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CHANGING STATE LAWS TO PROHIBIT THE DISPLAY OF HANGMAN'S NOOSES: TIGHTENING THE KNOT AROUND THE FIRST AMENDMENT?

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> It gives me great pain to read in every daily paper which visits my office of some poor black man being seized by a mob and lynched without even the semblance of law. The unlawful murderers, not satisfied with this, riddle the body of the poor Negro with bullets. Too often after the poor man is dead investigation proves that the wrong man was killed. The matter is laughed off by the cowardly outlaws with the sentence, "Only another Negro less." My God! When will this thing end, and where?[1]

Beginning with slavery and permeating every generation since, racism has led to grave and bone-chilling acts of terror spurred solely by the color of a fellow human's skin. As perhaps the most common display of such hatred,[2] the hanging of African-Americans by white mobs became a means to flaunt the power maintained by whites in the days of slavery,[3] and later, of Jim Crow justice.[4] Although such blatant acts of terror are virtually unthinkable today, the symbol of this dark period in American history—the noose—seems to be making a resurgence in appearances, summoning a time most Americans would rather not repeat. In Jena, Louisiana, the display of two nooses from a schoolyard tree led to an immense boiling of racial tension that

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* J.D., William & Mary School of Law, 2009; B.A., Towson University, 2006. I would like to thank my family, friends, and sorority sisters for their endless support, encouragement, and inspiration.

[1] Charles H. J. Taylor, *Is God Dead?*, KAN. CITY AM. CITIZEN, Feb. 19, 1892, *reprinted in* LYNCHING IN AMERICA: A HISTORY IN DOCUMENTS 119 (Christopher Waldrep ed., 2006).

[2] *See* Joseph Edwin Proffit, *Lynching: Its Cause and Cure*, 7 YALE L.J. 264, 264 (1898) ("The child of expediency has now become the despot of our civilization, unregardful of legal form, relentless in his decrees, untaught by mercy, intolerant and without conscience. Lynch law is now the rule, and legal form the exception.").

[3] *See infra* Part II.

[4] Analyzing the number of lynchings in Louisiana alone from the post-bellum period into the Jim Crow era, Michael Pfeifer found that "[l]ynchers killed 263 persons, at least 219 of them black, in northern parishes between 1878 and 1946." MICHAEL J. PFEIFER, ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY, 1874–1947, at 15 (2004). Another set of statistics reported that between 1889 and 1931, 3,290 people were lynched in the South, of whom 2,789 were black. Stewart E. Tolnay, E. M. Beck & James L. Massey, *Black Lynchings: The Power Threat Hypothesis Revisited*, 67 SOC. FORCES 605, 605–06 (1989).

ultimately spurred a national controversy.[5] In workplaces throughout the United States, reports of co-workers displaying hangman's nooses in view of African-American colleagues have become disturbingly frequent.

A *BusinessWeek* study from 2001 noted, "many experts say they are seeing a disturbing increase in incidents of harassment."[6] The study discovered noose incidents occurring in large, diverse cities such as San Francisco and Detroit, and reported that the Equal Employment Opportunity Commission (EEOC) had managed twenty-five noose cases in the eighteen months prior to the study, "'something that only came along every two or three years before.'"[7] While many hostile work environment cases involving the display of hangman's nooses in the workplace contain additional elements of racial harassment,[8] most courts would likely follow the general rule that one display of a hangman's noose to taunt an African-American colleague is sufficient to bring a hostile work environment claim.[9] Generally, courts seem to interpret potentially racially discriminatory acts with a high degree of sensitivity and subjectivity.[10]

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[5] *See infra* Part I.

[6] Aaron Bernstein, *Racism in the Workplace*, BUS.WK., July 30, 2001, at 64, *available at* http://www.businessweek.com/magazine/content/01_31/b3743084.htm.

[7] *Id.* (quoting Ida L. Castro, former EEOC chairwoman).

[8] *See, e.g.*, Mack v. ST Mobile Aerospace Eng'g, Inc., 195 F. App'x 829 (11th Cir. 2006) (reversing the district court's grant of summary judgment to an employer when incidents of harassment included the discovery of seven nooses within a two-year period, racial graffiti and confederate flags found throughout the workplace, and racially hostile comments used by supervisors); West v. Phila. Elec. Co., 45 F.3d 744, 748 n.1 (3d Cir. 1995) (holding that a hostile work environment based on race was present where black employees experienced "racially harassing conversations; racially derogatory postings on a bulletin board; slurs and physical threats; a large noose hanging in the workshop entranceway," and other racist acts); Carson v. Giant Food, Inc., 187 F. Supp. 2d 462 (D. Md. 2002) (denying defendant's motion to dismiss the plaintiffs' hostile work environment claim where nooses had been displayed in the employer's warehouses on at least four occasions and racist graffiti was written on the walls of trailers).

[9] Two United States district courts, as well as the Second Circuit, have directly asserted that only one display of a hangman's noose in a work setting can constitute a hostile work environment. *See* Rosemond v. Stop & Shop Supermarket Co., 456 F. Supp. 2d 204, 213 (D. Mass. 2006) ("[A] reasonable jury could determine that the noose incident, standing alone, was *objectively* hostile or abusive."); Williams v. N.Y. City Hous. Auth., 154 F. Supp. 2d 820, 823 (S.D.N.Y. 2001) (referencing Second Circuit decisions, and noting that "while a single incident must be 'extraordinarily severe' to create a hostile work environment, it need not involve actual or threatened physical assault. . . . [T]he placement of a noose in the workplace can reasonably be perceived as racially hostile conduct" (citations omitted)).

[10] *See, e.g.*, Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1083 (3d Cir. 1996) (holding that although several remarks the plaintiff claimed to be discriminatory were not overtly racist, "the use of 'code words' can, under circumstances such as we encounter here, violate Title VII [of the Civil Rights Act of 1964]," since such words "could be seen as conveying the message that members of a particular race are disfavored and that members of that race are, therefore, not full and equal members of the workplace"); Cheryl L. Howard, *Romeo*

The disturbing trend in noose incidents, which not only disrupts the workplace, but, as exemplified in Jena, now pervades our nation's school systems, requires a more stringent effort to quell the racial tension caused by such insensitive acts.

State legislators hold the key to preventing further tumultuous behavior. Many states currently maintain hate crime statutes, but due to definitional and interpretive concerns, the existing statutes may not effectively punish those individuals who display hangman's nooses with the intent to harass or intimidate based on race.[11] By enacting state statutes placing criminal prohibitions on displays of hangman's nooses, legislators will be able to control the sharp increase in noose cases and emphasize the importance of tolerating diversity in this supposedly tolerant modern society. Many state legislators, however, may be wary to implement such a statute for fear that it may cross into regulating constitutionally protected speech. Although the First Amendment, as incorporated through the Fourteenth Amendment, prohibits state regulation of expressive or political speech,[12] a criminal ban on the display of hangman's nooses would not interfere with this right because such displays represent harmful and harassing conduct rather than constitutionally-protected speech.[13] The display of a hangman's noose with the intent to harass or intimidate a particular person or class of people is a racist act comparable to the burning of a cross, an act that has been outlawed explicitly in twenty states as well as the District of Columbia.[14]

This Note argues that state legislatures already maintaining criminal laws banning cross burning should modify these statutes to proscribe the display of hangman's nooses as well, and states without such existing statutes should—as a matter of good public policy—adopt this type of law. Part I will present the facts surrounding the "Jena 6" controversy, which led to the urgency of this issue. Part II will discuss the history of lynchings in the United States and its close association with the suppression of African-Americans in society. This section is necessary to develop the argument that the hangman's noose represents a "particularly virulent form of intimidation"[15] that is of the same level of severity as cross burning. Part III will examine Supreme Court precedent concerning state cross-burning regulations in order to better define

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and Juliets: A Modern Workplace Tragedy, 9 U. PA. J. LAB. & EMP. L. 805, 828 (2007) (discussing *Williams* in which an African-American employee alleged that he had been subjected to a hostile work environment after walking into his supervisor's office and seeing a noose on the wall, and stating that "[a]lthough the plaintiff did not present evidence that the noose was specifically meant to insult him, the court considered the noose to be severe enough to create a hostile work environment, and it denied the employer's motion for summary judgment").

[11] *See infra* Part IV.D.

[12] The First Amendment reads, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[13] *See infra* Part IV.

[14] *See infra* note 48.

[15] Virginia v. Black, 538 U.S. 343, 363 (2003).

the parameters of the proposed hangman's noose ban. Part IV will delve into the potential First Amendment arguments concerning the proposed law, and will explain the means to give validity to those laws implicating the First Amendment. Part V will propose a draft statute based on existing cross-burning regulations and a recently proposed noose law introduced by the New York state senate. This section will then attempt to distinguish those factual scenarios that the proposed law would proscribe from those scenarios that would allow potential defendants to escape liability.

I. THREE NOOSES, AN OLD OAK TREE, AND RACIAL TENSION IN JENA, LOUISIANA

In September 2006, a black Jena High School student asked the vice principal if he could sit under an oak tree in the school's courtyard where white students typically gathered.[16] The vice principal assured him that he could sit wherever he wanted, so the black student and some friends sat under the tree.[17] The next day, two nooses hung from the oak tree.[18] Robert Bailey, one of the young men later included among the "Jena 6," stated, "I seen [the nooses] hanging. I'm thinking the KKK, you know, were hanging nooses. They want to hang somebody. Real nooses, the ones you see on TV, are the kind of nooses they were."[19]

A school district committee punished the three white students responsible for hanging the nooses with a three-day suspension.[20] Many in the school system thought of the two nooses as a mere prank.[21] After the noose incident, racial tension at Jena High School began to swell, resulting in informal reports of off-campus fights.[22] On November 30, 2006, the school's main academic building caught fire; the arson is still unsolved.[23] Four days after the arson, a group of students attacked a white student, Justin Barker, who was sent to the hospital with cuts and injuries to his eyes and

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[16] Susan Roesgen & Eliott C. McLaughlin, *Residents: Nooses Spark School Violence, Divide Town*, CNN, Sept. 5, 2007, http://www.cnn.com/2007/US/law/09/04/bell.jena.six/index.html.

[17] *Id.*

[18] Bill Sumrall, *Jena High Noose Incident Triggers Parental Protests*, THE TOWN TALK (Alexandria-Pineville, Louisiana), Sept. 6, 2006, at 6A, *available at* http://www.thetowntalk.com/apps/pbcs.dll/article?AID=/99999999/NEWS/70916001. Some later accounts of the Jena noose incident reported the number of nooses found in the tree as three rather than two. *E.g.*, Roesgen & McLaughlin, *supra* note 16.

[19] Roesgen & McLaughlin, *supra* note 16 (quoting Interview by Jacquie Soohen with Robert Bailey, in Jena, La. (July 10, 2007), *available at* http://www.democracynow.org/2007/7/10/the_case_of_the_jena_six).

[20] *Id.*

[21] Howard Witt, *House Panel Demands Answers in Jena Case: Justice Department Considers Probe of Racial Bias Allegations*, CHI. TRIB., Oct. 17, 2007, at C4, *available at* http://www.chicagotribune.com/services/newspaper/printedition/wednesday/chi-jena17oct17,0,1353598.story.

[22] Roesgen & McLaughlin, *supra* note 16.

[23] *Id.*

ears.[24] Barker was treated and released later that day.[25] Mychal Bell, Robert Bailey, Theo Shaw, Carwin Jones, Bryant Purvis, and Jesse Ray Beard were arrested and charged with attempted second-degree murder.[26] All of the teens arrested are black.[27] According to the charges, the teenagers used shoes as weapons used in the "attempted murder."[28] The six youths became known by their supporters across the country as the Jena 6.[29]

Three of the Jena 6 later had their charges reduced to aggravated battery, and on September 4, 2007, a district court judge vacated one of two convictions against Bell, agreeing with defense lawyers that the "charge of conspiracy to commit second-degree aggravated battery should have been brought in juvenile court rather than adult court."[30] By this time, however, the Jena 6 had already garnered support and outrage from a divided nation.[31] No organization worked harder to support the six young men than the NAACP,[32] an organization founded to counteract racial violence.[33] The history of the NAACP reflects the struggle against lynching in the Jim Crow era: "[B]y 1919 the organization was prepared to devote nearly one-fifth of its total operating budget to the anti-lynching campaign."[34] It seems unlikely that the NAACP founders would have imagined that the fight against this sinister legacy would continue into the twenty-first century.

II. A HISTORY OF HATRED: THE PRESENCE OF NOOSES IN AFRICAN-AMERICAN HISTORY

In 1945, sociologist Oliver C. Cox defined "lynching" as "an act of homicidal aggression committed by one people against another through mob action for the purpose of suppressing either some tendency in the latter to rise from an accommodated

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[24] *Id.*

[25] *Id.*

[26] State v. Bailey, 969 So. 2d 610, 610 (La. 2007).

[27] *Id.*

[28] Roesgen & McLaughlin, *supra* note 16.

[29] Amy Goodman, Editorial, *It's Still About Race in Jena, La.*, SEATTLE POST-INTELLIGENCER, July 19, 2007, at B6, *available at* http://seattlepi.nwsource.com/opinion/324177_amygoodman19.html.

[30] Roesgen & McLaughlin, *supra* note 16.

[31] *See, e.g., id.*; Jasiri Whipper, *Jena Fueling New Rights Movement, Waters Says*, POST & COURIER (Charleston, S.C.), Sept. 22, 2007, at A1, *available at* http://www.charleston.net/news/2007/sep/22/jena_fueling_new_rights_movement_waters_16895/.

[32] Press Release, National Association for the Advancement of Colored People, NAACP Coordinates Activities Around Jena Sentencing on Sept. 20 (Sept. 10, 2007), *available at* http://www.naacp.org/news/press/2007-09-10/index.htm.

[33] JONATHAN MARKOVITZ, LEGACIES OF LYNCHING: RACIAL VIOLENCE AND MEMORY 5 (2004).

[34] *Id.*

position of subordination or for subjugating them further to some lower social status."[35] To the descendants of slaves and virtually all African-Americans across the country, the hangman's noose thus represents a time of fear, marginalization, and degradation. In his book, *Legacies of Lynching*, Jonathan Markovitz explained that the importance of this history does not diminish with time:

> The lynching metaphor, and collective memories of lynching, can be reconstructed and deployed in a wide variety of ways and for a seemingly endless number of purposes, but the meaning that is attached to lynching is never arbitrary. Instead, our understandings of lynching are circumscribed by discursive battles in the past and the present.[36]

The sight of a noose marks a return to America's history of marginalizing African-Americans and carries this history into an all-too-current context.

Lynchings first became especially prevalent in the South, representing a way for southern whites to keep control over and respond to their fear of the black majority.[37] Starting with the Civil War era, "as communities throughout the South began to fear slave rebellions," white males sometimes executed groups of slaves "in order to terrorize the slave community into submission. . . . Despite the fact that lynchings occurred throughout the nation and targeted whites, Native Americans, Mexicans, and Asians, by the late nineteenth century, lynching had become a distinctly southern phenomenon whose victims were primarily African American."[38] Plantation owners in particular used lynchings to maintain order during the Civil War.[39] For example, "[i]n northern Louisiana's Cotton Belt, planters dominated the polity, kept the criminal justice system weak, and through rampant lynching and corporal punishment reserved for themselves the right to punish what they defined as African-American deviancy."[40] After the Civil War, the number of lynchings in America did not begin to diminish but instead continued to climb.[41]

In the Sugarland, lynchings became frequent because of claims by whites that an African-American male had raped a white woman, but over time, a rape claim became

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[35] Oliver C. Cox, *Lynching and the Status Quo*, 14 J. OF NEGRO EDUC. 576, 576 (1945).

[36] MARKOVITZ, *supra* note 33, at 146.

[37] *See generally* PFEIFER, *supra* note 4, at 67–93 (analyzing the exertion of white supremacy through lynch law in the different regions of the United States); Proffit, *supra* note 2, at 265 ("The white man saw in the negro the destroying instrument of his political dominance. . . . Two ethnologically distinct peoples with equal liberties cannot, for long, exist in the same territory without racial conflicts.").

[38] MARKOVITZ, *supra* note 33, at xxiii–xxiv (footnote omitted).

[39] PFEIFER, *supra* note 4, at 67.

[40] *Id.*

[41] *See* Proffit, *supra* note 2, at 266 ("In 1890 there were 127 victims who met their death at the hand of riotous mobs; two years later there were 235.").

unnecessary to hang an African-American.[42] For example, in Selma, Alabama, in 1893, a white woman gave birth after having a consensual sexual relationship with a black man, but the man was still lynched and his body was "'riddled with bullets.'"[43]

Although some whites acknowledged the inherent cruelty and unjust punishment thrust upon blacks during this time, mob executions of African-Americans continued without consequences for the white executioners. In September 1896, a white female living along the Mississippi River described race relations on the outskirts of New Orleans in a letter to her relative in Massachusetts: "Jefferson Parish of which Gretna is the county seat seems to have a great antipathy to the nigger in general and are daily shooting and lynching them: without apparent cause."[44] Similarly, in 1893, a white Methodist bishop named Atticus G. Haygood protested that the massive execution of blacks "'is not so extraordinary an occurrence to need explanation; it has become so common that it no longer surprises.'"[45] An article in an issue of the *Yale Law Journal* published in 1898 mourned that "[l]ynch law is now the rule, and legal form the exception," and categorized lynchings as "unregardful of legal form, relentless in his decrees, untaught by mercy, intolerant and without conscience."[46]

In summarizing the usefulness of and justification for lynching, Trudier Harris explained:

> [L]ynchings were carefully designed to convey to black persons in this country that they had no power and nothing else whites were obligated to respect . . . . Lynchings became, then, the final part of an emasculation that was carried out every day in word and deed. Black men were things, not men, and if they dared to claim any privileges of manhood, whether sexual, economic, or political, they risked execution.[47]

We see the effects of the lynching metaphor today in reports such as the story of the Jena 6 and in multiple recent court cases involving hangman's nooses. The most effective way of dealing with these racially hostile acts is to follow the lead of states

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[42] PFEIFER, *supra* note 4, at 78. The Sugarland is defined by Pfeifer as "a large swath of southern Louisiana distinguished by its ethnic and racial complexity . . . in the south central portion of the state." *Id.* at 75. The region received its name because of the large number of sugar plantations contained within it. *Id.*

[43] MARKOVITZ, *supra* note 33, at 1 (quoting IDA B. WELLS, A RED RECORD 65 (1895)). For a more in depth analysis of "The Myth of the Black Rapist," see *id.* at 8–11.

[44] PFEIFER, *supra* note 4, at 81 (quoting Letter from Alice Thrasher to Arthur Thrasher, Sept. 28, 1896).

[45] W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880–1930, at 8 (1993) (quoting Atticus G. Haygood).

[46] Proffit, *supra* note 2, at 264.

[47] TRUDIER HARRIS, EXORCISING BLACKNESS: HISTORICAL AND LITERARY LYNCHING AND BURNING RITUALS x (1984).

recognizing the importance of placing criminal sanctions on burning crosses, and to thereby prohibit the display of hangman's nooses as a criminally punishable act.

III. LAYING THE FOUNDATION FOR CONSTITUTIONALITY: CROSS-BURNING STATUTES WITH AN INTENT REQUIREMENT HAVE BEEN UPHELD BY THE SUPREME COURT

Although the mention of hangman's nooses explicitly in state laws is a very recent phenomenon, twenty states as well as the District of Columbia explicitly prohibit cross burning,[48] and several of those twenty-one jurisdictions directly bar the display of Nazi swastikas.[49] In designing a statute prohibiting the display of nooses, state legislatures should parallel the proposed statute with these existing cross-burning statutes, and should analyze Supreme Court precedent regulating cross burning in order to determine the language and scope of this proposed prohibition.

The language of those state statutes explicitly prohibiting the burning of crosses tends to include an opening provision making it unlawful for a person or persons to burn a cross;[50] a provision barring such burning on the property of another person without consent or on a highway or other public place;[51] and a provision requiring the "intent to intimidate" a person or group of persons.[52]

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[48] States with cross-burning prohibitions include: (1) Alabama, ALA. CODE § 13A-6-28 (LexisNexis 2008); (2) Arizona, ARIZ. REV. STAT. § 13-1707 (LexisNexis 2007); (3) California, CAL. PENAL CODE § 11411 (Deering 2007); (4) Connecticut, CONN. GEN. STAT. § 46a-58 (2007); (5) Delaware, DEL. CODE ANN. tit. 11, § 805 (2008); (6) District of Columbia, D.C. CODE ANN. § 22-3312.02 (LexisNexis 2008); (7) Florida, FLA. STAT. ANN. § 876.17 (LexisNexis 2008); (8) Georgia, GA. CODE ANN. § 16-11-37 (2007); (9) Idaho, IDAHO CODE ANN. § 18-7902 (2008); (10) Illinois, 720 ILL. COMP. STAT. ANN. 5/12-7.6 (LexisNexis 2008); (11) Louisiana, LA. REV. STAT. ANN. §14:40.4 (2008); (12) Missouri, MO. REV. STAT. § 565.095 (2008); (13) Montana, MONT. CODE ANN. § 45-5-221 (2007); (14) New York, N.Y. PENAL LAW § 240.31 (Consol. 2008); (15) North Carolina, N.C. GEN. STAT. § 14-12.12 (2007); (16) Oklahoma, OKLA. STAT. tit. 21, § 1174 (2007); (17) South Carolina, S.C. CODE ANN. § 16-7-120 (2007); (18) South Dakota, S.D. CODIFIED LAWS § 22-19B-1 (2007); S.D. CODIFIED LAWS § 22-19B-2 (2007); (19) Vermont, VT. STAT. ANN. tit. 13, § 1456 (2007); (20) Virginia, VA. CODE ANN. § 18.2-423 (2008); (21) Washington, WASH. REV. CODE ANN. § 9A.36.080 (LexisNexis 2008).

[49] Those jurisdictions also explicitly imposing criminal punishment for displays of Nazi swastikas are: (1) California, CAL. PENAL CODE § 11411 (Deering 2007); (2) District of Columbia, D.C. CODE ANN. § 22-3312.02 (LexisNexis 2008); (3) New York, N.Y. PENAL LAW § 240.31 (Consol. 2008); and, (4) Washington, WASH. REV. CODE ANN. § 9A.36.080 (LexisNexis 2008).

[50] *See, e.g.*, ARIZ. REV. STAT. § 13-1707 (LexisNexis 2008); LA. REV. STAT. ANN. § 14:40.4 (2008); N.C. GEN. STAT. § 14-12.12 (2007); N.Y. PENAL LAW § 240.31 (Consol. 2008); OKLA. STAT. tit. 21, § 1174 (2007).

[51] *See, e.g.*, sources cited *supra* note 50.

[52] *See, e.g.*, ALA. CODE § 13A-6-28 (LexisNexis 2008); ARIZ. REV. STAT. § 13-1707 (LexisNexis 2008); D.C. CODE ANN. § 22-3312.02 (LexisNexis 2008); GA. CODE ANN.

Three major Supreme Court cases lay out guideposts for designing a criminal statute prohibiting conduct such as cross burning that will avoid interfering with First Amendment free speech rights. The first of these cases to be decided, *R.A.V. v. City of St. Paul*, laid a rigid foundation disfavoring regulations used to quell conduct mixed with speech.[53] The Court in *R.A.V.* struck down a city ordinance in St. Paul, Minnesota criminalizing cross burning.[54] The facts of the case involved Robert A. Viktora, a white teenager, and several other white juveniles who burned a cross on the lawn of the only black family in their neighborhood.[55] Viktora was arrested and charged with violating the ordinance.[56] The St. Paul regulation made it a crime to place on public or private property a burning cross or other symbol likely to "arouse [] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[57] Although the Supreme Court of Minnesota found that the ordinance only prohibited "fighting words," which were not protected by the First Amendment, a unanimous U.S. Supreme Court decision written by Justice Scalia declared the ordinance unconstitutional for viewpoint discrimination and content-based discrimination.[58] The Court decided to apply the First Amendment to fighting words, which were traditionally thought to be outside the scope of the Amendment's protections.[59] Although the Court agreed as to the end result of the decision, Justice Stevens's concurrence noted the disagreement among the Justices over the means of reaching that conclusion.[60] Justice Stevens asserted that the ordinance was merely overbroad, and but for the overbreadth, the ordinance would have been constitutional.[61]

The discomfort of some of the Justices with a test strongly favoring speech over hostile conduct mixed with that speech can further be seen in the Court's decision just

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§ 16-11-37 (2007) ("intent to terrorize"); IDAHO CODE ANN. § 18-7902 (2008); 720 ILL. COMP. STAT. ANN. 5/12-7.6 (LexisNexis 2008); LA. REV. STAT. ANN.§ 14:40.4 (2008); MO. REV. STAT. § 565.095 (2008); MONT. CODE ANN. § 45-5-221 (2007); N.C. GEN. STAT. § 14-12.12 (2007); OKLA. STAT. tit. 21, § 1174 (2007); VT. STAT. ANN. tit. 13, § 1456 (2007) ("intention of terrorizing or harassing").

[53] 505 U.S. 377 (1992).

[54] *Id.* at 381.

[55] *Id.* at 379; Juan F. Perea, *Strange Fruit: Harassment and the First Amendment*, 29 U.C. DAVIS L. REV. 875, 876 (1996).

[56] *R.A.V.*, 505 U.S. at 379–80.

[57] *Id.* at 380 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

[58] *Id.* at 393–96.

[59] In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942), the Court deemed fighting words to be unprotected by the First Amendment. According to the Court in *R.A.V.*, however, "[i]t is not true that 'fighting words' have at most a *'de minimis'* expressive content or that their content is *in all respects* 'worthless and undeserving of constitutional protection'; sometimes they are quite expressive indeed." *R.A.V.*, 505 U.S. at 384–85 (citations omitted).

[60] *R.A.V.*, 505 U.S. at 417 (Stevens, J., concurring).

[61] *Id.* at 436. "[T]he St. Paul ordinance is not an unconstitutional content-based regulation of speech." *Id.*

one year later in *Wisconsin v. Mitchell*.[62] The Court in *Mitchell* limited the *R.A.V.* ruling by declaring that hate crime statutes are an acceptable means of regulating socially unacceptable conduct.[63]

On October 7, 1989, Todd Mitchell and several other African-American men beat a white juvenile unconscious after Mitchell reportedly said, "There goes a white boy; go get him!"[64] Mitchell was convicted of battery, which carries a two-year minimum prison sentence, but under Wisconsin's "hate speech" law, Mitchell received an enhanced sentence because he was determined to have intentionally selected the victim based on race.[65] The Supreme Court unanimously upheld Wisconsin's hate speech statute, distinguishing the ordinance at issue in *R.A.V.* as directed at constitutionally protected expression, and determining Wisconsin's statute to be a regulation on unprotected conduct.[66] Even though the Wisconsin statute did not just involve conduct, the Court decided that the statute focused on conduct, and had a mere incidental effect on speech.[67] A First Amendment cross-burning case out of Florida noted the limit *Mitchell* placed on *R.A.V.*: "*Wisconsin v. Mitchell* . . . clearly limited the impact of *R.A.V.* on statutes . . . which are aimed at conduct as opposed to expression."[68]

Finally, in *Virginia v. Black*,[69] "the Court struggled with how much one can suppress conduct without banning expression."[70] The Court ultimately found criminal bans on cross burning to be acceptable so long as intent was a requirement in the regulation.[71]

In 1998, Barry Elton Black led a Ku Klux Klan rally at which a cross was burned on private property with the owner's permission.[72] The cross, however, was clearly visible to nearby homeowners and motorists on a public road.[73] Black was convicted under Virginia's cross-burning statute.[74] The same year, Richard J. Elliott and Jonathan O'Mara burned a cross on an African-American's yard and were

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[62] 508 U.S. 476 (1993).

[63] *Id.* at 487.

[64] *Id.* at 480.

[65] *Id.* at 485.

[66] *Id.* at 487.

[67] For an explanation of this decision, see Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953, 975 (2004).

[68] United States v. Stewart, 65 F.3d 918, 929 (11th Cir. 1995).

[69] 538 U.S. 343 (2003).

[70] James L. Swanson, *Unholy Fire: Cross Burning, Symbolic Speech, and the First Amendment:* Virginia v. Black, 2003 CATO SUP. CT. REV. 81, 83. "There is no question that a burning cross is a combination of speech and conduct, and that the symbol can convey ideas and intimidation. In *Virginia v. Black* the Court found burning a cross to be sufficiently different to allow restrictions that would otherwise be prohibited by the First Amendment." *Id.*

[71] *Black*, 538 U.S. at 363.

[72] *Id.* at 348.

[73] *Id.*

[74] *Id.* at 349–50.

convicted and sentenced under the same statute.[75] The Virginia Supreme Court overturned the convictions, declaring the law unconstitutional because it conflicted with the First Amendment's guarantee of freedom of expression.[76] The Supreme Court of the United States, however, struggled with the issue. The Court was divided on some issues, but decided by a vote of six-to-three that a properly drafted law that criminally punished cross burning did not conflict with the First Amendment.[77]

During oral arguments, certain Justices berated the respondent's attempt to belittle the effect of cross burnings. Justice Thomas took the most favorable view toward the Virginia law, reflecting on the many lynchings permeating African-American history and arguing that "this was a reign of terror and the cross was a symbol of that reign of terror."[78] Justice Thomas went on to say that the burning cross was used "to terrorize a population"[79] and therefore "is unlike any other symbol in our society."[80] Justice Scalia, almost as forthrightly as Justice Thomas, compared a burning cross to a loaded gun and found the gun to be less intimidating than a burning cross on an African-American's lawn.[81] Justice O'Connor, who would later write the Court's opinion, vigorously attacked the respondent's suggestion that cross burning is not "a particularly virulent form of intimidation."[82]

The crux of Justice O'Connor's opinion, which was joined by Chief Justice Rehnquist and Justices Stevens, Breyer, Scalia, and Thomas, held that a state may criminalize cross burning precisely because it is "a particularly virulent form of intimidation."[83] The Court found that a statute regulating intimidation is acceptable. In upholding the statute in *Black*, the Court set forth guideposts for regulating hate speech while avoiding First Amendment interference. These guideposts allow legislatures to target "hate speech that bears a tight causal connection to proscribable conduct elements, such as threats, intimidation, or harassment."[84] Edward J. Eberle analyzed the broader implications of *Black* and determined that "[t]he lesson . . . is . . . not to regulate hate speech, but instead to target the species of hate speech that curtails interests of personal security, like freedom from intimidation."[85] By prohibiting acts used to harass or intimidate, legislation moves into that category of constitutional regulations that are acceptable means of controlling particularly intimidating contexts. "The

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[75] *Id.* at 350–51.
[76] *Id.* at 351.
[77] *Id.* at 361–63.
[78] Transcript of Oral Argument at 23, *Black*, 538 U.S. 343 (No. 01-1107).
[79] *Id.* at 24.
[80] *Id.* at 23.
[81] *Id.* at 30.
[82] *Id.* at 31.
[83] *Black*, 538 U.S. at 363.
[84] Eberle, *supra* note 67, at 979.
[85] *Id.* at 986–87.

essence of the harm posed by threat or intimidation is fear—fear that the violence or harm will occur. . . . Every person has a right to be safe and secure."[86]

As applied to the African-American student and his friends who sat under the old oak tree at Jena High School, had Louisiana maintained a statute prohibiting the display of hangman's nooses with the intent to intimidate, direct and circumstantial evidence of intent could find the proposed law to be valid. This intent requirement secures and safeguards First Amendment rights while imposing a just punishment against truly heinous acts.[87]

In *Black*, Justice O'Connor held part of the Virginia law to be unconstitutional because the statute did not require such proof of intent; the burning cross itself would be "prima facie evidence of intent to intimidate."[88] This provision conflicted with the First Amendment because it failed to differentiate between a burning cross "intended to intimidate" and one used to express a political message.[89] Justice Scalia disagreed on this point,[90] and Justice Thomas dissented by saying that the plurality went too far and that cross burning could never receive First Amendment protection because its sole message was one of terror and harassment.[91]

Although *R.A.V.*, *Mitchell*, and *Black* all involved "the interface of speech and social reality,"[92] the Court's decisions have evolved from a seemingly strict ban on any type of conduct regulation that interfered with speech, to a recognition of states' need to use their police powers to regulate certain types of malicious conduct that may also involve incidental infringements on free speech.

IV. BALANCING FREE SPEECH CONCERNS WITH THE STATE'S POWER TO REGULATE: APPLYING FIRST AMENDMENT JURISPRUDENCE TO A PROPOSED CRIMINAL PROHIBITION ON NOOSES

In determining the scope of a proposed noose prohibition, the different implications surrounding conduct, speech, symbolic speech, and speech-plus-conduct must be noted.[93] In light of the Court's holding in *Black*, the statute may not state an

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[86] *Id.* at 992. Eberle explains "that the manner of expression—threat or intimidation—is the harm, not the expression itself. This is the distinction between context (intimidation) and content (hate speech)." *Id.*

[87] *See infra* Part IV.

[88] *Black*, 538 U.S. at 347–48. Justices Scalia and Thomas did not agree with Justice O'Connor on this point, and they filed dissents arguing that the Virginia statute was constitutional even with the prima facie evidence provision. *See id.* at 369–71 (Scalia, J., concurring in part and dissenting in part), 398 (Thomas, J., dissenting).

[89] *Id.* at 367 (majority opinion).

[90] *Id.* at 369–71 (Scalia, J., concurring in part and dissenting in part).

[91] *Id.* at 388–95 (Thomas, J., dissenting).

[92] Eberle, *supra* note 67, at 987.

[93] In *United States v. O'Brien*, the Court laid out a step-by-step test to determine whether a regulation unlawfully infringed on First Amendment rights where "'speech' and 'nonspeech'

outright prohibition on all displays of nooses; it instead must ensure that those displays that fall into a constitutionally protected category of free speech are permitted.[94]

A. The Difficulty of Line Drawing

Differentiating speech from conduct poses problems for courts and constitutional law scholars. "Establishing appropriate boundaries for the protection of speech that can both intimidate and express an ideology constitutes a profound challenge for a progressive society committed to the twin goals of free expression and civil order."[95] Although it may seem simple to state "that thought and expression may not be punished, but that criminal intents and effects may," the "line between the two . . . is not always easy to draw."[96]

For example, symbolic speech—which can incorporate symbols, signs, and other means of expression—as well as speech-plus-conduct—activities such as picketing and demonstrating—receive First Amendment protection and therefore may not be regulated by the states. Examples of symbolic speech include

> displaying the red flag as a symbol of international revolution, . . . incorporating the Confederate stars and bars battle flag into the official flags of several southern states to symbolize opposition to desegregation, . . . pledging allegiance to the national flag of the United States, . . . defacing the national flag, [and] wearing clothing and armbands to protest the Vietnam War.[97]

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elements are combined in the same course of conduct." 391 U.S. 367, 376 (1968). The Court decided that regulation is permissible "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

[94] For example, in an essay depicting the pros and cons of bias crime statutes, both the proponent and opponent of hate crime laws agreed that, in light of the two different factual situations presented in *Black*, they "would permit the punishment of Elliot and O'Mara not only for intending to terrorize [their victim] but also for doing so with a further intent to cause fear and harm to other African Americans." Susan B. Gellman & Frederick M. Lawrence, *Agreeing to Agree: A Proponent and Opponent of Hate Crime Laws Reach for Common Ground*, 41 HARV. J. ON LEGIS. 421, 440 (2004). The authors also agreed that "Virginia may not constitutionally punish Barry Black" because the cross burning in which Black was involved was in the context of a Ku Klux Klan rally on private property. *Id.* at 439. *See supra* text accompanying notes 73–75 for the facts of *Black*.

[95] Roger C. Hartley, *Cross Burning—Hate Speech as Free Speech: A Comment on* Virginia v. Black, 54 CATH. U. L. REV. 1, 1 (2004).

[96] Gellman & Lawrence, *supra* note 94, at 437.

[97] Swanson, *supra* note 70, at 81 (footnotes omitted).

B. The Judicially Created Balancing Test

Courts use a balancing test to determine whether symbols or conduct express ideas and to measure the effect of statutes that may endanger First Amendment free speech guarantees.[98] The Court in *Black* was careful to differentiate hate speech regulated on the basis of its viewpoint—as was declared unconstitutional in *R.A.V.*[99]—from hate speech that is prohibited because it "seriously threatens issues of personal security (e.g., threat, intimidation, harassment)"—which was held to be constitutionally proscribable in *Black*.[100] "It is true that free speech has never been interpreted to protect absolutely all expression, with justification. It makes little sense to protect 'threats [that can] instill fear, incitement [that can] provoke violence, [or] false advertising [that can] defraud,' to name a few examples of harmful speech."[101] In *Black*, Justice O'Connor used a "true threat" analysis to balance the impingement on free speech with the state's need to regulate conduct representing a "true threat" to a person or group of people.[102]

Some scholars such as James Swanson, however, fear that O'Connor's "true threat" standard "is susceptible to expansive interpretation that might chill protected expression.... One effect of *Virginia v. Black* might be to chill expression by driving all cross burning underground and out of the public square. That may be good social policy, but it is not good constitutional law."[103] Roger C. Hartley, a professor at Catholic University's Columbus School of Law, made a similar argument, fearing further hate symbol prohibitions that "proscrib[e] speech on only one side."[104] Hartley

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[98] *See* Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, 1996 U. ILL. L. REV. 789, 802 (1996) (noting that deciding whether hate speech is constitutionally protected "is a question of balance in every case"); *see also* Wilson R. Huhn, *Assessing the Constitutionality of Laws that are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 802 (2004) ("American legal doctrine evolved . . . to a realistic balancing approach that developed over the course of the twentieth century.").

[99] R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

[100] Eberle, *supra* note 67, at 957 ("[B]ias-motivated thought that transforms to harmful overt conduct violates personal security and can be proscribed as hate crimes.").

[101] *Id.* at 959 (quoting Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 651 (2002)).

[102] Virginia v. Black, 538 U.S. 343, 359–60 (2003).

[103] Swanson, *supra* note 70, at 100–01.

[104] Hartley, *supra* note 95, at 14.

> By singling out this "symbol of hate" for selective treatment, Virginia has selected a symbol with particular content from the field of all proscribable expression meant to intimidate. This constitutes content-based (subject matter-based) discrimination within the meaning of the *R.A.V.* decision. But . . . the Court [also] held that this content-based . . . discrimination does not violate the *R.A.V.* equality principle.

criticized the Court for announcing that the statute in *Black* admittedly discriminated based on content but did not discriminate based on viewpoint because a cross could be burned for reasons other than racism.[105] Hartley found this idea difficult to harmonize, and feared that allowing this type of discrimination would lead to explicit prohibitions on other hate symbols that—under Hartley's view—should be protected as expressions of viewpoint.[106] This fear transformed into foresight when states began to add explicit prohibitions on swastikas into their criminal laws.[107] Although these additional regulations may be disfavored in Hartley's view, Supreme Court precedent in *Black* as well as social policy reasons uphold the constitutionality of the prohibitions whereby speech may be subdued in light of the "particularly virulent form of intimidation" presented.[108]

Swanson's analysis of the decision in *Black* seemed to resonate with Hartley's view.[109] Swanson, however, veered in a different direction from Hartley in his solution. Swanson proposed that states should not include in their criminal laws any explicit mention of potentially symbolic speech such as cross burning or the display of Nazi swastikas, but instead should adopt laws banning "*all* intimidating speech that threatens people with bodily harm or death."[110] Swanson explained that this proposal "will certainly proscribe some cross burnings, but not *because* they are cross burnings."[111] Under Swanson's solution, however, one may foresee definitional problems in interpreting "intimidating speech," and states may refrain from prosecuting under such statutes because of fear of misapplication. By including explicit proscriptions against specific acts like cross burning in hate crime statutes, states do not participate in viewpoint discrimination, but rather ensure that these especially demoralizing acts of harassment do not go unpunished.

Problems are bound to arise in differentiating speech from conduct because "[c]onceptually, all expression is both speech and action."[112] Hate speech and workplace speech may involve words mixed with conduct, while actions such as cross burning and pornography may not involve words at all, but may carry implications of free expression. This type of behavior has been referred to as "fringe speech."[113]

Id. at 16. The Court reached this decision because the history of cross burning implicates "a particularly virulent form of intimidation. *Id.* (citing *Black*, 538 U.S. at 363 (2003).

[105] *Id.* ("Cross burning, the Court reasoned, does carry a distinctive, but not necessarily racist, message.").

[106] *Id.* at 22 ("The swastika is a likely candidate as the next symbol some states will choose for selective proscription.").

[107] *See supra* note 49.

[108] *Black*, 538 U.S. at 363 (2003).

[109] Swanson, *supra* note 70, at 102 ("Establishing one exception to the First Amendment sets the stage for the next.").

[110] *Id.* at 103.

[111] *Id.*

[112] Eberle, *supra* note 67, at 964.

[113] *Id.* at 970.

Conduct and words contained in this category "legitimately possess communicative content based upon value determined vis-à-vis established free speech justifications. Yet, these areas also may present legitimate harms or problems, to individuals or society, that properly may call for regulation in order to safeguard people or the social order."[114]

States generally have broad police powers to legislate for the people on matters affecting the health, welfare, safety, and—occasionally—morals, of the public. States are constrained by their own constitutions and bills of rights, as well as by federal constitutional and statutory standards, due to the limitation on state power contained in the Supremacy Clause in Article VI.[115] A law imposing criminal punishment for the display of a hangman's noose would fall within the state's police power to regulate based on public welfare and safety. State police powers ultimately verified the constitutionality of the Virginia statute at issue in *Black* because of its purpose to protect against intimidation.[116] "[O]ur focus on speech should not blind us to the important countervailing interests that often arise when speech interacts with social reality. These social interests comprise appropriate objectives for governmental attention, helping to assure the public health, safety, and welfare."[117]

C. Hate Crime Statutes and Penalty Enhancement

Imposing a criminal ban on the display of hangman's nooses would be categorized as a hate crime statute. Hate crimes are defined by the Department of Justice as "offenses motivated by hatred against a victim based on his or her race, religion, sexual orientation, ethnicity, or national origin."[118] Generally, state hate crime statutes are constitutional under the state's police powers to protect the safety and general welfare of its citizens.[119]

Hate crime laws such as the regulation with which the Court dealt in *Wisconsin v. Mitchell* impose a higher penalty for crimes carried out because of prejudicial motive.[120] As previously discussed, penalty-enhancement laws are constitutional under *Mitchell*,

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[114] *Id.*

[115] U.S. CONST. art. VI. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[116] Although the Supreme Court in *Black* struck down the statute because of its prima facie evidence provision, the Virginia Supreme Court in *Elliott v. Commonwealth*, 593 S.E.2d 263 (Va. 2004), held that because the remainder of the statute was constitutional, it could be severed from the unconstitutional part and therefore remain valid law.

[117] Eberle, *supra* note 67, at 982.

[118] BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, A POLICYMAKER'S GUIDE TO HATE CRIMES 3 (1997).

[119] *See, e.g.*, Wisconsin v. Mitchell, 508 U.S. 476, 587 (1993).

[120] *See supra* text accompanying notes 62–67.

where the Court decided that any infringement on the First Amendment resulting from enhanced sentences would be too minimal to cause concern: "The impact on speech is, by reasonable calculation, incidental since speech considerations can only come into play after an underlying crime has been committed. In such a situation, there is reduced danger of censorship or other manipulation of ideas because the object of official regulation is behavior, not speech."[121] It is precisely that "reduced danger of censorship"[122] that led to its constitutionality.[123] Despite the Court's reasoning in *Mitchell*, some First Amendment advocates do not agree with the constitutionality of these "bump-up" statutes.[124] The argument against these types of statutes is that the only additional harm being penalized by the penalty-enhancement statute "is solely the effect of the offender's beliefs and/or expression of belief."[125]

D. Determining the Intent Standard

Unlike the "bump-up" hate crime statutes, a criminal law banning hangman's nooses would focus on transforming an act that would not otherwise constitute a crime into criminal behavior, based on the intent and effect of the act. In an essay debating the usefulness of hate crime statutes in light of First Amendment impingement, both the proponent and opponent of bias-crime statutes agreed that only "where behavior is accompanied by culpability, that is, intent to do harm, or *mens rea*, does the behavior cross the line into that which may be constitutionally proscribed."[126] After a majority of the Court declined to uphold the constitutionality of the Virginia statute's prima facie evidence clause in *Black*, legislatures were left with the lesson that "[i]ntimidation would have to be proved, not presumed."[127]

As a limit on proving intent, most states incorporating hate crime laws look to the point of view of the defendant, rather than the victim, to determine whether the defendant is criminally liable. The most common phrasing in hate crime statutes "provides that a defendant has committed a bias crime if he or she selected the victim 'because of' or 'by reason of' the victim's social group status."[128] This linguistic structure determines the perspective from which a fact finder is to view the alleged crime. In order to satisfy the intent requirement, therefore, a finder of fact must determine that the defendant intended to intimidate or harass the victim because of the

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[121] Eberle, *supra* note 67, at 975.

[122] *Id.*

[123] *Mitchell*, 508 U.S. at 488–89.

[124] Gellman & Lawrence, *supra* note 94, at 425.

[125] *Id.* at 432.

[126] *Id.* at 437.

[127] *Id.* at 439.

[128] Lu-in Wang, *Recognizing Opportunistic Bias Crimes*, 80 B.U. L. REV. 1399, 1406 (2000) (citing LU-IN WANG, HATE CRIMES LAW, § 10.04[1] (1994)).

victim's social status; a determination that the victim perceived such intimidation will not alone satisfy the intent standard.

The U.S. Sentencing Guidelines for federal courts utilize a "vulnerable victim" provision stating that "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim," the defendant's sentence may be raised by two levels.[129] A "vulnerable victim" is defined as a person who is "particularly susceptible to the criminal conduct,"[130] and this susceptibility may be caused by a victim's race or ethnic background.[131] The "knew or should have known" language in this provision appears to change the focus from the perspective of the defendant to that of the victim in determining sentences for crimes tried in federal courts. By stating that the defendant "knew or should have known" of the effect his or her conduct would have on the victim, the "vulnerable victim" provision effectively disregards the actual intent of the defendant in committing the crime.[132] In *United States v. Salyer*, the Sixth Circuit found that a defendant who burned a cross on an African-American couple's lawn was properly prosecuted under federal law for conspiracy to violate the couple's civil rights.[133] Holding that the district court accordingly applied the "vulnerable victim" provision in sentencing the defendant, the Sixth Circuit stated that "the defendant knew or should have known that the [couple was] unusually vulnerable to the threat of cross burning because they are black."[134]

Despite the use of the "knew or should have known" language in the "vulnerable victim" provision of the U.S. Sentencing Guidelines, this lower standard of intent is not likely to find broad application or to become incorporated in other hate crime statutes.[135] A state legislator seeking to introduce a criminal law prohibiting the display of nooses, therefore, would be prudent to maintain the standard "intent to intimidate" requirement. Under this standard, even if a defendant alleges that his conduct was meant as a mere joke or that he was unaware of the historically rooted implications

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[129] U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (2007).

[130] *Id.* at cmt. n.2; *see also* United States v. Salyer, 893 F.2d 113, 116 (6th Cir. 1989) (defining susceptibility as "'the state of being sensitive or predisposed'" (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 2303 (2002))).

[131] *See, e.g.*, *Salyer*, 893 F.2d at 113 (holding that the defendant, who was convicted of conspiring to threaten and intimidate his black neighbors by burning a cross in their lawn in violation of 18 U.S.C. § 241, was properly subjected to an increased sentence under the federal sentencing guidelines' vulnerable victim provision).

[132] Wang, *supra* note 128, at 1421 ("[T]he adjustment applies in cases where a victim's social group status made him or her especially 'vulnerable' or 'susceptible' to the criminal conduct, regardless of the defendant's feelings toward the victim's group.").

[133] *Salyer*, 893 F.2d at 113.

[134] *Id.* at 115.

[135] *See* Wang, *supra* note 128, at 1420 ("[I]t may not be desirable to incorporate vulnerable victim provisions into state law as an additional means of addressing bias-motivated crime."); *see also* United States v. Long, 935 F.2d 1207, 1210 (11th Cir. 1991) (explaining that "[s]weeping presumptions are not favored by section 3A1.1[(b)]").

of his actions, a finder of fact may still determine—by analyzing direct and circumstantial evidence—that the defendant actually held the requisite intent to intimidate. State legislatures, therefore, should veer away from "knew or should have known" language when drafting hate crime laws addressing nooses, and should instead keep in mind the fact that a defendant will not automatically be acquitted if he or she denies having the requisite intent to intimidate.[136]

E. The Societal Importance of Hate Crime Laws

Although the argument exists that penalty-enhancement statutes do not tread as far into First Amendment territory as other hate crime laws because they work to penalize already criminal behavior,[137] other forms of bias crime statutes banning specific symbols of hate may still significantly limit the degree of First Amendment infringement so long as intent must be proven and limits on proving intent are in place.

Even after the Court in *Black* limited the use of hate crime statutes to avoid a broad construction that would conflict with First Amendment rights, opponents of the statutes still "believe the only laws that can be justified are those prohibiting incitement to racial violence in situations of imminent peril."[138] Advocates of hate crime laws, however, argue that these statutes are constitutional and serve a beneficial purpose to society. This is because crimes committed based on bias send an "unmistakable message that the victim and the group to which he or she belongs are of lesser worth."[139] For example, "[a] cross burning or a swastika scrawling will not just evoke similar feelings in other African-Americans and Jews, respectively. Rather, members of these groups may perceive the criminal event as having threatened and attacked them personally."[140]

According to Professor Kathleen Mahoney, hate speech "is a form of harassment and discrimination that should be deterred and punished just like any other behavior that harms people. Free speech cannot be degraded to the extent that it becomes a license to harm."[141] Hate crime statutes thereby work to punish such harassing behavior while maintaining only an occasional incidental effect on free speech.[142] By analyzing a proposed criminal prohibition of hangman's nooses in this light, the behavior regulated by such a law frequently would be intentional intimidation or harassment, which the Court in *Black* found sufficient to pass constitutional muster.[143]

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[136] *See infra* Parts V.A. and B.

[137] *See supra* text accompanying notes 65–68, 120-21.

[138] Mahoney, *supra* note 98, at 794.

[139] Gellman & Lawrence, *supra* note 94, at 424.

[140] *Id.*

[141] Mahoney, *supra* note 98, at 793.

[142] *See supra* notes 66–68 and accompanying text.

[143] *See* Virginia v. Black, 538 U.S. 343, 363 (2003).

V. REQUIREMENTS FOR DRAFTING A STATUTE CRIMINALIZING HANGMAN'S NOOSES IN CONFORMITY WITH THE FIRST AMENDMENT

In December of 2007, the United States House of Representatives passed a resolution speaking to the permissibility of placing criminal prohibitions on hangman's nooses.[144] One week later, the Senate passed an essentially identical resolution.[145] Both resolutions condone criminal punishment for the display of hangman's nooses "under certain circumstances," and both explicitly limit this approval of prosecution to circumstances where such display is used "for the purpose of intimidation."[146] These resolutions seem not only to permit revisions of state hate crime statutes, but also to endorse and encourage such revisions.[147]

Incorporating a prohibition on the display of hangman's nooses would not require an overhaul in current state legislation. The addition of the explicit prohibition may easily fit in existing state statutes outlawing burning crosses and swastikas, or in those statutes demanding harsher punishment for hate crimes.

The New York legislature recently passed a statute explicitly proscribing the display of hangman's nooses.[148] As approved by the New York Senate, the provision amended subdivisions three and four of Section 240.31 of the state's penal law by making it "aggravated harassment in the first degree" for a person who:

> Etches, paints, draws upon or otherwise places or displays a noose, commonly exhibited as a symbol of racism and intimidation, on any building or other real property, public or private, owned by any person, firm or corporation or any public agency or instrumentality, without express permission of the owner or operator of such building or real property.[149]

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[144] H.R. Res. 826, 110th Cong. (2007) (enacted); *see also* Press Release, Al Green, Representative, U.S. House of Representatives, Congressman Al Green Applauds Senate Judiciary Committee's Passage of Anti-Noose Legislation, Urges Full Senate to Pass (Dec. 13, 2007), *available at* http://www.house.gov/list/press/tx09_green/pr_071213.html.

[145] S. Res. 396, 110th Cong. (2007) (enacted).

[146] H.R. Res. 826, 110th Cong. (2007) (enacted); S. Res. 396, 110th Cong. (2007) (enacted).

[147] The two resolutions contain persuasive statistics indicating a sense that current state law is not effectively addressing the surging hangman's noose problem in the country. *Id.* (noting statistics from the Southern Poverty Law Center, Equal Employment Opportunity Commission, and Tuskegee Institute concerning the rise in suspected hate crimes involving nooses, the increase in lawsuits filed involving nooses, and the history of lynching in the United States, respectively).

[148] S. Res. S6499, 2007 Leg., 231st Sess. (N.Y. 2007).

[149] *Id.* New York's governor signed the noose bill into law on May 15, 2008. Kenneth Lovett, *Patterson Signs Anti-Noose Bill Into Law*, N.Y. DAILY NEWS, May 15, 2008, *available at* http://www.nydailynews.com/news/ny_crime/2008/05/15/2008-05-15_patterson_signs_antinoose_bill_into_law.html. Connecticut and Louisiana legislatures have recently

The bill was introduced in response to a rise in noose displays in New York, including an event that received national attention whereby a noose was found hanging outside the office of an African-American professor at Columbia University.[150] In its "Justification" section, the Senate bill also referred to the "Jena 6" incident and the nationwide increase in similar incidents.[151] The New York statute represents one way of criminalizing the display of hangman's nooses without treading into activity protected by the First Amendment. The strength of the statute as a conduct regulation—as opposed to a speech regulation—may be increased by adding a provision whereby the responsible party must act with "intent to intimidate."

As with so many decisions, the proper application of the New York statute would turn on a case-by-case basis. The following subsections analyze varying fact patterns to discern which cases would most likely meet the intent threshold and which cases—whether through direct or circumstantial evidence—would not display the requisite intent.

A. Nooses in Private Residences and Establishments

A recent report from Florida explained that a couple who ran a biker bar included among the bar's many Halloween decorations a life-sized mannequin hanging from a "thick rope noose" in a tree in front of the bar.[152] The decoration was met with antagonism from local residents, seven of whom reportedly called in complaints to the Sheriff's Office.[153] The state attorney, however, explained that "the decoration is covered under freedom of expression."[154] Even if Florida maintained a statute containing an explicit ban on hangman's nooses, the right of the couple to keep their hanging mannequin would likely still be protected because the display was not meant to intimidate or harass; it was intended merely to supplement the other Halloween decorations at the bar.[155] Additionally, the display was placed on the couple's private property, and there appeared to be no intent to make the display visible from "a public

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passed similar bills that have also already been signed into law. *See* Daryl C. Hannah, *Jena 6 Aftermath: Nooses Punishable by Prison*, DIVERSITYINC., July 17, 2008, http://www.diversityinc.com/public/3855.cfm; David L. Hudson, Jr., *States Move to Add Nooses to List of Outlawed Symbols*, FIRST AMENDMENT CENTER, June 28, 2008, http://www.firstamendmentcenter.org/analysis.aspx?id=20234.

[150] *See* Karen W. Arenson, *Manhattan: Noose Found at Columbia*, N.Y. TIMES, Oct. 10, 2007, at B2.

[151] N.Y. S. Res. S6499.

[152] Erin Sullivan, *Noose as Halloween Decoration Draws Fire*, ST. PETERSBURG TIMES, Oct. 31, 2007, at 1B.

[153] *Id.*

[154] *Id.*

[155] *Id.* (noting the owners' insistence that they did not intend the decoration to provoke racial animosity and that "they have patrons of all races, plus multiracial couples who are regulars").

road or highway,"[156] so the locality of the conduct would also fall outside of the scope of the proposed statute.

In conformity with the Court's rulings in *R.A.V.* and *Black*, displaying a noose with the purpose of making a political statement rather than a harassing one would also fall outside the scope of the proposed legislation. For example, in a California neighborhood, a man placed a mannequin soldier hanging from a noose in his yard to make a statement about American soldiers being "left hanging" in Iraq by the Bush administration.[157] Although neighbors continuously complained about the sight of the hanging mannequin,[158] the display was placed completely on private property and contained a political message rather than one of intimidation or threat, and therefore, this was an example of constitutionally protected symbolic speech.[159]

In contrast to cases where a noose was displayed as a mere decoration or as part of a political message, certain acts conducted on private property *would* qualify as unprotected conduct that could properly be subject to criminal penalty under the *Black* ruling.[160] For instance, an African-American former professional boxer living in New York awoke one morning to find a noose hanging on his porch.[161] Although the facts of this incident have not sufficiently developed to draw the conclusion that the noose was hung with "intent to intimidate," local police were suspicious enough to treat the case as a "bias crime."[162] Evidence allowing this incident to fall within the scope of the proposed legislation includes the fact that the victim was African-American, automatically suggesting racial pinpointing, and the setting of the incident, which occurred on private property belonging to someone other than the person who hung the noose. Prosecutors, however, would need to effectively establish the "particularly virulent form of intimidation" element in order to convict the responsible person.

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[156] *See supra* note 50.

[157] Chip Johnson, *Pushing Free Speech Envelope*, S.F. CHRON., Feb. 21, 2005, at B1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/02/21/BAGBTBEKKP1.DTL.

[158] *Id.*

[159] Such displays used to convey ideology or to make a political statement were first held to be constitutionally protected by the Supreme Court in *Stromberg v. California*, 283 U.S. 359, 370 (1931) (overturning a state law barring the display of a red flag in opposition to the government). Subsequent cases protecting political speech and actions involving political ideology include: *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (protecting speech at a rally advocating violence); *Texas v. Johnson*, 491 U.S. 397, 406, 420 (1989) (finding flag burning to be symbolic speech protected by the First Amendment); and *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 133 (1992) (holding that where a public forum existed, the state could not give "unbridled discretion" to city administrators to discriminate against groups such as the Ku Klux Klan based on the content of their speech).

[160] *See supra* text accompanying notes 83–86.

[161] Richard Weir & Bill Hutchinson, *Black Man Wakes to Hate. Former Pro Boxer Finds Noose Dangling on Porch of His Valley Stream Home*, N.Y. DAILY NEWS, Nov. 1, 2007, at 1.

[162] *Id.*

In *United States v. Hobbs*, the defendants conspired to drive a black family in their neighborhood from their home.[163] In so doing, the defendants not only placed a burning cross in the family's yard, but also hung a noose on the family's doorknob.[164] The Fourth Circuit found that because "the government presented ample evidence—both direct and circumstantial—that [the defendants] were members of a conspiracy to intimidate the . . . family into leaving," the defendants' convictions of conspiracy would be upheld.[165] Even without the conspiracy and the cross-burning, if North Carolina maintained a statute such as the one proposed, the placement of the noose on the family's doorknob still would be criminally punishable so long as the government could maintain its burden of proof in showing intent to drive the family out of the neighborhood through intimidation.[166]

B. Nooses in Employment Settings

Although in private employment settings the First Amendment freedom of expression argument would not apply, several fact patterns involving nooses from hostile environment cases would fall outside the scope of the proposed statute, regardless of whether the incidents occurred in private or public employment settings. For example, in *Roberson v. Alltel Information Services*, when the alleged victim's co-workers walked past him with a cable shaped like a noose, the employee filed a complaint and, after being terminated, sued for discrimination based on race.[167] The court, however, found that the employee "failed to present sufficient evidence such that a reasonable factfinder could infer intentional discrimination."[168] The simple act of walking past a co-worker with a noose-like object would most likely fail to satisfy the intent requirement that the statute would need.

An even stronger case against prosecution is presented in *Ford v. West*.[169] In this case, evidence presented at trial showed that the noose displayed in a workplace really

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[163] 190 F. App'x 313, 314–15 (4th Cir. 2006).

[164] *Id.* at 315.

[165] *Id.*

[166] In fact, the North Carolina Senate recently introduced legislation that would prohibit the display of hangman's nooses. The state Senate approved a bill raising to felony status the existing penalty for burning crosses, and explicitly added the display of a hangman's noose as a felony. *See Nooses and Burning Crosses Deserve Tougher Sentences*, NEWS & RECORD (Greensboro, N.C.), July 8, 2008, at A6. The language of the Senate bill reads:

> A person who burns a cross or hangs a noose with the expectation and the probability that another person will view the cross or noose and with the intent to intimidate that person because of race, color, religion, nationality, or country of origin is guilty of a Class H felony.

S. Res. S1988, 2007-2008 Leg., Reg. Sess. (N.C. 2008).

[167] 373 F.3d 647, 650 (5th Cir. 2004).

[168] *Id.* at 656.

[169] 222 F.3d 767 (10th Cir. 2000).

was meant as a practical joke unrelated to race.[170] The co-workers were shown not to have the intent to harass or intimidate; therefore, not only would these facts relieve the potential defendants from subjection to criminal punishment, but they also prevent the employee from pursuing his civil hostile work environment claim.[171]

On the other hand, some employment cases clearly warrant the proposed statute to require criminal punishment for those employees responsible for displaying nooses. The court in *Williams v. Waste Management of Illinois, Inc.*, found that "the employer acted promptly and appropriately to end the harassment," which was sufficient to overcome a hostile work environment claim based on co-worker harassment.[172] In *Williams*, several employees continuously subjected an African-American employee to racist slurs and taunting, including an incident whereby a couple of co-workers placed a sickle with an extension cord fashioned in the shape of a hangman's noose on the plaintiff's workbench.[173] Circumstantial evidence showed that the noose incident in this case was almost certainly intentional: the plaintiff had not only faced other racist jokes from his co-workers, but after the noose incident, the plaintiff alleged that his co-workers "laughingly asked him how he liked" the sickle.[174] The evidence presented thus makes this scenario a potential criminal case under the proposed legislation because the co-workers used a "particularly virulent form of intimidation" to encourage the plaintiff to leave his employment.

C. Nooses on School Grounds

1. Jena High School Analysis (Jena, Louisiana)

In *Tinker v. Des Moines Independent Community School District*, the Supreme Court held that "[i]t can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[175] The Court in this case, however, acknowledged that under certain circumstances, First Amendment freedoms in school settings may be properly regulated even further than in other environments.[176] When symbolic speech or conduct mixed with words takes the form of "aggressive, disruptive action," a school may prohibit this behavior within the school environment.[177] In *Tinker*, the Court held that passive political speech like wearing

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[170] *Id.* at 771–72 (explaining that the co-worker "had hung the noose as a practical joke on [another co-worker] because [he] had commented that he should be hung for losing a game of dominoes").

[171] *Id.* at 779.

[172] 361 F.3d 1021, 1031 (7th Cir. 2004).

[173] *Id.* at 1025.

[174] *Id.*

[175] 393 U.S. 503, 506 (1969).

[176] *Id.* at 508 ("[T]his case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.").

[177] *Id*; *see also* Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007) (deferring to the school

black armbands did not materially and substantially interfere with the business of the school.[178] The school, therefore, did not have reason to anticipate disruption and could not ban the armbands, even though they might cause discomfort to others.[179]

In contrast to the facts of *Tinker*, where the activity in question involved the passive display of black armbands to protest the Vietnam War,[180] the display of a hangman's noose in a school environment would most likely be met with more suspicion. Whereas one set of facts involves passive political speech, the other involves an historically powerful weapon of hate and bigotry.[181] In accordance with *Tinker* and *Morse*, even if a state's legislature decided not to implement a law prohibiting the display of nooses, school administrators in primary and secondary educational institutions across the country may properly prohibit such displays as disruptive to the learning environment, and may take appropriate measures to enforce those prohibitions. The most powerful message of intolerance toward the display of hangman's nooses, however, would be sent through state action in imposing criminal punishment for those who use nooses to intimidate others.

Whether the proposed law would apply to the three white male students responsible for hanging the nooses in the schoolyard oak tree in Jena, Louisiana, would be an issue for the fact finder. Circumstantial evidence in the Jena scenario seems to build solid cases for both sides of the debate. In their defense, the perpetrators of the noose hanging claimed that they were unaware of the racist and intimidating meaning of the nooses and were therefore ignorant as to the effect the hanging nooses would have on black students and teachers who saw them.[182] The idea that teenagers would be uninformed as to what is typically perceived as common knowledge of African-American history is hard to fathom. The potential defendants, however, may make an argument for their naivete by relying on "the current state of historical illiteracy among young people."[183] Other avenues, including classroom lectures, television documentaries, and news reports, however, are available to inform young people in today's society. The argument that the teenagers were unaware of the tragic relationship between African-American history and the noose is therefore not likely to withstand suspicion. The potential defendants may also argue that their true intent in hanging the nooses was

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administration because the "'special characteristics of the school environment'" and the governmental interest in discouraging student drug abuse allowed prohibition of a banner promoting illegal drugs (quoting *Tinker*, 393 U.S. at 506)).

[178] *Tinker*, 393 U.S. at 508.

[179] *Id.*

[180] *Id.* at 504.

[181] *See supra* Part II.

[182] Charlotte Allen, *Jena: The Case of the Amazing Disappearing Hate Crime*, WKLY. STANDARD, Jan. 21, 2008, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/014/589bfhgz.asp.

[183] *Id.*

not to intimidate, but rather to play a "school spirit-prompted prank directed at a rival school's Western-themed football team."[184] Evidence that could be used in support of this argument includes the fact that the "nooses were in Jena High's school colors—one black, one gold."[185]

On the other hand, in prosecuting the young men responsible for hanging the nooses under the proposed law, the state would have a persuasive argument favoring conviction. First, the largely segregated environment of LaSalle Parish, where Jena is located, may have created a predisposition toward racial tension in the area.[186] Second, many students and residents in Jena became suspicious that the noose incident had a racial undertone because of the timing of the incident in relation to a question concerning whether black students were permitted to sit under the oak tree where the nooses were later found.[187] An African-American student had asked the question during a school assembly earlier in the same week as the noose incident.[188] Additionally, five racially motivated fights on the Jena High School campus reportedly broke out the week after the noose incident, providing further evidence of racial tension in the community.[189]

Under current Louisiana law, the "notion of prosecuting the high-school noose-hangers for hate crimes was at best far-fetched" because the state's hate crime statute may only be applied in cases where a violent crime such as murder or sexual assault is coupled with "the manifestation of racial or other hatred."[190] Had the Louisiana legislature adopted a law criminalizing the display of nooses, however, the students responsible for hanging the nooses on the oak tree at Jena High School may have faced much more severe consequences.

In any event, the young men who hung the nooses should have endured greater repercussions, if not by Louisiana law, then by school administrators. Instead of working to preserve a healthy, tolerant school environment, "Jena school officials dismissed the noose incident as a youthful prank and issued brief suspensions to the white students involved, angering black residents of the town."[191] In light of the "special characteristics"[192] of the school environment, further action should have been taken in order to quell racial tension after the noose incident and prevent what would become a national uproar.

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[184] *Id.*

[185] *Id.*

[186] *Id.* ("Jena, like the rest of the South, was once officially segregated, and there are remnants of racism. . . . Jena's black community . . . does look distinctly shabbier and isolated.").

[187] Sumrall, *supra* note 18.

[188] *Id.*

[189] Allen, *supra* note 182 (citing reports from the TOWN TALK (Alexandria-Pineville, La.).

[190] *Id.*

[191] Witt, *supra* note 21.

[192] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

2. University of Maryland Analysis (College Park, Maryland)

The events in Jena seem to have given rise to similar acts of racial aggression in schools. Nooses have recently been found on college campuses at both Columbia University[193] and the University of Maryland.[194] Despite the utopian perception of college and university campuses as forums for open discussion unencumbered by restraints on First Amendment freedoms,[195] the display of hangman's nooses in these environments should be prohibited for the same reasons as in other settings.

At the University of Maryland, a noose was found hanging in a tree near the Nyumburu Cultural Center, "a building that houses several African American campus organizations."[196] Maryland is looking into potential prosecution of the responsible party under its hate crime laws, which do not make specific reference to hangman's nooses, cross-burnings, or similar acts.[197] The Maryland hate crime statute applicable to this situation reads: "A person may not deface . . . real or personal property connected to a building that is publicly . . . owned . . . because a person or group of a particular race . . . has contacts or is associated with the building."[198]

The language of the current statute would subject a prosecutor to two major hurdles in properly trying this case. The first problem is whether defacement of public property itself may be subject to this criminal ban. In this case, the tree in which the noose was hung would represent the real property, and the Nyumburu Cultural Center would represent the public building to which a group of minorities are associated. Defense counsel, however, may be able to argue effectively that under the current language of the statute, the legislature intended to prohibit those acts of hate occurring solely on private property, and this statute was meant only incidentally to include public property when it is connected to the private property on which the act itself was committed. Had the legislature intended for those types of acts occurring on public property to be included in the criminal ban, the language of the statute would simply read: "A person may not deface property that is publicly or privately owned."[199]

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[193] *See* Arenson, *supra* note 150.

[194] Joe Holley, *U-Md. Responds to Possible Hate Crime*, WASH. POST, Sept. 10, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/10/AR2007091000799.html.

[195] *See* Healy v. James, 408 U.S. 169, 180 (1972) (noting that colleges and universities are not "enclaves immune from the sweep of the First Amendment"); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (holding that the classroom is "peculiarly the 'marketplace of ideas'").

[196] Holley, *supra* note 194.

[197] *See* MD. CODE ANN., CRIM. LAW §§ 10-304, 10-305 (LexisNexis 2007).

[198] MD. CODE ANN., CRIM. LAW § 10-305 (LexisNexis 2007).

[199] MD. CODE ANN., CRIM. LAW § 10-305 (LexisNexis 2007); *see also* MD. CODE ANN., CRIM. LAW § 10-304 (LexisNexis 2007) ("Because of another's race . . . a person may not . . . deface . . . the real or personal property of that person. . . ."). "'[P]erson' . . . does not include the State, its units, or subdivisions unless an intention to include these entities is made manifest

A second problem with Maryland's current hate crime statute is that in order to prosecute this particular case, the government would need to make a strong argument explaining that hanging a noose from a tree on school property is an act of "deface[ment]." Maryland neglected to define the term "deface" in the statute, and little case law exists to support a particular legal meaning of the word. The average reasonable person, however, would most likely look to the dictionary definition of "deface": "To mar the face, features, or appearance of; to spoil or ruin the figure, form, or beauty of; to disfigure."[200] Under this common definition of "deface," a noose hanging from a tree may not meet the threshold because the noose may easily be removed without spoiling or disfiguring the property. One may then suppose that the legislature had been thinking of racist or religiously-scathing graffiti or other more permanent acts of marring property when it decided upon the language of the statute.

On the other hand, under the Montana legislature's definition of "deface," which "includes but is not limited to cross burning or the placing of any word or symbol commonly associated with racial, religious, or ethnic identity or activities on the property of another person without his or her permission," the hangman's noose would properly fall into that category of conduct prohibited by the state's harassment statute.[201] Whether a Maryland court would decide to apply the lay meaning of "deface" or Montana's categorization would be entirely discretionary.

The Maryland legislature, seeming to understand this problem in the context of criminal prosecutions for hanging nooses, has begun to take steps similar to New York in amending the state's current hate crime laws. Two proposed bills—both of which would categorize the hanging of a noose on another's property as a hate crime—were brought to the attention of Maryland lawmakers. Maryland House Bill 80—introduced by Delegate S. Saqib Ali—attempted to expand "the prohibitions against harassment and property damage . . . to include the placement or display of a noose."[202] Under this proposal, as elaborated by a similar bill sponsored by Delegate Victor Ramirez, the current hate crime statutes dealing with the "defacement" of property, would include a clause specifically referring to hangman's nooses.[203] The relevant part of amended Section 10-304, as laid out by Maryland House Bill 41, would read: "Because of another's race, color, religious beliefs, sexual orientation, or national origin, a person may not: . . . hang or place a noose on the real or personal property of that person."[204] Likewise, under the original proposal, the relevant part of Section 10-305 would

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by the legislature.'" Revisor's Note to MD. CODE ANN., CRIM. LAW § 1-101 (LexisNexis 2007) (citing Unnamed Physician v. Comm'n on Med. Discipline, 400 A.2d 396, 402–03 (Md. 1979)).

[200] OXFORD ENGLISH DICTIONARY 368 (2d ed. 1989).

[201] MONT. CODE ANN., § 45-5-221 (2005).

[202] H.B. 80, 2008 Leg., 425th Sess. (Md. 2008), *available at* http://mlis.state.md.us/2008RS/fnotes/bil_0000/hb0080.pdf.

[203] H.B. 41, 2008 Leg., 425th Sess. (Md. 2008), *available at* http://mlis.state.md.us/2008RS/bills/hb/hb0041f.pdf.

[204] *Id.*

state: "A person may not . . . hang or place a noose on, or damage the real or personal property connected to a building that is publicly or privately owned, leased, or used."[205]

The proposed legislation immediately faced several attacks from delegates who were "particularly concerned about the First Amendment right to free speech."[206] Even after a proposed amendment to replace the word "nooses" in House Bill 80 with the broader term "weapons," the legislative director of Maryland's American Civil Liberties Union reportedly "told lawmakers that she believes the amendment still falls short of free speech requirements."[207]

The proposed amendments originally did not contain the language of "intent to intimidate" condoned by the Supreme Court in *Black*, nor did they utilize the more controversial, lower standard of "know or should have known" in regard to a potentially intimidating effect. Without this type of safeguard, Maryland delegates could have reasonably feared infringement on First Amendment speech rights. Even the sponsors of the legislation "acknowledged that there were 'freedom of speech issues' in the measures."[208] This concern for First Amendment rights most likely led the House to abandon the original proposal and instead devise a subsection of existing Section 10-305 of the Maryland Code, stating:

> A person may not affix, erect, or place a noose or swastika on a building or real property, public or private, without the express permission of the owner, owner's agent, or lawful occupant of the building or real property, *with the intent to threaten or intimidate* any person or group of persons.[209]

House Bill 41, as amended, passed the House in March 2008 but has not yet come up for a full vote in the Senate.[210] Under the revised version of House Bill 41, free speech rights receive greater protection than in the originally proposed bill because of the limit of applicability to the nooses displayed "with the intent to intimidate."[211] The Maryland legislature thus recognized that even though the general welfare of Maryland would most likely benefit from a hate crime law prohibiting hangman's nooses displayed with the intent to intimidate, there was no need for the state to design an all-inclusive ban on nooses that would infringe on First Amendment rights.

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[205] *Id.*

[206] Liz Farmer, *Lawmakers in Md. Weigh Taped Interrogations*, DAILY REC. (Balt., Md.), Jan. 17, 2008, *available at* http://findarticles.com/p/articles/mi_qn4183/is_20080117/ai_n21208259.

[207] Gadi Dechter, *State Digest*, BALT. SUN, Jan. 17, 2008, at 4B.

[208] Farmer, *supra* note 206.

[209] Md. H.B. 41, *available at* http://mlis.state.md.us/2008rs/bills/hb/hb0041t.pdf (emphasis added).

[210] Hudson, *supra* note 149.

[211] Md. H.B. 41, *available at* http://mlis.state.md.us/2008rs/bills/hb/hb0041t.pdf.

CONCLUSION

The period of "lynch law" may have ended many years ago, but sadly its effects and implications live on in the twenty-first century.[212] To allow acts of hatred to continue without threat of punishment is to regress into a state of barbarism thought to have been overcome by the Civil Rights Movement. By taking action to penalize those individuals who display nooses in order to threaten or harass others, state legislatures would secure a tolerant and accepting society and thereby safeguard the general welfare of their constituency. The story of the Jena 6 exemplifies the disturbing and controversial aftermath of a racist act that did not implicate criminal punishment for the responsible parties. A single unpunished racist act may permit racial tension within a community to stew, boil, and eventually spill into a national controversy.

In light of the events in Jena, Louisiana, and the many reports of similar noose displays that have sprung from that incident, state legislatures must take action to secure the well-being of their citizenry. Banning the intentional display of nooses to instill fear in a person or class of people does not infringe any further upon the First Amendment right to free speech than prohibiting symbols like burning crosses. The two symbols share a paralleled history and meaning of bigotry and terror, and the display of both should be punished at an equally severe level. As signaled by Supreme Court precedent and already existing hate crime laws, the need for protection against acts of hate must at times restrain First Amendment free speech rights. By maintaining sufficient safeguards, such as requiring an intent to intimidate in order to sanction a criminal law addressing hangman's nooses, state legislatures will be able to admonish the fear-inspiring icon of the noose while preserving basic constitutional rights.

[212] For an overview of "lynch law," see Proffit, *supra* note 2.