a case that receives national notoriety, you see an uptick in copycat offenses.”⁴² Media reports, many culled from Diversity Inc.,⁴³ a web-based organization which collected news accounts of the noose displays, show eighty separate displays of nooses in public and private workplaces, schools, and government offices since the beginning of 2007.⁴⁴ The copycat incidents do not seem to have any geographic concentration (see Figure 1). Incidents occurred in virtually every area of the country—the South (thirty-five incidents), the Northeast (twenty-one incidents), the Midwest (thirteen incidents), and the West (eleven incidents).

A majority of these eighty copycat incidents occurred in the workplace (forty-six incidents), followed by incidents occurring in schools (thirty incidents). Fewer took place in public areas (two incidents) or homes (two incidents). In many of the incidents there was not enough information supplied in the news account to get a sense of the perpetrator's motive. In the cases where information regarding motive was provided, there was no dominant explanation for why the nooses had been displayed. The largest number of incidents (twenty incidents) manifest clear racial motivation. The next largest category (sixteen incidents) involves incidents whose motivation was undetermined, but seem to have been racially motivated. However, at least some of these incidents purportedly lacked any racial motivation. Indeed, fourteen incidents were perpetrated as a “joke,” and six incidents were by individuals who claimed not to know the significance of the noose.⁴⁵

Looking to the copycat incidents depicted by the hangman's nooses in this diagram, the noose hangings occurring in the wake of the events in Jena are quite varied. They involve nooses left in municipal offices, on college campuses, and in private businesses.⁴⁶ Where there is enough information to discern motive, roughly forty-five of the noose hangers appear to have a racialized motive. Several of the incidents involved so-called jokes—practi-

⁴¹ Mark Potok, Luke Visconti, Barbara Frankel & Nigel Holmes, *The Geography of Hate*, N.Y. TIMES, Nov. 25, 2007, at WK11.

⁴² Marisol Bello, *Jena 6' Case in La. Spurs Copycats*, USA TODAY, Oct. 10, 2007, at 3A.

⁴³ See DiversityInc Noose Watch, <http://www.diversityinc.com/public/noosesightings/noose.cfm> (last visited Mar. 24, 2009).

⁴⁴ See Jeannine Bell, *Catalog of Copycat Incidents*, Oct. 31, 2008 (unpublished document on file with author).

⁴⁵ Four incidents fall into the miscellaneous category: perpetrated as a generalized threat (two incidents) and hung as a punishment (two incidents).

⁴⁶ October 24, 2007: Terre Haute, Indiana (nooses found on the Indiana State University campus); September 28, 2007: Hempstead, New York (nooses found hanging in the men's bathroom of the Village Police Department). See *Catalog*, *supra* note 44, at 12, 5.

cal jokes,⁴⁷ Halloween displays,⁴⁸ or misplaced attempts to dramatize punishment. For instance, in October of 2007, a community college newspaper editor used a noose in the newsroom to encourage reporters to meet their deadlines.⁴⁹ In other cases, the displayed nooses seem much more obviously connected to the historical legacy of lynching. Such incidents seem clearly targeted at Blacks and also evoke the connection between the noose and hanging. An example of this occurred on October 4, 2007, when a Black telephone company employee in Cranberry, Pennsylvania complained of a racial threat after she found a doll with a noose tied around its neck on her desk. The doll was accompanied with a note saying she did not deserve her promotion.⁵⁰

FIGURE 1⁵¹

⁴⁷ August 24, 2007: Germantown, Tennessee (employees at the Germantown Performing Arts Center hang nooses backstage as practical jokes). *See id.* at 1.

⁴⁸ September 25, 2007: Watchung, New Jersey (holidays store with the Halloween display that features stuffed doll hanging from a noose); October 26, 2007: Muncie, Indiana (sanitation worker hangs a noose from his truck as Halloween decoration). *See id.* at 4, 13.

⁴⁹ Katharine Kersten, Op-Ed., *Noose Outcry in the Campus Hall of Shame*, MINNEAPOLIS STAR TRIB., Nov. 19, 2007, at 1B.

⁵⁰ *Local Verizon Worker Says She's Target of Racial Threat*, WPXI.COM, Oct. 4, 2007, <http://www.wpxi.com/news/14267276/detail.html>.

⁵¹ This map is based on the image at <http://www.diversityinc.com/public/noosesightings/noose.cfm>.

The nooses that appeared in Jena were by no means isolated events, but are connected to a painful part of U.S. history. Moreover, the use of nooses has continued today, with displays in workplaces and numerous copycat incidents after Jena. The use of nooses today and their historical legacy will be analyzed in the next section, which further explores their meaning.

III. DIVINING THE MEANING OF THE NOOSE

A. *Perpetrator Explanations*

When a noose is displayed in a public space, the perpetrator is often not discovered. But, in employment discrimination cases, the majority of perpetrators who are identified are White males. Thus the biggest question is not who hangs nooses, but why they do it. Why would someone hang a noose?

When individuals are aware of the noose's historical connotation, the first explanation that comes to mind is racism. In a few recent employment discrimination cases, perpetrators acknowledged that they placed the noose because of racist ideology or bigotry.⁵² For instance, in *Lake v. AK Steel Corp.*,⁵³ a noose was displayed to Jerry Patterson, a mill worker. Prior to the noose display, coworkers, as well as Patterson's supervisor, had made racially derogatory comments to Patterson. Scott Hankey, one supervisor who was training Patterson, candidly admitted his racism, saying "I have to put my bigotry aside to train you, Jerry"⁵⁴

Despite the noose's long history as a symbol of racism, racist ideology is not the most common explanation perpetrators offer. In fact, irrespective of other indications of racism that may accompany the noose, few individuals who display nooses admit to having intended to send a racist message. This Article explores two of the alternate explanations.⁵⁵ First, many perpetrators claim that they were unaware of the negative connotations associated

⁵² See, e.g., *Crawley v. Ohio*, No. 02-1069, 2006 U.S. Dist. LEXIS 80919, at *14-15 (S.D. Ohio Nov. 6, 2006) (discussing perpetrator's admission that he does not like Black people and placed noose on anniversary of the Emancipation Proclamation); *Lake v. AK Steel Corp.*, No. 2:03cv517, 2006 U.S. Dist. LEXIS 25118, at *92 (W.D. Pa. Apr. 27, 2006) (noting that supervisor admits to bigotry); *Hardman v. AutoZone, Inc.*, No. 02-2291, 2004 U.S. Dist. LEXIS 2171, at *3-6 (D. Kan. Feb. 11, 2004) (noting that supervisor admits to being racist).

⁵³ 2006 U.S. Dist. LEXIS 25118.

⁵⁴ *Id.* at *44.

⁵⁵ There is a third explanation that involves perpetrators who may have been aware of the connotations of the noose, but nevertheless felt compelled to place one for a non-racial reason. The perpetrator admits having some comprehension of the noose's history but claims that in this particular instance the hangman's noose is used in a non-racial manner. An example of such a case involved Gabriel Keith, a journalist who served as news editor for the campus paper of the Minneapolis Community and Technical College. He made a mock noose from his sweatshirt drawstring and hung it from the ceiling of the college newsroom for a few minutes. He added a note about the hazards of missed deadlines. When asked about why he had hung the noose, Keith indicated that it was a message to the student reporters about missing deadlines. See Kersten, *supra* note 49.

with the noose. Alternatively, others admit to understanding what the noose meant, but claim to have intended the act as a joke.

i. Don't Know Nothin' 'Bout History

According to a school administrator at the high school in Jena, the three White students who hung the nooses from a tree in the middle of the schoolyard did not intend to invoke the nooses' racist legacy. They maintained that they had hung them in a tree as a lasso prank meant for other White students who were on the rodeo team.⁵⁶ The students reportedly had been watching episodes of "Lonesome Dove" and got the idea from the show.⁵⁷ The administrator who spoke with the students said they "honestly had no knowledge of the history concerning nooses and black citizens."⁵⁸

The perpetrators in Jena were not the first individuals to display a noose while claiming not to understand its meaning. This issue also arose in *Henderson v. International Union* in 2003.⁵⁹ In *Henderson*, a Black factory worker, Mildred Woody, discovered what appeared to be a noose made from a flexible piece of rubber at her assembly line workstation.⁶⁰ At some point after its discovery, Woody's White supervisor, Jim Miraglia, who had made the noose, said to Woody, "Millie, what's the beef?"⁶¹ Miraglia then picked up the noose and tried to tear it apart.⁶² After Woody screamed for him to put it down, Miraglia then threw the noose on Woody's workstation.⁶³ When questioned about the noose later, Miraglia, who the court noted was from the "east coast," indicated that he had been tying knots absentmindedly and was unaware of any racial connotation the noose might have.⁶⁴ Miraglia received counseling for tying the noose.⁶⁵

A similar situation involving an individual allegedly unaware of the noose's connotation occurred during a Syracuse, New York, Fire Department training.⁶⁶ A White fire department recruit, who was at the time practicing tying knots, tied one of the knots improperly.⁶⁷ He then showed the noose to several other recruits, one of whom was a Black woman, saying, "Look, I tied a noose."⁶⁸ Later, staff investigation determined that the recruit did not know that the noose was offensive to African Americans; the recruit was,

⁵⁶ Franklin, *supra* note 2, at 9.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 263 F. Supp. 2d 1245, 1250 (D. Kan. 2003).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Maureen Sieh, *Fire Trainee Creates Uproar with Noose*, SYRACUSE POST-STANDARD, Feb. 24, 2008, at B1.

⁶⁷ *Id.*

⁶⁸ *Id.*

however, disciplined.⁶⁹ As was later discovered, the recruit was not the only individual who did not seem to know that the noose was offensive to Blacks. An informal poll of the recruit's workplace later revealed others were unaware that Blacks found the noose offensive.⁷⁰

Despite the frequency with which it is raised, the explanation that individuals who placed nooses did not understand their significance is puzzling. First, the hangman's noose has a long and storied history. Second, many actors in society—from courts to politicians⁷¹ and lay individuals—understand nooses as threats. Finally, perpetrators who claim not to know what nooses mean nonetheless use them in a manner that captures their historical legacy associated with racial intimidation. For instance, the Jena nooses were found swinging from trees. They were not placed on the ground, left on picnic tables, taped to the soda machine, or placed in any other of a variety of public locations. If it is just a coincidence, then it is a very surprising one, for the students could not have hit on a better image than empty hangman's nooses swaying from a tree to conjure up the historical legacy of lynching.

ii. Noose Hanging Jokesters and Racial Pranksterism

In the second category of “nonracist” noose hangers are the individuals who appear to be fully informed about the noose's racist legacy, yet decide to make a joke about it.⁷² Cases in which nooses are hung as jokes, along with crosses burned as jokes or pranks,⁷³ fall into the general category of

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ The publicity surrounding the display of nooses at Columbia Teachers College and on a Coast Guard cutter may have led President Bush to denounce them. In a ceremony in the East Room of the White House commemorating Black History Month, Bush noted: “Displaying [a noose] is not a harmless prank. And ‘lynching’ is not a word to be mentioned in jest.” Steven Lee Meyers, *Bush, at Commemoration, Says Nooses Are Symbol of ‘Gross Injustice,’* N.Y. TIMES, Feb. 13, 2008, at A18.

⁷² See, e.g., *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1257 (11th Cir. 2003) (“jokes” played by workers include fashioning a noose); *Ford v. West*, 222 F.3d 767, 771 (10th Cir. 2000) (noose hung as practical joke); *Burns v. Winroc Corp.*, 565 F. Supp. 2d 1056, 1061 (D. Minn. 2008) (perpetrator claimed noose was a joke); *Lewis v. Penske Logistics, L.L.P.*, No. 2:04-cv-1011-WKW, 2007 U.S. Dist. LEXIS 54548, at *21 (M.D. Ala. July 26, 2007) (noose as Halloween prank); *Rosemond v. Stop & Shop Supermarket Co.*, 456 F. Supp. 2d 204, 209 (D. Mass. 2006) (noose hung as a joke); *Faulkner v. Niagara Mohawk Power Corp.*, No. 1:05-cv-0974, 2006 U.S. Dist. LEXIS 80670, at *3 (N.D.N.Y. Nov. 3, 2006) (noose as a joke directed at a White male); *Hardman v. Autozone, Inc.*, No. 02-2291-KHV, 2004 U.S. Dist. LEXIS 2171, at *4 (D. Kan. Feb. 11, 2004) (noose placed by worker's mailbox as a prank).

⁷³ See, e.g., *Newton v. Dep't of the Air Force*, 85 F.3d 595, 597 (Fed. Cir. 1996) (appellant claimed burning cross displayed in African American coworker's work area was a joke); *Police Officers for Equal Rights v. Columbus*, 644 F. Supp. 393, 402 (S.D. Ohio 1985) (wearing of white sheets and burning of cross as a joke); *Allstate Ins. Co. v. Browning*, 598 F. Supp. 421, 423 (D. Or. 1983) (cross burner alleged action was prank); *United States v. Hooper*, 4 M.J. 830, 831 (A.F.C.M.R. 1978) (cross burned on military base as joke); *In re Steven S.*, 25 Cal. App. 4th 598, 605 (Cal. Ct. App. 1994) (cross burned as a Friday the 13th joke); *Garrison v.*

racial pranksterism. For instance, in St. Louis, three sheriff's deputies decided to play a practical joke on another deputy by throwing a noose over a pipe to hang his chair.⁷⁴ In another case, a White electrician working in a hospital placed a noose in the hospital's locker area hanging from a light fixture.⁷⁵ When asked to explain it, he later referred to it as a "dumb practical joke."⁷⁶ Other incidents involved nooses hung as Halloween jokes.⁷⁷

In cases of racial pranksterism, noose hangers claim their actions are entirely nonracial. Indeed, they often claim to be shocked that anyone could have misunderstood their actions. Often their own histories of racial interaction are trotted out as evidence of their lack of racial motivation. For instance, William Gould, the electrician who hung the noose in the hospital locker area, said "I'm not a racist person."⁷⁸ He described "D.S.," the Black electrician who found the noose, as "my best buddy for 8 1/2 years. We worked together very well and buy each other breakfast on our birthdays."⁷⁹ Gould's statements suggest that his relationship with his Black coworker and other Blacks he knows are evidence of his lack of racial motivation in hanging the noose: "I feel betrayed . . . I just showed [D.S.] my daughter's wedding pictures. A lot of Black folks came and stayed overnight at our house. I don't have those issues."⁸⁰

It is not as simple, then, as merely separating racially motivated incidents from those that seem not to be. Indeed, the various nonracial motivations for hanging a noose suggest different levels of intent. In the first scenario, where the perpetrator hangs a noose in purported ignorance, she might be able to defend herself by insisting that her lack of knowledge proves she could not possibly have intended harm. In the second scenario, in which the perpetrator knows how others might understand a noose but intends it only as a joke, she might defend her actions by saying her intent was not to threaten but merely to shock or amuse. Finally, for the scenario in which the perpetrator is only using the noose as a vehicle to send a non-racial threatening message, the perpetrator might insist that using the noose

Conklin, No. 234243, 2003 Mich. App. LEXIS 337, at *5 (Mich. Ct. App. Feb. 14, 2003) (cross burning alleged as part of a Halloween prank). For a discussion of crosses burned as jokes, see Jeannine Bell, *O Say, Can You See: Free Expression by the Light of Fiery Crosses*, 39 HARV. C.R.-C.L. REV. 335 (2004).

⁷⁴ Jake Wagman, *Noose's Revival Is Raising the Issue of Intent*, ST. LOUIS POST-DISPATCH, Jan. 18, 2008, at A1.

⁷⁵ Kitty Caparella, *Feds Not Amused by Noose 'Joke'*, PHILA. DAILY NEWS, Sept. 4, 2008, at 8.

⁷⁶ *Id.*

⁷⁷ See Potok et al., *supra* note 41, at WK11 (describing two incidents, one involving a sanitation worker who hung a noose from his truck as a Halloween decoration, and the second involving a holiday store with a Halloween display featuring a stuffed doll resembling a Black man hanging from a noose); see also Paul Vitello, *This Halloween, Man in Noose Wins a Reprieve*, N.Y. TIMES, Oct. 27, 2007, at B1 (describing conflict over Halloween decorations).

⁷⁸ Caparella, *supra* note 75.

⁷⁹ *Id.*

⁸⁰ *Id.*

in a non-threatening manner falls within her First Amendment rights to freedom of expression.

The intent of individuals who hang nooses is important because of the First Amendment doctrine laid out in *Virginia v. Black*.⁸¹ *Black* was an appeal by the Commonwealth of Virginia from a decision made by the Virginia Supreme Court that struck down, on First Amendment grounds, Virginia's cross burning statute.⁸² The statute under which defendants Barry Black, Richard Elliot, and Jonathan O'Mara were convicted provided:

It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.⁸³

Like those who hang nooses, people who burn crosses may do so for a variety of different reasons. Barry Black, the ideological cross burner and admitted racist of the group, was charged and convicted under the Virginia cross burning statute after having presided over a cross burning at a Ku Klux Klan rally. Elliot and O'Mara, by contrast, were not affiliated with the Klan. They were charged and convicted under the Virginia cross burning statute for having burned a cross in their African American neighbor's yard in retaliation for a complaint he made regarding their backyard shooting range.⁸⁴

On appeal to the Supreme Court, the Court recognized the historical legacy of cross burning, and the way in which this legacy affects Blacks.⁸⁵ In keeping with its historical use, the Court recognized cross burning as a threat: "The person who burns a cross directed at a particular person is often making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan."⁸⁶

Though the Court acknowledged that cross burning could be (and traditionally had been) used to threaten, the Court held that the act of burning a cross was not a threat *per se*.⁸⁷ In other words, there were circumstances—and Justice O'Connor noted several⁸⁸—which could constitute "innocent" cross burnings—the burning of the cross that was not intended to intimidate the victim.⁸⁹ According to the Court, crosses burned without intent to intimi-

⁸¹ 538 U.S. 343 (2003).

⁸² See *id.* at 351-52 (discussing *Black v. Commonwealth*, 553 S.E.2d 738 (Va. 2001)).

⁸³ VA. CODE ANN. § 18.2-423 (2004).

⁸⁴ *Black*, 538 U.S. at 363.

⁸⁵ *Id.* at 352-57.

⁸⁶ *Id.* at 357.

⁸⁷ *Id.* at 360, 365-66.

⁸⁸ Justice O'Connor gave the following examples as cross burning not used to intimidate: cross burning used (1) as a statement of ideology; (2) to show group solidarity, such as a Klan rally; or (3) as theatre, expressing neither ideology nor intimidation (i.e., in movies or plays). *Id.* at 365-66.

⁸⁹ *Id.*

date were expression protected by the First Amendment.⁹⁰ As long as the statute criminalizing cross burning took care to regulate only those cross burnings intended to intimidate, the Court held that state regulation of cross burning did not violate the First Amendment.⁹¹

Even though the perpetrator's motive may matter from a First Amendment perspective, focusing on the motive of the noose-hanger provides an incomplete and misleading view of the harm perpetrated. It is impossible to analyze and propose remedies for noose hanging without examining its effects on the victim. The next section considers how noose hanging impacts those who view it.

B. *The Social Meaning of the Noose*

As described in Part II, the hangman's noose possesses a distinct historical meaning associated with the lynching of Blacks. In fashioning a response to the recent spate of noose hangings, we must consider how any proposed solutions will be accepted by society in order to determine their likelihood of success. To do so, it is important to evaluate the social meaning of noose hanging. The social meaning of noose hanging is how it is viewed as well as understood by different groups in society. The social meaning of noose hanging is explored with respect to three distinct groups whose support for changes in policy might be important: the media; perpetrators and some White Americans; and those most likely be victimized by noose hangings—Blacks.

i. *Media Constructions of the Noose*

The most straightforward reaction to noose hangings is the one generated by the news media responsible for reporting incidents that have occurred. When noose hangings are reported in the media, reporters almost uniformly describe the noose in a manner consistent with its historical meaning as a racially offensive symbol used to intimidate.⁹² For instance, one fairly representative article explaining an incident in which a White recruit displayed a noose during a training session described nooses as “a disturbing reminder of the days when lynching of [B]lacks was common . . . used to

⁹⁰ *Id.* at 366-67.

⁹¹ *Id.* at 367.

⁹² See, e.g., Dean Bohn, “Alarming” Vestige of Racism Turning up on Campuses, SAGINAW NEWS (Mich.), Nov. 17, 2007, at 8A (quoting Director of Department of Civil Rights, who maintained nooses were “an undeniably clear symbol of racial intolerance to the absolute extreme”); John Ehinger & David Person, Editorial, *Smoking Under Siege*, HUNTSVILLE TIMES (Ala.), Nov. 17, 2007, at 11A (describing the noose as a symbol of lynching and racial hatred that does not have another meaning); Lolis Eric Elie, *Symbol of Hate Still in the News*, NEW ORLEANS TIMES PICAYUNE, Nov. 26, 2007, at 11A (describing nooses as a symbol of hate that conjures up images of extrajudicial justice); Op-Ed., *A Noose is Found at a South Florida High School*, S. FLA. SUN-SENTINEL, Mar. 3, 2008, at 30A (describing the history of the noose as involving mutilated bodies).

intimidate African-Americans.”⁹³ Associations between the noose as a symbol and the history of Black lynching are often bolstered by news reports citing the number of individuals lynched between the end of the Civil War and the end of World War II.⁹⁴

News articles frequently use experts—officials from the Justice Department, the National Association for the Advancement of Colored People (“NAACP”), or the Southern Poverty Law Center—to provide historically accurate descriptions of the practice of lynching.⁹⁵ On other occasions, public officials are quoted offering fairly standard historical descriptions of the meaning of the noose. When these public officials are asked about the noose, they may insist that the hangman's noose ranks high as a symbol of ethnic hatred.⁹⁶ Commenting on the discovery of a noose that was found hanging in the police locker room in Hempstead, New York, Deputy Chief Willie Dixon said, “[T]here is no difference between a noose and a swastika, except who they're aimed at.”⁹⁷ This analogy is not unusual. Many mainstream news reports also highlight this equivalency.⁹⁸

ii. *Social Understandings of the Meaning of the Hangman's Noose in “Black” and “White”*

Even though the mainstream news media offers a consistent, historically accurate portrayal of the message sent by a noose, upon careful scrutiny it is apparent that Whites and Blacks perceive perpetrators' actions

⁹³ Sieh, *supra* note 66.

⁹⁴ See, e.g., Darryl Fears, Editorial, *In Jena and Beyond, Nooses Return as a Symbol of Hate*, WASH. POST, Oct. 20, 2007, at A1 (describing the thousands of Black people killed during years of widespread lynching); Vitello, *supra* note 77 (offering estimates of the number of people lynched in the United States between the end of the Civil War and the end of World War II).

⁹⁵ See, e.g., Fears, *supra* note 94 (quoting a magazine published by the Southern Poverty Law Center, and Hilary O. Shelton, Director of the NAACP's Washington Bureau).

⁹⁶ Press Release, Commission on Security & Cooperation in Europe, *Cardin Leads Briefing on the Rise of Hate Crimes in Cyberspace* (May 15, 2008), 2008 WLNR 9286273.

⁹⁷ Sid Cassese, ‘*Ultimate Symbol of Disgust*’; *Hempstead Deputy Chief Says Noose Found in Department Locker Room is Deeply Hurtful, but Vows Not to be Intimidated by Incident*, NEWSDAY, Oct. 1, 2007, at A7. For similar associations made by public officials, see Press Release, U.S. Dep't of Justice, *Remarks as Delivered by Attorney General Michael B. Mukasey at the Martin Luther King, Jr. Day Prayer Breakfast* (Jan. 19, 2008), available at http://www.usdoj.gov/archive/ag/speeches/2008/ag_speech_080119.html.

⁹⁸ See, e.g., Kevin Deutsch, *Anti-Semitic Incidents Drop for Second Year*, PALM BEACH POST, Mar. 6, 2008, at 3B; Editorial, *Racism's Ugly Grip Still Haunts Us*, INSIDE BAY AREA.COM (Cal.), Sept. 23, 2007, available at http://findarticles.com/p/articles/mi_qn4176/is_20070923/ai_n20520432; Editorial, *Vandalism at Parkland Synagogue Repulsive to Entire Community*, S. FLA. SUN-SENTINEL, May 3, 2008, at Commentary; *Foxman and Sharpton Issue Joint Statement on Symbols of Hate*, U.S. NEWSWIRE, Nov. 1, 2007, at Business Editors; David Ovalle, *Miami Police Investigate Noose Finding*, MIAMI HERALD, Jan. 17, 2008, at B5; Andrew Stephen, *The Deep South, the White Tree, the Noose*, NEW STATESMAN, Oct. 25, 2007, at 26; Michael Weiss, *Free the Jena 6?*, SLATE, Sept. 21, 2007, <http://www.slate.com/id/2174569>; *The Montel Williams Show: Race on Trial: The Jena 6* (CBS television broadcast Oct. 2, 2007); *The O'Reilly Factor: Interview with Jesse Jackson* (Fox News Network television broadcast Sept. 27, 2007).

differently. News articles, explanations given by perpetrators, and informal polling done after the Jena Six controversy suggest that some Whites are more likely to view the placement of a hangman's noose as a prank, while Blacks are more likely to view nooses as genuine threats.⁹⁹

a. Victims' Perceptions of Noose Hangings

When noose hangings are targeted at an individual, the target is frequently, though not always, Black.¹⁰⁰ Blacks often view the hanging of a noose as threatening behavior, even in cases in which the perpetrator may later insist that his or her intention was not to harm.¹⁰¹ It is easy to see why those at whom a hangman's noose is targeted may have this reaction. When noose hangings are targeted at individuals in the workplace, they are often accompanied by speech indicating that the noose has been hung because the Black worker's performance, or very presence, is resented. For example, in the case mentioned earlier involving the Black female telephone worker who had recently been promoted in Cranberry, Pennsylvania, the worker in question discovered a doll with a rope around its neck in an envelope on her desk.¹⁰² A note pinned to the doll warned that the employee did not deserve the promotion she had received.¹⁰³ In this case, the perpetrator invoked the segregation-era lynching of Blacks to suggest that the worker had stepped out of her place.

Even when a direct message of resentment or hatred is absent, noose hangings are often accompanied, preceded, or followed by racial or ethnic slurs, which sharply emphasize the noose hangers' antipathy toward the targeted Black worker.¹⁰⁴ Such an example arose in *Burns v. Winroc Corp.*¹⁰⁵ In *Burns*, Tyrone Burns and Marvin Dortch, Black delivery drivers, described racist harassment in the form of being told racist jokes on a num-

⁹⁹ See, e.g., *All Things Considered*, *supra* note 5 (describing racial split in feelings about the Jena Six incident); Tristram, *supra* note 3 (contrasting school administrators who saw the noose as a harmless prank with Blacks who saw nooses as a provocation "brass knuckled in not-so-distant history"); Vitello, *supra* note 77 (describing White confusion at Black fear of Halloween decorations depicting a hanging).

¹⁰⁰ See, e.g., *Carter v. New Venture Gear, Inc.*, No. 5:00-cv-1744, 2007 U.S. Dist. LEXIS 71695, at *20-21 (N.D.N.Y. Sept. 26, 2007) (noose directed at White employee).

¹⁰¹ See, e.g., *Hollins v. Delta Airlines*, 238 F.3d 1255, 1257 (10th Cir. 2001) (adjudicating complaint by Black workers regarding White workers' noose jokes and mock hangings); *Ford v. West*, 222 F.3d 767, 772 (10th Cir. 2000) (reviewing allegation by Black worker that White worker's noose joke is racial harassment); *Fears*, *supra* note 94 (describing Errol Madyun, a Black ironworker who characterized finding a noose intimidating while supervisor said noose was just a joke).

¹⁰² Tony Norman, *Nooses Are All the Rage*, PITTSBURGH POST-GAZETTE, Oct. 23, 2007, at A2.

¹⁰³ *Id.*

¹⁰⁴ See, e.g., *Burns v. Winroc Corp.*, 565 F. Supp. 2d 1056 (D. Minn. 2008); *Williams v. Asplundh Tree Expert Co.*, No. 3:05-cv-479-J-33MCR, 2006 U.S. Dist. LEXIS 52197, at *6-7 (M.D. Fla. July 27, 2006); *Golston v. Am. Airlines, Inc.*, No. Civ.A. 402CV713Y, 2004 WL 1969842 (N.D. Tex. Sept. 7, 2004).

¹⁰⁵ 565 F. Supp. 2d 1056.

ber of occasions, hearing racial epithets used in their presence (the word "nigger" was used frequently to describe African Americans), and on a particular occasion being treated in a very demeaning way.¹⁰⁶ On one occasion, Burns was approached by a coworker who said, "I'm not a racist or nothing, but you're really starting to act like a nigger now."¹⁰⁷ The frequency of the racial jokes and epithets was high in the period before Burns discovered a noose hanging vertically, in the same manner in which it would appear if it had been used to hang someone.¹⁰⁸ Burns discovered the noose hung over electrical wires near a warehouse bathroom shortly after Martin Luther King, Jr. Day.¹⁰⁹

The individual target of a noose may not always be indicated explicitly. Some incidents may involve nooses left anonymously in workplaces, government offices, public spaces, or in and around schools or universities. But even in cases where the noose does not appear to be directed at a particular individual, the noose's violent legacy, combined with the reality of thousands of hate crimes committed each year,¹¹⁰ still cause racial and ethnic minorities to view the noose as a threat:

The hangman's noose remains a potent and threatening symbol for African-Americans, in part because the grim specter of racially motivated violence continues to manifest itself in present day hate crimes. Moreover, persistent inequality in this country resuscitates for modern African-Americans many of the same insecurities felt years ago.¹¹¹

The noose's legacy is one of violence, and the experiences that minorities may have as victims and witnesses of hate crime and racial discrimination make the threat a serious one.

At bottom, noose hanging is threatening conduct that places the minority target in the same position as a victim of a hate or bias crime who has been racially harassed. Hate crime is very destabilizing to victims. Research on hate crime victims reveals that the most common reaction is anger,

¹⁰⁶ *Id.* at 1059-61, 1064. One incident that the decision reports involved a White employee throwing a telephone and telling the Black worker to "fetch, boy." *Id.* at 1059.

¹⁰⁷ *Id.* at 1060.

¹⁰⁸ *Id.* at 1061.

¹⁰⁹ *Id.*

¹¹⁰ In 2007, law enforcement agencies around the country reported 3121 hate crimes directed at racial and ethnic minorities. See U.S. FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS tbl.1 (2007), http://www.fbi.gov/ucr/hc2007/table_01.htm. Because of the way the data is reported, this statistic does not include hate crimes that were classified as anti-Hispanic; if included, these incidents would amount to an additional 595 hate crimes in 2007. See *id.*

¹¹¹ *Williams v. N.Y. City Hous. Auth.*, 154 F. Supp. 2d 820, 825 (S.D.N.Y. 2001) (citation omitted).

followed by fear.¹¹² Victims often experience a variety of psychological and physiological symptoms when they encounter racial harassment, including high blood pressure, depression, nightmares, and post-traumatic stress.¹¹³ Side-by-side studies comparing the experiences of victims of bias-motivated and non-bias-motivated physical assaults of similar severity reveal that the victims of the bias-motivated assaults are much more likely to feel the effects of victimization and to have these feelings linger.¹¹⁴ Racial harassment can also lead an individual to significantly alter her life, including changing her schedule to avoid the harasser.¹¹⁵ Noose hangings in the workplace may have long-term consequences for the worker: “[T]he appreciation that even one incident of racially threatening conduct—such as hanging a noose over the workstation of a [B]lack employee or burning a cross in his or her presence—can itself create a racially hostile work environment”¹¹⁶

Publicized noose hangings are likely to have the same effect as other well-publicized hate crimes. In addition to the harm that an individual experiences when a hate crime is committed against them, research reveals that members of the community who learn of the event are harmed as well: “Members of the target community experience reactions of actual threat and attack from this very event. Bias crimes spread fear and intimidation beyond the immediate victims and their families to those who share only racial characteristics with their victims.”¹¹⁷

b. Noose Hanging as Just a Prank

Viewing nooses as a threat contrasts quite sharply with the “it was just a joke” reaction some White perpetrators, their supervisors, and members of the general public have taken toward the display of nooses. A “just kidding” approach to nooses appears in reports of mock hangings and the use of nooses as Halloween decorations. In recent years, popular Halloween deco-

¹¹² Jack McDevitt, Jennifer Balboni, Luis Garcia & Joann Gu, *Consequences for Victims: A Comparison of Bias- and Non-Bias-Motivated Assaults*, 45 AM. BEHAV. SCI. 697, 699 (2001).

¹¹³ See, e.g., Mari Matsuda, *The Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2336 (1989).

¹¹⁴ McDevitt et al., *supra* note 112, at 711.

¹¹⁵ See, e.g., Howard J. Ehrlich, Barbara E.K. Larcom & Robert D. Purvis, *The Traumatic Impact of Ethnviolence*, in THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY 63, 66 (Laura Lederer & Richard Delgado eds., 1995) (describing the behavioral alterations made by victims of ethnviolence); Lu-in Wang, *The Transforming Power of “Hate”*: *Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47, 120-24 (1997) (describing schedule alterations made by racial and ethnic minority group members).

¹¹⁶ L. Camille Hebert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819, 880 (1997) (expressing the hope that insights from racially hostile workplaces “may help decisionmakers to realize that a single incident of sexually offensive and degrading behavior, such as the touching of a woman on her breast or genitals against her will even a single time, can irreversibly alter her work environment”).

¹¹⁷ Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crime*, 93 MICH. L. REV. 320, 345-46 (1994).

rations have included stuffed dummies (often with dark faces to symbolize rotting flesh) hanging from trees by their necks.¹¹⁸ When they find such decorations outside homes, Blacks have typically reacted with horror. The Reverend Johnny Gamble, pastor of the Friendship Baptist Church in Stratford, Connecticut, heard complaints of a noose from parishioners and went to see it for himself.¹¹⁹ Gamble later indicated: "At first, I couldn't believe my eyes. But there it was. A mannequin of a [B]lack man, hanging from the neck."¹²⁰ Though such figures are often removed when complaints are made, some White homeowners who hang such decorations may still defend them, calling allegations of racial insensitivity "completely overblown and ridiculous."¹²¹

Public noose and lynching jokes and casual references to the hanging of Blacks have recently been made in a variety of contexts. One widely-publicized example that dramatizes differences between the ways some Blacks and some Whites view the noose is an incident involving Golf Channel anchor Kelly Tilghman. Tilghman and her co-anchor, Nick Faldo, were joking at the Mercedes-Benz championship and were talking about young golfers' quests to unseat Black golfer Tiger Woods. "Maybe they should just gang up for a while," said Faldo. "Lynch him in a back alley," laughed Tilghman.¹²²

Immediately after the comment, Tilghman's employer's actions suggested that they accepted her comment as an innocent remark that had no harmful effects. Initially, the Golf Channel indicated that it would not discipline Tilghman.¹²³ In keeping with the notion that the remark was an innocent one, four days after Tilghman made the comment the Golf Channel was content to issue a statement indicating that Tilghman had apologized to Woods. The network maintained: "We regret the unfortunate choice of words that Kelly used during the broadcast and apologize to anyone who was offended by her remarks."¹²⁴ Even Tiger Woods supported the idea that the incident was a just an innocent joke. He accepted the apology through his agent, indicating that "there was no ill intent."¹²⁵ Apology accepted, the harm was erased, end of story.

Unfortunately for Tilghman, this was not the end of the story. Soon after the Golf Channel's response, Reverend Al Sharpton was interviewed on CNN. Sharpton indicated that he did not think that the apology was suffi-

¹¹⁸ Vitello, *supra* note 77.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Brian Tucker, *Noose Flap Displays Loose Thinking*, CRAIN'S CLEVELAND BUS., Jan. 28, 2008, at 8. After uproar over her comments, the Golf Channel suspended Tilghman for ten days. *Id.*

¹²³ Jill Painter, *Tilghman off Course on Woods*, DAILY NEWS OF L.A., Jan. 9, 2008, at C2.

¹²⁴ *Id.*

¹²⁵ Larry Dorman, *Woods Calls Anchor's Racial Remarks 'Unfortunate'*, N.Y. TIMES, Jan. 22, 2008, at D7.

cient and suggested that Tilghman should be fired. Invoking lynching's historical context, Sharpton explained: "Lynching is not murder in general. It is not assault in general. It is a specific racial term that this woman should be held accountable for What she said is racist. Whether she is a racist—whether she runs around at night making racist comments—is immaterial."¹²⁶ Sharpton indicated that if Tilghman was not fired, Sharpton and his supporters would picket the Golf Channel's Orlando, Florida headquarters. In response, the Golf Channel suspended Tilghman for ten days.¹²⁷

The golf industry's response to Tilghman's suspension was sharply indicative of an approach that denies the noose's historical legacy and dismisses many Blacks' belief that the hanging of a noose constitutes a threat. In the wake of the suspension, *Golfweek*, one of the golf industry's publications, featured a large photograph of a hangman's noose on the cover with the caption "Caught in a Noose: Tilghman slips up, and Golf Channel can't wriggle free."¹²⁸ Four pages of commentary in the issue were devoted to the controversy, with a column supporting Tilghman and an editorial cartoon depicting the Reverend Sharpton, holding a noose, standing on ice with two Golf Channel employees nearby.¹²⁹ In the cartoon, Sharpton is handing the noose to the Golf Channel employees who are peering down a hole into the ice, where presumably Tilghman has fallen.¹³⁰

Another public example of how Whites and Blacks may differ in their responses to nooses was found on *The O'Reilly Factor*.¹³¹ In an interview with the Reverend Jesse Jackson, talk show host Bill O'Reilly maintained that the White students who hung the nooses at Jena High would be properly punished by sending them to "sensitivity training."¹³² In doing so, O'Reilly expressed the view that the noose was not a real threat to the Black students toward whom the noose was allegedly directed, and implied that the Black students were just being overly sensitive.¹³³ After O'Reilly's comment, Rev. Jackson sought clarification as to whether O'Reilly thought that the noose constituted a hate crime, and, with a little reluctance, O'Reilly agreed that it did.¹³⁴ Rev. Jackson then compared the noose to a burning cross in order to emphasize the significance of the noose.¹³⁵

¹²⁶ Elliot McGlaughlin, *Tiger OK with 'Lynch' Remark but Sharpton Ready for Battle*, CNN.COM, Jan. 10, 2008, <http://www.cnn.com/2008/US/01/10/tilghman.woods>.

¹²⁷ Associated Press, *Sports Briefing: Golf; TV Anchor Suspended*, N.Y. TIMES, Jan. 10, 2008, at D4.

¹²⁸ Bill Higgins, *Golfweek Magazine Appoints New Editor*, CAPE COD TIMES (Hyannis, Mass.), Jan. 19, 2008, at Bus. & Fin. News.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *The O'Reilly Factor: Interview with Jesse Jackson* (Fox News Network television broadcast Sept. 27, 2007).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

Bill O'Reilly's response to Jena Six may be common among non-target groups.¹³⁶ Non-target groups are more likely to view hate speech as insignificant rather than admitting that it is threatening to victims.¹³⁷ For example, in an editorial dated September 23, 2007, the *Inside Bay Area Newspaper* described Whites' reaction to Jena Six as part of the "What racism?" camp, insinuating that Whites perceived the nooses as a joke.¹³⁸ Some blame the White (or non-target group) response to Jena Six on a lack of education regarding nooses, while others deny the malicious intentions of the perpetrator—chalking the noose up to a silly prank.¹³⁹

When employers or other authorities accept the explanation that a noose hanging or a casual reference to lynching is only a joke, prank, or a slip, they send a clear message that the individual at whom the noose has been targeted should ignore the incident and be a good sport about it. For instance, one of the Jena copycat incidents involved a Black construction worker who found a noose hanging from his construction site.¹⁴⁰ When the Black worker reported the noose to his White supervisor, he was told to shrug it off as a prank.¹⁴¹ Unsurprisingly, in workplaces where racial epithets are frequently condoned by employers as jokes, Black employees may not immediately report noose hanging to supervisors.¹⁴²

Treating nooses as a prank falls in the same category as the "just kidding" approach to hate speech generally. In *Public Response to Racist Speech: Considering the Victim's Story*, legal scholar Mari Matsuda lists several similar examples of "just kidding" hate speech stories to illustrate that "[t]he typical reaction of non-target-group members is to consider the incidents isolated pranks, the product of sick-but-harmless minds."¹⁴³ Matsuda explains that this reaction is part of a refusal to recognize that people similarly situated (other Whites) are actually racist.¹⁴⁴

Though perpetrators may offer a variety of nonracial explanations for hanging a noose, as this section reveals, theirs is not the predominant approach. The media, victims, and those who either appreciate victims' perspectives or have some knowledge of the noose's historical connotations view the noose as a threat. Regardless of the perpetrator's intent, victims who are targeted by noose hangings often feel threatened. Thus, approaching a noose hanging as a threat and punishing those who target victims in

¹³⁶ See Matsuda, *supra* note 113, at 2327.

¹³⁷ *Id.*

¹³⁸ Editorial, *Racism's Ugly Grip Still Haunts Us*, *supra* note 98.

¹³⁹ See Matsuda, *supra* note 113, at 2327; Matthew Solis et al., *Jena Six Events Reveal Racial Inequality in U.S. Criminal Justice System*, 15.1 HUMAN RIGHTS BRIEF 30 (2007).

¹⁴⁰ Fears, *supra* note 94.

¹⁴¹ *Id.*; see also *Burns v. Winroc Corp.*, 565 F. Supp. 2d 1056 (D. Minn. 2008). In *Burns*, a Black employee was told: "I took it down. It's no big deal no more. It's over, you know." *Id.* at 1061.

¹⁴² Matsuda, *supra* note 113, at 2327.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

this manner, regardless of their intent, makes sense from a fairness perspective. Moreover, given the long and bloody history of the noose, perpetrators should not be able to claim ignorance of the import of this particular symbol. The next section will discuss legal regimes for addressing this conduct.

IV. COMBATING NOOSES WITH LEGAL REGIMES

In the wake of the noose hanging in Jena and similar incidents that followed, legislators from states across the country—North Carolina, Louisiana, Florida, Michigan, Maryland, Missouri, New York—rushed to criminalize the hanging of nooses, despite the fact that a variety of potential remedies already existed. Before the new anti-noose statutes, noose hanging was prohibited by employment law, criminal law, and general civil rights legislation. This section evaluates the efficacy of both the legislation aimed specifically at nooses, and also more generalized remedies from other areas.

A. *Employment Discrimination*

If a noose is displayed in the workplace, the worker has the option of bringing suit under Title VII of the Civil Rights Act of 1964, which prohibits racial discrimination in employment.¹⁴⁵ Many federal courts ruling on Title VII claims involving nooses have acknowledged the noose as a symbol of racial hatred.¹⁴⁶ The issue of actual victim impact has played a key role in several courts' evaluations of hostile environment claims.¹⁴⁷ Courts have only allowed secondhand evidence of noose incidents to support Title VII claims when the plaintiff is able to produce evidence of other racially hostile conduct directed at her personally.¹⁴⁸ In one case, *Drummond v. M.P.W.*

¹⁴⁵ 42 U.S.C. § 2000e (2006). Under Title VII, employers may not:

(1) fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify . . . employees or applicants . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

¹⁴⁶ See *Allen v. Mich. Dep't of Corr.*, 165 F.3d 405, 411 (6th Cir. 1999) (noting that noose drawing was perhaps plaintiff's most disturbing evidence of racial harassment); *Little v. Nat'l Broad. Co.*, 210 F. Supp. 2d 330, 391 (S.D.N.Y. 2002) (stating that "the hangman's noose remains a potent and threatening symbol" for Blacks (quoting *Williams v. New York City Hous. Auth.*, 154 F. Supp. 2d 820, 826 (S.D.N.Y. 2001))); *Williams*, 154 F. Supp. 2d at 824.

¹⁴⁷ This same issue was present in the Jena incident. There, school officials maintained that the nooses were found hanging in the early morning and were removed soon afterward. See Franklin, *supra* note 10. Thus, the nooses were only hanging from the tree for a short period of time and may have been removed before few, if any, Black students saw them. In such a circumstance, the question becomes whether the nooses still caused harm if their intended victims did not observe them firsthand.

¹⁴⁸ See, e.g., *Henderson v. Int'l Union*, 263 F. Supp. 2d 1245, 1277 (D. Kan. 2003).

Stone,¹⁴⁹ the plaintiff alleged a racially hostile work environment by asserting that a noose left on a payphone in the work area that many African American employees utilized constituted racial harassment. The court rejected this claim because the plaintiff could not show other incidents of racial harassment, and he did not personally observe the noose.¹⁵⁰

Not all cases in which a noose has been displayed have been accepted as harassment severe enough to satisfy a hostile environment claim. Cases are most likely to be successful if there is direct evidence of the noose (the plaintiff actually saw the noose), the noose is displayed in a supervisor's office, and if the noose is not hung in a setting where ropes are generally used.¹⁵¹ Without further evidence of racial harassment, courts may reject the placement of nooses as evidence of a hostile environment in situations in which the presence of the noose was reported to the plaintiff (i.e., she did not observe the noose personally).¹⁵² Employers who face racial harassment claims for their employees placing nooses in the workplace are less likely to be held liable when supervisors were not involved in the hanging of the noose.¹⁵³ Employers have been able to prevail in some cases when they have taken remedial action to address the situation,¹⁵⁴ and in some circumstances when they were able to show evidence that the placement of the noose was race-neutral.¹⁵⁵

B. *Anti-Noose Legislation and the "Innocent" Noose Hanger*

After the events in Jena became publicized and copycat noose hanging incidents began to occur in the fall of 2007, state legislatures turned their attention to creating legislation aimed directly at deterring noose hanging. In 2008, the legislatures of North Carolina, New York, and Louisiana passed statutes outlawing the placing of a noose.¹⁵⁶ In addition, legislators in Florida, Maryland, and Missouri considered statutes criminalizing the hanging of

¹⁴⁹ No. 91-2719, 1993 WL 17607, at *3 (E.D. La. Jan. 19, 1993).

¹⁵⁰ *See id.* at *4.

¹⁵¹ *See* Jerome R. Watson & Richard W. Warren, "I Heard It Through the Grapevine": *Evidentiary Challenges in Racially Hostile Work Environment Litigation*, 19 LAB. LAW. 381, 389 (2004).

¹⁵² *See, e.g., Henderson*, 263 F. Supp. 2d at 1277.

¹⁵³ *See Jackson v. T & N Van Serv.*, 86 F. Supp. 2d 497, 503 (E.D. Pa. 2000) (holding that company could only be vicariously liable for incidents it knew or should have known about, and failed to promptly correct, when none of the coworkers involved were employee's supervisors).

¹⁵⁴ *See Russell v. Am. Eagle Airlines, Inc.*, 46 F. Supp. 2d 1330 (S.D. Fla. 1999).

¹⁵⁵ *See Motley v. Tractor Supply Co.*, 32 F. Supp. 2d 1026 (S.D. Ind. 1998).

¹⁵⁶ Act Effective July 1, 2008, 2008 La. Acts 643 (codified at LA. REV. STAT. ANN. § 14:40.5 (2008)); Act of May 7, 2008, 2008 N.Y. Laws 74 (codified at N.Y. PENAL LAW § 240.31 (Consol. 2009)); Act of Aug. 8, 2008, 2008 N.C. Sess. Laws 197, §§ 1-3 (codified at N.C. GEN. STAT. § 14-12.12-14-12.14 (2009)).

a noose.¹⁵⁷ Though their timing and similarity seems to suggest that they are aimed largely at prohibiting the display of nooses, the state statutes that have been passed and those that are proposed are far broader. In many cases, the attention to nooses was linked with a variety of bias-motivated crimes, including burning crosses and swastikas.

State statutes, such as Maryland's, that regulate the hanging of nooses reflect the requirement in *Black* that intent to intimidate must be present. The new anti-noose statutes in North Carolina, Louisiana, and New York only criminalize noose hanging that is intended to intimidate.¹⁵⁸ Regardless of the harm that noose hanging causes, if the individual did not intend to threaten, she cannot be punished under such criminal statutes. With respect to the effectiveness of anti-noose statutes, criminalizing such hangings captures the vast majority of offenses, where the noose is used to threaten. Unfortunately, as the Jena Six case demonstrates, this approach does not address the significant number of perpetrators who hang nooses as jokes or pranks—those who, like the students who hung the nooses at Jena High, do not appreciate the significance of the hangman's noose. Such perpetrators impart fear and intimidation, but cannot be punished under the legislation specially aimed at the harm they cause with nooses.

C. Criminal and Civil Rights Statutes

States that do not have statutes aimed specifically at the hanging of nooses still may be able to punish the incidents under coercion or civil rights statutes. Criminal coercion statutes punish the use of threats in attempting to force an individual to do something, or, as would be more appropriate for noose hangings, to prevent them from doing something they are legally entitled to do.¹⁵⁹ If the placement of the noose is racially motivated, two of the most likely legal routes are found either under federal civil rights law¹⁶⁰ or under state hate crime legislation. State hate crime statutes may exist in the form of bias-motivated violence and intimidation statutes, which criminalize the selection of victim for harassment or violence on the basis of race, religion, or other discriminatory animus.¹⁶¹ In the alternative, states may have

¹⁵⁷ See John Gramlich, *Noose Displays Provoke New State Penalties*, WEEKLY STORIES, STATELINE.ORG, June 6, 2008, at 10, available at <http://archive.stateline.org/weekly/Stateline.org-Weekly-Original-Content-2008-06-02.pdf>.

¹⁵⁸ LA. REV. STAT. ANN. § 14:40.5; N.Y. PENAL LAW § 240.31; N.C. GEN. STAT. § 14-12.12–14-12.14.

¹⁵⁹ See, e.g., ALA. CODE § 13A-6-25(a) (2008); ALASKA STAT. § 11.41.530 (2008); ARK. CODE ANN. § 5-13-208 (2008); CONN. GEN. STAT. ANN. § 53a-192 (West 2008); DEL. CODE ANN. tit. 11, § 791 (2008); KY. REV. STAT. ANN. § 509.080 (West 2008); NEV. REV. STAT. § 207.190 (West 2008); N.Y. PENAL LAW §§ 135.60, 135.65 (McKinney 2008).

¹⁶⁰ There have been several lawsuits dealing with nooses filed under the following provisions of federal law: 18 U.S.C. § 241 (2006); 42 U.S.C. §§ 1981, 1983, 1985, 2000 (2006). See, e.g., *United States v. Hobbs*, Nos. 05-4744, 05-4745, 2006 U.S. App. LEXIS 18113, at *2 (4th Cir. 2006).

¹⁶¹ See DEL. CODE ANN. tit. 11, § 1304 (2008).

hate crime penalty enhancement statutes, which enhance the penalty when the defendant was motivated by racial or other discriminatory animus.¹⁶² Finally, states may have general civil rights statutes, criminalizing any individual's interference with another's enjoyment of any rights or privilege secured by the state or federal Constitution, that might be used to prosecute noose hanging.¹⁶³

A variety of problems arise with using hate crime or civil rights legislation to attack noose hanging. The largest problem is the issue of the perpetrator's motivation. First, in hate-crime cases, the perpetrator's motivation is central. In the case of noose hanging, prosecutors would have to prove that perpetrators acted with some sort of biased racial motivation. Though the vast majority of jurisdictions have hate crime legislation, the distribution of resources with respect to investigative skills on the part of police responsible for investigating crime varies.¹⁶⁴ This means that investigators must collect evidence of motive, which may not be easy even if motive exists.¹⁶⁵ In addition, police from some departments, particularly those that do not have hate crime units, may be ill-equipped to collect evidence of motivation,¹⁶⁶ so prosecutors may be reluctant to bring charges even if their jurisdictions have comprehensive hate-crime legislation. Finally, as was discussed in Part III, in many noose cases perpetrators may insist that they were not motivated by racism or any other bias. In cases where perpetrators are able to demonstrate credibly they had some other intention, it is unlikely prosecutors will elect to bring charges.

V. WHERE DO WE GO FROM HERE?: A VICTIM-CENTERED APPROACH TO REGULATING EXTREME SYMBOLS OF HATE SPEECH

Like the burning cross and the swastika, the hangman's noose is a prominent symbol of extreme hatred. Punishing the use of these symbols presents legal challenges. These symbols have a sordid history of which victims cannot help but be reminded when they are displayed. Indeed, the display of each of such symbols is a message invoking its history and thereby conveying a profound threat. Despite the nearly universal message that each of these symbols seems to convey to the targeted populations—largely racial, ethnic, and religious minorities—some perpetrators (though

¹⁶² See, e.g., ALA. CODE § 13A-5-13 (2008).

¹⁶³ See, e.g., CAL. PENAL CODE § 422.6 (West 2008); ME. REV. STAT. ANN. tit. 17, § 2931 (2008); MASS. GEN. LAWS ANN. ch. 265, § 37 (2008); W. VA. CODE ANN. § 61-6-21(B) (West 2008).

¹⁶⁴ See JEANNINE BELL, *POLICING HATRED: LAW-ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME* 14-17 (2002).

¹⁶⁵ See Karen Franklin, *Good Intentions: The Enforcement of Hate Crime Penalty Enhancement Statutes*, 46 AM. BEHAV. SCI. 154, 157-59 (2002).

¹⁶⁶ See Jeannine Bell, *Deciding When Hate Is a Crime: The First Amendment, Police Detectives and the Identification of Hate Crime*, 4 RUTGERS RACE & L. REV. 33, 51-53 (2002) (describing police units with different capacities to investigate hate crime).

clearly not all) claim to have a different understanding. They use nooses as jokes or may intend (or at least claim they intend) to send a nonracial message. This section argues that the use of these threatening symbols should be regulated when the perpetrator is communicating a threat.

Using cross burning as an analogy provides a doctrinal basis for punishing some noose hanging. In *Virginia v. Black*, the Supreme Court acknowledged the threatening nature of the burning cross and allowed states to regulate this particular form of expressive conduct when it is intended to intimidate.¹⁶⁷ But one cannot necessarily infer from *Black* that all noose hanging may be regulated. In fact, from a social perspective, one of the greatest difficulties in First Amendment hate speech jurisprudence is that courts have allowed the individuals who use hate symbols to decide what they mean. Under *Black*, individuals can assert whether they are burning a cross as a statement of ideology, as a symbol of group solidarity, or as a symbol of something else to avoid the law's constitutional reach. This means it is the way the perpetrator sees the symbol that governs whether the incident can be punished. Thus, the person who places it, not the individual who sees it, decides its meaning. This is true even in the case of a burning cross—a symbol that the Court and American society at large have identified as threatening.

The Supreme Court's decision in *Black* offers little space for the victim's perspective. In a case in which there is uncontroverted evidence that the perpetrator intended the burning cross as a joke, or meant to send a wholly nonviolent message, *Black* seems to suggest that the state would not be able to punish the perpetrator, even if the victim were upset or frightened. The prevalence of joking, historically unaware perpetrators, and even perpetrators who are fully aware of the historical legacy but do not intent to send a racial threat using one of these hate symbols, suggest that there may be many who escape punishment.

The literature on victims' experiences of hate speech indicates that there is a wide gap between the perspectives of perpetrators and victims.¹⁶⁸ This gulf is one that cannot be bridged unless we clearly support the idea that noose hanging constitutes a threat. Neither hate crime legislation with its concern for motivation, nor recent noose legislation with its focus on the intent to intimidate, is able to adequately punish perpetrators who maintain that they did not intend to intimidate victims. This Article proposes that where the perpetrator has used an extreme hate symbol like a burning cross, a noose, or a swastika, courts should take an approach that incorporates the victim's perspective.

¹⁶⁷ 538 U.S. 343, 357, 363 (2003).

¹⁶⁸ See generally MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÉ WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

A. *A Victim-Based, Reasonable Person Approach: A Clear Approach for the Simplest of Cases*

In order to deal with those cases where lack of intent seems to thwart punishment under existing legislation, I advocate a victim-centered approach. This is of course not the first victim-centered approach to racist speech. Other scholars have advocated victim-based approaches to the legal regulation of racist speech to address the harm that such speech causes to the minorities who are so frequently its targets.¹⁶⁹ One of the most predominant victim-centered approaches to racist speech is that offered by Matsuda. In her article, *Public Response to Racist Speech: Considering the Victim's Story*,¹⁷⁰ Matsuda notes that even though regulations on hate speech have been accepted in several other countries¹⁷¹ and under international law,¹⁷² the American tradition of First Amendment absolutism means that there is a substantial barrier to the adoption of regulation in this area.¹⁷³ Because the United States has an ugly history of suppressing speech, and to avoid the social danger posed by regulating potentially valuable speech, Matsuda concerns herself only with regulating the most extreme cases of racist speech.¹⁷⁴ Matsuda offers a theory for regulating the "worst of the worst" racist hate speech. She identifies the worst racist speech as that which meets the following three criteria:

1. The message is of racial inferiority;
2. The message is directed against a historically oppressed group;
- and
3. The message is persecutorial, hateful, and degrading.¹⁷⁵

Wary of critics' concerns, this Article crafts an approach that is even narrower than Matsuda's. Rather than focusing on several different types of hate speech, as Matsuda does, it advocates a victim-centered approach that focuses only on punishing the "wordless speech" in readily identifiable extreme symbols of racial hatred like the hangman's noose.

¹⁶⁹ *Id.*

¹⁷⁰ Matsuda, *supra* note 113.

¹⁷¹ *Id.* at 2346-47 (citing laws punishing hate speech in the United Kingdom, Canada, Australia, and New Zealand).

¹⁷² Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination states that state parties:

Shall declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin . . .

Matsuda, *supra* note 113, at 2341 (quoting International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1996, 660 U.N.T.S. 195).

¹⁷³ *Id.* at 2351-53.

¹⁷⁴ *Id.* at 2356-58.

¹⁷⁵ *Id.* at 2357.

Irrespective of the perpetrator's actual intent, often the victim experiences the hanging of a noose as a threat. To evaluate whether the placement of a noose constitutes legally threatening conduct, and therefore may be punished, courts adopt the Ninth Circuit's approach to evaluate whether the noose hanger's behavior constitutes true threat. Such a test was applied in *United States v. Mitchell*,¹⁷⁶ a case in which an individual made a threat against President Reagan's life.¹⁷⁷ Mitchell later claimed his threats should reasonably have been regarded as "ludicrous and made in jest."¹⁷⁸ Looking to the full context of Mitchell's speech, as required by *Watts v. United States*,¹⁷⁹ in *Mitchell* the Ninth Circuit adopted an objective intent standard for interpreting the requirement that a threat be made "knowingly and willfully."¹⁸⁰ The Ninth Circuit's objective standard required that "the defendant intentionally make a statement that a reasonable person under the circumstances would interpret as a serious expression of intent to harm the President."¹⁸¹ I suggest that courts use a similar standard to evaluate whether a noose hanging constitutes threatening conduct. Courts should assess whether it appeared that the person who has placed the noose intended to act in a manner that a reasonable person under the circumstance would interpret as a threat. The historical context of noose hanging means that in the vast majority of cases courts would be likely to determine that noose hanging is a threat, irrespective of a perpetrator's contention that such behavior was innocent.

Virginia v. Black may provide limited support for this approach. In *Black*, the Court recognized that cross burning is threatening because of its historical use.¹⁸² The Court also noted that cross burning's violent history can be evoked even when it is used in very different contexts. The Court noted that "individuals without Klan affiliation who wish to threaten or menace another person sometimes use cross burning because of this association between a burning cross and violence."¹⁸³ Because burning crosses have been used in an historical context that is threatening, the Court accepted that so long as the perpetrator intended to intimidate, the state may prohibit cross burning. Given the history of the hangman's noose, a clear analogy could be made to hanging of nooses. Nooses hung by a perpetrator who intended to intimidate or threaten may be proscribed by the state.

Adopting the objective reasonable person approach is not necessarily prohibited by *Black*. Though *Black* provides explicit protection for some

¹⁷⁶ 812 F.2d 1250 (9th Cir. 1987).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1256.

¹⁷⁹ 394 U.S. 705, 708 (1969).

¹⁸⁰ 812 F.2d at 1253.

¹⁸¹ *Id.*

¹⁸² *Virginia v. Black*, 538 U.S. 343, 360 (2003) ("[T]he history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.").

¹⁸³ *Id.* at 357.

cross burners (i.e. political cross burners¹⁸⁴), the Court does not precisely define how the courts should determine the perpetrator's intent. Rather, in *Black* the Court was concerned with the prima facie provision in the Virginia cross burning statute which stipulated: "[A]ny burning of a cross shall be prima facie evidence of an intent to intimidate."¹⁸⁵ The prima facie evidence provision rendered the statute unconstitutional because it did not allow a fact-finder to make a distinction between the different types of cross burnings.¹⁸⁶ An objective reasonable person standard in noose hanging cases would not operate in the same manner as the prima facie provision.

I advocate an objective standard for the placement of the noose in only the most threatening of cases—cases in which a specific, readily identifiable victim has been targeted. For instance, this proposal is not aimed at cases like the one in Jena, where the nooses were hung in the schoolyard and could have been directed at several students—or all of the Black population on the school grounds. Rather, it is created to address cases in which there is a readily identifiable victim. Using such a standard could at least in some cases allow states to punish cases of joking or other "uninformed" noose hangers in either the criminal or civil context, for instance through existing noose statutes or employment law. By allowing some sort of legal remedy, this victim-centered approach would much more effectively address the substantial harm that victims experience.

In cases involving the hanging of nooses, or placement of other extreme symbols, targeted victims are particularly susceptible. They are likely to experience a noose hanging, a burning cross, or a swastika as a threat, regardless of the individual perpetrator's intent. It makes sense to hold perpetrators responsible not just from the perspective of fairness to victims, but also for efficiency reasons. There is significant historical background as well as broad social understanding that the hangman's noose and other symbols of extreme hatred constitute threats when used in a particular context. Given this, the perpetrator is the cheapest cost avoider. It is far easier for him to avoid the harm to the victim than it would be for the victim to avoid being harmed.

Looking to the area of employment law, an approach along the lines of the one this Article advocates was employed by the court in *Williams v. New York City Housing Authority*.¹⁸⁷ In *Williams*, two African American employees working as caretakers for a facility that was part of the New York Housing Authority brought suit against their employer for racial discrimination. At issue was an incident in which one of the employees, Gregory Williams, entered the office of his White supervisor, Kevin Burns, and noticed a noose hanging on the wall behind Burns' desk. When confronted about the noose

¹⁸⁴ *Id.* at 365.

¹⁸⁵ *Id.* at 347.

¹⁸⁶ *Id.* at 366.

¹⁸⁷ 154 F. Supp. 2d 820 (2001).

display by several coworkers, Burns removed the noose, insisting that “[i]t was a joke” and “you know I’m not like that.”¹⁸⁸

Williams was not a straightforward racial harassment case in which recovery was likely. The plaintiff’s difficulty in *Williams* was that no other evidence of racially hostile conduct was produced. The court found that the placement of the noose alone was sufficiently severe to establish a racially hostile work environment. Denying the defendant’s argument that this was a joke, Judge Robert Carter rejected as “naïve and untenable” the defendant’s notion that the display of the noose by the White supervisor could not sufficiently alter the conditions of employment for an African American employee.¹⁸⁹ Judge Carter noted:

[T]he noose is among the most repugnant of all racist symbols, because it is itself an instrument of violence. It is impossible to appreciate the impact of the display of a noose without understanding this nation’s opprobrious legacy of violence against African-Americans. . . . The effect of such violence on the psyche of African-Americans cannot be exaggerated. . . . Thus, even though there may not have been a large number of isolated remarks or actions, the severity of the conduct at issue, if proven, would be sufficient to establish a hostile work environment.¹⁹⁰

Focusing on the noose’s historical context and the ways in which it might be viewed by the plaintiff, Judge Carter adopted a victim-centered perspective. Similar to what one might predict would happen in the reasonable person approach advocated above, Judge Carter rejected the defendant’s insistence that his behavior was non-racial. Here the historical context—the nation’s legacy of violence against Blacks—and the noose display stood in place of the perpetrator’s intent. In holding the defendant liable, Judge Carter assumed that by hanging the noose the defendant intended the logical consequence of his actions—to create a hostile work environment.

VI. CONCLUSION

*Southern trees bear strange fruit,
Blood on the leaves and blood at the root,
Black bodies swinging in the southern breeze,
Strange fruit hanging from the poplar trees.*¹⁹¹

At least in the case of the hangman’s noose, legal trees bear strange fruit. The hangman’s noose that, as this Article demonstrates, is still in fairly

¹⁸⁸ See, e.g., *Primm v. U.S. Fid. & Guar. Ins. Corp.*, 922 S.W.2d 319, 321 (Ark. 1996).

¹⁸⁹ Robert A. Mikos, “Eggshell” Victims, Private Precautions, and the Societal Benefits of *Shifting Crime*, 105 MICH. L. REV. 307, 338 (2006).

¹⁹⁰ 154 F. Supp. 2d 820, 824 (S.D.N.Y. 2001).

¹⁹¹ *Id.* at 821.

frequent use has a distinct historical message—as a threat invoking the lynching of Blacks. This precise message is clearly understood both by victims and by many in the media and society as a whole.

If an analogy can be made between a burning cross and a hangman's noose, the Supreme Court's decision in *Virginia v. Black* may create a space for social and historical understanding of the noose's message to be turned upside down. As discussed above, not every contemporary case of noose hanging manifests decisive evidence of the intent to threaten. As was the case in the noose hanging in Jena, Louisiana, the perpetrators' intent may be unknown. In other cases, perpetrators may display a hangman's noose as a joke. Under an interpretation of *Black* that strictly requires evidence of the perpetrator's intent to threaten, *Black* preserves the right of joking and similarly motivated cross burnings by those who did not intend to threaten. For courts to undertake some sort of fact-specific evaluation of a perpetrator's intent in cases involving the hanging of nooses or the use of other extreme symbols like cross burning allows the perpetrator's perspective to control.

A reasonable person objective approach like the one advocated here allows for a perpetrator to be punished even if she maintains that she placed the noose as a joke or did not intend racism in its placement. If courts reject this approach and force the prosecution to always prove that the perpetrator intended to threaten individuals targeted by noose hangings are forced to live in a parallel perpetrator-created universe, where, against the great weight of history and societal expectation, the hangman's noose is transformed. The hangman's noose changes from what victims and the rest of society sees—an unmistakable sign of violence wrought by the Ku Klux Klan—into a harmless prank. Validating the perpetrator's perspective in this way is symbolic of the lynch mob all over again.

