

2017

Reconciling the History of the Hangman's Noose and its Severity Within Hostile Work Environment Claims, 51 J. Marshall L. Rev. 137 (2017)

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RECONCILING THE HISTORY OF THE HANGMAN’S NOOSE AND ITS SEVERITY WITHIN HOSTILE WORK ENVIRONMENT CLAIMS

TESS GODHARDT

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I. INTRODUCTION

An African-American employee walks into a warehouse he had entered hundreds of times over the course of his employment.¹ It is there he encounters, dangling for all to see, a hangman’s noose.² The simple imagery of a noose - swaying eerily above - invokes a sense of evil, wrongdoing, and fear. One does not have to encounter the object to sense this. Mere knowledge of the noose’s bloodstained history can incite these emotions all on its own. The hangman’s noose is indelibly linked to lynching, the Ku Klux Klan, and the murdering of thousands of African-Americans.³ Despite this

1. These are the underlying facts of *Henry v. Regents of the Univ. of California*, 644 F. App’x 787, 788 (9th Cir. 2016).

2. *Id.*

3. See Tuskegee Institute, *Lynchings: By Year and Race, 1882-1968*, CHESNUTTARCHIVE.ORG, www.chesnuttarchive.org/classroom/lynching_table_year.html (last visited Mar. 30, 2017) (calculating that from the year 1882 to 1968, 3,445 African Americans were lynched in the United States).

heinous past, the Ninth Circuit rule the noose was not sufficiently severe or pervasive enough for a plaintiff to prevail on a hostile work environment claim.⁴ This is the story of Jon Henry.⁵

The Ninth Circuit's dismissal of Henry's hostile work environment claim, brought under Title VII of the Civil Rights Act and against the University of California, forms the groundwork for this comment.⁶ A hostile work environment cause of action requires the plaintiff to demonstrate "conduct that was sufficiently severe or pervasive enough to alter the conditions of their employment."⁷ Henry's alleged incident involving the hanging noose was deemed not to have met this standard by the District Court and the Ninth Circuit⁸—thus creating a split among the circuits.⁹ Following the affirmation by the Ninth Circuit, Henry filed a petition for writ of certiorari to the United States Supreme Court proposing the issue of whether "a hangman's noose, intentionally placed in an African-American employee's work area by his non-African-American supervisor, is sufficiently severe as a matter of law to constitute race harassment under Title VII?"¹⁰ The dark and complex history of the noose combined with the current status of race relations within the United States elevates the significance of the Ninth Circuit's recent decision and the Supreme Court's denial of Henry's writ.¹¹ Not only did Henry's petition propose a volatile issue, but it presented an opportunity for the United States Supreme Court to acknowledge the connotation the noose holds, and its place in American history.

4. *Henry*, 644 F. App'x 787 at 788.

5. *Id.*

6. *Id.* at 789.

7. This element was first recognized in *Rogers v. EEOC*, 454 F. 2d 234 (5th Cir. 1971). The Supreme Court cemented the precedent in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

8. *Henry v. Regents of the Univ. of California*, 37 F. Supp. 3d 1067, 1087 (N.D. Cal. 2014); *Henry*, 644 F. App'x 787 at 789.

9. Petition for Writ of Certiorari, *Henry*, 644 F. App'x 787 (2016). Henry alleges in his petition for writ of certiorari to the U.S Supreme Court that the Ninth Circuit's holding within his case is contrary to what the 7th, 10th, 11th, and D.C. Circuit courts have held in similar actions involving isolated incidents of nooses within a place of employment. *Id.* According to *Henry*, each of these circuits have held that an isolated incident of a noose is sufficiently severe or pervasive enough to alter the conditions of the victim's employment. *Id.* The alleged circuit split will be discussed later on within this comment. *Id.*

10. *Id.*

11. See Giovanni Russonello, *Race Relations are at Lowest Point in Obama Presidency, Poll Finds*, N.Y. TIMES (July 13, 2016), www.nytimes.com/2016/07/14/us/most-americans-hold-grim-view-of-race-relations-poll-finds.html?_r=0 (citing a poll that stated "six in ten Americans say race relations are growing worse, up from 38% a year ago."); see also Jim Norman, *U.S. Worries About Race Relations Reach a New High*, GALLUP (Apr. 11, 2016), www.gallup.com/poll/190574/worries-race-relations-reach-new-high.aspx (showing "that more than a third (35%) of Americans now say they are worried a great deal about race relations in the U.S.—which is higher than at any time since Gallup first asked the question in 2001."); *Henry v. Regents of the Univ. of Cal.*, 137 S. Ct. 303 (2016).

The denial of Henry's petition intensifies the demand for another method in which to recognize the atrocious history and significance of the hangman's noose.

This Comment will begin by summarizing the history of the hangman's noose and its legacy within the United States. The legal aspects and the formation of the hostile work environment claim will then be discussed. The circuit split created by the Ninth Circuit's decision in *Henry* and the aberrations posited in the holding will be analyzed, along with the flaws inherent in the use of an objective test as applied to a hostile environment cases.¹² Finally, this Comment will propose that the U.S. Congress should legislate a *per se* statute for hostile work environment claims that would automatically deem the usage of a noose severe or pervasive enough to alter the victim's working conditions.

II. BACKGROUND

In today's world, it is a rare occurrence to see or hear about one being lynched due to an unlawful hanging.¹³ In spite of this decline, the noose remains as equally haunting and sinister as when mob justice employed it to achieve their racist objectives.¹⁴ To truly comprehend what the hangman's noose represents today and the emotions it can conjure, one must know and understand its history. Part 1 of this section will provide an overview of the noose and its prominence before and after the Reconstruction Era while Part 2 will discuss its prevalence in America today. A brief synopsis of Title VII and a hostile work environment cause of action will be given in Part 3. The facts and resulting decision of *Henry v. Regents of the Univ. of California*¹⁵ will then be provided in Part 4.

A. The History of the Noose

The ominous aura surrounding the noose derives from its link with the practice of lynching.¹⁶ Although the roots of this execution

12. *Henry*, 644 F. App'x 787 at 788; *Henry*, 37 F. Supp. 3d 1067 at 1087.

13. See William L. Ziglar, *The Decline of Lynching in America*, 63 INT. SOCIAL SCIENCE REV. 14-25, 23 (1988)(discussing the general decline in lynching from the Reconstruction Era to the 1960s).

14. See James Schuler, *The Ominous Symbolism of the Noose*, L.A. TIMES (Oct. 27, 2014), www.latimes.com/opinion/op-ed/la-oe-shuler-noose-hate-crimes-20141028-story.html (affirming that although lynching has declined since the 1930s, the noose has "become a stand-in for vigilantism, for murder by community, an unveiled threat, and a symbol to brandish to keep blacks in their place").

15. *Henry*, 37 F. Supp. 3d 1067; *Henry*, 644 F. App'x 787.

16. JAMES ELBERT CUTLER, *LYNCH-LAW: AN INVESTIGATION INTO THE HISTORY OF LYNCHING IN THE UNITED STATES* 91 (1969). Cutler examines and discusses the beginning of lynching within the United States during the Revolutionary War and goes on to discuss accounts of lynching during the

method can be traced back to the Revolutionary War,¹⁷ the notoriety of lynching within the United States arose from its use to hang African-Americans within the years of 1865 to 1968.¹⁸ During the Reconstruction Era, a period that followed the South's loss in the Civil War, America saw its first surge in the lynching of African-Americans.¹⁹ The most considerable increase began, however, in 1880 and would last until 1930.²⁰

1. *Lynching During the Reconstruction Era*

From 1867 until 1877, the South was occupied by Union Troops under the Military Reconstruction Acts.²¹ Initiatives within the Act allowed former slaves to vote and hold political offices— notions that were radical to Southerners²² whose economy and social order prior to the Civil War was dependent upon the institution of slavery.²³ With the initiatives under the Reconstruction Act and the passage of the Emancipation Proclamation, former slaves rose to the same social rank of their owners overnight.²⁴ A Southerner's way of life was effectively demolished and white supremacy was in peril.²⁵ Threatened by the African-Americans' rise in status, white Southerners turned to lynching and mob justice to reassert their dominance.²⁶ A supremacy that had once been achieved through slavery "would now be restored through terror."²⁷ In a summary

slavery movement. *Id.*; CHRISTOPHER WALDREP, AFRICAN AMERICANS CONFRONT LYNCHING: STRATEGIES OF RESISTANCE FROM THE CIVIL WAR TO THE CIVIL RIGHTS ERA XV (2009).

17. CUTLER, *supra* note 16, at 23. The term "lynch" is said to have derived from a type of law administered by Colonel Charles Lynch during the Revolutionary War. *Id.*; WALDREP, *supra* note 16, at 2. According to Waldrep, lynching originated during the American Revolution when Patriots hanged or whipped captured Tories. Although lynching is widely used to reference the act of hanging, the term encompasses multiple methods of death. *Id.*

18. National Association for the Advancement of Colored People, *History of Lynchings*, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, www.naacp.org/history-of-lynchings/ (last visited Mar. 26, 2017).

19. MICHAEL J. PFEIFER, ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY, 1874-1947 13 (2004).

20. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THIRTY YEARS OF LYNCHING IN THE UNITED STATES 6 (1919).

21. The Independence Hall Association, *Reconstruction*, USHISTORY.ORG, www.ushistory.org/us/35.asp (last visited Mar. 30, 2017).

22. *Id.*

23. CUTLER, *supra* note 16, at 137-38.

24. E.B. Beck & Stewart E. Tolnay, *Violence toward African Americans in the Era of the White Lynch Mob*, in ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE 121-44, 122 (1995).

25. PFEIFER, *supra* note 19, at 13. Pfeifer finds that the Emancipation Proclamation had upset certain notions of white supremacy in the South such as the "slaveholder's recourse to corporal punishment and the slave patrol's police power." *Id.*

26. *Id.*

27. Equal Justice Initiative, *A Summary Report: Lynching in America*:

report of lynching in America, the Equal Justice Initiative described the practice during this time period as “violent, public acts of torture” that created a fearful environment which “reinforced a legacy of racial inequality that has never been adequately addressed in America.”²⁸ It was also during this era that the Ku Klux Klan first emerged.²⁹ The KKK’s message was simple, but ghastly—to put blacks back in their place.³⁰ Donning white masks and robes, the Klansmen instilled fear within the Black community with their use of the hangman’s noose for the systematic lynching of African-Americans.³¹

Throughout the Reconstruction era, little effort was expended by local, state, or federal authorities to curb the increasingly violent and lawless white supremacists.³² As a result, the perfect environment for “a wave of counterrevolutionary terror” that “lacks a counterpart in the American experience” was created.³³ However, Congress achieved temporary success in 1871 by enacting the Ku Klux Klan Act—a law that extended the jurisdiction of the federal courts to KKK cases.³⁴ The Act’s passage effectively led to nine counties subjected to martial law, thousands of arrests, and the fall of the KKK.³⁵ Despite these successes, however, the KKK would see a resurgence in the early 1900s.³⁶ Moreover, lynching would continue on in the KKK’s absence.

2. *Lynching from the Years 1880 to 1930*

When the Reconstruction era came to an end, Union troops were withdrawn from the South and the white Southerners quickly regained political power.³⁷ It was here, from 1880 to 1930, that

Confronting the Legacy of Racial Terror, EQUAL JUSTICE INITIATIVE, www.eji.org/sites/default/files/lynching-in-america-second-edition-summary.pdf 10 (last visited Mar. 28, 2017).

28. *Id.*

29. CUTLER, *supra* note 16, at 139.

30. *Id.*

31. Jeannine Bell, Article, *The Hangman’s Noose and the Lynch Mob: Hate Speech and the Jena Six*, 44 HARV. C.R.-C.L. L. REV. 329, 333 (2009).

32. Equal Justice Initiative, *supra* note 27, at 8.

33. *Id.* at 3.

34. A&E Television Networks, LLC, *Ku Klux Klan Act Passed by Congress*, HISTORY.COM, www.history.com/this-day-in-history/ku-klux-act-passed-by-congress (last visited Mar. 28, 2017).

35. *Id.*

36. *Id.*

37. Equal Justice Initiative, *supra* note 27, at 8; EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 24 (2015). After the white Southerners regained political power, all former Confederate states “rewrote their constitutions to include provisions restricting voter rights with poll taxes, literacy tests, and felon disenfranchisement.” *Id.* These Constitutions effectively “institutionalized” the racial inequality that existed, allowed for the creation of the Jim Crow laws, and set off the “second slavery” era. *Id.*

lynching would become a common practice in the South.³⁸ Maneuvering around the Thirteenth Amendment, which prohibited slavery “except as punishment for crime,”³⁹ politicians, newspapers, and cartoonists began characterizing African-Americans as threatening beasts and criminals who needed to be controlled.⁴⁰ One radical example of this is the movie, “The Birth of a Nation”, which portrayed African-American men as unintelligent and sexually aggressive towards white women.⁴¹ Due to these depictions, during the early 1900s African-American men were increasingly accused of murder and raping or attacking white women⁴²—for all of which, lynching was seen as the appropriate response.⁴³ It is not readily known whether these crimes were truly committed, for a majority of these hangings were extra-judicial.⁴⁴ The accused would be forcibly taken from the custody of the law and lynched by mobs or societies such as the KKK.⁴⁵ However, a 2015 report found that many of the African-American victims “were murdered without being accused of any crime” and were killed “for minor social transgression or for demanding basic rights and fair treatment.”⁴⁶

While overt racism was a prevailing motive for lynching in the 1900s, state complicity in the practice perpetuated the act and allowed for mob justice to continue to run rampant.⁴⁷ In one case, a South Carolina Governor refused to indict certain mob leaders who brought about the lynching of one Willis Jackson.⁴⁸ In addition to refusing to charge the wrongdoers, the Governor expressed regret for not having lead the gang himself.⁴⁹ Throughout the 1920s, there was a Congressional effort to pass federal legislation that addressed nationwide lynching.⁵⁰ However, Southern Democrats effectively

38. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *supra* note 20, at 6; EQUAL JUSTICE INITIATIVE, *supra* note 37, at 28. The ratio of black lynching victims to white in this era had increased to more than 6 to 1. *Id.* After 1900, the ratio was 17 to 1. *Id.* Professor Stewart Tolnay, using this data, concluded that “lynching in the South became increasingly and exclusively a matter of white mobs murdering African-Americans—a routine and systematic effort to subjugate the African-American minority.” *Id.*

39. U.S. CONST. amend. XIII.

40. E.B. Beck and Stewart E. Tolnay, *supra* note 24, at 122.

41. THE BIRTH OF A NATION (David W. Griffith Corp. 1915). The movie employed white actors who would don black face to portray African-American men. *Id.*

42. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *supra* note 20, at 6. The research found that the crime “attacks upon white women” would often have “no stronger evidence than an African-American entering the room of a woman or brushing up against her.” *Id.*

43. Equal Justice Initiative, *supra* note 27, at 11.

44. CUTLER, *supra* note 16, at 152.

45. *Id.*

46. Equal Justice Initiative, *supra* note 27, at 5.

47. E.B. Beck and Stewart E. Tolnay, *supra* note 24, at 123.

48. *Id.*

49. *Id.*

50. Steven J. Jager, *Dyer Anti-Legislation Bill (1922)*, BLACKPAST.ORG, ww

blocked the anti-lynching bill (deemed the Dyer Bill) each time it was presented to the Senate.⁵¹ Ultimately, the legislation was defeated three times.⁵² Another anti-lynching legislation movement was taken up in the 1930s with the Costigan Wagner Bill, but again, Southern opposition proved too resilient.⁵³

Lynching would ultimately begin to see a decrease in the 1910s to the 1930s.⁵⁴ This decline has been attributed to multiple factors such as Congressional efforts to pass anti-lynching legislation,⁵⁵ the creation of the National Association for the Advancement of Colored People and their work in raising awareness of the issue,⁵⁶ and general urbanization of the South.⁵⁷ While sporadic lynching would occur until the 1960s, its numbers would never reach the height it did during the 1880s to the early 1900s.⁵⁸ Although diligent reporting on lynching was not prevalent until the late 1870s, new studies have determined that from 1877 to 1950, 3,959 African-Americans were hanged within the U.S.⁵⁹

B. Prevalence of the Noose Today

Today, the noose is a lasting remnant of the fear, intimidation, and blatant racism African-Americans endured throughout the 19th and early 20th centuries.⁶⁰ The Equal Justice Initiative

w.blackpast.org/aah/dyer-anti-lynching-bill-1922 (last visited Jan. 3, 2017).

51. *Id.*

52. National Association for the Advancement of Colored People, *Oldest and Boldest*, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, www.naacp.org/oldest-and-boldest/ (last visited Mar. 27, 2017).

53. National Association for the Advancement of Colored People, *NAACP History: Costigan Wagner Bill*, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, www.naacp.org/oldest-and-boldest/naacp-history-costigan-wagner-act/ (last visited Feb. 13, 2017).

54. Robert A. Gibson, *The Negro Holocaust: Lynching and Race Riots in the United States, 1880-1950*, TEACHERSINSTITUTE.YALE.EDU, teachersinstitute.yale.edu/curriculum/units/1979/2/79.02.04.x.html (last visited Mar. 29, 2017).

55. ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950*, at 22 (1980). Zangrando notes the decrease in lynching numbers could be attributed to Southern whites suppressing the news of mob violence due to their worry that “outside pressure might produce a federal anti-lynching law.” *Id.*

56. *Id.* at 22. The NAACP was founded following a race riot in Springfield, Illinois in which two African-Americans were lynched. *Id.*

57. *Id.*

58. *Id.*

59. Equal Justice Initiative, *supra* note 27, at 8.

60. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *STEMMING THE TIDE OF INJUSTICE AGAINST AFRICAN AMERICANS* (2007)(discussing the hanging of nooses at a school in Jena, Louisiana, and noting the hangman's noose is a symbol of the racist, segregation-era violence enacted on blacks.) It is an unmistakable symbol of violence and terror that whites used to demonstrate their hatred for blacks. *Id.* It was used to send a message to blacks in general about respecting the racial boundaries and to not get out of place. *Id.*

contends that this lynching era “significantly marginalized black people in the country’s political, economic, and social systems . . . [and] inflicted deep traumatic and psychological wounds . . . on the entire African-American community.”⁶¹ Notwithstanding the emotional connotations of the noose, sightings of the object are still common today. One such occurrence took place within a school yard in Jena, Louisiana, in 2007.⁶² Following the incident, the National Association for the Advancement of Colored People declared a State of Emergency⁶³ in which they reported that forty-three noose hangings had occurred since early 2006.⁶⁴

Relevant to this Comment, there have also been numerous claims of nooses appearing within the workplace. The latest statistical data concerning these allegations comes from an interview conducted in 2000 with the chairwoman of the Federal Equal Employment Opportunity Commission, Ida L. Castro.⁶⁵ Castro indicated the Commission has witnessed, since the late 1990s, “a disturbing national trend of increased racial harassment cases involving hangman’s nooses in the workplace.”⁶⁶ At that time, the EEOC had filed 20 racial harassment claims that involved the allegation of nooses found within a place of employment⁶⁷. The use of physical objects, such as the noose or Ku Klux Klan attire, are alleged in 5.8% of all hostile work environment claims.⁶⁸ In January of 2017, the EEOC issued proposed guidance on hostile work environment claims.⁶⁹ The purported reason for the guidance was because one third of the 90,000 charges the agency received in 2015 were workplace harassment claims.⁷⁰ It noted that conduct not directed at an employee, such as the display of a noose, can contribute to a hostile work environment cause of action.⁷¹

61. Equal Justice Initiative, *supra* note 37, at 62.

62. Richard G. Jones, *In Louisiana, a Tree, a Fight and a Question of Justice*, N.Y. TIMES (Sept. 19, 2007), www.nytimes.com/2007/09/19/us/19jena.html.

63. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *supra* note 60.

64. *Id.*

65. U.S. Equal Employment Opportunity Commission, *EEOC Chairwoman Responds to Surge of Workplace Noose Incidents at NAACP Annual Convention*, EEOC.GOV (July 13, 2000), www.eeoc.gov/eeoc/newsroom/release/7-13-00-b.cfm.

66. *Id.*

67. *Id.*

68. Pat K. Chew and Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKLEY J. EMP. & LAB. L. 49, 74 (2006).

69. Robert G. Brady and Katherine M. Bogard, *EEOC’S Proposed Enforcement Guidance on Harassment: Should You Care?*, N.Y. LAW JOURNAL (Apr. 7, 2017), www.newyorklawjournal.com/id=1202783257769/EEOCs-Proposed-Enforcement-Guidance-on-Harassment-Should-You-Care?slreturn=20170314175324.

70. *Id.*

71. *Id.*

1. Congressional Efforts Concerning the Hangman's Noose

Following the trend of the Reconstruction and post-Reconstruction eras, the U.S. Congress has taken little action regarding the noose in today's world despite its continued use.⁷² In 2005, the United States Senate recognized the storied past of the hangman's noose and their failed efforts to fight against lynching by introducing Resolution 39.⁷³ This resolution apologized to the victims of lynching and the descendants of those victims for the failure of the Senate to enact anti-lynching legislation.⁷⁴ Before voting on the resolution commenced, Senator Mary Landrieu stated, "[t]here may be no other injustice in American history for which the Senate so uniquely bears responsibility."⁷⁵ Anti-lynching legislation has never been passed by the United States' Congress. Furthermore, "no prominent monument or memorial exists to commemorate the thousands of African-Americans who were lynched."⁷⁶

2. Judicial Decisions Involving the Hangman's Noose

In the context of hostile work environment claims, the judiciary has seen multiple cases alleging the use of the object. It appears in a variety of circumstances—not always hanging from the ceiling of a warehouse. For example, in *Henderson v. Int'l Union*, the plaintiff found a noose at her work station that was made from a piece of flexible rubber.⁷⁷ The plaintiff in *Williams v. New York City Housing Authority* walked into their supervisor's office and noticed a noose the supervisor kept hung on his wall for display.⁷⁸ In *Allen v. Michigan Dep't of Corrections*, a note, written on a department form, was signed with the letters, KKK, and contained a drawing of a stick figure that had a noose around its neck.⁷⁹

No matter where the noose appears, however, the judicial system has consistently condemned the object and what it stands for.⁸⁰ The Seventh, Tenth, Eleventh, and D.C. Circuits have found

72. See EQUAL JUSTICE INITIATIVE, *supra* note 37, at 62 (observing that "state officials' indifference to and complicity in lynchings created enduring national and institutional wounds that we have not yet confronted or begun to heal.").

73. S. Res. 39, 109th Cong. (2005-2006).

74. *Id.*

75. Avis Thomas-Lester, *A Senate Apology for History on Lynching*, THE WASH. POST (June 14, 2005), www.washingtonpost.com/wp-dyn/content/article/2005/06/13/AR2005061301720.html.

76. EQUAL JUSTICE INITIATIVE, *supra* note 37, at 63.

77. *Henderson v. Int'l Union*, 263 F. Supp. 2d 1245, 1250 (D. Kan. 2003).

78. *Williams v. New York City Housing. Auth.*, 154 F. Supp. 2d 820, 821 (S.D.N.Y. 2001).

79. *Allen v. Michigan Dep't of Corrections*, 165 F. 3d 405, 408 (6th Cir. 1999).

80. *Porter v. Erie Foods Int'l, Inc.*, 576 F. 3d 629, 636 (7th Cir. 2009) (articulating the "noose is a visceral symbol of the deaths of thousands of

incidents involving a noose at a place of employment sufficiently severe or pervasive enough to alter the conditions of the victim's work conditions.⁸¹

Notably, the U.S. Supreme Court's decision in *Virginia v. Black* impacted State laws concerning the hangman's noose.⁸² The 2003 opinion determined that a State can enact a statute banning cross-burning, that was done with the intent to intimidate, without running afoul of the First Amendment.⁸³ A burning cross was often employed by the KKK in the early 1900s to terrorize African-Americans.⁸⁴ The Anti-Defamation League recognizes the image of a burning cross as "one of the most potent hate symbols in the United States."⁸⁵

Since *Virginia v. Black*, half of the states in the U.S. have outlawed cross-burning that is being used to intimidate.⁸⁶ Moreover, several jurisdictions' statutes are written in a way that condemns all symbols that "are calculated to intimidate or threaten" thereby effectively banning the hangman's noose as well.⁸⁷ Although these statutes do not directly reference the hangman's noose, they have also not been overturned due to First Amendment issues.⁸⁸

C. Title VII of the Civil Rights Act

While specific actions to combat the use of the hangman's noose were not taken by the U.S. Congress or the judiciary, the federal government did begin to explicitly acknowledge racial discrimination in the early 1960s. In the wake of the Supreme Court's decision in *Brown v. Board of Education*,⁸⁹ the call to pass

African-Americans at the hand of lynch mobs."); *see also* *Tademy v. Union Pac. Corp.*, 614 F. 3d 1132, 1142 (10th Cir. 2008) (positing "the noose is among the most repugnant of all racist symbols, because it is itself an instrument of violence."); *see also* *Burkes v. Holder*, 953 F. Supp. 2d 167, 169 (D.D.C. 2013)(specifying the "noose is a powerful symbol of racism and violence against African Americans.").

81. *Porter*, 576 F. 3d 629 at 636; *Hollins v. Delta Airlines*, 238 F. 3d 1255 (10th Cir. 2001); *Vance v. S. Bell Tel. & Tel. Co.*, 863 F. 2d 1503, 1511 (11th Cir. 1989); *Burkes*, 953 F. Supp. 2d 167 at 179.

82. *Virginia v. Black*, 538 U.S. 343 (2003).

83. *Id.* at 363.

84. Anti-Defamation League, *Burning Cross*, ANTI-DEFAMATION LEAGUE, www.adl.org/education/references/hate-symbols/burning-cross (last visited Mar. 30, 2017).

85. *Id.*

86. Kathleen Ann Ruane and Charles Doyle, *Burning Crosses, Hangman's Nooses, and the Like: State Statutes that Proscribe the Use of Symbols of Fear and Violence with the Intent to Threaten*, FAS.ORG (Oct. 5, 2007), fas.org/sgp/crs/misc/RL34200.pdf.

87. *Id.*

88. *Id.* at 6.

89. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

federal legislation combating racial discrimination intensified.⁹⁰ Pressure from civil rights activists in the form of boycotts and sit-ins led Congress to ultimately enact the Civil Rights Act of 1964.⁹¹ Encompassed within the Act, Title VII prohibits discrimination on the basis of race, color, sex, national origin and religion within the private employment sector.⁹² Although sex, national origin, and religion are codified within Title VII, the principal purpose of Title VII is to prevent and proscribe discrimination within the work place on the basis of race or color.⁹³

1. *The Development of Hostile Work Environment Claims Under Title VII*

The implementation of Title VII paved the way for the hostile work environment claim to develop. *Rogers v. EEOC*, decided in 1971, became the first case to explicitly acknowledge a cause of action arising from a discriminatory work environment.⁹⁴ Brought under Title VII of the Civil Rights Act of 1964,⁹⁵ the respondent, Mrs. Josephine Chavez, alleged her employer's policy of segregating patients based on race, made her uncomfortable.⁹⁶ Despite this feeling of discomfort, the District Court held Mrs. Chavez had failed to show she was aggrieved.⁹⁷ The alleged conduct did not force Mrs. Chavez to treat only patients of a certain race or origin, it merely offended her.⁹⁸ Mrs. Chavez's discomfort with her employer's conduct, the District Court concluded, was not enough to raise a Title VII cause of action.⁹⁹

The Fifth Circuit disagreed.¹⁰⁰ Judge Goldberg noted that working environments which contain enough discrimination as to effect ones emotional and psychological well-being are well within the target range of Title VII.¹⁰¹ The Fifth Circuit found the scope of

90. John F. Kennedy, *Civil Rights Address*, AMERICANRHETORIC.COM, www.americanrhetoric.com/speeches/jfkcivilrights.htm (last visited Mar. 30, 2017).

91. Robert Belton, *The 40th Anniversary of Title VII of the Civil Rights Act of 1964 Symposium: Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 432 (2005).

92. 42 USCS § 2000e-2 (a)(1) (1972).

93. Clare Tower Putnam, Comment, *When Can a Law Firm Discriminate Among Its Own Employees to Meet a Client's Request? Reflections on the ACC's Call to Action*, 9 U. PA. J. LAB. & EMP. L. 657, 664 (2007) (Congressman Celler asserting, "You must remember the basic purpose of Title VII is to prohibit discrimination in employment on the basis of race or color.").

94. *Rogers v. EEOC*, 454 F. 2d 234, 238 (1971).

95. *Id.*

96. *Id.* at 237.

97. *Rogers v. EEOC*, 316 F. Supp. 422, 425 (1970).

98. *Id.* at 425.

99. *Id.*

100. *Rogers*, 454 F. 2d 234 at 238.

101. *Id.* (explaining "[o]ne can readily envision working environments so

Title VII to be broad—protecting an employees’ psychological well-being as well as economic from an employer’s abuse.¹⁰² However, they noted that an employer’s “mere utterance of an ethnic or racial epithet which engenders offensive feelings” will not rise to a Title VII violation.¹⁰³ At the same time, the Fifth Circuit held that a discriminatory atmosphere could constitute a violation under Title VII.¹⁰⁴ Thus, the foundation was laid for what has become the modern hostile work environment claim.¹⁰⁵

Although the seminal case of *Rogers* involved racial discrimination,¹⁰⁶ the jurisprudence of hostile work environment claims was developed through the adjudication of sexual harassment claims rather than racially motivated cases.¹⁰⁷ Following *Rogers*, lower courts consistently held that the elements needed to prove a sexual harassment claim were the same as those needed within a hostile work environment cause of action.¹⁰⁸ The first discriminatory harassment case to reach the Supreme Court, *Meritor Sav. Bank, FSB v. Vinson*, decided in 1986, cemented this precedent.¹⁰⁹ Following *Meritor*, a plaintiff must prove that “he was subject to unwelcome harassment; the harassment was based on his race; the harassment was severe or pervasive so as to alter the conditions of the employee’s work environment by creating a hostile or abusive situation; and there is a basis for employer liability.”¹¹⁰

To develop the “sufficiently severe and pervasive”¹¹¹ standard more thoroughly, the Supreme Court addressed another hostile work environment claim in *Harris v. Forklift Sys.*¹¹² While upholding the *Meritor* standard, the Court further expanded upon the severe or pervasive test by noting the conduct must be objectively and subjectively perceived as hostile.¹¹³ This determination, the Court decided, should be made by looking at the

heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.”).

102. *Id.*

103. *Id.* at 239.

104. *Id.*

105. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (stating that “*Rogers* was apparently the first case to recognize a cause of action based upon a discriminatory work environment.”).

106. 454 F. 2d 234 at 238.

107. Chew and Kelley, *supra* note 68, at 74.

108. 454 F. 2d 234.

109. 477 U.S. 57 at 67. A female bank employee, Michelle Vinson, alleged her male supervisor, Sidney Taylor, had publicly fondled her and asked her for sexual demands. *Id.* In order to keep her job, Ms. Vinson complied out of fear. *Id.* Over the course of her employment, she alleges they engaged in intercourse 40-50 times, Taylor had exposed himself to her, and had also forcibly raped her on multiple occasions. *Id.* at 59-61.

110. *Id.* at 67.

111. *Meritor*, 477 U.S. 57 at 67.

112. *Harris v. Forklift Sys.*, 114 S. Ct. 367 (1993).

113. *Id.* at 370.

totality of the circumstances.¹¹⁴ Relevant factors such as the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, were listed by the Court as being indicative of a hostile or abusive environment.¹¹⁵ Yet, confusion within the lower courts still existed over what definitively constituted a hostile environment.¹¹⁶

D. *Henry v. Regents of the Univ. of California*¹¹⁷

On March 15, 2016, the confusion created by *Meritor* over what constituted a hostile environment culminated in the Ninth Circuit's dismissal of Jon Henry's hostile work environment claim.¹¹⁸ The decision of the District Court to grant summary judgment in favor of the defendants over Henry's claim was affirmed.¹¹⁹ Henry, an African-American man, was employed at the University of California, San Francisco.¹²⁰ Throughout his time with the University, Henry alleged he suffered "severe race-based harassment."¹²¹ One instance, that formed the basis for his hostile work environment claim, occurred on July 10, 2012.¹²² On that day, Henry alleged he walked into the inventory warehouse and discovered a noose that was hung by being taped to a box.¹²³ Henry indicated he felt the noose was "placed there to intimidate, harass, and threaten him."¹²⁴ The defendants alleged that the employee who allegedly tied and hung the noose to the box, Danny Paik, had done so because "it was the most challenging knot he could think of"—not due to any racial connotations.¹²⁵ Although Paik admitted committing the offense, later investigation by the defendants

114. *Id.* at 371.

115. *Id.* at 370.

116. Maria Milano, Comment, *Toward a New Standard: Hope for Greater Uniformity in the Treatment of Hostile Work Environment Claims*, 78 MARQ. L. REV. 190, 194 (1994); see also *Harris*, 114 S. Ct. 367 at 372 (Scalia, J., concurring) (Justice Scalia noted that adding the reasonable person standard to the test for a hostile work environment claim did not provide any clarity. It simply allows "virtually unguided juries to decide whether...conduct engaged in or permitted by an employer is egregious enough to warrant an award of damages.")

117. *Henry v. Regents of the Univ. of Cal.*, 644 F. App'x 787, 788 (2016).

118. *Id.*

119. *Id.* at 788-89. The Plaintiff had also brought three retaliation claims. *Id.*

120. *Henry v. Regents of the Univ.*, 37 F. Supp. 3d 1067, 1070 (N.D. Cal. 2014).

121. *Id.*

122. *Id.* at 1073.

123. *Henry*, 644 Fed. Appx. 787 at 788.

124. *Henry*, 37 F. Supp. 3d 1067 at 1073.

125. *Id.*

determined he had not.¹²⁶ The true culprit's identity was never confirmed.¹²⁷

Narrowing in on Henry's hostile work environment claim, the Court focused their attention on whether the incident with the noose, as an isolated event, was sufficiently severe or pervasive enough to alter Henry's work conditions.¹²⁸ Although the court acknowledged the connotations of the noose,¹²⁹ they ultimately concluded that one incident involving the object was not sufficiently severe or pervasive enough.¹³⁰ In affirming the District Court's opinion, the Ninth Circuit noted the isolated incident was not extremely serious as to alter his employment.¹³¹ Henry's allegations did not amount to "discriminatory changes in the terms and conditions of his employment."¹³²

III. ANALYSIS

The essence of this Comment stems from the holding in *Henry* which placed the Ninth Circuit at ends with the Eleventh, Seventh, and Tenth Circuit.¹³³ Part A of this section discusses case law from these circuits that concern the severity of the hangman's noose while Part B addresses the mistakes made by the District Court within the *Henry* decision.¹³⁴ Additionally, the objective test—used to determine the severity of conduct within hostile work environment claims—as well as its alternative, the reasonable black person standard, will be examined.

126. *Id.*

127. *Id.*

128. *Id.* at 1086.

129. *See id.* at 1087 (acknowledging that "even if the noose was not directed specifically at plaintiff, because of the legacy of slavery and its aftermath, a reasonable African-American would have been offended by being confronted with such an emotionally-charged symbol in the workplace.").

130. *Id.*

131. *Henry v. Regents of the Univ. of Cal.*, 644 Fed. Appx. 787, 788 (9th Cir. 2016).

132. *Id.*

133. 644 Fed. Appx. 787 at 788.

134. *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F. 2d 1503, 1504 (11th Cir. 1989); *Adams v. Austal, U.S.A., L.L.C.*, 754 F. 3d 1240 (11th Cir. 2014); *Porter v. Erie Foods Int'l, Inc.*, 576 F. 3d 629, 630 (7th Cir. 2009); United States Court of Appeals, Seventh Circuit, *Jerome Cole v. Board of Trustees of Northern Illinois University, et al.*, CASELAW.FINDLAW.COM (Sept. 27, 2016) caselaw.findlaw.com/us-7th-circuit/1749187.html; *Hollins v. Deltha Airlines*, 238 F. 3d 1255, 1256 (10th Cir. 2001); *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1141 (10th Cir. 2008).

A. *The Circuit Court Split*

1. *The Eleventh Circuit*

The Ninth Circuit's decision regarding the severity of the hangman's noose in *Henry* departs from the uniform precedent its sister circuits has developed over the years.¹³⁵ Recognition of the noose's severity in the context of a hostile work environment claim was first discussed in 1989 by the Eleventh Circuit in *Vance v. Southern Bell Tel. and Tel. Co.*¹³⁶ The plaintiff, a black woman, was working for Southern Bell as a switchboard operator.¹³⁷ A week after transferring to a new department, the plaintiff found what she believed to be a noose hanging from a light fixture above her work station.¹³⁸ Two days later, the plaintiff found another noose hanging in the same location.¹³⁹ While holding that the District Court had erred in determining the severity of the alleged harassment incidents, the Eleventh Circuit stated, "[t]he grossness of hanging an object resembling a noose at the work station of a black female is self-evident."¹⁴⁰

The Eleventh Circuit recently reaffirmed and expanded their belief as to the severity of the noose in *Adams v. Austal, U.S.A., L.L.C.*¹⁴¹ Here, an objectively hostile work environment was found for a plaintiff who had only heard about the hanging of a noose within his place of employment.¹⁴² While recognizing that the plaintiff's experience was less severe than those who had seen the noose, the court still declared the object a "severe form of racial harassment."¹⁴³

2. *The Seventh Circuit*

The Seventh Circuit, relying on the precedent laid out in the Eleventh, followed suit in 2009 with *Porter v. Erie Foods Int'l, Inc.*¹⁴⁴ The plaintiff, Mr. Porter, was the only African-American employee scheduled during the third shift and he alleged that on multiple occasions he was shown a noose by his co-workers.¹⁴⁵ Quoting the dissent in *Vance*,¹⁴⁶ the court found the incidents to be sufficiently

135. *Porter*, 576 F. 3d 629 at 636; *Hollins*, 238 F. 3d 1255; *Vance*, 863 F. 2d 1503 at 1511; *Burkes*, 953 F. Supp. 2d 167 at 179.

136. *Vance*, 863 F. 2d 1503 at 1504.

137. *Id.* at 1506.

138. *Id.*

139. *Id.*

140. *Id.* at 1511.

141. *Adams v. Austal*, 754 F. 3d 1240 (11th Cir. 2014).

142. *Id.* at 1253.

143. *Id.*

144. *Porter v. Erie Foods Int'l, Inc.*, 576 F. 3d 629, 630 (7th Cir. 2009).

145. *Id.* at 632-34.

146. *Id.*:

severe as to rise to a hostile work environment claim.¹⁴⁷ In a more recent decision, the Seventh Circuit cited *Porter*¹⁴⁸ and stated they would not “flatly reject as insufficiently severe an entire set of cases” involving the hangman’s noose given its atrocious history.¹⁴⁹

3. The Tenth Circuit

The plaintiff in *Hollins v. Delta Airlines*, decided in the Tenth Circuit, found several hangman’s nooses dangling from the ceiling in his work area and two other areas at his place of employment.¹⁵⁰ Rejecting the District Court’s notion that the presence of the nooses was “uncontrovertibly innocuous”,¹⁵¹ the Tenth Circuit argued the incidents precluded summary judgment on the hostile work environment claim. In a more vehement decision, the Tenth in *Tademy v. Union Pacific Corp.* also denied the defendant’s summary judgment.¹⁵² The plaintiff in *Tademy* had come upon a life-size hangman’s noose that was suspended from an industrial wall clock.¹⁵³ The court, relying upon *Hollins* along with *Vance*,¹⁵⁴ recognized the atrocity of the noose by stating, “like a slave-masters whip, the image of a noose is deeply a part of this country’s collective consciousness and history, any further explanation of how one could infer a racial motive appears quite unnecessary.”¹⁵⁵ Until *Henry v. Regents*,¹⁵⁶ each Circuit that has taken on the issue regarding the

The noose in this context is a symbol not just of racial discrimination or of disapproval, but of terror. Those of us for whom a particular symbol is just that—a symbol—may have difficulty appreciating the very real, very significant fear that such symbols inspire in those to whom they are targeted. No less than the swastika or the Klansman’s hood, the noose in this context is intended to arouse fear.

Vance v. Southern Bell Tel. & Tel. Co., 863 F. 2d 1503, 1583 (11th Cir. 1989) (Fay, J. dissenting).

147. *Porter*, 576 F.3d 626 at 636.

148. *Id.* at 627.

149. United States Court of Appeals, Seventh Circuit, *supra* note 134. The court ultimately held that the plaintiff could not succeed on his hostile work environment claim. *Id.* However, the court noted they did not need to “[lay] down . . . firm rules for when a noose in a workplace is or is not severe” because the plaintiff failed the fourth element of the claim—a basis for employer liability. *Id.*

150. *Hollins v. Deltha Airlines*, 238 F. 3d 1255, 1256 (10th Cir. 2001).

151. *Id.* at 1257-58.

152. *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1141 (10th Cir. 2008).

153. *Id.* at 1137.

154. *Hollins*, 238 F. 3d 1255 at 1256-58; *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F. 2d 1503, 1511 (11th Cir. 1989).

155. *Tademy*, 614 F. 3d 1132 at 1142 (citing *Johnson v. Potter*, 177 F. Supp. 2d 961, 965 (D.Minn.2001)); *Virginia v. Black*, 538 U.S. 343, 388 (2003).

156. *Henry v. Regents of the Univ. of Cal.*, 644 Fed. Appx. 787, 788 (9th Cir. 2016).

severity of the noose has found the object to be severe enough to succeed on a hostile work environment claim.¹⁵⁷

B. *The Mistakes within the Henry Decision*¹⁵⁸

The holding in *Henry*¹⁵⁹ not only created a split between the circuits, but was a decision that relied upon the wrong standards to determine severity and that analogized Henry's situation to factually dissimilar cases. Moreover, the District Court placed a concerning emphasis on who the noose was directed at—a method that fails to hold all types of perpetrators accountable and ignores the well documented history of the hangman's noose and other historically racist objects.

To begin with, the District Court had found that Henry's incident involving the noose was not as severe when compared to other cases, and as such, he could not meet the third element of a hostile work environment claim.¹⁶⁰ But this comparison was erroneous. A hostile work environment claim required Henry to show conduct that was severe or pervasive enough to alter his work conditions—not conduct that, when compared to other cases, was as severe.¹⁶¹ The standard for determining the severity of conduct within hostile work environment actions was long ago established by the U.S. Supreme Court as an objective one.¹⁶² The objective test asks whether a reasonable person would find the conduct to be sufficiently severe as to alter one's work conditions.¹⁶³ If the reasonable person were to conclude this, the conduct would be said to be sufficiently severe.¹⁶⁴ Even though the objective standard has been the prevailing test to determine severity in hostile work environment causes of actions since *Harris v. Forklift Sys.*,¹⁶⁵ the District Court never explicitly applied it to Henry's action.¹⁶⁶ Because of this, the District Court failed to adequately analyze Henry's action as set forth by precedent¹⁶⁷ and accordingly, the District Court could not have correctly concluded that Henry's claim was not sufficiently severe.

157. *Porter v. Erie Foods Int'l, Inc.*, 576 F. 3d 629, 636 (7th Cir. 2009); *Hollins*, 238 F. 3d 1255; *Vance*, 863 F. 2d 1503 at 1511; *Tademy*, 614 F.3d 1132 at 1141; *Henry*, 644 Fed. Appx. 787.

158. *Id.*

159. *Id.*

160. *Henry v. Regents of the Univ.*, 37 F. Supp. 3d 1067, 1087 (N.D. Cal. 2014).

161. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 58 (1986).

162. *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993)

163. *Id.*

164. *Id.*

165. *Id.*

166. *Henry v. Regents of the Univ.*, 37 F. Supp. 3d 1067, 1087 (N.D. Cal. 2014).

167. *Harris*, 510 U.S. 17 at 21.

The District Court's decision was also erroneous due to two faulty analogies. The first misguided analogy occurred when the District Court determined the severity of Henry's claim by comparing it to *Bolden v. PRC Inc.*,¹⁶⁸ a case that had been decided in the Tenth Circuit. In *Bolden*, isolated racial comments were alleged as the sufficiently severe conduct—a fact pattern drastically different from *Henry's*.¹⁶⁹ While multiple racial epithets can create a cause of action for a hostile work environment claim,¹⁷⁰ courts continue to hold that an “employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee” cannot form the basis of a hostile work environment claim under Title VII.¹⁷¹ The citation to and reliance upon the Tenth Circuit decision was not analogous to the facts presented by Henry and therefore, flawed. The difference between isolated incidents involving racial epithets and an isolated incident involving a noose is one that has been recognized since the beginning of the hostile work environment jurisprudence.¹⁷² The Supreme Court explicitly recognized this notion in *Meritor Sav. Bank, FSB v. Vinson*.¹⁷³ Because the District Court failed to acknowledge the distinction between cases involving racial epithets and ones involving a severely racist object, the conclusion they came to in Henry's cause of action was improper. If the court had analogized the case to one that involved a noose, such as the ones decided in the Seventh, Tenth, and Eleventh Circuits, presumptively, the District Court would have come to the same conclusion as those circuits had.¹⁷⁴

The second flawed comparison was committed when the District Court found Henry's situation to be more in line with the incident involved in *McCoy v. City of New York*.¹⁷⁵ The court in *McCoy* found an alleged incident of a noose could not be termed “pervasive” because it did not “occur in concert or with a regularity that can reasonably be termed pervasive.”¹⁷⁶ This standard is not a

168. *Bolden v. PRC Inc.*, 43 F. 3d 545, 551 (10th Cir. 1994); *Henry*, 37 F. Supp. 3d 1067 at 1069.

169. The court cited to *Bolden v. PRC Inc.*, where the Plaintiff had alleged isolated incidents of racial enmity such as being called a “nigger” and being told he better be careful “because [the Defendants] know people in the Ku Klux Klan.” 43 F. 3d 545 at 551; *Henry*, 37 F. Supp. 3d 1067 at 1069.

170. *Hicks v. Gates Rubber Co.*, 833 F. 2d 1406, 1412-13 (10th Cir. 1987); *Johnson v. Bunny Bread Co.*, 646 F. 2d 1250, 1257 (8th Cir. 1981).

171. This notion was first recognized in *Rogers*. *Rogers v. EEOC*, 454 F. 2d 224, 238 (5th Cir. 1971).

172. *Id.*

173. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 58 (1986).

174. *Porter v. Erie Foods Int'l, Inc.*, 576 F. 3d 629, 636 (7th Cir. 2009); *Hollins v. Deltha Airlines*, 238 F. 3d 1255, 1255 (10th Cir. 2001); *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F. 2d 1503, 1511 (11th Cir. 1989); *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1141 (10th Cir. 2008).

175. *Henry v. Regents of the Univ.*, 37 F. Supp. 3d 1067, 1086 (N.D. Cal. 2014); *McCoy v. City of New York*, 131 F. Supp. 2d 363, 374 (E.D.N.Y. 2001).

176. *Id.*

requirement of a hostile work environment claim nor recognized by any other circuit.¹⁷⁷ An incident does not need to occur in concert or with a regularity to be considered sufficiently severe or pervasive. As previously discussed, the objective standard is the test used to determine severity or pervasiveness.¹⁷⁸ Moreover, several courts have held that an extremely serious isolated incident can support a hostile work environment action on its own.¹⁷⁹ Therefore, the court's reliance upon *McCoy* was misguided.¹⁸⁰

Aside from the District Court applying imprecise severity tests to Henry's claim and equating the case to factually dissimilar situations, the Court additionally erred when it failed to view the facts of Henry's case in a light most favorable to him as required of a motion for summary judgment.¹⁸¹ Thus, the Court was unable to see the similarities between his allegations and that of *Smith v. Town of Hempstead*.¹⁸² In *Smith*, two African-American plaintiffs found a noose hanging on the wall in an area where the employees regularly gathered.¹⁸³ The District Court in *Henry* relied heavily upon the statement in *Smith* that the noose had been hung in "an area where all African American employees would pass that morning."¹⁸⁴ This fact was vital to the Court as it indicated the noose was directed at the plaintiffs or at African-American employees as a whole.¹⁸⁵

In *Henry*, the Plaintiff alleged that the noose was hung in the Facilities Maintenance Inventory Warehouse.¹⁸⁶ While it can be argued that there is confusion within Henry's allegations concerning who discovered the noose,¹⁸⁷ it can be contended that the noose was discovered within a warehouse that almost all Building Maintenance employees would pass through.¹⁸⁸ Although it is not

177. *Id.*

178. *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993)

179. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (noting that isolated incidents that are "extremely serious" can amount to discriminatory changes in the "terms and conditions of one's employment."); *McCoy*, 131 F. Supp. 2d 363 at 374.

180. *Id.*

181. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

182. *Smith v. Town of Hempstead*, 798 F. Supp. 2d 443, 453 (E.D.N.Y. 2011).

183. *Id.* at 448.

184. *Id.*

185. *Henry v. Regents of the Univ.*, 37 F. Supp. 3d 1067, 1086 (N.D. Cal. 2014).

186. *Id.* at 1075.

187. The court discussed how Henry's complaint had stated he saw the noose on July 10, 2012, but an email from the Superintendent and a written statement from Cornel Nickelson (a co-worker) both claimed Nickelson had discovered the noose. *Id.* at 1074. However, Henry's opposition brief noted both he and Nickelson were the ones who found the noose. *Id.* Furthermore, there was evidence to support the idea that the Superintendent's email was discussing a different incident in which Nickelson, alone, had discovered a noose on the roof of the School of Nursing. *Id.*

188. *Id.*

certain that every single African-American employee would pass by the noose, it can at least be argued that the location of the noose was in a similar location as the one in *Smith* and it was within an area that most employees would traverse.¹⁸⁹ If the Court had been viewing Henry's facts in the light most favorable to him, their analysis of *Smith* should have varied dramatically.

The District Court's most concerning mistake, however, derives from its concentration on Henry's inability to allege facts that showed the noose was specifically directed at him or any other African-American employee.¹⁹⁰ To signify the importance of this showing, the District Court cited to two cases decided outside their district:¹⁹¹ *Wilson v. NYC Dept. of Transportation* and *Smith v. Town of Hempstead*.¹⁹² In *Wilson*, a noose was hung outside of the plaintiff's locker.¹⁹³ While in *Smith*, the noose was found in a central garage where all African American employees would pass through.¹⁹⁴ Both plaintiffs in these cases could allege facts that demonstrated the nooses were directed at themselves or other African-American employees.¹⁹⁵ The issue with demanding a plaintiff to make this showing is that it fails to hold accountable those who claim they were hanging the noose as a prank, in protest to a different issue, or that they did not know the history of the noose and its connection to African-Americans.¹⁹⁶

These excuses are common in incidents that involve racist objects. For example, in *Henderson v. Int'l Union*, two incidents of noose hanging were alleged.¹⁹⁷ In the first occurrence, the culprit contended he was from "the east coast" and had just been absentmindedly tying knots without knowing the racial history of the particular knot he was tying.¹⁹⁸ The second offender argued he hung the noose to express concerns that "the union ought to be hung for failing to accomplish certain measures with regard to profit sharing."¹⁹⁹

189. *Smith v. Town of Hempstead*, 798 F. Supp. 2d 443, 448 (E.D.N.Y. 2011).

190. The court focused on two cases outside its district that had found a single display of a noose sufficient to survive a motion for summary judgment. Both cases, per the court, were decided as they were because the Plaintiff could prove the nooses were directed at them or African-American employees in general. *Henry*, 37 F. Supp. 3d 1067 at 1087.

191. *Id.*

192. *Wilson v. NYC Dept. of Transportation*, No. 01 Civ. 7398 (RJH), 2005 U.S. Dist. LEXIS 21620 (S.D.N.Y. 2005); *Smith*, 798 F. Supp. 2d 443 at 453.

193. *Wilson*, No. 01 Civ. 7398 (RJH), 2005 U.S. Dist. LEXIS 21620 at *22.

194. *Smith*, 798 F. Supp. 2d at 453.

195. *Id.*; *Wilson*, No. 01 Civ. 7398 (RJH), 2005 U.S. Dist. LEXIS 21620, at *22.

196. Bell, *supra* note 31, at 338 (discussing the various explanations that Defendants have given for tying and hanging a noose).

197. *Henderson v. Int'l Union*, 263 F. Supp. 2d 1245, 1250 (D. Kan. 2003).

198. *Id.*

199. *Id.*

In Jena, Louisiana, during a high school assembly, an African-American student asked the principal “whether Black students could sit under the tree in the center of campus.”²⁰⁰ The question was said to have been asked as a joke.²⁰¹ The following day, however, nooses were found hanging from a tree in the center of campus.²⁰² The white students who were found to have hung the nooses stated they did “not intend to invoke the nooses’ racist legacy” and stated they “had no knowledge of the history concerning nooses and black citizens.”²⁰³ The hanging of a noose at a workplace has also been excused as a prank by many perpetrators.²⁰⁴ However, these explanations, particularly the claim of not knowing the racial connotations of the noose, are hard to swallow given the symbolism of the noose in today’s society.²⁰⁵

Even disregarding the fact that forcing a plaintiff to demonstrate who the noose was directed at fails to account for excuses put forth by perpetrators, the emphasis on this showing is still a cause for concern. Given the history of the noose and what it represents to African-Americans, it should be self-explanatory that a noose displayed where nooses are not generally found represents a threat directed at African-Americans.²⁰⁶ African-Americans who

200. *Id.*; Susan Roesgen & Elliot C. McLaughlin, *Residents: Nooses Spark School Violence, Divide Town*, CNN (Sept. 5, 2007), www.cnn.com/2007/US/law/09/04/bell.jena.six/index.html.

201. Roesgen & McLaughlin, *supra* note 200.

202. *Id.*

203. Bell, *supra* note 31, at 338; Craig Franklin, *Media Myths About the Jena 6: A Local Journalist Tells the Story You Haven't Heard*, CHRISTIAN SCI. MONITOR (Oct. 24, 2007), www.csmonitor.com/2007/1024/p09s01-coop.html.

204. Bell, *supra* note 31, at 339-40; Jake Wagman, *Noose's Revival is Raising the Issue of Intent*, ST. LOUIS POST-DISPATCH (Jan. 18, 2008), www.amren.com/news/2008/01/nooses_revival/; *see, e.g.*, *Newton v. Dep't of the Air Force*, 85 F. 3d 595, 597 (Fed. Cir. 1996)(a burning cross that was displayed in an African-American's work area was said to have been a prank); *Police Officers for Equal Rights v. Columbus*, 644 F. Supp. 393, 402 (S.D. Ohio 1985)(a worker's wearing of white sheets and the burning of a cross was claimed to be a joke); *Allstate Ins. Co. v. Browning*, 598 F. Supp. 421, 412 (D. Or. 1983)(another cross burning that was alleged to be a prank); *United States v. Hooper*, 4 M.J. 830, 831 (A.F.C.M.R. 1978)(cross burning that took place on Friday the 13th was seen as a joke); *Garrison v. Conklin*, No. 234243, 2003 Mich. App. LEXIS 337, 5 (Ct. App. Feb. 14, 2003)(a burning cross was claimed to be a Halloween prank).

205. Modern depictions of slavery within the media are becoming increasingly common within the 21st century. *See* 12 YEARS A SLAVE (Regency Enterprises 2013)(portraying the journey of a freed African-American from the North who was captured and placed into slavery in the South); *see* LINCOLN (2012)(showing the plight of slaves during the Civil War and how the Emancipation Proclamation came to be created); *see* DJANGO UNCHAINED (The Weinstein Company 2012)(following the story of a freed slave who is attempting to save his wife from enslavement); *see* THE BIRTH OF A NATION (Bron Studios 2016)(a graphic remake of the 1915 movie that tells the story of the slave, Nat Turner, and his revolt).

206. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *supra* note 60; National Association for the Advancement of Colored People,

witness a noose or other historically racist objects in the workplace should not have to illustrate the history of these objects and demonstrate why they invoke certain emotions. The noose has been a recognized racist symbol since before the Civil Rights Movement.²⁰⁷ This fact alone should be enough to satisfy the court's question of whether a noose hanging in a work environment, where African-Americans are employed, is directed at African-Americans.

Notwithstanding the numerous errors committed by the District Court, the Ninth Circuit nonetheless affirmed the lower court's finding in a short opinion.²⁰⁸ The Ninth simply agreed that the isolated incident of a noose in Henry's claim was not sufficiently severe to alter the conditions of his employment and that he was unable to provide evidence that demonstrated racial motive behind the incident.²⁰⁹

1. *The Objective Standard*

Although the District Court and the Ninth Circuit erred on multiple occasions in *Henry*,²¹⁰ the exact dilemma in the decision lies with the third element of the hostile work environment claim. As laid out in *Harris v. Forklift Sys.*, to succeed on the third element of a hostile work environment claim, a victim must prove certain conduct was both subjectively and objectively sufficiently severe or pervasive to alter their work conditions.²¹¹

The objective test requires the judge or the jury to ask whether a reasonable person in the same or similar situation would find the alleged conduct to be sufficiently severe or pervasive enough to alter their work conditions.²¹² This reasonable person, which first emerged in 1837 through *Vaughan v. Menlove*,²¹³ is a hypothetical

supra note 52.

207. *Id.*

208. *Henry v. Regents of the Univ.*, 37 F. Supp. 3d 1067 (N.D. Cal. 2014).

209. *Id.* at 789.

210. *Id.*

211. *Harris v. Forklift Sys.*, 114 S. Ct. 367 (1993).

212. *Id.* at 21 (affirming that “conduct not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.”).

213. Shailin Thomas, *Vaughan v. Menlove —“The Unreasonable Hay Stacker”*, H2O.LAW.HARVARD.EDU, h2o.law.harvard.edu/collages/4855 (last updated June 2, 2014). This seminal case revolved around the issue of whether the defendant, Menlove, had committed gross negligence. *Id.* The standard for determining negligence, at this time, was whether the person could be said to have acted as a “prudent man” would have acted in the same situation. *Id.* The defendant argued that this “prudent man” standard should take into account certain characteristics of the defendant. *Id.* In his case, he contended that because he was of lower intelligence, the hypothetical “prudent man” should also take on that quality. *Id.* As such, the defendant argued he was not negligent because a “prudent man” in his situation, with his lower IQ, would have done the same as he did. *Id.* The court rejected this characterization and held that

individual who adheres to the generally accepted standards of society.²¹⁴ While in theory this hypothetical being may sound pragmatic, in practice the usage of the reasonable person standard has been widely criticized²¹⁵ for its failure to encompass the difference between how a reasonable white person would react and how a reasonable minority group would react.²¹⁶

The reasonable person, although meant to be gender and race neutral, often takes on a white, male persona.²¹⁷ In the hostile work environment realm, this white male standard becomes problematic as only 8.6% of racial harassment cases are brought by white plaintiffs.²¹⁸ This means that even though over 90% of hostile work environment claims will be brought by a minority race, the severity of their claim will still be judged by the white, male-biased reasonable person standard.²¹⁹ Herein lies the problem with using an objective test in hostile work environment claims—especially those that involve a historically racist object. A noose or a Ku Klux

this “prudent man” does not take on a defendant’s personality/characteristics. *Id.* It is a hypothetical person who acts as a standard, reasonable person would. *Id.*

214. *Id.*

215. See generally, Mayo Moran, *Symposium: Who is the Reasonable Person? The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233 (2010) (discussing the controversy surrounding the use of the reasonable person standard); see Meri O. Triades, Article, *Finding a Hostile Work Environment: The Search for a Reasonable Reasonableness Standard*, 8 WASH. & LEE R.E.A.L. J. 35, 39 (2002) (analyzing the various reasonable person standards utilized by the courts in hostile work environment claims involving sexual harassment).

216. See, Naomi R. Cahn, *Symposium: The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1404 (1992) (reflecting the standard’s inability to apply to women as there is a “male bias inherent” within the reasonable person standard).

217. During the evolution of the reasonable person standard, lawmakers were almost exclusively white males and therefore, the legal standard continued to take on a white male bias. Andre Douglas Pond Cummings, Article, *“Lions and Tigers and Bears, Oh My” or “Redskins and Braves and Indians, Oh Why”: Ruminations on McBride v. Utah State Tax Commission, Political Correctness, and the Reasonable Person*, 36 CAL. W. L. REV. 11, 27-8 (1999) (citing BRUE WRIGHT, BLACK ROBES, WHITE JUSTICE 7 (1987)):

Today various studies have found serious inequities in our judicial system. One reason, blacks believe, is because those who administer the systems of justice are mostly white males.) They bring to their professions the same habits of prejudice that are inseparable from the lives they have lived, their white neighborhoods, their white clubs and the privileges of a white skin that they have always enjoyed.

Id.; Sarah McLean, Comment, *Harassment in the Workplace: When Will the Reactions of Ethnic Minorities and Women be Considered Reasonable?*, 40 WASHBURN L.J. 593, 601 (2001) (citing United States Initial Report to the United Nations Committee on The Convention on the Elimination of all forms of Racial Discrimination).

218. Chew and Kelley, *supra* note 68, at 64.

219. *Id.*

Klan hood is not going to appear as severe to a white person as it would to an African-American.²²⁰

This notion is demonstrated within multiple racial harassment cases that have employed the reasonable person standard.²²¹ To combat this issue, some have proposed the use of a race specific test.²²² This has been come to be known as the reasonable black person standard. This standard was adopted within *Harris v. International Paper Co.*²²³ and *Williams v. New York City Housing Authority*²²⁴—both of which found for the plaintiff. Despite the outcomes in these two cases, simply changing the name of the test has not been shown to have the desired effect the proponents of the change are looking for.²²⁵ In an empirical study conducted by Barbara A. Gutek, she found that altering the jury instructions from a reasonable person to a reasonable woman had “little if any effect” on the participants’ judgments.²²⁶ Gender and race inevitably shape

220. See Mari J. Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2327 (1989) (stating that “the typical reaction of target-group members to an incident of racist propaganda is alarm and immediate calls for redress.”) The typical reaction of non-target group members is to consider the incidents isolated pranks, the product of sick-but-harmless-minds.” *Id.*

221. *Davis v. Monsanto Chemical Co.*, Civ. No. 85-CV-74031-DT 1987 U.S. Dist. LEXIS 15759 (E.D. Mich. May 6, 1987). A hostile work environment claim was brought by the two African American Plaintiffs against the factory they were employed at. *Id.* at *10. They alleged severe discriminatory conduct that included racially offensive graffiti on the bathroom walls, a training poster that included an inept worker, labeled with the same name as one of the Plaintiffs, that was shaded to represent a black person, racial epithets that were used in conversations on a daily basis, white employees refusing to eat lunch with the black employees and refusing to shower in the stalls that the black employees used. *Id.* at *11. Despite the plethora of allegations, the court did not find the conduct actionable. *Id.* They concluded that racial slurs were a “part of the workday world of the factory” and the Plaintiffs had assumed the risk of this harassment by working in an environment they had been warned was bias. *Id.*; *Vaughn v. Pool Offshore Co.*, 683 F. 2d 922, 924 (5th Cir. 1982). The Plaintiff, an African American male, was an employee of an oil rig. *Id.* at 923. He claimed he was referred to by his co-workers as “nigger”, “coon”, and “blackboy.” *Id.* The Plaintiff further alleged ammonia was poured on top of him while he was showering, he had hot coffee poured into his back pocket, and he was stripped down naked and had his genitals greased with oil. *Id.* at 924. Furthermore, a toolshed on the oil rig had had “KKK” written across it. *Id.* The Fifth Circuit found in favor of the Defendants, noting that “hazing and practical joking should be viewed realistically as male interaction and not atypical of the work environment involved.” *Id.*

222. *Triades*, *supra* note 215, at 56.

223. *Harris v. International Paper Co.*, 765 F. Supp. 1509 (D. Me. 1991);

224. *Williams v. New York City Hous. Auth.*, 154 F. Supp. 2d 820 (S.D.N.Y. 2001).

225. Barbara A. Gutek, Maureen Ann O’Connor, Renee Melancon, Tracey M. Geer & Robert S. Done, *The Utility of the Reasonable Woman Legal Standard in Hostile Environment Sexual Harassment Cases: A Multimethod, Multistudy Examination*, 5 PYSCH. PUB. POL. AND L. 596, 623 (1999).

226. *Id.*; Elizabeth L. Shoenfelt et al., *Reasonable Person Versus Reasonable*

how a person will react to a certain situation.²²⁷ It follows that without having a standard that reflects these differences, the cases involving a non-white or woman plaintiff will fail to reach the fairest outcome for that plaintiff.

Unfortunately, Gutek's study demonstrates that using a non-neutral reasonable person standard is not the ideal method of providing judges and juries a way in which to view the case from a different perspective.²²⁸ Despite the jury instructions the participants in the study received, they continually came to the same conclusion for the Plaintiff.²²⁹ Gutek's findings signify that inconsistent results will continue to pervade hostile work environment claims, even if the reasonable black person standard was adopted by each court.

The decision in *Henry* perfectly demonstrates the inability of the race-specific test to truly comprehend the perspective of an African-American who witnesses a racially charged object.²³⁰ Although the District Court did not overtly apply the objective standard to Henry's action, it noted in their final paragraph that "a reasonable African-American would have been offended by being confronted with such an emotionally-charged symbol in the workplace."²³¹ It appears the Court did slightly contemplate the objective standard and even considered it from a reasonable African-American person's viewpoint.²³² However, despite using the race-specific test and faintly recognizing the connection between the noose and African-American history,²³³ the District Court still found that a noose would only "offend" the reasonable African-American.²³⁴

These race-specific or gender specific standards do not get at the heart of the matter—removing the inherent biases that both judges and jurors unconsciously, or consciously, have. When it comes to recognizing the atrocity of the noose and other historically racist objects, these null results will not suffice. It is time for the U.S. to recognize the downfalls of employing the objective standard

Woman: Does it Matter?, 10 AM. U.J. GENDER SOC. POL'Y & L. 633, 649-50 (2002) (an empirical study that came to the same conclusion as Gutek).

227. Matsuda, *supra* note 220, at 56.

228. Gutek, *supra* note 222, at 623.

229. *Id.*

230. *Henry v. Regents of the Univ.*, 37 F. Supp. 3d 1067, 1087 (N.D. Cal. 2014).

231. *Id.*

232. *Id.*

233. *Id.* The Court, for the first time in the opinion, noted the impact that the history of the noose may have on African-Americans. *Id.* They stated that "even if the noose was not directed specifically at plaintiff, because of the legacy of slavery and its aftermath, a reasonable African-American would have been offended . . ." *Id.*

234. *Id.*

in hostile work environment claims that involve historically racist objects and to provide a more concrete test.

IV. PROPOSAL

The objective test has failed victims who have faced historically racist objects time and time again.²³⁵ The test has an inherent inability to account for the racist significance of the noose and its impact upon African-Americans who come upon it within their workplace.²³⁶ Although race-specific objective tests have been successful in some cases,²³⁷ the resulting decision within *Henry*²³⁸ indicates that more adamant steps need to be taken to combat the atrocity of the noose.

This Comment advocates that when historically racist objects are alleged within a hostile work environment claim, the severe or pervasive element should be found to have been met *per se*. The *per se* approach disposes of the objective test altogether, thereby ridding the courts and the jury of grappling with the issue of whether they would have found the conduct to be sufficiently severe. Enacting statutes that deem nooses, swastikas, and KKK hoods *per se* sufficiently severe or pervasive to alter one's work conditions will provide consistency on the volatile subject and help demonstrate America's willingness to confront their atrocious history with African-Americans in reconciling manner.

A. Providing Consistency

Per se designations allow for specific conduct or incidents to be deemed as having met certain legal standards by, of, or in itself.²³⁹ Essentially, to satisfy a legal element, no other evidence is needed other than the conduct was committed or the incident occurred.²⁴⁰ When applied to hostile work environment claims, if the plaintiff can show that a noose was displayed at their place of employment, then they will have met the sufficiently severe or pervasive element without having to provide any further evidence. The objective

235. Chew and Kelley, *supra* note 68, at 64 (finding that Plaintiffs in hostile work environment claims lose 80% of the time).

236. Matsuda, *supra* note 220, at 2320 (discussing how non-target groups consider racist propaganda incidents to be isolated pranks).

237. *Harris v. International Paper Co.*, 765 F. Supp. 1509 (D. Me. 1991); *see also Williams v. New York City Hous. Auth.*, 154 F. Supp. 2d 820 (S.D.N.Y. 2001).

238. *Henry v. Regents of the Univ. of Cal.*, 644 Fed. Appx. 787, 788-89 (9th Cir. 2016).

239. Merriam-Webster Dictionary, *Per se*, MERRIAM-WEBSTER.COM, www.merriam-webster.com/dictionary/per%20se (last visited Mar. 24, 2017).

240. Cornell University Law School, *Per Se*, LAW.CORNELL.EDU www.law.cornell.edu/wex/per_se (last visited Mar. 22, 2017).

portion of the severity element would be removed thus eliminating its core problem.

The fundamental issue inherent in the use of the objective test is that it does not rid jurors and judges of their inherent biases.²⁴¹ Consequently, the results of hostile work environment claims are inconsistent as they are dependent upon the internal prejudices of the different triers of fact. While this inconsistency may be tolerable in cases that involve allegations of “mere utterances of racial epithets” and other racially offensive conduct, this discrepancy will not do for incidents that involve a symbol that has been explicitly recognized as one embodying racism and violence.²⁴² By removing the objective test and replacing it with the *per se* method, hostile work environment claims that allege conduct involving a noose would no longer produce inconsistent results.

Consistency in this specific cause of action is needed given the known history of the noose, what it stands for, and the failure of non-victimized groups to truly comprehend its symbolism.²⁴³ Although many may understand the history of the noose, those who are not within the group that has been historically victimized by it are unlikely to have the same reaction to seeing it within their workplace. Courts ruling under the *per se* method could account for this inability to perceive the noose in the same way as the victim—providing consistency on the matter. In essence, the *per se* approach would require the courts to recognize the African-American's perception of the noose—a deference the history of the object adamantly demands.

Furthermore, the *per se* method would hinder perpetrators from using a noose within the workplace for supposed non-racial reasons. While the noose is widely seen as a symbol of racism, a surprising number of defendants within hostile work environment claims have argued they did not know the history of the noose or they believed they were committing a harmless prank.²⁴⁴ When it comes to an object that represents the murders of thousands of African-Americans, no such justification should be permitted even if it is valid. In today's world, not knowing the history of the noose is a difficult excuse to comprehend.²⁴⁵

Even if a perpetrator intended the display of the noose to be a joke, those who are the target of the noose are highly unlikely to perceive it as such.²⁴⁶ Employing the *per se* approach would

241. Cummings, *supra* note 214.

242. Rogers v. EEOC, 454 F. 2d 234, 238 (5th Cir. 1971) (the court held that a “mere utterance of an ethnic or racial epithet which engenders offensive feelings” will not arise to a Title VII violation).

243. Matsuda, *supra* note 220, at 2320.

244. Bell, *supra* note 31.

245. See 12 YEARS A SLAVE (Regency Enterprises 2013); LINCOLN (2012); DJANGO UNCHAINED (The Weinstein Company 2012); THE BIRTH OF A NATION (Bron Studios 2016).

246. Matsuda, *supra* note 217, at 2320.

enlighten those who claim to not know the history of the noose and deter the alleged pranksters from using the object as such. Because this method would cement the element of “sufficiently severe or pervasive enough” in favor of the Plaintiff from the beginning, a Plaintiff’s success on the cause of action would be more likely.²⁴⁷ As such, those who may wish to pull a prank using a noose would be more hesitant to do so.

While the *per se* method can be criticized for not allowing any justification for conduct, this is a small price to pay for ensuring the background of the noose is recognized consistently as pervasive or severe enough to alter the victim’s work environment. Moreover, plaintiffs whose allegations involve the noose are not guaranteed an outright win with the implementation of the *per se* method. The plaintiff would still have to prove the other elements required within a hostile work environment claim.²⁴⁸ As such, defendants would still have a chance to put forth a defense.

Other critics of employing the *per se* approach in hostile work environment claims may argue it has First Amendment implications. However, the decision in *Virginia v. Black* provides strong precedent for allowing a *per se* noose statute to pass constitutional muster.²⁴⁹ The U.S. Supreme Court held in *Virginia* that the “First Amendment permits [statutes] that outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly²⁵⁰ virulent form of intimidation.” Within the opinion, the Court noted that “the Klan used cross burnings as a tool of intimidation and threat of impending violence.”²⁵¹ The burning of a cross, during the Lynching era, was a warning that violence was going to occur.²⁵² With lynching at the height of its use during this time, this violence was most likely going to be carried out with the hangman’s noose.²⁵³ Intrinsically, the hangman’s noose is not a tool of intimidation like the burning cross but rather an

247. Chew and Kelley, *supra* note 68, at 84. As of 2006, Defendants were successful in 81% of racial harassment cases.

248. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 667 (1986).

249. *Virginia v. Black*, 538 U.S. 343, 359 (2003). The respondents in this case were all convicted, on separate occasions, of violating a Virginia cross-burning statute. *Id.* at 348. One respondent had led a Ku Klux Klan rally in which a cross was burned. *Id.* The other respondents had attempted to burn a cross on the lawn of African-Americans. *Id.* at 350. The respondents argued that the Virginia cross-burning statute was facially unconstitutional because it chilled the expression of speech protected under the First Amendment. *Id.* at 351.

250. *Id.* at 363.

251. *Id.* at 354.

252. *Id.*; Wilson R. Huhn, *Cross Burning as Hate Speech Under the First Amendment to the United States Constitution*, AMSTERDAMLAWFORUM.ORG, amsterdamlawforum.org/article/view/103/184#sdendnote5anc (last visited Apr. 5, 2017).

253. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *supra* note 20, at 28.

actual tool of violence. As such, there should be no need for the *per se* statute to consider the intent of the perpetrator. The hangman's noose, in and of itself, should be seen as much more than just a vehicle of intimidation. Given this and following the logic in *Virginia v. Black*, a *per se* statute concerning the hangman's noose would not run afoul of the First Amendment because it is more than a tool used to terrorize, it is an actual tool of violence.²⁵⁴

B. Unification

America has never had a commendable record when it comes to its treatment towards African-Americans. While many believe that the worst of it is over, the fact is that the status of today's race relations within America is still far from stellar.²⁵⁵ Although lynching does not occur as often or as publicly as it did during the 1900s, racial hatred is still as prevalent. It merely exists at a less overt level.²⁵⁶ Furthermore, the Presidency of Donald J. Trump²⁵⁷ is already expected to damage race relations further.²⁵⁸ In the eighth month of President Trump's presidency, an alternative-right rally turned violent, and then deadly, when a proclaimed white supremacist ran his car into a crowd of counter-protestors.²⁵⁹ In his first remarks following the bloody protest, President Trump failed to condemn the white supremacist groups, including the various KKK groups who participated in the rally, and stated that there was "hatred, bigotry, and violence" emanating from both sides of the rally.²⁶⁰ These events provide the perfect backdrop for the

254. *Virginia v. Black*, 538 U.S. 343, 354 (2003)

255. Russonello, *supra* note 11; Norman, *supra* note 11.

256. See Natalie Musumecl, *KKK Celebrating Trump's Election with Victory Parade*, N.Y. POST (Nov. 11, 2016), nypost.com/2016/11/11/kkk-celebrating-trumps-election-with-victory-parade/ (With the election of Donald Trump, various KKK chapters throughout the U.S. have surfaced to celebrate); Jaweed Kaleem, *The Ku Klux Klan says it will hold a Trump Victory Parade in North Carolina*, L.A. TIMES (Nov. 10, 2016), www.latimes.com/nation/politics/trailguide/la-na-updates-trail-guide-kkk-trump-north-carolina-1478822255-htmlstory.html (One of the largest Ku Klux Klan groups in the country announced it would hold a parade to celebrate the then President-elect Donald Trump's win.) The group is cited as having between 150 and 200 members and as being one of the most active Klan groups in the U.S. today. *Id.*

257. Associated Press, *Trump Elected President in Surprise Win*, NEWSOLA.COM (Nov. 9, 2016), newsela.com/articles/2016-trump-win/id/23866/.

258. Shiva Manima, *Many Voters, especially blacks, expect race relations to worsen following Trump's election*, PEW RESEARCH CENTER (Nov. 21, 2016), www.pewresearch.org/fact-tank/2016/11/21/race-relations-following-trumps-election/ (stating that polls indicated nearly half of U.S. voters expect Trump's election to the Presidency to worsen race relations).

259. Maggie Astor & Christina Caron, *A Guide to the Violence in Charlottesville*, N.Y. TIMES (Aug. 13, 2017), www.nytimes.com/2017/08/13/us/charlottesville-virginia-overview.html.

260. Glenn Thrush & Maggie Haberman, *Trump is Criticized for Not Calling Out White Supremacists*, N.Y. TIMES (Aug. 12, 2017), www.nytimes.com.

implementation of the *per se* method in hostile work environment claims.

Given Congress' failure to effectively recognize the atrocity of the noose and their complicity with the lynching that occurred by it,²⁶¹ reconciliation in this area would best be achieved through them. The passage of a statute that explicitly says the noose is sufficiently severe or pervasive enough will recognize the experiences and perceptions of African-Americans. The courts will be acknowledging that as a different race, African-Americans may have a diverse understanding or reaction to a certain object. Congress will be taking into consideration the background of African-Americans and America's history towards them. Recognizing the role that the U.S. has played in the shaping of African-American's lives is an empathetic step that speaks of peace and reconciliation.

V. CONCLUSION

In *Henry*,²⁶² the issue presented was of paramount significance given the history of the hangman's noose and the status of race relations within the United States. Title VII, the statute under which Henry's hostile work environment claim is brought, was enacted to dispel racial discrimination. Yet in 2016, the Ninth Circuit failed to recognize one of the most racially charged objects in the history of African-Americans as being severe or pervasive enough to alter a victim's work environment.²⁶³ This failure is directly attributable to the objective element required within the third element of a hostile work environment claim.

This Comment proposes the implementation of a *per se* method. The *per se* approach rids the courts of the objective view, which has caused not only a circuit split, but inconsistencies across the board. The history of the noose calls for a more reliable viewpoint. By recognizing in a significant, concrete way that the hangman's noose does have an atrocious history that is sufficiently severe or pervasive enough to alter one's work conditions, Congress will be acknowledging the bloodied past the U.S. has with African-Americans thereby taking a step towards further reconciliation or understanding between the two races in a time where it is needed the most.

com/2017/08/12/us/trump-charlottesville-protest-nationalist-riot.html.

261. S. Res. 39, 109th Cong. (2005-2006). Senator Mary Landrieu stated, before voting took place, "There may be no other injustice in American history for which the Senate so uniquely bears responsibility." Thomas-Lester, *supra* note 75.

262. *Henry v. Regents of the Univ. of Cal.*, 644 Fed. Appx. 787 (9th Cir. 2016).

263. *Id.*