

Analogizing Race and Sex in Workplace Harassment Claims

L. CAMILLE HÉBERT*

Drawing analogies between one area of the law and another promises to have beneficial effects on developing areas of the law—an established legal concept applied in a new context helps legitimize claims in fledgling areas of the law. Analogizing sex to race has helped to establish the legitimacy of sex-based workplace harassment claims. However, analogizing race to sex may be more problematic, because use of that analogy threatens to adversely affect race-based claims of workplace harassment.

Sexual harassment law has developed its own standards of proof to analyze hostile environment claims, standards designed with an intent to defeat claims thought to be insignificant or frivolous. Applying those standards to claims of racial harassment may erode the ability of victims of race-based harassment to prevail on legitimate claims. In addition, analogizing race and sex risks ignoring the very real and important differences between race and sex. On the other hand, analogizing race and sex may help decisionmakers to recognize the discriminatory nature of both types of conduct and the real harms caused by those workplace activities.

I. INTRODUCTION: THE “TWO-EDGED SWORD” OF ANALOGY

The use of analogy is pervasive in legal reasoning and analysis.¹ Drawing analogies between that which is legally uncertain or unproven and that which is

* Professor of Law and Associate Dean for Academic Affairs, The Ohio State University College of Law. B.A., 1979, Kansas State University; J.D., 1982, University of Kansas School of Law. I appreciate the helpful comments that I received on earlier drafts of this article from James J. Brudney, Christopher B. McNeil, and Deborah J. Merritt. I wish to acknowledge the research assistance of Edward Redder, The Ohio State University College of Law class of 1998. I also want to thank Bev Caley, The Ohio State University College of Law class of 1992, who several years ago gave me an idea that indirectly led to this article. The research for this article was supported by a grant from The Ohio State University Center for Labor Research and a research leave from The Ohio State University College of Law. An earlier version of this article was presented as the Dorothy Thompson Civil Rights Lecture at Kansas State University on March 19, 1996.

¹ See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (1948) (indicating that the basic pattern of legal reasoning is reasoning by example, by which similarity is seen between cases, the rule of law of the first case is articulated, and then the rule of law is made applicable to the second case). See also JOVAN BRKIC, LEGAL REASONING: SEMANTIC AND LOGICAL ANALYSIS 82 (1985) (indicating that reasoning by analogy is a major mode of reasoning in all legal systems, particularly the Anglo-American legal system).

known or recognized is a common method of gaining acceptance for new legal claims and theories. To the extent that a new claim can be shown to be similar to the established claim, the new claim gains legitimacy. But this effect may not be the only result of drawing analogies between new and established claims. To the extent that there is uncertainty about the legitimacy of the new claim, analogizing new and established claims may cast a shadow on the established claim.²

This "two-edged sword" aspect of use of analogy can be seen in the decisions of the courts dealing with issues of workplace harassment. The explicit and implicit comparisons drawn by the courts between sexual harassment and racial harassment have produced both of these positive and negative effects. For some courts, drawing analogies between race and sex in the context of workplace harassment has allowed the courts to understand and to demonstrate the unlawful and discriminatory nature of sexually harassing behavior. On the other hand, by importing into the racial context legal standards refined and given substance in connection with sexual harassment claims—for which the courts have adopted a number of measures to protect against what are perceived to be nonmeritorious, trivial, or even frivolous claims³—the courts have made it increasingly difficult for employees to successfully establish the existence of a racially hostile or abusive work environment. Therefore, for some courts, the use of analogies between racial and sexual harassment, rather than causing them to recognize the seriousness of sexual harassment, may in fact have caused them to take claims of racial harassment less seriously.

Somewhat paradoxically, the seeds of both of these approaches are found in the very same decisions of the United States Supreme Court and of the lower

² See, e.g., Martha Minow, *The Supreme Court, 1986 Term, Foreward: Justice Engendered*, 101 HARV. L. REV. 10, 27 (1987) (suggesting that the majority of the United States Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987), a case involving a challenge to race discrimination in the administration of the death penalty, analogized race, sex, and ethnicity to physical appearance as a way to "trivialize" the concerns of the dissenting justices as to the effect of race in death penalty cases).

³ For example, the requirement that the plaintiff establish the "unwelcomeness" of sexually harassing conduct, and the willingness of the Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68–69 (1986), to allow introduction of evidence about an employee's "dress and personal fantasies" with respect to that issue suggests a concern that women will entice men to engage in sexual conduct and then complain of sexual harassment. See *infra* text accompanying notes 15–17. Similarly, the requirement adopted by a number of lower courts, and only recently rejected by the United States Supreme Court in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22–23 (1993), that a plaintiff demonstrate the existence of severe psychological injury even to state a claim of sexual harassment, indicates a concern that women will seek recovery for trivial conduct not worthy of the attention of the courts.

courts on which those Supreme Court decisions rely; the language and analysis of the Court points in both of these directions at once. For while the Supreme Court analogized race and sex in order to bolster its recognition of sexual harassment as a form of actionable sex discrimination, the Court also used language and adopted standards for sexual harassment claims that have the potential to make it more difficult to establish all claims of discriminatory harassment. Therefore, lower courts whose use of analogies between racial harassment and sexual harassment has resulted in bolstering claims of sexual harassment and those whose use has resulted in a weakening of racial harassment claims both have been able to make credible contentions that they are following the lead of the United States Supreme Court. In fact, the Court's very uncertainty about the appropriateness and implications of this analogy appears to be responsible for the mixed signals received by the lower courts.

Part II of this Article will first address the appropriateness of drawing analogies between race and sex in the context of claims of workplace harassment by exploring both judicial acceptance of these analogies and the actual differences and similarities between race and sex, as well as the intersection of race and sex, particularly as it applies to the harassment of minority-group women. Next, I will explore in Part III the manner in which the courts have applied analogies between race and sex in the context of selected elements of harassment claims in order to demonstrate the effects of analogizing race and sex. Finally, I will suggest in Part IV of the article that, although the benefits of analogizing racial harassment and sexual harassment are considerable and ultimately justify this use of analogy, there is great need to be cognizant of and diligent in guarding against the costs that analogizing race and sex can impose.

II. THE APPROPRIATENESS OF ANALOGIES BETWEEN RACE AND SEX

A. *Judicial Treatment of Explicit Analogies Between Race and Sex*

At one level, the use of analogies between race and sex in the context of Title VII's⁴ prohibition against discrimination in employment is neither new nor controversial. Although Title VII's prohibition against sex discrimination has unusual origins in that the inclusion of the word "sex" in Title VII was apparently initially proposed in order to prevent the enactment of the entire statute,⁵ the statute's legislative history generally reflects a rejection of

⁴ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1994).

⁵ See congressional debate on the amendment offered by Representative Smith proposing the addition of the term "sex" to Title VII. 110 CONG. REC. 2577-84 (1964), *reprinted in* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII

differential treatment of sex and race discrimination.⁶ Similarly, the United States Supreme Court has had no difficulty in recognizing that standards adopted in the context of race discrimination are also applicable in the context of sex discrimination, for both disparate treatment⁷ and disparate impact claims.⁸ Accordingly, the hesitation of some courts to accept the appropriateness of analogies between race and sex in the context of workplace harassment claims probably has much to do with the somewhat grudging acceptance by courts of sexual harassment as a form of actionable sex

AND XI OF CIVIL RIGHTS ACT OF 1964, at 3213-28 (1968). In explaining his support of the amendment, Representative Smith discussed the "rights" of women to find a husband as one of the reasons for his proposed amendment. The debate on the proposed amendment contains suggestions that supporters of the amendment sought to include "sex" in the bill as a method of damaging the proposed statute, and some of the stated opposition to amendment was on that ground. For a discussion of the origins of the inclusion of the term "sex" in Title VII, see BARBARA LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 3 n.2 (1992) (indicating that "sex" was added to Title VII by its opponents as a last-minute effort to defeat the bill). See also Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 441 (1966) (indicating that inclusion of the term "sex" in Title VII was "in the spirit of satire").

Interestingly, the apparent effort of Representative Smith to defeat the entire statute by seeking to point out what he apparently believed to be the absurdity of extending the protection of the statute to gender discrimination may foreshadow the subsequent use of analogies between race and sex to weaken claims of racial discrimination.

⁶ The proposed amendment to add "sex" to the prohibited grounds for employment discrimination was opposed, among other reasons, on the ground that sex was sufficiently different from other protected characteristics to merit separate statutory treatment. See 110 CONG. REC. 2577-84 (1964), reprinted in U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964*, at 3213-28 (1968). The adoption of the proposed amendment by a vote of 168 to 133 over those objections presumably represents a rejection of that argument.

See also H.R. REP. NO. 92-238, at 5 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2141 ("Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.").

⁷ The first disparate treatment case decided by the United States Supreme Court was *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), involving a claim of intentional race discrimination. The standards adopted in that case were later applied by the Court in the context of a claim of intentional sex discrimination in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

⁸ The United States Supreme Court articulated the standards for disparate impact claims in the context of a claim of race discrimination in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and then adopted those standards for sex discrimination claims in *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

discrimination⁹ in spite of the Supreme Court's pronouncement to that effect.¹⁰

The initial use of explicit analogies between race and sex in the context of workplace harassment claims appears to have been motivated by a desire to increase the awareness of the harm caused by sexual harassment and to create better acceptance of sexual harassment claims. This use of analogy can be found in the first case of discriminatory workplace harassment to reach the United States Supreme Court. In *Meritor Savings Bank v. Vinson*,¹¹ the Court suggested that sexual harassment was analogous to other forms of discriminatory harassment such as harassment on the basis of race or ethnic characteristics. In finding sexual harassment that creates a hostile working environment to be actionable under Title VII, the Court referred with approval to cases recognizing hostile environment claims based on race.¹² The Court's quotation of the following passage from a lower court case indicates the Court's belief in the appropriateness of the analogy between the two types of harassment:

"Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."¹³

This analogy between racial harassment and sexual harassment supported the decision of the *Meritor* Court to recognize the existence of a hostile environment caused by sexually harassing conduct as unlawful sex discrimination, just as a racially hostile environment had been recognized as a form of unlawful race discrimination. However, after recognizing the similarities between racial and sexual harassment and stating boldly that "Title VII affords employees the right to work in an environment free from

⁹ For a discussion of the reluctance of courts to treat sexual harassment as a form of sex discrimination, see L. Camille Hébert, *The Economic Implications of Sexual Harassment for Women*, 3 KAN. J.L. & PUB. POL'Y 41, Spring 1994, at 42-44, 50.

¹⁰ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.").

¹¹ 477 U.S. 57 (1986).

¹² See *Meritor*, 477 U.S. at 66 (citing *Firefighters Inst. for Racial Equal. v. St. Louis*, 549 F.2d 506, 514-15 (8th Cir. 1977); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976)).

¹³ *Meritor*, 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

discriminatory intimidation, ridicule, and insult,"¹⁴ the Court went on to impose stringent burdens on employees alleging sexually harassing workplace conduct. The imposition of these burdens belie the Court's belief in the appropriateness of the analogy, because it is unlikely that those standards would have been imposed with respect to other claims of discriminatory harassment.

The Court stressed that only "unwelcome" sexual conduct was actionable under Title VII and that the determination of whether conduct was unwelcome presented "difficult problems of proof."¹⁵ These proof problems focus on what the Court said was the critical issue of "whether respondent by her conduct indicated that the alleged sexual advances were unwelcome."¹⁶ Among the conduct deemed relevant by the Court to the question of whether the employee's conduct indicated the welcomeness or unwelcomeness of the harasser's conduct was the employee's "sexually provocative speech or dress" and "publicly expressed sexual fantasies."¹⁷ The Court's discussion of the unwelcomeness requirement indicates its belief that it is difficult to distinguish between welcome and unwelcome sexual conduct in the workplace and seems to presume that the conduct is welcome unless the woman affirmatively and unambiguously indicates otherwise. The Court's choice of language also suggests that a woman's word that sexual conduct is unwanted is insufficient and can be overcome by the harasser's understanding of her conduct. The Court's use of the word "provocative" also seems to imply that women are responsible for the sexually harassing conduct directed at them. It is difficult to imagine the Supreme Court saying any of those things in the context of racial harassment.

In addition, the Court discussed, without resolving, the issue of whether the employer could be held liable for sexual harassment by the employee's supervisor. Departing from the guidelines of the Equal Employment Opportunity Commission (EEOC), which indicated that employers were liable for sexual harassment by supervisory employees just as they were for other forms of discrimination by supervisory employees,¹⁸ the Court indicated that there were limits on the extent to which employers could be held liable for the

¹⁴ *Id.* at 65.

¹⁵ *Id.* at 68.

¹⁶ *Id.*

¹⁷ *Id.* at 68-69.

¹⁸ See 29 C.F.R. § 1604.11(c), (d) (1985). The amicus brief filed by the Solicitor General of the United States on behalf of the EEOC took a position on employer liability inconsistent with its own guidelines, suggesting that, absent notice, employers should not be automatically liable for sexually harassing conduct of supervisory employees that created a hostile work environment. See description of amicus brief in *Meritor*, 477 U.S. at 74-77 (Marshall, J., concurring).

sexually harassing conduct of even supervisory employees when the supervisor was not directly exercising the authority delegated by the employer.¹⁹ The Court's hesitation to hold employers responsible for the sexually harassing conduct of supervisory employees and its willingness to depart from the rules of employer liability generally applicable in the discrimination context suggest that it perceived sexually related conduct in the workplace to be personally motivated rather than job-related, as other forms of discrimination, such as race discrimination, were apparently considered to be.²⁰

Two other aspects of the Court's decision also suggested, perhaps unintentionally, that the Court perceived differences between racial and sexual harassment relevant to the standards that it was adopting. The Court stressed that only "severe or pervasive" sexual conduct was actionable under Title VII, relying in part on the standards adopted by the lower courts for actionable racial harassment.²¹ Although finding that this standard was met by the employee's allegations, the Court's choice of language may have been unfortunate. The Court noted that the employee's allegations of harassment by her supervisor—which included claims that she had been fondled in front of other employees, had been subjected to repeated demands for sex, had been coerced into having sexual intercourse, and had been raped—were "plainly sufficient."²² The Court's language, however, gave no indication of what type of conduct short of that alleged would meet the "severe or pervasive" standard, leaving room for the possibility that only similar types of conduct would meet the standard.²³ It is

¹⁹ See *Meritor*, 477 U.S. at 70–71.

²⁰ See *id.* at 70–71 (indicating that the courts have consistently held employers liable for discriminatory discharges of employees by supervisors even if the employer was unaware of or disapproved of the supervisor's actions). The concurring justices took issue with the majority's resolution of the issue of employer liability for supervisory harassment. Drawing their own analogy to racial discrimination, the justices indicated that "when a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer." *Id.* at 75 (Marshall, J., concurring).

The Court's reluctance to hold employers liable for sexual harassment by supervisory employees in the absence of some evidence of direct employer culpability is reminiscent of the prior unwillingness of the lower courts to find employer liability for what the courts deemed to be personal conduct motivated by sexual desire. See *infra* text accompanying notes 180–83.

²¹ *Id.* at 67 (citing *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) ("'[M]ere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not affect the conditions of employment to sufficiently significant degree to violate Title VII.")).

²² *Id.* at 67.

²³ Almost a decade later, in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the Court seemed to acknowledge that its language may have been misread:

difficult to imagine that the Court would have required, or would have been understood as requiring, an equivalent level of racial hostility for recognition of racially harassing conduct as unlawful.

Finally, the Court's very language recognizing hostile environment sexual harassment as a form of sex discrimination can be read as suggesting a difference between sexual harassment and other forms of discriminatory harassment. When the Court asserted that "without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex,"²⁴ the Court might be understood as suggesting that not all sexual harassment is "because of sex" and that only harassment found to be so motivated is actionable under Title VII. This interpretation of the Court's language would suggest a different view of sexual and racial harassment, because it is difficult to conceive of the Court suggesting that racially harassing conduct could be found not to be racially motivated.

After drawing the initial analogy between race and sex and then articulating standards for the sexual harassment claim before it, the *Meritor* Court was silent on the issue of whether it believed that the standards that it was adopting for sexual harassment claims might apply to other claims of harassment, such as racial harassment. However, more recently, the Court has suggested the appropriateness of a single standard for judging claims of discriminatory harassment. In its second decision dealing with sexual harassment, *Harris v. Forklift Systems, Inc.*,²⁵ the Court discussed in common terms "a work environment abusive to employees because of their race, gender, religion, or national origin" without any hint that different standards might be applicable to these different types of harassment.²⁶ Another basis for reading the Court's opinion in *Harris* as support for a common standard for all claims of discriminatory harassment is the Court's failure to expressly identify by name the nature of the harassment alleged. Justice O'Connor's opinion for the Court makes reference to "a discriminatorily 'abusive work environment'" and to "'abusive work environment' harassment,"²⁷ but nowhere uses the term

The appalling conduct alleged in *Meritor*, and the reference in that case to environments "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers," merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable.

Id. at 22 (citations and some internal quotation marks deleted).

²⁴ *Meritor*, 477 U.S. at 64.

²⁵ 510 U.S. 17 (1993).

²⁶ *Id.* at 22.

²⁷ *Id.* at 18, 20.

“sexual harassment” or gives any indication that the nature of the harassment alleged has any bearing on the issue before the Court. Only in Justice Scalia’s concurring opinion is the term “sexual harassment” used.²⁸

Justice Ginsburg’s concurrence in *Harris* was more explicit on this point. In discussing the standard for actionable harassment articulated in a lower court racial harassment case, she noted: “*Davis* concerned race-based discrimination, but that difference does not alter the analysis; except in the rare case in which a bona fide occupational qualification is shown, Title VII declares discriminatory practices based on race, gender, religion, or national origin equally unlawful.”²⁹ Accordingly, Justice Ginsburg explicitly took the position that racial and sexual harassment claims should be subjected to the same standard.

However, in the case to which Justice Ginsburg referred, *Davis v. Monsanto Chemical Co.*,³⁰ the United States Court of Appeals for the Sixth Circuit explicitly took the position that the standards for actionable sexual harassment and actionable racial harassment were different. The court of appeals gave no justification for this different treatment, simply concluding, with a questionable analogy to constitutional analysis, that “the application of slightly different standards in different types of hostile work environment claims is entirely consistent with established civil rights jurisprudence.”³¹

The *Davis* court’s decision to apply different standards to racial harassment and sexual harassment has been seen by some as an attempt by the court of appeals to distance itself from the onerous standards for establishing a claim applied by that court in a previous sexual harassment case, *Rabidue v. Osceola Refining Co.*³² The concurring and dissenting judge in *Davis* chided the majority for “its fervor to distance itself from *Rabidue*,” resulting in different

²⁸ See *id.* at 24 (Scalia, J., concurring).

²⁹ *Id.* at 25–26 (Ginsburg, J., concurring) (citations and footnote omitted). For a discussion of the irrelevance of the bona fide occupational defense to sexual harassment claims, see *infra* text accompanying notes 63–66.

³⁰ 858 F.2d 345 (6th Cir. 1988).

³¹ *Id.* at 348 n.1. The *Davis* court’s reference to constitutional standards is suspect because, while the courts have recognized different levels of scrutiny under equal protection analysis, there is nothing in Title VII that suggests that different protected classes are entitled to different levels of protection from discrimination. See *supra* text accompanying notes 4–8. See also *J.E.B. v. Alabama*, 511 U.S. 127, 137 n.6 (1994) (noting that the Court “once again need not decide whether classifications based on gender are inherently suspect”).

A year after its decision in *Davis*, the United States Court of Appeals for the Sixth Circuit reversed its decision to apply different standards to claims of racial and sexual harassment. In *Risinger v. Ohio Bureau of Workers’ Compensation*, 883 F.2d 475, 484–85 (6th Cir. 1989), the court of appeals indicated that the decision in *Davis* to apply different standards to claims of racial harassment and sexual harassment was incorrect.

³² 805 F.2d 611 (6th Cir. 1986).

standards for judging racial and sexual harassment.³³ And, indeed, aspects of the majority's opinion in *Davis* do suggest that the court of appeals may have been trying to avoid the effects of applying the standards for sexual harassment articulated in *Rabidue* in the context of racial harassment. For example, the *Davis* court cautioned against relying on its prior opinion in *Rabidue* to "erroneously . . . encourag[e] the perpetuation of the status quo":³⁴

In *Rabidue*, this court quoted with approval a passage from the district court's opinion. This court stated that "Title VII [was] not designed to bring about a magical transformation in the social mores of American workers."

In reading this passage, however, one should place emphasis on the word "magical," not the word "transformation." Title VII was not intended to eliminate immediately all private prejudice and biases. That law, however, did alter the dynamics of the workplace because it operates to prevent bigots from harassing their co-workers. . . . In essence, while Title VII does not require an employer to fire all "Archie Bunkers" in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinions in a way that abuses or offends their co-workers.³⁵

In spite of the protestations of the *Davis* court to the contrary, this approach was indeed quite different from that taken by the court of appeals in *Rabidue*. In *Rabidue*, the plaintiff alleged that she was offended by the sexual comments and conduct of her co-workers, including being referred to by sexually offensive epithets and having to work in an area filled with pornographic pictures and drawings.³⁶ There, the court of appeals explained that whether actionable harassment was established depended on "the personality of the plaintiff and the prevailing work environment," citing with approval to the following statement of the district court:

[I]t cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring

³³ *Davis*, 858 F.2d at 351 (Norris, J., concurring in part and dissenting in part).

³⁴ *Id.* at 350.

³⁵ *Id.*

³⁶ See *Rabidue*, 805 F.2d at 615. The specifics of the plaintiff's allegations are not set forth in the majority opinion and can only be found in the opinion of the dissenting judge. *Id.* at 623–24 (Keith, J., dissenting).

about a magical transformation in the social mores of American workers.³⁷

The *Davis* court's apparent concern that the standards it had adopted for sexual harassment cases might be inappropriate for judging claims of racial harassment may reflect a number of possible concerns. It is possible that the panel of the court of appeals in *Davis* simply disagreed with the panel decision in *Rabidue*, as was suggested by the concurring and dissenting judge in *Davis*,³⁸ and therefore seized the opportunity to avoid the effects of the standards adopted in that earlier case. It is also possible that the *Davis* court truly believed that racial and sexual harassment were sufficiently distinct forms of discrimination to justify the application of different legal standards.

Both before and after the Supreme Court's decision in *Harris*, the lower courts have been quite divided on the question of whether analogies between race and sex are useful or appropriate in determining the merits of workplace harassment claims. A number of courts have been accepting of analogies drawn between racial and sexual harassment, apparently recognizing and giving weight to similarities between those types of behavior. For example, in one of the first lower court cases to recognize that a sexually hostile working environment could violate Title VII, the United States Court of Appeals for the District of Columbia Circuit in *Bundy v. Jackson*³⁹ explicitly drew an analogy between racial harassment and sexual harassment:

Racial or ethnic discrimination against a company's minority clients may reflect no intent to discriminate directly against the company's minority employees, but in poisoning the atmosphere of employment it violates Title VII. Sexual stereotyping through discriminatory dress requirements may be benign in intent, and may offend women only in a general, atmospheric manner, yet it violates Title VII. Racial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too may create Title VII liability. How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal?⁴⁰

This court, recognizing that the effects of sexually harassing conduct can be as damaging to women as racially harassing conduct is to members of minority

³⁷ *Id.* at 620-21.

³⁸ See *Davis*, 858 F.2d at 351 (Norris, J., concurring in part and dissenting in part) (referring to the majority's apparent "distaste for this court's opinion in *Rabidue*").

³⁹ 641 F.2d 934, 943 (D.C. Cir. 1981) (characterizing issue of whether sexual harassment itself constitutes discrimination with respect to terms and conditions of employment as a "novel question" and noting that "no court has as yet so held").

⁴⁰ *Id.* at 945.

groups, concluded that both types of conduct should be subject to the same regulation and prohibition.

The concurring judge in *Swenson v. Northern Crop Insurance, Inc.*,⁴¹ in considering whether a claim of intentional infliction of emotional distress could be based on the existence of sex discrimination by the employer, also compared the effects of racial and sexual discrimination. She reasoned:

Is sex discrimination fairly regarded as "atrocious and utterly intolerable in a civilized community"? The answer must derive not alone from the act of sex discrimination but from the impact of that act on its victim. Sex discrimination debases, devalues and despoils. When we cannot do anything to overcome another's criticism, hatred or contempt, we are, in effect, struck twice: first, by the act and, second and equally devastating, by the realization that we are helpless to undo that act, overcome it or change it. This is particularly true in a workplace. . . . Discrimination is not a tale of hurt feelings, unkind behavior or inconsiderate conduct by one against another. That it may insult is irrelevant; that it strips its victim of self-esteem, self-confidence and self-realization is the nub of its evil and the stuff of its outrageousness. As a subscriber to Oliver Wendell Holmes'[s] belief that experience (not logic) fuels the engine of the law, and as a member of a class that has been subjected to discrimination, I find it difficult to understand how, at least, some members of the jury, whom we would all agree are reasonable members of their community, would not agree that sex discrimination, like race discrimination, goes beyond all bounds of decency and is truly atrocious and utterly intolerable in a civilized community.⁴²

The United States District Court for the Southern District of Indiana in *Bilbrey v. Werts Novelty Co.*,⁴³ in holding that harassing conduct did not have to be sexual in nature to constitute sexual harassment, also drew an analogy between racial harassment and sexual harassment, this time focusing on the motivation behind the two types of conduct:

The "entire spectrum of disparate treatment" encompasses abuse or harassment that is directed at an individual because of his or her gender. Consider for example a group of minority workers whose employer was racist and regularly battered them because of their minority status. Could anyone seriously be heard to argue that such behavior would not give rise to a claim of racial harassment based on a hostile working environment? Of course not. If this is so, then the same holds true for sex discrimination. That the focus of the discrimination has shifted from race, color, or nationality to gender is of no consequence; an employer who is abusive towards men or women because of their sex is every

⁴¹ 498 N.W.2d 174 (N.D. 1993).

⁴² *Id.* at 188 (Levine, J., concurring) (citations omitted).

⁴³ 881 F. Supp. 370 (S.D. Ind. 1994).

bit as culpable under Title VII as the battering racist.⁴⁴

The court's point is that sexual harassment and racial harassment are equally unlawful under Title VII because they are both motivated by discriminatory intent toward protected groups. Just as racial harassment can be motivated by race without being explicitly racial in nature, sexual harassment can be motivated by gender without being explicitly sexual in nature.

Some courts, however, seem to have had more difficulty recognizing non-sexual conduct as potentially sexually harassing than they have had recognizing non-racial conduct as racially harassing. In *Jones v. City of Overland Park*,⁴⁵ the plaintiff, a black female, alleged that a pattern of harassment by fellow employees was based on both her race and her gender. Some of the conduct complained of was explicitly racial in nature—she was accused of playing a “skin game” in connection with complaints about her treatment by co-workers, she heard that an employee had removed a radio from the office so that the plaintiff would not play “nigger music,” she was referred to as a “nigger,” she was told that she was assigned to the department because of her race, and she was called “Aunt Jemima.”⁴⁶ Other conduct was not explicitly racial or sexual but consisted of rude, intimidating, and insulting treatment. The district court refused to grant summary judgment for the defendant on the claim of racial harassment, finding the plaintiff's allegations sufficient to state a claim:

On this record, the Court has little trouble concluding that Jones alleges facts sufficient to sustain her claim for a racially hostile work environment. Contrary to the City's characterization, Jones alleges more than just casual and isolated remarks. While it is true that Jones identifies only four instances in which race-based comments were made directly to her, the Court's consideration is not limited to overtly racial acts. Rather, the totality of the circumstances in this case includes allegations of ongoing intimidation, sarcasm, and insult which, along with the overtly racial acts, might be sufficiently severe or pervasive to alter the conditions of Jones'[s] employment.⁴⁷

The district court, however, did grant summary judgment against the plaintiff's claim of sexual harassment, finding that nothing in the record supported the plaintiff's allegations of a sexually hostile environment, even though it refused to grant summary judgment on the sexual harassment claim of the other plaintiff, who complained primarily of conduct that was not explicitly

⁴⁴ *Id.* at 375.

⁴⁵ No. 92-2163-KHV, 1994 U.S. Dist. LEXIS 15238 (D. Kan. Aug. 15, 1994).

⁴⁶ *Id.* at *4-5.

⁴⁷ *Id.* at *5-6.

sexual in nature.⁴⁸ While the district court was willing to recognize the possibility that the non-racial conduct was racially motivated, it was unwilling, even applying the deferential standard of summary judgment,⁴⁹ to conclude that conduct also may have been motivated by her gender.⁵⁰

Other courts have more directly taken the position that analogies between racial harassment and sexual harassment are not appropriate. For the most part the courts that have taken this position have not adequately explained their reasoning in reaching this conclusion. For example, the United States District Court for the District of Maryland in *Hopkins v. Baltimore Gas & Electric Co.*,⁵¹ in rejecting a claim of same-sex sexual harassment as not stating a claim under Title VII, expressly rejected any attempt to draw an analogy between sexual harassment and harassment on the basis of race: "Plaintiff has not here argued that Title VII should encompass same-gender sexual harassment because that statute encompasses 'same-race racial harassment.' This court is satisfied that 'racial harassment' is not a proper analogy for 'sexual harassment' in the Title VII context."⁵²

The only support cited by the district court for this statement is a footnote in a student note in the *Duke Law Journal*, which reads in its entirety:

The "because of sex"/sexual problem does not appear with regard to discrimination based on factors other than gender. The problem in the gender area arises at least partially because the term "sexual" has a meaning other [than "relating to gender;"] it can also mean "relating to erotic desires." This problem does not arise, for example, in the context of the terms "race" and

⁴⁸ See *id.* at *7-11. The conduct complained of by that plaintiff consisted of comments about her childless status and her living with her husband prior to their marriage, as well as being called "bitchy" and a "bitch." See *id.* at *9-10.

⁴⁹ "The Court considers all evidence and reasonable inferences therefrom in the light most favorable to the non-moving party." *Id.* at *2.

⁵⁰ The court noted:

Although sexual harassment may be aggregated with racial harassment to satisfy the severity or pervasiveness requirements, Jones simply did not identify any "sexually harassing conduct" that could be aggregated. Given the absence of any evidence to support the allegation, Jones is not entitled to bring charges of sexual harassment on the coattails of her charges of racial harassment just because she happens to be black and a woman.

Id. at *7 (citations omitted). The district court did not seem to recognize the very real possibility that the harassment of the plaintiff was motivated both by her race and her sex—that she did not "just . . . happen[] to be black and a woman." *Id.*

⁵¹ 871 F. Supp. 822 (D. Md. 1994), *aff'd*, 77 F.3d 745 (4th Cir. 1996).

⁵² *Id.* at 834 n.21.

“racial.”⁵³

This footnote, however, is making a statement about the semantic difficulties of interpreting the word “sexual,” not about the appropriateness of drawing analogies between race and sex in the context of workplace harassment. In fact, in the same section of his note that contains this footnote, the author explicitly draws an analogy between gender-based harassment and racial harassment.⁵⁴

The concurring judge of the United States Court of Appeals for the District of Columbia Circuit in *Barnes v. Costle*⁵⁵ provided somewhat more support for drawing distinctions between sexual harassment and racial harassment. In the context of a quid pro quo sexual harassment claim in which the female plaintiff’s job had been eliminated because she rejected the sexual advances of her supervisor, the concurring judge noted:

Sexual advances may not be intrinsically offensive, and no policy can be derived from the equal employment opportunity laws to discourage them. We are not here concerned with racial epithets or confusing union authorization

⁵³ Joshua F. Thorpe, Note, *Gender-Based Harassment and the Hostile Work Environment*, 1990 DUKE L.J. 1361, 1378 n.80.

⁵⁴ See *id.* at 1380. In arguing that harassment need not be sexually motivated—as opposed to being motivated by gender—in order to be actionable under Title VII, the author argues:

Analogies from the race discrimination context also support this view. Employees alleging that they have been discriminated against on the basis of race are not denied an opportunity to seek a remedy simply because ascertaining an employer’s motives is difficult. . . . Employees who allege that they have been discriminated against on the basis of gender rather than race should have the same opportunity to prove claims of impermissibly motivated discrimination.

Id. at 1380–81. The author later adds: “Analogies from early hostile work environment cases in the context of racial, ethnic, and religious discrimination are again instructive on this point.” *Id.* at 1381. Continuing with the use of analogy, the author argues:

If gender-based harassment is recognized as actionable, employers may wonder whether calling a female employee, “Honey,” or making sexist jokes will lead to liability under Title VII. It is doubtful, however, whether employers have much question about whether calling black employees, “Boy,” or making racist jokes, if sufficiently patterned, will lead to such liability. Arguably, the difference is that sexist behavior is perceived as *relatively* more acceptable, or as *relatively* less offensive, than racist behavior in the workplaces of America. Title VII should not countenance this perception.

Id. at 1396.

⁵⁵ 561 F.2d 983 (D.C. Cir. 1977).

cards, which serve no one's interest, but with social patterns that to some extent are normal and expectable. It is the abuse of the practice, rather than the practice itself, that arouses alarm.⁵⁶

What the concurring judge seems not to have recognized is that a claim of sexual harassment necessarily constitutes a claim of "abuse of the practice" and that, to the extent that sexual advances in the workplace are unwanted or coerced and interfere with the working environment of women subjected to them, the policy of the antidiscrimination laws, if really aimed at gender equality in the workplace, should serve to discourage them.

In addition, in spite of this judge's assertion that sexual advances are part of "normal" social patterns, he presumably would not take the position that coerced sexual advances are also "normal" or serve anyone's interests other than those of the harasser. In addition, to the extent that the judge's distinctions between racial harassment and sexual harassment are based on his characterization of sexual advances as "normal," presumably he would not have reached the same conclusion about other forms of sexual harassment, such as use of sexually offensive epithets directed at women.

To the extent that rejection of analogies between sexual harassment and racial harassment is based on the greater societal acceptance of sexually related behavior than of racially related behavior outside of the workplace, that reasoning is inconsistent with the purpose of antidiscrimination laws in general and of Title VII in particular. Much of the workplace behavior prohibited by Title VII, whether of a sexual or racial nature, had been socially accepted before the enactment of the statute; that very fact made enactment of the statute a matter of considerable controversy and spirited debate. In addition, just because behavior may be acceptable—or accepted—outside of the workplace does not make it acceptable within the workplace. As the United States Court of Appeals for the Federal Circuit explained in the case of *King v. Hillen*:⁵⁷

[N]o principled argument supports the view that sex-based offensive behavior in the workplace is immune from remedy simply because it may be culturally tolerated outside of the workplace. The purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment. The reasonableness of sex-based conduct is determined from the perspective of eliminating "the entire spectrum of disparate treatment of men and women" in

⁵⁶ *Id.* at 1001 (MacKinnon, J., concurring).

⁵⁷ 21 F.3d 1572 (Fed. Cir. 1994).

employment.⁵⁸

One of the principal purposes of the antidiscrimination laws has been to challenge the prevailing social view about the role of women and minorities, as well as the aged and the disabled, in the workplace; a plurality of the United States Supreme Court has announced that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."⁵⁹ Accordingly, it is no more reasonable to expect that female employees will be sexually accommodating or tolerant of sexual demands or conduct imposed upon them by their employers and co-workers than it is to assume that black employees will be subservient and racially deferential in their workplace dealings.

Courts have looked to the common purpose of Congress in enacting Title VII to eliminate both race and sex discrimination from the workplace as grounds for applying the same standards to both racial and sexual harassment claims. For example, the United States District Court for the District of Arizona in *Stingley v. Arizona*⁶⁰ rather summarily concluded that racial and sexual harassment claims should share the same standards because "Title VII hostile environment claims are founded on the same principles whether based on race or sex."⁶¹ While this court might be faulted for its lack of analysis, its presumption of the appropriateness of the analogy between race and sex might be excused by the close similarity between the congressional treatment of race and sex under Title VII. As Justice Ginsburg noted in her concurrence in *Harris v. Forklift Systems, Inc.*,⁶² other than situations in which the bona fide occupational qualification defense applies, Title VII equally prohibits discrimination based on race and gender.

Justice Ginsburg's conclusion that the existence of the bona fide qualification defense to claims of sex discrimination but not race discrimination is irrelevant in the area of sexual and racial harassment seems obvious. The bona fide occupational qualification defense, which allows consideration of sex when that characteristic is "reasonably necessary to the normal operation of that particular business or enterprise,"⁶³ has been narrowly interpreted to apply only to characteristics that affect the ability of an employee to perform his or her

⁵⁸ *Id.* at 1582.

⁵⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

⁶⁰ 796 F. Supp. 424 (D. Ariz. 1992).

⁶¹ *Id.* at 428.

⁶² 510 U.S. 17, 25-26 (Ginsburg, J., concurring). *See also supra* text accompanying note 29.

⁶³ 42 U.S.C. § 2000e-2(e)(1) (1994).

job.⁶⁴ It is difficult to imagine that anyone would seriously assert that allowing sexually related conduct to exist in the workplace is reasonably necessary to the normal operation of businesses or is necessary to job performance, at least with respect to businesses and jobs other than those whose very purpose is to "sell sex."⁶⁵ If consideration of the hundreds of sexual harassment cases decided by the courts in the last few decades tells us nothing else, those cases confirm that the continued existence of sexually related conduct in the workplace does nothing to further the business-related activities of the employers, but instead creates disruption and inefficiency in those workplaces. Even truly consensual sexual and romantic relationships in the workplace do not increase the harmony of the workplace but lead to resentment and claims of favoritism.⁶⁶

B. Differences and Similarities Between Race and Sex

The threshold issue in considering the appropriateness of drawing analogies between race and sex with respect to workplace harassment claims is whether the two types of harassment are sufficiently alike to justify the use of the analogy. Use of an analogy makes little sense and serves little purpose if the categories being compared share few common characteristics. Indeed, the key assumption behind the use of analogy is that the different categories or classes being compared do in fact have much in common. On the other hand, suggesting that racial harassment and sexual harassment are legally analogous types of conduct is not the same thing as suggesting that those types of conduct are identical, either in historical context, current experience, or motivation. There are, indeed, both similarities and stark contrasts between sexually motivated and racially motivated harassing behavior.

From a historical point of view, there are certain similarities between the treatment of women, both white and non-white, and minorities of both genders. In some aspects, women and minorities share a common history of deprivation

⁶⁴ See *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 200-06 (1991) (holding that infertility cannot be required as a condition of employment in positions involving lead based on the bona fide occupational qualification defense, on the grounds that fertile women are as able to make batteries as men and infertile women).

⁶⁵ Indeed, there would appear to be some question as to whether the bona fide occupational qualification defense should be allowed even for businesses in the sex-selling business, given that use of the defense in such a situation would perpetuate the very sexual stereotypes and views of the proper role of women that Title VII was enacted to counteract. That topic, however, is beyond the scope of this Article.

⁶⁶ See, e.g., *DeCinto v. Westchester County Med. Ctr.*, 807 F.2d 304 (2d Cir. 1986) (male respiratory therapists challenged action of male supervisor in designing promotion standards in order to favor female applicant with whom he was romantically involved).

of legal and political rights. A plurality of the United States Supreme Court in *Frontiero v. Richardson*,⁶⁷ in considering the issue of whether classifications based on sex should be subject to strict scrutiny under constitutional analysis, noted similarities between the historical treatment of women and minorities:

[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself “preservative of other basic civil and political rights”—until adoption of the Nineteenth Amendment half a century later.⁶⁸

On the other hand, the historical denial of equal rights to women, the traditional subordination of women to men, and even the misogynous attitudes of some men is not the same, and has not left the same legacy, as slavery, segregation, and centuries of racial hatred. Frederick Douglass graphically illustrated this point in his plea for white women to support black suffrage even in the absence of women’s suffrage:

When women, because they are women, are dragged from their homes and hung upon lamp-posts; when their children are torn from their arms and their brains dashed upon the pavement; when they are objects of insult and outrage at every turn; when they are in danger of having their homes burnt down over their heads; when their children are not allowed to enter schools; then they will have [the same] urgency to obtain the ballot.⁶⁹

With respect to the treatment of women and minorities in the workplace during somewhat more recent history, Professor Gunnar Myrdal in his book *An American Dilemma: The Negro Problem and Modern Democracy*⁷⁰ drew

⁶⁷ 411 U.S. 677 (1973).

⁶⁸ *Id.* at 685 (citations and footnote omitted). The plurality went on to note that women continued to face pervasive discrimination in the workplace as well as in society in general. *See id.* at 686. In *J.E.B. v. Alabama*, 511 U.S. 127 (1994), in the context of invalidating as unconstitutional the use of gender-based peremptory challenges to potential jurors, a majority of the Supreme Court cited with approval use of the analogy between race and sex by the *Frontiero* plurality. *See J.E.B.*, 511 U.S. at 135–42.

⁶⁹ ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* 82 (Vintage Books 1983) (quoting 2 HISTORY OF WOMEN SUFFRAGE 382 (Elizabeth Cady Stanton et al. eds., Charles Mann 1887)).

⁷⁰ GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN*

explicit parallels between the treatment of women and the treatment of blacks in the 1940s, noting the "striking similarities" between the two groups on a number of fronts, including their treatment in the workplace:

The most important disabilities still affecting her status are those barring her attempt to earn a living and to attain promotion in her work. As in the Negro's case, there are certain "women's jobs," traditionally monopolized by women. They are regularly in the low salary bracket and do not offer much of a career. All over the world men have used the trade unions to keep women out of competition. Women's competition has, like the Negro's, been particularly obnoxious and dreaded by men because of the low wages women, with their few earning outlets, are prepared to work for. Men often dislike the very idea of having women on an equal plane as co-workers and competitors, and usually they find it even more "unnatural" to work under women. White people generally hold similar attitudes toward Negroes.⁷¹

Professor Myrdal also noted certain similarities between the treatment of women and blacks with respect to what he refers to as "personal relations" that may have a bearing on issues involved in workplace harassment. He noted:

In personal relations with both women and Negroes, white men generally prefer a less professional and more human relation, actually a more paternalistic and protective position—somewhat in the nature of patron to client in Roman times, and like the corresponding strongly paternalistic relation of later feudalism. As in Germany it is said that every gentile has his pet Jew, so it is said in the South that every white has his "pet nigger," or—in the upper strata—several of them. We sometimes marry the pet woman, carrying out the paternalistic scheme. But even if we do not, we tend to deal kindly with her as a client and a ward, not as a competitor and an equal.⁷²

The aversion of many men to working with women as equals and the tendency of some men to treat women with a greater familiarity and paternalism than characterizes their dealings with other men, noted by Professor Myrdal in the 1940s, appears to continue to characterize current dealings between men and women. For example, the results of a number of studies about gender fairness and the courts indicate that a substantial percentage of female lawyers report that male lawyers call them by their first names while referring to male lawyers by titles and surnames and that male lawyers make comments about the physical or sexual appearance of women.⁷³

DEMOCRACY (20th anniv. ed. 1962).

⁷¹ *Id.* at 1077.

⁷² *Id.* at 1078.

⁷³ See Pamela Coyle, *Taking Bias to Task*, 82 A.B.A. J., April 1996, at 63, 65–66

With respect to the experience of harassment, individuals who have been sexually harassed do not necessarily have the same experience, emotional or otherwise, as individuals who have been subjected to racial harassment. Many women, including members of minority racial and ethnic groups, have been conditioned to view sexual behavior directed toward them as other than hostile or at least as ambiguously motivated.⁷⁴ Many women have also been led to believe that they are responsible for the sexually harassing behavior directed at them, so that their experience of sexual harassment may be complicated by feelings of guilt.⁷⁵ This same type of confusion is less likely to be experienced with respect to racially harassing conduct because that conduct is generally experienced, at least by its recipients, as unambiguously hostile.⁷⁶

In some situations, however, the experience of men and women who have been sexually harassed has much in common with the experiences of men and women who have been subjected to racial harassment. Social science research indicates that the targets of sexual harassment and the targets of racial harassment suffer similar physical and psychological harms. Among the effects reported by those subjected to racial harassment, including racial epithets and racial hate speech, are rapid pulse rate, hypertension, headaches, dizziness, social withdrawal, and chronic depression, sometimes leading to psychosis and nervous breakdown.⁷⁷ The physical and psychological symptoms reported by

(reporting results of Utah Task Force on Gender and Justice, which indicated that 65% of women lawyers answering survey indicated that male lawyers sometimes or more frequently referred to female but not male lawyers by their first names and that male lawyers made comments about only women lawyers' physical or sexual appearance).

⁷⁴ See THE GOVERNOR'S TASK FORCE ON SEXUAL HARASSMENT, SEXUAL HARASSMENT: BUILDING A CONSENSUS FOR CHANGE, FINAL REPORT SUBMITTED TO GOVERNOR MARIO M. CUOMO 69-70 (1993) (noting conversations with Latina and Asian women who reported that much of the behavior that constitutes hostile environment sexual harassment may be accepted as normal in their community or causes confusion because sexual approaches are seen as aspects of admiration).

⁷⁵ See Peggy Crull, *The Stress Effects of Sexual Harassment on the Job*, in ACADEMIC AND WORKPLACE SEXUAL HARASSMENT 133, 141-42 (Michele A. Paludi & Richard B. Barickman eds. 1991) (many women who are targeted for sexual harassment may feel guilty that they in some way caused the behavior because "[g]irls' education to male sexuality includes the message that they are responsible for controlling male sexual behavior"). See also THE GOVERNOR'S TASK FORCE ON SEXUAL HARASSMENT, *supra* note 74, at 13-16 (reporting that one of the persistent myths about sexual harassment is that victims are to blame for being harassed).

⁷⁶ Although the perpetrators of racial harassment often attempt to excuse their conduct as a "joke," individuals who are subjected to racially offensive comments, pictures, and gestures report that the conduct is not perceived as funny, but rather as offensive and threatening. See *infra* text accompanying notes 149-51.

⁷⁷ See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's*

individuals who have been subjected to sexual harassment are similar to the effects reported by targets of racial harassment and include headaches, backaches, nausea, weight loss or gain, insomnia, depression, and nervousness.⁷⁸

The manner in which women react to sexual harassment and minorities react to racial harassment and the reasons for those reactions may also have common causes. It is likely that one's present perceptions are shaped and influenced by past experiences, and white women, minority women, and minority men, at least to an extent, share similar histories and experiences of discrimination.⁷⁹ This history and continuing experience of discrimination may

Story, 87 MICH. L. REV. 2320, 2336-37 & nn.83-84 (1989).

⁷⁸ See Jill Laurie Goodman, *Sexual Harassment: Some Observations on the Distance Traveled and the Distance Yet to Go*, 10 CAP. U. L. REV. 445, 456-57 (1981); U.S. MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM?*, 81-82 (1981). For a more detailed discussion of the effects of sexual harassment on women, see L. Camille Hébert, *supra* note 9, at 41, 44.

⁷⁹ Commentators who have focused on the differences between racism and sexism have reached different conclusions about the relative importance of race and sex in our society. Professor Richard Wasserstrom seems to suggest that sexism is actually a more pervasive evil in our society than is racism:

[S]exism could plausibly be regarded as a deeper phenomenon than racism. It is more deeply embedded in the culture, and thus less visible. Being harder to detect, it is harder to eradicate. Moreover, it is less unequivocally regarded as unjust and unjustifiable. That is to say, there is less agreement within the dominant ideology that sexism even implies an unjustifiable practice or attitude. Hence, many persons announce, without regret or embarrassment, that they are sexists or male chauvinists; very few announce openly that they are racists. For all of these reasons sexism may be a more insidious evil than racism, but there is little merit in trying to decide between two seriously objectionable practices which one is worse.

Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 U.C.L.A. L. REV. 581, 590-91 (1977).

Professor Catharine MacKinnon argues that sexism is as serious a problem as racism when she asserts that "[t]o argue that sex oppression is a pale sister of racial oppression, so that even to compare them mocks the degradation of blacks and minimizes the violence of racism, severely underestimates the degradation and systematic brutality, physical as well as emotional, that women sustain every day at the hands of men." CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 129 (1979).

Chief Justice Rehnquist, however, dissenting in *J.E.B. v. Alabama*, 511 U.S. 127 (1994), argued that race and sex are sufficiently different to justify the application of different standards because of the greater severity of racial discrimination:

Racial groups comprise numerical minorities in our society, warranting in some

have much to do with the way that women and minorities experience racially and sexually harassing behavior. Past experience causes the targets of discrimination and violence to see what may appear to others as trivial and non-threatening behavior as anything but. As Professor Matsuda writes in explaining the effect of racist speech on the targets of that conduct: "Members of target-group communities tend to know that racial violence and harassment is widespread, common, and life-threatening; that 'the youngsters who paint a swastika today may throw a bomb tomorrow.'"⁸⁰ Similar conclusions have been drawn about the reaction of women to sexually harassing conduct. Women, for whom sexually abusive conduct is not an unknown or uncommon experience, may tend to see "minor" harassment as threatening in a way that men are less likely to construe that behavior.⁸¹ As explained by the United States Court of Appeals for the Ninth Circuit in *Ellison v. Brady*:⁸²

[M]any women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape or sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.⁸³

That this fear on the part of women is not groundless or the result of hysteria is demonstrated by a number of litigated sexual harassment cases in which verbal sexual harassment and physically harassing conduct has culminated in sexual

situations a greater need for protection, whereas the population is divided almost equally between men and women. Furthermore, while substantial discrimination against both groups still lingers in society, racial equality has proved a more challenging goal to achieve on many fronts than gender equality.

Id. at 154–55 (Rehnquist, C.J., dissenting).

⁸⁰ Mari J. Matsuda, *supra* note 77, at 2330–31.

⁸¹ See SUSAN D. CLAYTON & FAYE J. CROSBY, JUSTICE, GENDER, AND AFFIRMATIVE ACTION 90 (1992) (describing study indicating that women who had previously been subjected to sexual assaults had much harsher attitudes toward sexual harassment than women who had not previously been victimized; also suggesting that women who have themselves been subjected to sexual harassment may be less likely to engage in blaming the victim of harassment and therefore be less tolerant of harassment).

⁸² 924 F.2d 872 (9th Cir. 1991).

⁸³ *Id.* at 879 (footnotes and citations omitted).

assault⁸⁴ and rape.⁸⁵

Even in situations in which women do not explicitly fear that other forms of sexual harassment will lead to rape or sexual assault, women's experience may validate their concerns that "mild" forms of harassment will lead to more "serious" sexually harassing behavior. Studies have indicated that generalized sexualization of the workplace is correlated with more instances of sexual harassment directed at women. For example, viewing of pornographic pictures has been associated with the tendency of male subjects to treat women as sexual objects in their behavior. Similar tendencies on the part of men to treat women in a sexualized manner and to engage in stereotyping about women have been found to be associated with tolerance of profanity and sexual jokes in the workplace.⁸⁶ As one female employee testified in a sexual harassment case brought by a female co-worker, the employee "steered clear of men who worked where such pictures [of nude and partially nude women] were displayed because she came to expect more harassment from those men."⁸⁷

Differences and similarities also exist with respect to the motivation behind sexually and racially harassing conduct in the context of the workplace. In at least some situations and with respect to certain types of harassment, the

⁸⁴ See *Reed v. Delta Air Lines, Inc.*, No. 93-5031, 1994 U.S. App. LEXIS 3485 (6th Cir. Feb. 24, 1994) (per curiam) (plaintiff, who initially was subjected to a forced kiss, questions about her marital status, and "professions of love" from her supervisor, was later sexually assaulted by him when he forcibly pushed her down on his desk, put his hand up her shirt, pulled her underwear over, and put his finger in her vagina); *Ficek v. Griffith Lab. Inc.*, No. 93 C 6178, 1995 U.S. Dist. LEXIS 1153 (N.D. Ill. Jan. 27, 1995) (female plaintiff alleged pattern of sexually harassing behavior, including repeated comments about her buttocks and underwear, being called sexually offensive names, being made the object of sexually offensive graffiti, and being sexually assaulted by a co-worker in the parking lot behind a bar).

⁸⁵ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 60 (1986) (allegations of sexual harassment by female plaintiff against bank manager included his actions of asking her to have sexual relations, fondling her, exposing himself to her, and forcibly raping her); *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995) (pattern of sexual harassment of female plaintiff by her supervisor—which included his making crude references to her body, regularly indicating his desire to have sex with her, fondling her breasts, and putting his hand between her legs—ultimately culminated in rape), *cert. denied*, 116 S. Ct. 569 (1996); *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439 (7th Cir. 1994) (plaintiff alleged pattern of harassment by co-workers included comments about the plaintiff's breast size, sexually explicit messages from co-workers, a co-worker's repeated attempts to hug and kiss her, and her subsequent rape at the workplace by an unknown assailant).

⁸⁶ See testimony of Dr. Susan Fiske, Professor of Psychology at University of Massachusetts at Amherst, in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1502-05 (M.D. Fla. 1991), describing studies upon which her testimony was based.

⁸⁷ *Id.* at 1500 (testimony of Lawanna Gail Banks).

perpetrators of racial and sexual harassment may have very different motives and purposes for engaging in harassing behavior. Although some forms of sexual harassment may in fact be attributable to misguided attempts to show affection or to initiate a romantic relationship rather than to hostility to women,⁸⁸ it seems unlikely that any forms of racial harassment can be reasonably explained in such a manner.

On the other hand, sexual harassment of women is often motivated by some of the same factors and considerations that prompt racial harassment of minority men and women. While sexual harassment consisting of sexual advances is often seen as motivated by sexual attractiveness rather than hostility, the facts of some sexual harassment cases cast serious doubt on those assumptions. Instead, even sexual advances often appear to be motivated by the same hostility toward women—or hostility toward women in certain positions in the workforce—as are other forms of sexually harassing behavior. For example, the female plaintiff in *Cornwell v. Robinson*⁸⁹ was subjected to a pattern of sexually and racially harassing behavior by co-workers who

⁸⁸ Although some sexually related behavior that occurs in the workplace might be categorized as attempts at establishing a social or romantic relationship and, therefore, as socially acceptable behavior, truly consensual sexually related conduct, standing alone, will rarely result in the filing of a sexual harassment case, at least by the participants in such a relationship. Some commentators and courts who argue against taking too stringent a stand against sexually related conduct in the workplace argue that many persons meet their future spouses in the workplace and that too stringent a standard would preclude or chill the creation of such relationships. However, if a social or romantic overture is welcomed and the relationship mutually desired, the likelihood of a claim being made is quite remote unless later conduct by one of the parties imposes job-related benefits or burdens based on the continued existence of such a relationship, such as when an employee claims that he or she was threatened with job-related consequences for refusing to continue the relationship. Indeed, I am not aware of a single litigated sexual harassment case in which a claim has been asserted simply because an employer or supervisory employee made a single verbal, nonthreatening overture of a social or romantic nature toward an employee, who declined that overture. Sexual harassment claims based principally on the existence of romantic overtures virtually all involve contentions that the overture was accompanied by a threat of job-related consequences, that the overture was accompanied by unwelcome and offensive touching, or that the overture was made repeatedly even though the person making the overture was told that the recipient of the overture was uninterested. Most sexual harassment claims, however, are not based on what most people would view as normal romantic overtures; instead, those claims involved allegations of offensive sexually related comments and name calling, offensive touching, and attempts at coercing participation in sexual conduct. After all, use of sexually derogatory language towards women, placement of sexually explicit cartoons and pictures in the workplace, and sexual assault can hardly be characterized as either affectionate or romantic.

⁸⁹ 23 F.3d 694 (2d Cir. 1994).

repeatedly expressed their intent to "get the bitches out of here."⁹⁰ Much of the harassment consisted of undermining the authority of and using sexually and racially offensive epithets toward the plaintiff and her female co-workers at the residential facility for male juveniles, which had traditionally employed only men in their positions. In addition, however, the plaintiff was sexually propositioned by one of her co-workers, who, when she rebuffed his advances, grabbed at her chest and ripped her blouse.⁹¹ The context of this sexual advance leaves little doubt that it was motivated by the same animus and hostility as prompted the rest of the sexual and racial harassment of the plaintiff.

Similarly, the circumstances surrounding the sexual conduct directed toward the female plaintiff in *Beardsley v. Webb*⁹² also strongly suggest that it was motivated by the supervisor's resentment of the plaintiff's position in the workforce. The plaintiff was the highest ranking female employee in the sheriff's office when her direct supervisor began to refer to her as "honey" and "dear" in front of her subordinates, to touch her during roll call, to ask her about her underwear and her use of birth control, and to suggest that they engage in sexual activity in the parking lot. When she complained about his behavior, he told her that "she had chosen to work 'in a field primarily occupied by men' and that if she didn't like it she could 'just get out.'"⁹³

An examination of the history, motivations, and effects of sexually harassing and racially harassing conduct suggests that, while race and sex are by no means identical and are different in some important ways, there are parallels between race and sex, particularly in the context of workplace harassment, that provide justification for drawing analogies between racial harassment and sexual harassment for purposes of developing and applying the legal standards that apply to such claims.

C. Sexual and Racial Harassment of Minority-Group Women

A study of harassment of persons subject to both racial and sexual harassment provides added support for use of analogies between race and sex in considering workplace harassment claims, because those cases demonstrate the interconnections and similarities between racial harassment and sexual harassment. After all, for certain groups of people, harassment may be neither just sexual nor just racial; instead, the harassment to which they are subjected may have both racial and sexual overtones and motivations. Accordingly, the similarities and overlap between racial and sexual harassment may be best

⁹⁰ *Id.* at 698.

⁹¹ *See id.*

⁹² 30 F.3d 524 (4th Cir. 1994).

⁹³ *Id.* at 528.

understood in the context of harassment of minority-group women, who are likely to face both kinds of harassment.⁹⁴

I do not mean to suggest, however, that minority-group women who are sexually or racially harassed have the same experiences as white women who are subjected to sexual harassment or as minority-group men who are subjected to racial harassment. The complexities of the intersection of race and gender create a number of unique circumstances with respect to harassment of minority women. For example, the type of harassment directed at black women often reveals a combination of race and sex at work, so that the motivation for that behavior cannot properly be attributed to "just" race or "just" sex. Professor Kathryn Abrams argues that use of epithets such as "nigger bitch" conveys what she refers to as "a kind of racialized sexual hostility, or sexualized racial hostility."⁹⁵

A number of workplace harassment cases reflect the combination of racial and sexual harassment directed at minority women. In *Brooms v. Regal Tube Co.*,⁹⁶ the black female plaintiff alleged that she was subjected to a combination of racial slurs and sexual innuendo by her supervisor, the employer's human resource manager. Among the harassing incidents to which the plaintiff was subjected were being shown a pornographic picture depicting an interracial act of sodomy and being told that the picture depicted the "talent" of a black woman and showed the purpose for which she had been hired. At another time, the supervisor showed the plaintiff what the court characterized as "a racist pornographic picture involving bestiality" and told her that the picture "depicted how she 'was going to end up.'"⁹⁷ In *Carter v. Sedgwick County, Kansas*,⁹⁸ the plaintiff's supervisor boasted to her of his sexual conquests of "black pussy" and presented her with a picture of a photograph of a black male with an elongated penis, which he captioned "Long Dong Silver."⁹⁹ In *Stingley v. State of Arizona*,¹⁰⁰ an African-American woman alleged that she was called "a black bitch slut."¹⁰¹ The black female plaintiff in *Splunge v. Shoney's, Inc.*¹⁰² complained of a wide variety of verbal sexually related conduct by her

⁹⁴ See *infra* text accompanying notes 96-103.

⁹⁵ Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2501 (1994).

⁹⁶ 881 F.2d 412 (7th Cir. 1989).

⁹⁷ *Id.* at 417.

⁹⁸ 705 F. Supp. 1474 (D. Kan. 1988), *aff'd in part and vacated in part*, 929 F.2d 1501 (10th Cir. 1994).

⁹⁹ *Id.* at 1476.

¹⁰⁰ 796 F. Supp. 424 (D. Ariz. 1992).

¹⁰¹ Her black male co-worker was also referred to by racist "nicknames" such as "watermelon eater," "naphead," "nigger," "spearchucker," and "token." *Id.* at 426 n.3.

¹⁰² 874 F. Supp. 1258 (M.D. Ala. 1994).

manager, including being told that he "wouldn't mind having [him] a black woman" and that black women "know how to screw."¹⁰³

It should not be surprising that harassment of minority-group women, particularly harassment that is perpetuated by majority-group men, is both racial and sexual in nature. Aggression against and attempts to intimidate minority women traditionally has, at least from the days of slavery, taken sexual forms. As Professor Angela Davis explains in her book *Women, Race & Class*, rape was used by American slave owners to terrorize and dominate slave women and to demoralize slave men and, after the abolition of slavery, by terrorist organizations such as the Ku Klux Klan as part of the effort to thwart the movement for black equality.¹⁰⁴

Somewhat more surprising may be the fact that harassment of minority-group women by minority-group men may also have racial overtones. Although courts express a good deal of skepticism about whether members of minority groups or members of a particular gender are capable of discriminating against members of their own group or gender,¹⁰⁵ some of the harassment directed at black women by black men does have racial overtones; some of that harassment is explicitly racial in nature. For example, the black female plaintiff in *Cornwell v. Robinson*¹⁰⁶ alleged harassment by both white men and black men. The harassment by both groups was both sexual and racial in nature:

There were certain staff that just did not want me on the unit. I was referred to as a bitch. Of course, that was the primary one.

¹⁰³ *Id.* at 1267.

¹⁰⁴ See DAVIS, *supra* note 69, at 24-25, 175-76 (1981). Professor Davis also describes the use of rape against Vietnamese women during the Vietnam War as a weapon of political terrorism. See *id.* at 24.

¹⁰⁵ See Abrams, *supra* note 95, at 2522-23 & n.168 (discussing reluctance of courts to accept claims of intragroup discrimination); see also *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 834 (D. Md. 1994) ("[T]his Court holds that Title VII does not provide a cause of action for an employee who claims to have been the victim of sexual harassment by a supervisor or co-worker of the same gender Where, as here, the alleged harasser and the alleged victim are both of the same gender, the language of the statute would be strained beyond its manifest intent were the Court to hold that under these facts there has been discrimination 'because of . . . sex.'"); *Hansborough v. City of Elkhart Parks & Recreation Dep't*, 802 F. Supp. 199, 207 (N.D. Ind. 1992) (noting, in context of claim by black male of race discrimination by his black female supervisor, that a plaintiff who alleges intraracial discrimination bears a "relatively unique and difficult burden of proof").

¹⁰⁶ 23 F.3d 694 (2d Cir. 1994).

And then I was referred to as a dog fucking bitch, a black whore. The white guys called me a black whore. The black guys called me a black ho, a black stank bitch, a black stank ho, variations of, you know, things like that.¹⁰⁷

These instances of racial and sexual harassment against minority-group women suggest the similarity between racially harassing conduct and sexually harassing conduct. A black woman who is referred to as a "black whore" or

¹⁰⁷ *Id.* at 698 (quoting Trial Transcript at 1238).

The harassment of minority-group women by members of their own minority group raises a number of unique issues. For example, when a black woman is sexually harassed by a black man or black men, that woman may encounter additional disincentives to complain about or otherwise report that sexually harassing behavior. A black woman complaining about sexual harassment by a black man may encounter pressure from inside the black community not to "air your dirty laundry in public," THE GOVERNOR'S TASK FORCE ON SEXUAL HARASSMENT, *supra* note 74, at 69, or to refrain from inflicting harm on the black community by reinforcing racial stereotypes about black men as sexual predators. See Kimberlé Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 402, 420 (Toni Morrison ed. 1992) [hereinafter *Whose Story?*]; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. L. FORUM 139, 162-63 [hereinafter *Demarginalizing Race and Sex*]. Professor Crenshaw gives the example of the treatment of Professor Anita Hill in the black press after making allegations of sexual harassment against now-Associate Justice Clarence Thomas: "In many such accounts Hill was portrayed as a traitor for coming forward with her story. Many commentators were less interested in exploring whether the allegations were true than in speculating why Hill would compromise the upward mobility of a black man and embarrass the African-American community." Crenshaw, *Whose Story?*, *supra*, at 420. Because charges of sexual misconduct, including rape, traditionally have been used as a method of oppressing black men, black women may face considerable internal conflict about making and pursuing charges of sexual harassment against black men who harass them. See DAVIS, *Rape, Racism and the Myth of the Black Rapist*, in WOMEN, RACE & CLASS, *supra* note 69, at 172-201 (describing the ways in which accusations of rape have been used to justify lynching and other forms of oppression of black men, contributing to the reluctance of black women to support anti-rape movements). In addition, black women who are subjected to harassing conduct by black men may suffer additional and more serious harm because of a sense of betrayal by a member of their own community. See, e.g., I. Elena Featherston, *On Becoming a Dangerous Woman*, in SEXUAL HARASSMENT: WOMEN SPEAK OUT 71 (Amber Coverdale Sumrall & Dena Taylor eds. 1992), reprinted in BEVERLY BALOS & MARY LOUISE FELLOWS, LAW AND VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION 285, 288 (Carolina Academic Press 1994) (providing description by black female author of her feelings of betrayal as a child due to sexual conduct by older brother of a black playmate).

"black bitch" is not complimented by the sexual reference while being insulted by the racial reference. When she is shown a picture of racist pornography, she is unlikely to draw a distinction between the insult that is being made to her on racial grounds and the sexually offensive nature of the conduct. A black woman who is told of her white supervisor's desire and interest in "black pussy" or of his view that black women "know how to screw" is likely to feel the degradation of both the racial and the sexual reference. Professor Kimberlé Crenshaw has noted that the sexual harassment of minority women frequently has racial overtones; she suggests that this racial component to sexual harassment may serve to confirm the discriminatory nature of sexual harassment: "Racism may well provide the clarity to see that sexual harassment is neither a flattering gesture nor a misguided social overture but an act of intentional discrimination that is insulting, threatening, and debilitating."¹⁰⁸

III. THE EFFECTS OF JUDICIAL ANALOGIES BETWEEN RACE AND SEX

In most cases, courts considering claims of racial harassment, sexual harassment, or both, do not draw or address explicit analogies between race and sex. Instead, in most cases, the silent or implicit effects of analogizing racial harassment and sexual harassment can be seen only by the courts' use of the same or similar standards for both types of claims. However, some conclusions can be drawn about the effects of analogizing race and sex in the context of workplace harassment claims even when courts do not explicitly draw those analogies in connection with their resolution of harassment claims.

The courts have decided hundreds of cases dealing with racial harassment and sexual harassment in the thirty-some years since the enactment of Title VII.¹⁰⁹ In analyzing the manner in which courts have decided claims of racial harassment and sexual harassment, and in judging the effects of analogizing

¹⁰⁸ Crenshaw, *Whose Story?*, *supra* note 107, at 402, 412.

¹⁰⁹ Although there was initially some doubt as to whether Title VII's prohibition on discrimination in employment reached discriminatory conduct that did not result in tangible detriment to employment opportunities or benefits, it is now well established that discriminatory harassment is actionable whether or not tangible harm results; the intangible harm caused by a hostile or abusive working environment is sufficient to constitute a violation of Title VII. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Even before the Supreme Court decisions in *Meritor* and *Harris*, a number of lower courts had held that Title VII protected against discriminatory working environments as well as against more tangible discriminatory actions. *See Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976) (stating that Title VII grants an employee the right to "working environment free of racial intimidation"); *Bundy v. Jackson*, 641 F.2d 934, 943-45, 948 (D.C. Cir. 1981) (recognizing viability under Title VII of discriminatory environment claims in context of sexual harassment, without regard to loss of tangible job benefits).

race and sex, several aspects of those claims need to be examined.¹¹⁰ Although parallels between the courts' treatment of racial harassment and sexual harassment can be found with respect to virtually all elements of workplace harassment claims, the effects of analogizing racial harassment and sexual harassment can be seen most clearly with respect to four aspects of those claims: (1) the unwelcomeness of the harassing conduct; (2) the perspective from which actionable harassment is judged; (3) the requirement of severity or pervasiveness; and (4) issues of employer liability for harassing conduct. With respect to a fifth element of workplace harassment claims—the requirement that the harassment be discriminatory on the basis of a protected characteristic—the potential effects of analogizing race and sex can be seen. Each of these aspects of workplace harassment claims will be discussed below.

A. Welcomeness of Harassing Conduct

A critical element of a claim of sexual harassment is the requirement that the conduct complained of be "unwelcome."¹¹¹ The courts have stressed that sexually related conduct is actionable only if the target of that conduct can be said not to have incited the conduct and then only if the conduct is deemed to be offensive to him or her.¹¹² Accordingly, a significant number of sexual harassment cases decided by the courts deal with welcomeness and address issues ranging from the prior sexual activities of the harassed employee¹¹³ to

¹¹⁰ There are a number of cases alleging racial and sexual harassment that are discussed in such a summary fashion—with the courts generally concluding that no actionable harassment has been shown—that it is difficult to assess the merits of the claims and therefore the validity of the courts' assessments of the claims. Those cases are not discussed in this analysis because of these difficulties of interpretation and analysis. It is possible, however, that even the willingness of courts to grant summary disposition of claims of sexual and racial harassment reflects the level of seriousness with which such claims are viewed.

¹¹¹ As the United States Supreme Court stressed in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986), "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"

¹¹² The term "unwelcomeness" has generally been defined as having two components: "[T]he challenged conduct must be unwelcome 'in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive.'" See EEOC: POLICY GUIDANCE ON SEXUAL HARASSMENT (Mar. 18, 1990) (citing *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982)), reprinted in [8 Fair Empl. Prac. Man.] Lab. Rel. Rep. (BNA) 405 (Mar. 19, 1990).

¹¹³ See, e.g., *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1322 (8th Cir. 1994) (noting that district court had rejected the plaintiff's testimony that she had been offended by sexual activities at office functions "because she had admitted having had a relationship with a married man"; court of appeals held that district court had erred as a

what she wore to work,¹¹⁴ to what she said to co-workers,¹¹⁵ including how she responded to sexually harassing conduct by co-workers¹¹⁶ and whether or not she told or laughed at certain jokes.¹¹⁷

In contrast, welcomeness has traditionally not been an issue with respect to racially harassing conduct. As the Equal Employment Opportunity Commission explained in its *Enforcement Guidance on Harris v. Forklift Systems, Inc.*: "Outside the context of harassment that is sexual in nature, welcomeness is seldom an issue. If one is subjected to taunts based on ethnicity, religion, etc., there is ordinarily no question that the comments are perceived as abusive."¹¹⁸

However, in cases articulating the standard for actionable racial harassment, at least some courts have indicated that one of the required

matter of law in focusing on the plaintiff's private life); *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 962-63 (8th Cir. 1993) (district court found that sexual harassment of the plaintiff, including use of sexually offensive terms toward the plaintiff and the repeated sexual advances of the president of the company, were not offensive because the plaintiff had posed nude in a magazine; court of appeals reversed).

¹¹⁴ See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68-69 (1986) (indicating that evidence of "a complainant's sexually provocative speech or dress" is "obviously relevant" to the issue of whether the conduct complained of was unwelcome).

¹¹⁵ See, e.g., *Carr v. Allison Gas Turbine Div.*, 32 F.3d 1007, 1010-11 (7th Cir. 1994) (district court found that harassing conduct directed toward the plaintiff—including use of derogatory sexual epithets toward her, defacing her equipment and clothing, sabotaging her work by hiding her equipment, the action of her co-workers in exposing themselves to her—was not unwelcome because she used the terms "fuck head" and "dick head"; court of appeals reversed).

¹¹⁶ See *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271 (5th Cir. 1989). The district court found that sexually harassing conduct toward the female plaintiff was welcome because, on three occasions, she responded to harassing conduct with arguably sexual references: she told co-worker that he had never had "a good woman"; she called a co-worker a "mother fucker" after being called a "bitch"; and she called a co-worker a "whoremong[er]" after a sexual remark was made about her on a radio transmitter. The court of appeals reversed the district court's grant of summary judgment, noting that "[t]hese comments were limited replies to an onslaught of sexual remarks and gestures." *Id.* at 1273 & n.4, 1275.

¹¹⁷ See, e.g., *Loftin-Boggs v. City of Meridian*, 633 F. Supp. 1323, 1327 (S.D. Miss. 1986) (holding that plaintiff could not demonstrate the existence of a hostile environment based on the actions of her supervisor in making derogatory remarks about women, sexually propositioning her, and excluding her from professional meetings based on her gender, in part because of the testimony of her co-workers that she "often made jokes about sex"), *aff'd without opinion*, 824 F.2d 971 (5th Cir. 1987).

¹¹⁸ *Enforcement Guidance on Harris v. Forklift Systems, Inc.* (March 8, 1994), reprinted in *Daily Lab. Rep.* (BNA) No. 45, at D-1 (March 9, 1994). One cannot help wonder, however, why it is that the same assumption would not be made about sexually related "taunts"; one would imagine that being subjected to sexual epithets and derogatory remarks would be perceived to be as abusive as being the target of racial or ethnic taunts.

elements is that the target have been "subject to unwelcome racial harassment."¹¹⁹ This requirement has been borrowed directly from the standard for sexual harassment claims¹²⁰ and appears to be a direct result of drawing analogies between sexual harassment claims, for which "welcomeness" is often seen as an important issue, and racial harassment claims, for which welcomeness has generally not been considered to be a relevant issue.

The result of borrowing the requirement of "unwelcomeness" from sexual harassment cases and applying that standard to racial harassment cases is not entirely clear. In most racial harassment cases, even when the requirement of unwelcomeness is articulated as an element of the claim, that element is presumed to be met. For example, in *Johnson v. Teamsters Local Union No. 559*,¹²¹ in a case involving a black male plaintiff's claim that his union had created a racially hostile environment consisting of threats, insults, and racial epithets on the bathroom walls, the singing of "slave songs" in his presence, and other threatening and derogatory conduct on the part of union members, the extent of the district court's analysis on the issue of unwelcomeness consisted of the following statement: "he was subject to unwelcome racial harassment as evidenced by the graffiti and taunting."¹²²

While most of the racial harassment cases decided to date have in fact spent little time in determining whether or not the harassing conduct was unwelcome to the target of the harassment, it is by no means unthinkable that a court would undertake that analysis, particularly when unwelcomeness is stated as a formal element of the claim. After all, not only have a number of courts considered the issue of whether sexually demeaning and derogatory conduct is unwelcome, but some of those courts have actually concluded that such conduct is not unlawful because it was welcome. For example, the United States Court of Appeals for the Seventh Circuit in *Reed v. Shepard*¹²³ held that the female plaintiff, a jail employee, could not state a cause of action for sexual harassment because the

¹¹⁹ See, e.g., *Johnson v. Teamsters Local Union No. 559*, 67 Fair Empl. Prac. Cas. (BNA) 1150 (D. Mass. 1995); *Motley v. Parker-Hannifan Corp.*, No. 1:94-CV-639, 1995 U.S. Dist. LEXIS 7420, at *5 (W.D. Mich. 1995); *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1512-13 (D. Me. 1991), *vacated in part*, 765 F. Supp. 1529 (D. Me. 1991).

¹²⁰ The authority cited for this standard in *Johnson v. Teamsters Local Union No. 559*, 67 Fair Empl. Prac. Cas. at 1152-53, is *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). The authority cited for this standard in *Motley v. Parker-Hannifan Corp.*, No. 1:94-CV-639, 1995 U.S. Dist. LEXIS 7420, at *5, is *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986). The court in *Harris v. International Paper Co.*, 765 F. Supp. 1509 (D. Me. 1991), indicated that the standard for racial harassment was based on the EEOC's regulations defining sexual harassment. *Id.* at 1513 n.5.

¹²¹ 67 Fair Empl. Prac. Cas. (BNA) 1150 (D. Mass. 1995).

¹²² *Id.* at 1153.

¹²³ 939 F.2d 484 (7th Cir. 1991).

conduct to which she was subjected—including being physically assaulted by being punched in the kidneys, being handcuffed to the drunk tank in the jail, being regularly subjected to remarks about oral sex, having her head grabbed and forcefully placed in the laps of her male co-workers, having a cattle prod placed between her legs, being maced, and being handcuffed to the toilet and having her faced pushed into the toilet—was welcome. The court concluded that this pattern of conduct was welcomed because the plaintiff had used offensive language, had shown co-workers her abdominal scar from her hysterectomy, had given suggestive gifts to male co-workers, and sometimes did not wear a bra under her t-shirts.¹²⁴ A court that could conclude that a woman was “enthusiastic[ally] receptive”¹²⁵ to such demeaning and hostile sexually derogatory conduct might well be able to convince itself that a member of a minority group might enjoy—and even encourage—similarly demeaning and abusive racially oriented conduct.

Some of the racial harassment cases decided by the courts, while not specifically framing their analysis in terms of the welcomeness of the harassing behavior, have used language suggestive of that used in sexual harassment cases to indicate welcomeness. For example, in *Vaughn v. Pool Offshore Co.*,¹²⁶ the United States Court of Appeals for the Fifth Circuit, in upholding the district court’s finding of no actionable racial harassment, noted the lower court’s finding that the plaintiff had also used racial slurs.¹²⁷ This is precisely the type of conduct used in a number of sexual harassment cases to justify a finding of welcomeness on the part of a harassed employee.¹²⁸

A dissenting opinion in another case also uses language suggesting that racially offensive conduct was incited by the conduct of the black employee at whom the conduct was directed; the issue of whether harassing conduct is “incited” by the target of that conduct has been considered to be a critical element of “welcomeness.”¹²⁹ The dissenting judge in *Newton v. Department of*

¹²⁴ See *id.* at 486–88.

¹²⁵ *Id.* at 491.

¹²⁶ 683 F.2d 922 (5th Cir. 1982).

¹²⁷ See *id.* at 924. The court’s opinion does not elaborate on the nature of these racial slurs allegedly made by the plaintiff, nor does it provide any information about the context in which they were made. The court does not even indicate what racial group the slurs were made against—that is, whether they were directed against the plaintiff’s white co-workers or some other group. Nor does the court give any indication of whether the plaintiff’s use of unspecified racial slurs might have been provoked by the admittedly frequent, racially derogatory conduct directed toward the plaintiff. This context, while not excusing the plaintiff’s own use of racial slurs, would clearly be relevant to the issue of whether such use indicated welcomeness.

¹²⁸ See *supra* text accompanying notes 113–17.

¹²⁹ See *supra* note 112 for definition of “unwelcomeness.”

the Air Force,¹³⁰ in arguing that a supervisor had been inappropriately removed from his position because he burned a cross in front of black employees whom he supervised, indicated that the incident was “inevitable” in light of racial comments made by the black employee at whom the cross burning was targeted; the black employee apparently referred in a “joking” manner to the white supervisor as a “white hillbilly mother fucker” and a “Klan mother fucker.”¹³¹ Elsewhere in the opinion, the dissenting judge indicated that the supervisor had “permitted himself to be in an improper relationship with an employee” and that his “misguided effort to participate in that relationship” lead to his cross-burning activities.¹³² The unstated assumption of the dissenting judge that the black employee had incited the racially offensive conduct toward himself—that he had “asked for it”—almost leaps from the written opinion.

In the context of the issue of “welcomeness,” it appears that use of analogies between racial and sexual harassment, whether explicit or implicit, has the potential to make it more difficult to establish claims of racial harassment. This potential effect is created because the felt need to use the same or similar standards in both types of cases causes courts to raise questions, previously thought inappropriate or even unthinkable, about whether minority group members are responsible for the harassing conduct directed toward them.

B. *The Perspective for Judging Actionable Harassment*

A heavily contested issue in the area of sexual harassment is the choice of the perspective from which sexually harassing conduct is to be judged. The essence of the dispute is whether the existence of actionable sexual harassment—whether the conduct is sufficiently serious to be actionable—is to be judged from the perspective of a gender-blind “reasonable person” or from the perspective of a gender-specific “reasonable woman.”¹³³ Although the United States Supreme Court in *Harris v. Forklift Systems, Inc.* made passing reference to the standard of a reasonable person,¹³⁴ it is by no means clear that the Court’s opinion should be read to have resolved conclusively the choice of

¹³⁰ 85 F.3d 595 (Fed. Cir. 1996).

¹³¹ *Id.* at 600 (Plager, J., dissenting).

¹³² *Id.*

¹³³ The United States Court of Appeals for the Seventh Circuit in *Saxton v. American Telephone & Telegraph Co.*, 10 F.3d 526 (7th Cir. 1993), framed the issue as the choice between “the perspective of a reasonable woman as opposed to a genderless reasonable person.” *Id.* at 534 n.13. One cannot help but wonder how decisionmakers are to determine what the perspective of a “genderless” person is likely to be, given that all decisionmakers will have a gender.

¹³⁴ 510 U.S. 17, 21–22 (1993).

the appropriate perspective for judging claims of sexual harassment.¹³⁵ Lower courts interpreting *Harris* reflect the belief that this issue remains open.¹³⁶

The issues involved in choosing between the "reasonable person" and the "reasonable woman" standard are many. Among those issues are whether the choice of perspective makes any difference in identifying actionable harassment and, if it does, which perspective is the proper one.¹³⁷

Curiously, the dissenting opinion of Chief Justice Rehnquist in the case of *J.E.B. v. Alabama*¹³⁸ provides some support for recognition of a gender-specific standard, at least with regard to the issue of whether men and women might in fact have different perspectives relevant to the resolution of certain legal issues. In that case, a majority of the Court found that use of a peremptory challenge to exclude members of one gender from the jury violated the equal protection clause. The majority rejected the suggestion that it was permissible to rely on gender-based stereotypes in excluding potential jurors on the basis of sex, regardless of whether there was any truth supporting those stereotypes. The dissenting justice, however, argued that gender may in fact make a difference with respect to the issue of perspective: "The two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely 'stereotyping' to say that these differences may produce a difference in outlook

¹³⁵ Compare Abrams, *supra* note 95, at 2525 & n.182 (concluding that the United States Supreme Court rejected the "reasonable woman" standard in *Harris v. Forklift Systems, Inc.*), with L. Camille Hébert, *Sexual Harassment is Gender Harassment*, 43 U. KAN. L. REV. 565, 593-94 (1995) (arguing that *Harris* should not be read as an adoption of the "reasonable person" standard over the "reasonable woman" standard, in light of the failure of any member of the Court to discuss any of the implications of the choice between those standards).

¹³⁶ See, e.g., *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1454 & n.8, 1456 (7th Cir. 1994) (noting that "reasonable person" standard may include "consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability" and applying "reasonable woman" standard in judging whether environment was objectively hostile or abusive); *King v. Hillen*, 21 F.3d 1572, 1582-83 (Fed. Cir. 1994) (noting that the Supreme Court in *Harris* "touched on the subject of reasonableness," but indicating that it was not necessary to "enter the debate" about the appropriate standard; referring to the "reasonable woman" standard); *Currie v. Kowalewski*, 842 F. Supp. 57, 63 (N.D.N.Y. 1994) ("Although the *Harris* case did not explicitly decide whether a reasonable person or a reasonable woman (or victim) standard applies, certainly any reasonable woman or person would have found the defendant's behavior to be offensive and repulsive."), *aff'd*, 40 F.3d 1236 (2d Cir. 1994).

¹³⁷ For a more detailed discussion of the issues involved in the choice between a gender-blind and a gender-specific standard for sexual harassment, see Hébert, *supra* note 135, at 592-606.

¹³⁸ 511 U.S. 127 (1994).

which is brought to the jury room.”¹³⁹

Justice Rehnquist sought to distinguish use of gender in selection of jurors from use of race:

Under the Equal Protection Clause, these differences mean that the balance should tilt in favor of peremptory challenges when sex, not race, is the issue. . . . Accordingly, use of peremptory challenges on the basis of sex is generally not the sort of derogatory and invidious act which peremptory challenges directed at black jurors may be.¹⁴⁰

What Chief Justice Rehnquist fails to understand, however, is that the experiences of members of minority groups—which, at least with respect to certain issues, may differ significantly from the experiences of majority group members—may also influence their perspectives.¹⁴¹

However, that men and women may have different perspectives on issues for which they may have disparate experiences, including issues of sexual harassment, does not support the exclusion of members of either sex from being decisionmakers on such cases, as apparently suggested by the dissent in *J.E.B.* That women may perceive as hostile and abusive conduct that men are more likely to view as trivial does not mean that men—or women—should be excluded from juries or panels of judges deciding such cases.¹⁴² Instead, the issue is whether, when the standard to be applied considers whether conduct is sufficiently serious to be considered abusive and hostile, the perspective of those most likely to recognize the harmful nature of the conduct on its targets should be given special consideration.

The resolution of this issue of perspective in the context of sexual harassment claims will undoubtedly have an effect on how this issue is resolved in connection with claims of racial harassment. If a gender-blind “reasonable

¹³⁹ *Id.* at 155 (Rehnquist, C.J., dissenting).

¹⁴⁰ *Id.*

¹⁴¹ See *supra* text accompanying notes 79–80.

¹⁴² Nor should male supervisors be allowed to escape responsibility for failing to remedy sexual harassment by a claim that they, as men, are unable to recognize the types of behavior that are offensive to women, as attempted by the supervisor in *Carr v. Allison Gas Turbine Division*, 32 F.3d 1007 (7th Cir. 1994). The plaintiff’s immediate supervisor in that case testified that “even though some of the offensive statements were made in his presence, not being a woman himself he was not sure that the statements would be considered offensive by a woman.” *Id.* at 1010. Quite apart from the credibility issues involved in this supervisor’s claimed inability to determine that women might be offended by use of the terms “whore,” “cunt,” and “pussy” to refer to the female plaintiff, use of any standard that does not completely exclude the perspective of women will require both male and female supervisors to be aware of what conduct is offensive to both men and women.

person" standard is ultimately adopted in connection with claims of sexual harassment, then it also seems likely that a race-blind "reasonable person" standard will be deemed to be appropriate for claims of racial harassment.

In the context of claims of racial harassment, the question is whether the existence of a hostile or abusive working environment is to be judged from the perspective of a race-blind reasonable person or from the race-specific perspective of a reasonable person who shares the racial identity of the target of harassment. There are really two questions that are important in resolving this issue. The first is whether the choice of perspective will have any effect on the determination of whether harassing conduct is actionable. The second question is, assuming that the choice of perspective has any bearing on the manner in which conduct is perceived, which perspective is appropriate for judging racial harassment claims.

With respect to this first issue, it seems reasonable to assume that one's experiences tend to have an effect on the way that one views the world; therefore, women, who are disproportionately the targets of sexual harassment, might be assumed to view sexual harassment differently from men. Similarly, members of minority groups, who are more likely to have been on the receiving end of racial harassment and other forms of racial discrimination than non-minority-group members, might be assumed to have different perspectives on racial harassment from their white counterparts. As Professor Richard Delgado indicates in his article discussing the issue whether nonwhite scholars have a special "voice" on issues of civil rights, it is no stranger to expect that such a perspective exists than it is to hold that "the patient in the dentist's chair is the one who knows when it hurts."¹⁴³ Professor Martha Minow rejects the notion of a single perspective on legal issues, indicating that "[w]hat interests us, given who we are and where we stand, affects our ability to perceive."¹⁴⁴ Similarly, Professor David Kretzmer argues that the harm caused to individuals based on racist speech is based on that individual's experience with antagonism toward the group of which he or she is a member:

It is not surprising, therefore, that a derogatory remark about the ethnic group to which an individual belongs, in a society with no history of antagonism toward that group, and when the individual himself has no experience of antagonism toward his own ethnic group, may cause no harm at all. Thus, for example, the statement in America that all whites should be deprived of the vote is unlikely to cause much (or any) harm to whites. On the other hand, when the speech at issue is associated with a history of antagonism towards the

¹⁴³ Richard Delgado, *When A Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 100, 104 (1990) (arguing that racism plays a substantial role in the lives of nonwhite scholars and gives them a special "voice" on issues of civil rights).

¹⁴⁴ Martha Minow, *supra* note 2, at 46.

groups concerned, the harm to the individual may be significant. Consider the position of the Holocaust victim subjected to Nazi propaganda or the black bombarded with Ku Klux Klan propaganda.¹⁴⁵

The importance of perspective as shaped by experience was recognized by the United States Court of Appeals for the Seventh Circuit in *Daniels v. Essex Group, Inc.*¹⁴⁶ In that case, among the incidents alleged by the plaintiff to have been racially harassing was graffiti on the bathroom walls, which said "All niggers must die," "KKK," and "hi Bob KKK." The district court described the effect that mention of the KKK would have on blacks with the following words:

The most violent threats to black society are well known to come from that organization. Furthermore, there is no more chilling image than that of a black man being hung by the KKK. Any reasonable person who is targeted by such a terrorist organization over a period of time without any protection from his employer would surely suffer similar adverse effects as those experienced by Daniels.¹⁴⁷

The court of appeals concluded that "[p]lainly, any black would find this graffiti threatening."¹⁴⁸

Similarly, the United States District Court for the District of Maine in *Harris v. International Paper Co.*,¹⁴⁹ drawing a direct analogy between race and sex,¹⁵⁰ recognized that the different social experiences of racial minorities and nonminorities is relevant to their perspectives on racially harassing conduct:

¹⁴⁵ David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 465 (1987).

¹⁴⁶ 937 F.2d 1264 (7th Cir. 1991).

¹⁴⁷ *Id.* at 1274 (quoting *Daniels v. Essex Group, Inc.*, 740 F. Supp. 553, 560 (N.D. Ind. 1990)).

¹⁴⁸ *Id.*

¹⁴⁹ 765 F. Supp. 1509 (D. Me. 1991).

¹⁵⁰ The district court noted:

To give full force to [the] basic premise of antidiscrimination law, and to [the] recognition of the differing perspectives which exist in our society, the standard for assessing the unwelcomeness and pervasiveness of conduct and speech must be founded on a fair concern for the different social experiences of men and women in the case of sexual harassment, and of white Americans and black Americans in the case of racial harassment.

Black Americans are regularly faced with negative racial attitudes, many unconsciously held and acted upon, which are the natural consequences of a society ingrained with cultural stereotypes and race-based beliefs and preferences. As a result, instances of racial violence or threatened violence which might appear to white observers as mere "pranks" are, to black observers, evidence of threatening, pervasive attitudes closely associated with racial jokes, comments or nonviolent conduct which white observers are also more likely to dismiss as non-threatening isolated incidents. The omnipresence of race-based attitudes and experiences in the lives of black Americans causes even nonviolent events to be interpreted as degrading, threatening, and offensive. Even an inadvertent racial slight unnoticed either by its white speaker or white bystanders will reverberate in the memory of its black victim.¹⁵¹

Assuming that choice of perspective may make a difference in determining what type of racially related or racially motivated conduct is sufficient to be actionable, the second issue involves a choice between perspectives. This choice, of course, is not value free. The choice between perspectives is closely related to the goals sought to be obtained. To the extent that protection is sought to be provided to prevailing workplace norms, a race-neutral standard is more attractive, because that choice of perspective causes to be unlawful only that conduct that all persons—black and white, minority and nonminority—clearly recognize as harmful and abusive. On the other hand, the choice of a race-specific and race-conscious standard reflects a desire to challenge current prevailing norms by making clear that conduct seen as common and trivial to whites may be profoundly damaging and harmful to racial minorities.¹⁵² That is, the issue is whether the abusiveness of racial taunts and other racially related conduct is to be judged from the perspective of one conditioned to expect racial abuse and animus (and, therefore, more sensitive—or sensitized—to racially harassing conduct) or from the perspective of one unlikely to have directly suffered the effects of racial bias and therefore who is less likely to recognize its hurtful and damaging nature. As Professor Mari Matsuda suggests in her article defining what should be categorized as racist speech: "Rather than looking to

¹⁵¹ *Id.* at 1515–16 (citing DERRICK BELL, *AND WE ARE NOT SAVED* 181–85 (1987); Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Mari J. Matsuda, *supra* note 80, at 2326–35; Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 406–13 (1987)).

¹⁵² See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1526–27 (M.D. Fla. 1991) (indicating, in sexual harassment context, that standards reflecting the particular sensitivity of women to harassing behavior is necessary "[t]o implement fully the promise of Title VII").

the neutral, objective, unknowing, and ahistorical reasonable person, we should look to the victim-group members to tell us whether the harm is real harm to real people."¹⁵³

There are, however, some potential risks associated with adoption of a race-specific standard for judging claims of racial harassment, just as there are risks associated with the adoption of a gender-specific standard for judging claims of sexual harassment. Professor Martha Chamallas sees a similar danger in use of the "reasonable black person" standard as that posed by use of the "reasonable woman" standard:

The reasonable woman's perspective might backfire if courts, lawyers, and other legal actors lose sight of the critique of objectivity and instead treat the women's view as in women's minds only, thereby underscoring women's separateness from the real world of work and men. There is also the danger that the reasonable black person's perspective could be used in a repressive way to blame the victim for failing to adopt the "white" interpretation of behavior that would simultaneously avoid a lawsuit and cut down on the number of occasions racial meanings would attach to actions.¹⁵⁴

These risks, however, would be largely eliminated or at least decreased by the appropriate application of these standards by decisionmakers sensitive to the special experiences of women and minorities with respect to workplace harassment. Some decisionmakers have shown this heightened awareness of the truly harmful effects of sexually harassing behavior.¹⁵⁵

A number of courts have suggested that a race-specific standard is appropriate for judging claims of racial harassment. For example, the United States District Court for the District of Massachusetts in *Johnson v. Teamsters Local Union No. 559*,¹⁵⁶ a case in which the black plaintiff had been subjected to racial taunts and racially derogatory graffiti by fellow union members, held that the conduct created a hostile work environment because "any reasonable black person in [the plaintiff's] situation would have found the work

¹⁵³ Matsuda, *supra* note 80, at 2368.

¹⁵⁴ Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 123 (1992).

¹⁵⁵ In some cases, this heightened awareness appears to be associated with exposure to expert testimony concerning women's perspectives on sexual harassment. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1502-09 (M.D. Fla. 1991) (court's discussion of the effects of sexual harassment on women and reliance on expert testimony). In other cases, sensitivity to the effects of sexually harassing behavior on women may be attributable to the decisionmaker's own experiences of discrimination, as reflected in the dissenting opinion of Judge Damon Keith, an African-American judge, in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 623 (6th Cir. 1986).

¹⁵⁶ 67 Fair Empl. Prac. Cas. (BNA) 1150 (D. Mass. 1995).

environment hostile or abusive."¹⁵⁷ Similarly, the United States District Court for the District of New Jersey in *Martinez v. National Broadcasting Co.*¹⁵⁸ indicated that, in order for a plaintiff to state a claim of actionable racial harassment, the plaintiff was required to show that the conduct complained of "was severe or pervasive enough to make a reasonable person of plaintiff's race believe that the conditions of employment were altered and the working environment was hostile or abusive."¹⁵⁹ The United States District Court for the District of Maine in *Harris v. International Paper Co.*¹⁶⁰ agreed that the appropriate standard for judging a hostile environment racial harassment case brought by black men was that of a "reasonable black person," reasoning that Title VII's concern with remedying the effects of harassing conduct on its victims requires that the fact finder "walk a mile in the victim's shoes."¹⁶¹

The effects of analogizing race and sex in the context of racial harassment claims may be most profound in connection with the issue of choice of perspective for judging harassment claims. While use of the analogy may help clarify that women have a unique perspective on sexually harassing behavior similar to the unique perspective of racial minorities on racial harassment, analogizing race and sex on this issue may instead have quite damaging effects for racial harassment claims. If courts follow the lead of the *Harris* Court in applying a single standard for actionable harassment to all claims of discriminatory harassment,¹⁶² adoption of a gender-blind "reasonable person" standard in sexual harassment cases, based on the view that explicit consideration of gender is irrelevant or unnecessary in judging the claim of harassment, undoubtedly would result in the adoption of a race-blind reasonable person standard in racial harassment cases, also suggesting the irrelevance of the perspective of race in the experience of racial harassment. Application of such a standard by decisionmakers not sensitive to the relative positions of racial minorities and racial majorities in our society is likely to result in a finding that quite serious and damaging conduct is not sufficient to be unlawful.

A recent case indicates the potential for this danger. In *Newton v. Department of the Air Force*,¹⁶³ the United States Court of Appeals for the

¹⁵⁷ *Id.* at 1153.

¹⁵⁸ 877 F. Supp. 219 (D.N.J. 1994).

¹⁵⁹ *Id.* at 231.

¹⁶⁰ 765 F. Supp. 1509 (D. Me. 1991).

¹⁶¹ *Id.* at 1516. The district court seemed to be suggesting that while the "reasonable black person" standard was appropriate for the black male plaintiffs complaining of racial harassment, a different standard might be appropriate for a black woman complaining of harassment. *See id.* at 1516 n.12.

¹⁶² *See supra* text accompanying notes 25-28.

¹⁶³ 85 F.3d 595 (Fed. Cir. 1996).

Federal Circuit considered the claim of a white supervisor challenging his dismissal for burning a cross in an area in which black employees were working. The supervisor argued that termination was inappropriate because he had only been joking with a black employee. The majority of the court of appeals upheld the removal, noting the serious racial nature of the conduct engaged in by the supervisor:

The burning of a cross, for whatever reason, cannot be justified. It is not a quaint artifact of our nation's past that can be perceived without emotion. It represents bigotry that our society has combatted for many years but that still exists today. The appellant himself noted in his testimony that, on the same day that the incident at the facility was reported on television, another cross burning was reported in Oklahoma.¹⁶⁴

The dissenting judge, on the other hand, would have held that the termination of the supervisor was inappropriate. The dissenting judge not only suggested that the black employee was responsible for the cross burning incident because of his admittedly inappropriate racial comments to his supervisor,¹⁶⁵ but also trivialized the significance of the cross burning by describing the incident as "the stunt of burning in front of Lewis two popsicle-like chemical mixing sticks shaped in the form of a cross."¹⁶⁶ The dissenting judge also suggested the lack of harm caused by that incident by noting that "[i]t was not until several days later, perhaps after Lewis described the event to others, that Lewis decided he was offended and initiated a complaint."¹⁶⁷ Finally, the dissenting judge dismissed the employer's action of removing the supervisor who committed the cross burning as an attempt to be "politically-correct."¹⁶⁸

The tone and language of the dissenting judge's opinion unmistakably conveys his belief that, as asserted by the supervisor, this cross burning was only a joke, did not evidence any racially discriminatory intent, and was

¹⁶⁴ *Id.* at 597.

¹⁶⁵ The dissenting judge noted that the black employee who was the target of the cross burning had called his supervisor a "white hillbilly mother fucker" and a "Klan mother fucker" and had remarked that "I'll bet that hillbilly mother fucker is running the KKK." *Id.* at 600 (Plager, J., dissenting).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* A review of the majority opinion, however, reveals that the cross burning incident occurred on Saturday and was reported to another supervisor early in the day on Monday. The report occurred early enough in the day to allow the supervisor to whom the report was made to question a number of employees about it and "later that day" place the offending supervisor on non-duty status. A delay of less than two days, over a weekend, would not seem to merit the dissenting judge's indication that it took "several days" for the black employee to "decide" that he was offended. *Id.*

¹⁶⁸ *Id.* at 601.

without racial harm to the black employees who observed it. If an incident as racially charged and as reminiscent of racial hatred and animus as the burning of a cross can be dismissed as harmless and nondiscriminatory behavior, then other similar racial behavior could also be dismissed as attempts at humor and not actionable under Title VII.

Given that the choice of courts between different perspectives for judging workplace harassment claims is likely to go hand-in-hand with the adoption of either gender- and race-blind or gender- and race-specific standards for both types of claims, the effect of analogizing race and sex in this area is unclear. The use of analogies might serve to convince courts of the relevance of specific standards for both types of claims, making it somewhat easier to establish actionable harassment. On the other hand, courts might instead adopt "neutral" standards for each type of claim, increasing the risk of perpetuating current norms of workplace conduct.

C. *How Bad Is Bad Enough?*

The United States Supreme Court has twice articulated the standard for actionable workplace harassment, both times in the context of a case involving allegations of harassment that were sexual in nature.¹⁶⁹ However, although sexual harassment was at issue in both of those cases, the standard for actionable harassment articulated in those cases apparently also applies to claims of harassment based on other protected characteristics, such as racial harassment.¹⁷⁰ Lower courts dealing with claims of harassment following *Harris v. Forklift Systems, Inc.*¹⁷¹ generally have concluded that the legal standards governing claims of racial harassment and sexual harassment are the same.¹⁷²

In defining the standard for actionable harassment under Title VII, the United States Supreme Court in *Harris* held that not all discriminatorily harassing conduct is sufficiently serious to violate Title VII's prohibition against

¹⁶⁹ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–23 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

¹⁷⁰ For a discussion of the language in *Harris* that suggests the appropriateness of a single standard for workplace harassment, see *supra* text accompanying notes 25–28.

¹⁷¹ 510 U.S. 17 (1993).

¹⁷² See, e.g., *Martinez v. National Broad. Co.*, 877 F. Supp. 219, 230–31 (D.N.J. 1994) ("Whether the hostile work environment is due to discrimination based on race or sex, the law is the same."); *Jones v. City of Overland Park*, No. 92-2163-KHV, 1994 U.S. Dist. LEXIS 15238, at *3 (D. Kan. Aug. 15, 1994) ("[t]he *Harris* standard applies to both types of hostile work environment claims"); *Coleman v. Tennessee*, 846 F. Supp. 582, 589 (M.D. Tenn. 1993) ("[T]he standard for governing hostile work environment harassment is the same regardless of whether the harassment is sexual or racial.").

discrimination. In that case, the Court set forth the following standard:

"[M]ere utterance of an . . . epithet which engenders offensive feelings in an employee" . . . does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is 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. . . .

But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.¹⁷³

In some sexual harassment cases, quite serious conduct—including the regular use of epithets such as "whores," "cunt," "pussy," and "tits" to refer to women, informing a female employee that all she needed was "a good lay," and posting of pornographic pictures in common work areas—has been dismissed as merely annoying and as having a "de minimis" effect on the work environment.¹⁷⁴ In reaching this conclusion, reliance has been placed on the "undisputed" fact that "in some work environments, humor and language are rough hewn and vulgar."¹⁷⁵ Another court has described instances in which a

¹⁷³ *Harris*, 510 U.S. at 21–22 (citation omitted).

¹⁷⁴ See *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 622 (6th Cir. 1986) (characterizing use of obscenities toward female employees as merely annoying and display of posters of nude women as having a "de minimis effect" on the work environment).

¹⁷⁵ *Id.* at 620 (quoting *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984)).

There is a tendency to discount the harmfulness of behavior that is part of the prevailing culture. As Celia Kitzinger states in her description of what she terms the "frequency double-bind":

[T]hose highlighting the social problem are quizzed as to the frequency with which the alleged problem (say, sexual harassment) occurs. If they produce low frequencies, their opponents claim that as the problem is rare, it isn't 'really' a problem. If they produce high frequencies, their opponents claim that as the alleged 'problem' happens all the time, it can't really be very serious, but is just 'part of life'.

Celia Kitzinger, *Anti-lesbian Harassment*, in *RETHINKING SEXUAL HARASSMENT* 125, 129 (Clare Brant & Yun Lee Too eds. 1994).

supervisor made physical and verbal sexual advances to a female subordinate, including repeatedly placing his hand on her upper leg and thigh, lunging at her, and forcibly kissing her, as "relatively limited" and "merely offensive."¹⁷⁶

In judging the severity of racially harassing conduct, courts have looked to the standards set forth in *Harris*, as well as other sexual harassment cases, to determine if the conduct complained of could be characterized as sufficiently severe to be actionable. While it is natural that lower courts would look to the language of the *Harris* Court for guidance in judging harassment claims, some of the implications of the adoption of standards from sexual harassment cases for racial harassment cases are disturbing.

The decision of the United States District Court for the Western District of Michigan in *Motley v. Parker-Hannifan Corp.*¹⁷⁷ graphically illustrates the dangers of analogizing racial harassment and sexual harassment in judging the severity or pervasiveness of harassing conduct. In that case, the black male plaintiff complained of three incidents in support of his claim of racial harassment. The most serious incident involved a doll-like figure hung in his workplace, described as a "black African American hung in effigy." The other incidents involved racially related graffiti on the bathroom wall directed at the plaintiff and a flier for a company event altered by shading of the face and labeling the flier with the plaintiff's name. Although the district court also justified its grant of summary judgment for the employer on lack of proof of respondeat superior liability, the court first found that the conduct of which the plaintiff complained was not sufficiently serious to constitute actionable harassment. In justifying this conclusion, the court relied expressly on a previously decided sexual harassment case for the applicable standard:

It should be noted, however, that this "frequency double-bind" apparently does not affect all social problems. It is difficult to imagine, for example, decisionmakers concluding that workplace drug use is not a significant problem because drug use is pervasive in some workplaces. Instead, the perceived pervasiveness of such use is precisely the argument used to justify taking stringent action against such use.

¹⁷⁶ *Saxton v. American Tel. & Tel.*, 10 F.3d 526, 534 (7th Cir. 1993). Sadly, these cases are not atypical. *See, e.g., Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir. 1995) (reversing jury verdict for plaintiff on grounds that the male supervisor's comments to female subordinate, including making grunting sounds as she walked out of office and making gestures suggesting masturbation, could not reasonably be found to constitute actionable sexual harassment); *Stoeckel v. Environmental Mgmt. Sys., Inc.*, 882 F. Supp. 1106, 1109-16 (D.D.C. 1995) (finding sexually harassing conduct—including action of male supervisor in making sexual comments to female subordinate, rubbing her neck and shoulders, touching her clothing, taking her hand and leading her around the office, and following her into an elevator and placing his hands on either side of his face to suggest that he was going to kiss her—not serious enough to be actionable).

¹⁷⁷ No. 1:94-CV-639, 1995 U.S. Dist. LEXIS 7420 (W.D. Mich. May 10, 1995).

Conduct must be sufficiently severe or persuasive to create an objectively hostile work environment to come within Title VII's purview. Moreover, hostile work environment claims "are characterized by multiple and varied combinations and frequencies of offensive exposures, which characteristics would dictate an order of proof that placed the burden upon the plaintiff to demonstrate that injury resulted not from a single or isolated offensive incident, comment, or conduct, but from incidents, comments, or conduct that occurred with some frequency." Plaintiff's claim of hostile work environment is premised on the doll-like figure incident. Under *Rabidue*, an isolated incident such as this is insufficient to create an objectively hostile work environment. Even coupled with the incidents involving the graffiti and the flier, Defendant's conduct—to the extent, if any, that it is attributable to Defendant—falls far short of the severity and pervasiveness necessary to create an objectively hostile work environment.¹⁷⁸

Under the standard articulated by the court, a single incident of harassment, no matter how severe, would be incapable of establishing a hostile or abusive work environment. Such an interpretation of the standard would mean that an employee would be required to tolerate at least one incident of racial harassment, no matter how severe, simply because it comes alone. The damaging effect of such a rule should be obvious in the context of the *Motley* case itself; the simulation in the workplace of the lynching of a black man—with its attendant statement of racial hatred and animus—is not even unlawful as long as it happens only once.¹⁷⁹

¹⁷⁸ *Id.* at *6, 7 (citations omitted). In a factually similar case, the district court in *Vance v. Southern Bell Telephone & Telegraph Co.*, 672 F. Supp. 1408 (M.D. Fla. 1987), granted judgment notwithstanding the verdict for the employer in a racial harassment case, finding as a matter of law that two incidents in which the black female plaintiff found a noose hanging over her desk could not create a racially hostile work environment. The United States Court of Appeals for the Eleventh Circuit disagreed, holding that both the number and severity of harassing incidents had to be considered in determining whether actionable harassment had occurred. *See Vance v. Southern Bell Tel. & Tel. Co.*, 83 F.2d 1503 (11th Cir. 1989). The court of appeals went on to conclude that the jury could have properly found the existence of a racially hostile environment, noting that "[t]he grossness of hanging an object resembling a noose at the work station of a black female is self-evident." *Id.* at 1510-11 & n.4.

¹⁷⁹ That the employer in this case took prompt action to terminate the employee responsible for this harassment is irrelevant to this part of the court's holding. The district court found both that the harassment was not serious enough to be actionable *and* that the employer could not be held liable for the harassment because of its prompt remedial action. *See Vance*, 672 F. Supp. at 1415. The dual holding of the court, however, suggests that the conduct complained of by the plaintiff would not have been actionable racial harassment even if the employer had taken no action to discourage such conduct or had even condoned the conduct.

This manner of analysis is a direct result of the use of analogies between race and sex in judging workplace harassment claims. The requirement of "severity" or "pervasiveness" seems geared to ensure that "trivial" claims of sexual harassment not be deemed actionable. Importing this standard into racial harassment cases threatens to trivialize the harm created by even isolated incidents of racially hostile conduct.

D. *Employer Liability for Harassing Conduct*

Another issue that arises in connection with claims of racial and sexual harassment is the issue of employer liability. Employer liability is not automatic in those cases in which actionable harassment is shown, even when a supervisory employee is shown to be responsible for the harassing conduct. Instead, the courts have looked to some level of notice or other form of culpability on the part of the employer before finding the employer liable for the creation of a hostile work environment.

These standards for employer liability for workplace harassment arise out of the less-than-definitive standards for employer liability articulated by the United States Supreme Court in *Meritor Savings Bank v. Vinson*.¹⁸⁰ In that case, the Court, while declining to set forth concrete rules for employer liability, indicated that courts are "to look to agency principles for guidance," expressly rejecting the contention that employers should be strictly liable for sexual harassment engaged in by their supervisors.¹⁸¹ The Court's concern about holding employers strictly liable for the sexually harassing conduct of supervisory employees most likely reflects concerns similar to those voiced by earlier courts deciding sexual harassment cases about the appropriateness of holding employers liable for the sexually related conduct of their supervisors. For example, the United States District Court for the Northern District of California in *Miller v. Bank of America*¹⁸² expressed amazement that employers could be held liable for sexual conduct on the part of employees:

It is conceivable, under plaintiff's theory, that flirtations of the smallest order would give rise to liability. The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions. Such being the case, it would seem wise for the Courts to refrain from delving into these matters short of specific factual allegations describing an employer policy which in its application imposes or permits a consistent, as distinguished from isolated, sex-

¹⁸⁰ 477 U.S. 57 (1986).

¹⁸¹ *Id.* at 69-73.

¹⁸² 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

based discrimination on a definable employee group.¹⁸³

Similarly, the United States District Court for the District of New Jersey in *Tomkins v. Public Service Electric & Gas Co.*¹⁸⁴ expressed skepticism about holding an employer liable for what the court characterized as a "physical attack motivated by sexual desire on the part of a supervisor and which happens to occur in a corporate corridor rather than a back alley."¹⁸⁵

The application of this standard of employer liability has resulted in incredibly harsh treatment of employees who have been subjected to even the most severe forms of sexual harassment in the workplace. For example, in *Gary v. Long*,¹⁸⁶ the plaintiff alleged that her supervisor first promised her job-related benefits if she had sex with him and, when she refused, threatened to fire her if she did not submit. The pattern of sexual harassment, which included his making crude references to her body, regularly indicating his desire to have sex with her, fondling her breasts, and putting his hand between her legs, ultimately culminated in rape. The supervisor then threatened the plaintiff with reprisals if she told anyone about what had happened. When she finally did report his activities some months later, the employer concluded that there was no evidence to corroborate her allegations and reassigned the plaintiff to another facility.¹⁸⁷ The United States Court of Appeals for the District of Columbia Circuit held that the employer could not be liable for the sexual harassment that the plaintiff suffered at the hands of her supervisor because the employer had a policy against sexual harassment, which should have informed the plaintiff that her supervisor's actions were not authorized by the employer.¹⁸⁸ Essentially, the court faulted the plaintiff for failing to

¹⁸³ *Id.* at 236.

¹⁸⁴ 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

¹⁸⁵ *Id.* at 556. Similar attitudes about holding employers liable for racially harassing conduct of employees and supervisors are reflected in early racial harassment cases. For example, in *Johnson v. Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981), the United States Court of Appeals for the Eighth Circuit held that the use of racial slurs by co-employees and supervisors of the black plaintiffs did not violate Title VII, in part because "[s]uch racial slurs as were present at Bunny Bread were largely the result of individual attitudes and relationships which, while certainly not to be condoned, simply did not amount to violations of Title VII." *Id.* at 1257. The court's reference to "individual attitudes and relationships" suggests an unwillingness on the part of the court to find Title VII liability for what was viewed as largely personal, non-work-related behavior.

¹⁸⁶ 59 F.3d 1391 (D.C. Cir. 1995).

¹⁸⁷ *See id.* at 1393-94.

¹⁸⁸ *See id.* at 1398-99. Although the court of appeals noted that an employer can be strictly liable for quid pro quo sexual harassment, the court found the quid pro quo theory to be inapplicable because the plaintiff could not show that she in fact suffered an economic

immediately report the harassing conduct of her supervisor, in spite of the fact that she was threatened with adverse consequences by her supervisor, who presumably appeared to her to have the power to make those consequences come about. Most ironically, when the plaintiff did report the supervisor's conduct (as she was faulted for not doing earlier), she apparently was not believed because no corroborating evidence could be found. Instead of disciplinary action being taken against her harasser and rapist, she was transferred to another position.¹⁸⁹ The court of appeals then upheld the dismissal of the plaintiff's Title VII claim against the individual supervisor, finding no basis for individual liability.¹⁹⁰ Essentially, the court of appeals informed the plaintiff that, although Title VII was clearly violated by the sexually harassing conduct of her supervisor, no one was liable for that harassing conduct.¹⁹¹

injury because of the harassment by her supervisor:

[I]t takes more than saber rattling alone to impose *quid pro quo* liability on an employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances. To hold otherwise would be to impose liability on the employer without evidence that the supervisor has acted as its agent. Although Gary alleged that Long repeatedly threatened her with adverse job consequences if she did not submit to his sexual advances, those threats were not carried out. Accordingly, we hold that Gary has failed to make out a claim of *quid pro quo* sexual harassment.

Id. at 1396 (citations omitted).

¹⁸⁹ Although the district court never made a determination as to the truth of the plaintiff's allegations, because the plaintiff's claim was decided on summary judgment, the court was required to presume that the facts as alleged by the plaintiff were true.

¹⁹⁰ See *Gary*, 59 F.3d at 1399; see also *Grant v. Lone Star Co.*, 21 F.3d 649, 652-53 (5th Cir. 1994) (holding that individual supervisor, who actively participated in sexually harassing conduct toward the plaintiff, did not constitute an "employer" under Title VII and therefore could not be held personally liable; the jury had found all defendants other than the individual supervisor not to be liable for sexual harassment).

¹⁹¹ Not all courts, however, have applied the rules of employer liability for sexually harassing conduct by employees to excuse employers from liability for such conduct. Rather than simply accepting any employer remedial action as sufficient to exonerate the employer, some courts have been more demanding as to the type of remedial actions taken by employers. See, e.g., *Ficek v. Griffith Lab. Inc.*, No. 93-C-6178, 1995 U.S. Dist. LEXIS 1153, at *19-21 (N.D. Ill. Feb. 1, 1995) (female plaintiff alleged that she had been subjected to 36 incidents of sexually harassing conduct by her male co-workers, including repeated comments about her buttocks and underwear, being called sexually offensive names, placement of sexually offensive graffiti on the walls of the men's restroom, and sexual assault by a co-worker in the parking lot of a bar; employer's action six months later of holding a

Although some earlier cases suggested that employers might be more generally liable for racially harassing conduct of at least supervisory employees,¹⁹² more recently, the rules of employer liability adopted in connection with claims of sexual harassment have been held applicable to claims of harassment on the basis of race. As the United States Court of Appeals for the Fourth Circuit explained in *Dennis v. County of Fairfax*,¹⁹³ involving a claim of racial harassment:

In both cases, the general question is the proper extent of an employer's responsibility for the offensive acts of its employees, an inquiry that implicates principles of agency law. The particular type of prejudice that generated the impermissible employee behavior is clearly of little relevance to that question. For reasons of consistency and logic, then, the notice rule for employer liability that governs sexual harassment under Title VII should also control here.¹⁹⁴

Accordingly, it appears that rules of employer liability created to prevent employers from being held liable for what has been perceived to be the personal and sexually motivated behavior of its employees will also be applied to insulate employers from liability for the racially motivated and racially derogatory conduct of supervisory and nonsupervisory employees. As a result, minority employees subjected to pervasive racial harassment in the workplace may well find themselves with no cause of action against either their employers or the supervisors or co-workers participating in the harassment, at least in part because of the unwillingness of courts to hold employers liable for what they viewed as sexually motivated, non-work-related conduct.

meeting of its employees to discourage harassment and issuing a new policy statement on sexual harassment "too little, too late"); see also *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1327 (8th Cir. 1994) (holding district court's finding of no employer involvement in showing of videotape of bare-breasted female sales representatives at company party to be clear error, in light of fact that several area managers were present when videotape was shown and no one was ever reprimanded for the incident).

¹⁹² See *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1512 (11th Cir. 1989) (indicating that employer could be directly liable for racially harassing conduct of supervisory employee, without regard to notice); *Barnes v. Costle*, 561 F.2d 983, 999 & n.5 (D.C. Cir. 1977) (indicating that "a supervisor's persistent use of racial epithets would undoubtedly lead to an employer's Title VII liability" because an employer would actually know or should know of the conduct, because "a simple order announced by the employer . . . would obviate the problem," and because "[n]ame-calling of any kind is close to abuse, and there is no harm from inducing its complete avoidance").

¹⁹³ 55 F.3d 151 (4th Cir. 1995).

¹⁹⁴ *Id.* at 155 (citations omitted).

E. The Discriminatory Nature of Harassment

The potential—if not yet realized—damaging effects of use of analogy between sexual harassment and racial harassment can be seen with respect to an additional element of workplace harassment claims: the requirement that the harassment reflect discrimination on the basis of a protected characteristic. One of the major obstacles facing employees making claims of sexual harassment has been convincing the decisionmaker that the harassment was based on sex. In the early days of sexual harassment law, this obstacle seemed almost insurmountable; the courts seemed intent on finding that sexually related conduct was directed at women not because of their gender but because of their sexual attractiveness to the harasser.¹⁹⁵ After the Supreme Court's decision in *Meritor*, the lower courts had less difficulty concluding that sexually related conduct directed against an employee was based on sex, instead seeming to assume almost automatically that sexually related conduct in the workplace was motivated by gender.¹⁹⁶

In recent cases, however, some courts appear to be reexamining the issue of whether sexually harassing conduct is motivated by gender. Many of the cases raising this issue involve allegations of same-sex conduct. For example, in *Vandeventer v. Wabash National Corp.*,¹⁹⁷ the United States District Court for the Northern District of Indiana, in finding that a sexual epithet directed by one man against another did not constitute sexual harassment,¹⁹⁸ indicated that the

¹⁹⁵ See, e.g., *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 162, 163-64 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977).

¹⁹⁶ See, e.g., *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). In articulating the elements of a sexual harassment claim, the court of appeals in *Ellison* did not even list as a separate requirement that the harassment be based on sex, instead apparently subsuming such a requirement within the requirement that the employee show "that he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature." *Id.* at 975-76.

This observation of the analysis of those courts on this issue is not intended as a criticism. I also believe that sexually harassing conduct reflects discriminatory motives based on gender. For a discussion of the gender bias behind sexually harassing conduct in the workplace, see Hébert, *supra* note 135, at 568-76.

¹⁹⁷ 887 F. Supp. 1178 (N.D. Ind. 1995).

¹⁹⁸ The male co-worker had called the male plaintiff a "dick sucker." The district court noted:

While the epithet used and the taunting had a "sexual" component, as do most expletives, the crucial point is that the "harasser" was not aiming expletives at the victim

essence of actionable sexual harassment was “gender bias”:

The words “sex” and “sexual” create definitional problems because they can mean either “relating to gender” or “relating to sexual/reproductive behavior.” The two are not the same, but are certainly related and easily confused. Title VII only recognizes harassment *based* on the first meaning, although that frequently *involves* the second meaning. However, harassment which involves sexual behavior or has sexual behavior overtones (i.e., remarks, touching, display of pornographic pictures) *but is not based on* gender bias does *not* state a claim under Title VII. . . .

. . .

It is being the victim of anti-male or anti-female bias that forms the basis of a Title VII sexual harassment claim, not simply being exposed to “sexual”-type comments or behavior. Title VII is meant to rectify gender bias in the workplace, not *per se* to outlaw foul mouths or obscenities. Sometimes sexually-explicit comments are evidence of or constitute gender bias, and sometimes not.¹⁹⁹

While the *Vandeventer* court’s language might be seen as a positive step towards the recognition of sexual harassment as a form of gender or sex discrimination, the court’s attempt to distinguish between sexual conduct that is motivated by gender bias and that which is not is troubling. First, the existence of bias or animus has not been a requirement for a successful discrimination claim; all that has been required is that the challenged act be based on a protected characteristic, regardless of the existence, or absence, of animus.²⁰⁰ Focusing on bias encourages courts to find actionable sexual harassment only in those situations in which the court can attribute the harassing behavior to hostility or animus towards women. While much sexually harassing behavior likely is, in fact, attributable to such hostility,²⁰¹ courts have tended to see harassment of a sexual nature as motivated by sexual attraction or attempts at

because of the victim’s maleness. He was taunting the victim because he did not like him; Mr. Feltner’s gender was irrelevant. There was no evidence that the abuse was based on the “harasser’s” disdain for the victim’s gender. Thus, it was not actionable under Title VII.

Id. at 1181 n.2.

¹⁹⁹ *Id.* at 1181–82.

²⁰⁰ See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987) (holding that union can be held liable for intentional discrimination for failing to process race-based grievances, even though union held no racial animus toward minorities).

²⁰¹ See Hébert, *supra* note 135, at 568 (discussing denigrating and hostile nature of many types of sexually harassing conduct).

humor rather than by gender hostility.²⁰²

In addition, acceptance of this distinction would mean that the protection granted to the target of harassment would be made to depend on the intent—or perceived intent—of the harasser, rather than on the effect of that harassment on the target. Sexual harassment is prohibited in employment largely because of the damaging effects of such harassment to the working environment and to the employees who must work in that environment, not just because of the specific intent of the harasser.²⁰³ Attempting to distinguish between conduct motivated by gender and conduct not so motivated will only encourage harassers to blame their harassing conduct on other motives, even though gender and gender stereotypes undoubtedly play a role in virtually all sexually harassing conduct. Even the *Vandeventer* harasser's use of the sexual epithet "dick sucker" toward his male co-worker represents an attempt to use a challenge to the target's masculinity—seen as a critical aspect of gender—as a weapon of insult.²⁰⁴

The case of *Goluszek v. Smith*²⁰⁵ represents another use of gender stereotype in same-sex sexual harassment. In that case, the male plaintiff, who had never been married and who still lived with his mother, alleged that he had been subjected to numerous comments about sex and his sex life, including being told that he had to be married to work at the company, that he had been shown pictures of nude women, and that he had been poked in the buttocks

²⁰² See, e.g., *Carter v. Sedgwick County, Kansas*, 705 F. Supp. 1474, 1476-78 (D. Kan. 1988) (although the plaintiff testified that she felt humiliated and degraded by the receipt of sexual "gifts," the court found that the plaintiff failed to make out a prima facie case of sexual harassment under 42 U.S.C. § 1983 because "[t]he evidence does not indicate that defendant Cameron gave plaintiff any sexual gifts with the intent to intimidate or harass her"), *aff'd in part and vacated in part*, 929 F.2d 1501 (10th Cir. 1991).

²⁰³ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23 (1993) (focusing on the subjective and objective effects of the harassing conduct rather than the specific intent of the harasser); see also *King v. Frazier*, 77 F.3d 1361, 1363 (Fed. Cir. 1996) (rejecting arbitrator's conclusion that male employee could not be disciplined for sexually harassing conduct toward female employees because he did not know that his sexually explicit comments made to women were wrong and constituted sexual harassment; the court of appeals held that focus on the harasser's perspective and intent in determining whether sexual harassment had occurred was inappropriate), *cert. denied*, 117 S. Ct. 62 (1996).

²⁰⁴ A classic manner of challenging the masculinity of a man is to label him as "gay," just as a classic way of challenging the femininity of the woman is to call her a "lesbian." See SUZANNE PHARR, *HOMOPHOBIA: A WEAPON OF SEXISM* 17-20 (Chardon Press 1988), reprinted in LESLIE BENDER AND DAAN BRAVEMAN, *POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER* 252, 258-59 (West 1995); Elvia R. Arriola, "What's the Big Deal?" *Women in the New York City Construction Industry and Sexual Harassment Law, 1970-1985*, 22 COLUM. HUM. RTS. L. REV. 21, 62 (1990) (describing action of male construction workers who attacked the femininity of female workers by calling them "dykes").

²⁰⁵ 697 F. Supp. 1452 (N.D. Ill. 1988).

with a stick. The United States District Court for the Northern District of Illinois, wrongly I believe, concluded that Title VII had not been violated. The court reasoned that, even though the plaintiff may have been harassed because he was a male, he could not establish that he was a male working in an "anti-male environment," which the judge said was the essence of Title VII's prohibition against sexual harassment.²⁰⁶ But this plaintiff clearly appears to have been harassed because of his gender and because of his failure to comply with the standards of sexuality expected of members of his gender.²⁰⁷ That is the essence of sex discrimination.²⁰⁸

The type of reasoning used by the *Vandeventer* and *Goluszek* courts also appears to be having an impact on the standards for sexual harassment claims outside of the context of same-sex harassment.²⁰⁹ To the extent that the courts construe sexually derogatory comments and actions of harassers as not based on gender but rather on personal animosity or some other factor, those courts will find that the conduct does not constitute actionable sexual harassment under Title VII.²¹⁰ Some courts have in fact reached precisely this conclusion. For example, the United States District Court for the District of Nevada in *Bradshaw v. Golden Road Motor Inn*²¹¹ granted summary judgment for the defendant-employer on the female plaintiff's sexual harassment claim, indicating that the pattern of harassment complained of by the plaintiff was based on personal animosity between her and her supervisor rather than on sex discrimination. In reaching this conclusion, the court discounted the supervisor's regular use of the terms "fucking bitch" and "cunt" to refer to the plaintiff because there was insufficient evidence that these terms were used in

²⁰⁶ See *id.* at 1456.

²⁰⁷ See Chamallas, *supra* note 154, at 127 (expressing belief that Goluszek was "singled out for harassment because he did not conform to the men's image of male heterosexuality").

²⁰⁸ As a plurality of the United States Supreme Court indicated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1988), "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251.

²⁰⁹ Even the court's language in *Vandeventer* leaves open the possibility of the spillover effect of this method of viewing sexually related harassing conduct. The court noted: "This distinction makes little difference when dealing with male-on-female or female-on-male sexual harassment, at least, it has typically been treated as one and the same." *Vandeventer v. Wabash Nat'l Corp.*, 887 F. Supp. 1178, 1181 (N.D. Ind. 1995) (emphasis added).

²¹⁰ This line of reasoning might ultimately lead courts to conclude that the sexual comments and conduct of a harasser are based not on gender but on the particular sexual attractiveness or lack of attractiveness of the target of harassment, returning full circle to the analysis of some pre-*Meritor* decisions. See *supra* text accompanying notes 182-85.

²¹¹ 885 F. Supp. 1370 (D. Nev. 1995).

her presence.²¹² Although that fact might have been relevant to the issue of whether use of those terms contributed to the hostile environment experienced by the plaintiff, the supervisor's use of such terms would clearly seem to be relevant to the issue of whether the other harassment of the plaintiff was motivated by gender or just personal animosity.

It is even possible that this type of reasoning may affect the manner in which courts evaluate the motivations behind racially harassing conduct. For the most part, courts have had little difficulty recognizing that the use of racially derogatory terms and other forms of racial harassment are racially motivated.²¹³ However, in *Vaughn v. Pool Offshore Co.*,²¹⁴ the United States Court of Appeals for the Fifth Circuit noted the racial nature of some of the harassment complained of by the plaintiff, but held that the harassment of the plaintiff was not racially motivated. The conduct complained of by the plaintiff included a number of incidents of "pranks" or "hazing"; being called "nigger," "coon," and "black boy"; and—on the same day as he quit his job—an incident in which a co-worker, after hearing a newscast about a shooting incident by a black man, said, in the plaintiff's presence, that "that's just like a nigger; give him a gun and he shoots anything that moves," a comment met with laughter by the crew. There was also an incident in the workplace between the plaintiff and an employee of a different company in which racial remarks were made. Finally, on the oil rig platform, under the control of that other company, was a tool shed labeled "KKK Headquarters."²¹⁵

In upholding the district court's conclusion that the harassment resulted not from "an environment 'polluted with discrimination'" but from "an atmosphere replete with instances of humiliating acts shared by all," the court of appeals noted:

The district court found the latter, concluding that the hazing and practical joking should be viewed realistically as male interaction and not atypical of the work environment involved. The court determined that Vaughn used racial slurs along with his co-employees and that other Pool employees were

²¹² See *id.* at 1381.

²¹³ See, e.g., *Brown v. East Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993) ("[T]he term 'nigger' is a universally recognized opprobrium, stigmatizing African-Americans because of their race."); *McKnight v. General Motors Corp.*, 908 F.2d 104, 114 (7th Cir. 1990) (use of word "nigger" "even in jest could be evidence of racial antipathy"); *Taylor v. Jones*, 653 F.2d 1193, 1199 (8th Cir. 1981) (in connection with constructive discharge claim, the black female plaintiff alleged that a hangman's noose had been hung in the supply room; the district court noted, and the court of appeals agreed, that "[t]he message conveyed or attempted to be conveyed by that action was unmistakable").

²¹⁴ 683 F.2d 922 (5th Cir. 1982).

²¹⁵ See *id.* at 923–24.

subjected to the same obnoxious treatment. The court found it significant that Vaughn's co-workers expressed amicable feelings towards Vaughn, which negated a characterization of the atmosphere as "dangerously charged with racial discrimination." Recognizing that derogatory remarks would constitute a Title VII violation "upon attaining an excessive or opprobrious level," the court was persuaded that the evidence presented did not suggest "a malicious or inordinate racial slur usage that would result in defendant's liability." These factual findings are not clearly erroneous.²¹⁶

In reaching this conclusion, the court of appeals relied in part on the plaintiff's testimony that he did not believe that he was subjected to certain pranks because he was black. However, the testimony quoted by the court in the opinion does not support any suggestion that the plaintiff believed that the racial slurs, which the court said usually accompanied the "pranks," were also not directed at him because of his race.²¹⁷ Accordingly, the court's reliance on the plaintiff's "perception of his environment" in finding that the environment was generally abusive but not "polluted with discrimination" is suspect.

Similarly, the court's reliance on the fact that white employees were also subjected to "pranks" and "crude language" to find that the environment was not racially abusive is also subject to challenge. First, there is no indication in the decision that the language directed at the white employees was racial in nature other than the unexplained statement that the plaintiff also used racial slurs; because the decision does not indicate the nature of those slurs, it is not clear that the slurs used were even directed at or derogatory to those white employees.²¹⁸ Secondly, there is no indication that the plaintiff's presumably

²¹⁶ *Id.* at 924-25. Although the court of appeals did note the district court's finding that the plaintiff himself used racial slurs, there is no indication of the nature of the slurs used by the plaintiff nor any indication that the plaintiff could be said to have "welcomed" the racially harassing conduct to which he was subjected. For a discussion of the "welcomeness" aspects of this case, see *supra* text accompanying notes 126-27.

²¹⁷ See *id.* at 925.

²¹⁸ There seem to be at least two possibilities concerning the nature of the racial slurs reportedly made by the black plaintiff. One possibility is that the black plaintiff used a racial slur or slurs to refer to his white co-workers, such as the term "honkey." While use of such a term would be clearly inappropriate and might even constitute actionable racial harassment in certain circumstances, the use of racially offensive and racially motivated language directed at white employees would not serve to excuse the racially offensive and racially motivated language and conduct directed at the black plaintiff; both types of conduct would be racially discriminatory and therefore prohibited by Title VII. The second possibility is that the black plaintiff used a racial slur to refer to himself or members of the racial group to which he belonged, such as referring to himself as a "nigger." Again, this use of a racial slur would clearly be inappropriate in the context of the workplace but should not serve to excuse—or render nondiscriminatory—use of the same or similar terms by white employees. Use of a

all-white co-workers²¹⁹ were subjected to anything resembling the racially offensive stereotypes about members of their race reflected in the statement "that's just like a nigger; give him a gun and he shoots anything that moves." Finally, the presence of the term "KKK Headquarters" on a tool shed on the oil rig would clearly seem to affect black employees differently from white employees, creating a racially hostile, rather than just generally offensive, environment.²²⁰

The United States District Court for the District of Kansas in *Bernard v. Dorskocil Cos.*²²¹ recognized just such a distinction and rejected a similar attempt by an employer to pass off racially hostile conduct as nondiscriminatory. The employer had sought to characterize the harassment complained of by the plaintiff, the sole black employee in the workplace,²²² as "horseplay" and had asked the district court to "consider separately those allegations involving 'behavior commonplace in the "blue collar environment" from that conduct motivated by a racial animus' in evaluating plaintiff's evidence supporting his racial harassment claim." Among the conduct characterized as "horseplay" was being called a "black boy" by his assistant foreman; being told by that foreman that "we don't allow your kind at the water fountain"; using the term "nigger rigged"; the telling of racial jokes by co-workers; the altering by co-workers of the settings on his welding tools and the banging of hammers on his work table; threatening to tie a lacquer-saturated rag around his neck while he was welding; and placing a tungsten welding tip

derogatory term to refer to oneself, particularly if done in a joking or ironic manner, is not the same as being bombarded with that term by members of a racial group known to have used that term, and other terms, in a racially offensive and degrading manner.

²¹⁹ Although the decision does not indicate whether the plaintiff was the only non-white employee working on the oil rig, the lack of a reference to any other black employees suggests that the remaining employees were in fact white. In addition, the fact that the supervisor's reaction to the racially derogatory remark relating to the shooting incident was that "they should have some respect for [Vaughn]" suggests that the plaintiff was the only black employee. *Vaughn*, 683 F.2d at 924.

²²⁰ See also *Bolden v. PRC Inc.*, 43 F.3d 545, 549, 551, 554 (10th Cir. 1994) (affirming summary judgment for employer on black plaintiff's claim of a racially hostile working environment, in part on the ground that he had not shown that the hostility directed at the plaintiff by his co-workers was racially motivated, in spite of the fact that at least some of the harassing conduct was explicitly racial in nature; two co-workers made racial remarks, including use of the term "nigger" and telling the plaintiff "you better be careful because we know people in [the] Ku Klux Klan").

²²¹ 861 F. Supp. 1017 (D. Kan. 1994).

²²² See *Bernard v. Dorskocil Cos.*, 861 F. Supp. 1006, 1009 (D. Kan. 1994) (decision of district court considering the employer's motion for summary judgment on another of the plaintiff's claims).

in his chair resulting in an injury, which was later relied on by the employer to justify the plaintiff's termination.²²³ Rejecting the defendant's motion for summary judgment, the district court indicated that there was evidence of a racial motivation behind the "horseplay" to which the plaintiff was subjected:

[T]he plaintiff in this case appears to have been subjected to a quantitatively and qualitatively greater level of harassment than his co-workers. While horseplay, pranks, and foul language may be commonplace at Reno. . . , the horseplay, pranks, and language directed at plaintiff appear to have been uniquely mean-spirited and numerous. The reason for this is, of course, not entirely clear. But *the fact that plaintiff was the only black employee* certainly suggests to this court that the motivating reason was plaintiff's race.²²⁴

Accordingly, the district court held that the plaintiff was entitled to the opportunity to prove at trial that even the harassment directed at him that was not explicitly racial in nature was in fact racially motivated.²²⁵

The renewed focus of courts on the requirement that employees demonstrate the discriminatory nature of sexually oriented conduct, and the apparent willingness of those courts to accept other motivations for that conduct, may well have an effect on the approach courts take to similar claims that racially explicit conduct is not motivated by race. But such an approach is inappropriate regardless of whether racial or sexual harassment is involved. Just as it is troubling for courts to accept arguments that racially explicit conduct is not racially discriminatory but instead "horseplay" or male-bonding, so it is equally troublesome that courts would accept the use of sexually derogatory terms such as "dick sucker," "fucking bitch," or "cunt" not to be discriminatory on the basis of gender but merely to reflect personal animus. In both situations, those epithets and slurs not only seek to communicate a discriminatory message about the person and group at which they are leveled, but they in fact have the effect of communicating that message.²²⁶

²²³ See *Bernard v. Dorskocil Cos.*, 861 F. Supp. 1017, 1020-22 (D. Kan. 1994).

²²⁴ *Id.* at 1021.

²²⁵ See *id.* at 1022.

²²⁶ See *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 998, 1000 (10th Cir. 1996) (noting that use of words such as "cunt" and "whore" to refer to the plaintiff are "sexual epithets" that are "'intensely degrading' to women," and rejecting district court finding that harassment of female plaintiff was not based on gender); *Hurley v. The Atlantic City Police Dep't*, 933 F. Supp. 396, 402 n.2 (D.N.J. 1996) (noting the harmful nature of graffiti that referred to the female plaintiff as a "cunt").

IV. CONCLUSION: ARE THE BENEFITS WORTH THE RISKS?

Judging the wisdom and appropriateness of using analogies between racial harassment and sexual harassment requires not only an inquiry that addresses the extent to which such analogies are factually accurate, but also one that considers the manner in which those analogies have been used in practice and weighs the relative costs and benefits of use of those analogies.

The discussion contained in Part III reveals that there are indeed certain dangers and risks that accompany the use of analogies between race and sex in the area of workplace harassment. A study of the courts' treatment of racial harassment claims and sexual harassment claims indicates that some courts have used explicit and implicit analogies between race and sex to make it more difficult to establish the existence of racial harassment, by importing the standards for sexual harassment claims into the standards of proof for racial harassment claims. Accordingly, some courts have begun to use language suggesting that "welcomeness" may be an issue in racial harassment claims, so that it becomes relevant to ask whether the target of harassment somehow invited that behavior.²²⁷ The movement of courts toward a more "gender-neutral" (or gender-blind, which may not be the same thing)²²⁸ perspective for judging sexually harassing conduct may also cause courts to reject the relevance of the experience of racial minorities with racially threatening and offensive conduct.²²⁹ The use of the standard developed in the context of sexual harassment requiring that conduct be "severe or pervasive" in order to be actionable has led the courts to conclude that even quite damaging and serious racially motivated behavior, including references to lynching or racially motivated assault, is insufficient to state a cause of action for racial harassment.²³⁰ The use of standards of employer liability developed in connection with sexual harassment claims in the context of racial harassment claims may well leave many employees victimized by racially hostile workplaces with no remedy for this discriminatory and damaging behavior.²³¹ Analogies between race and sex may also lead courts to conclude that even

²²⁷ See *supra* text accompanying notes 126-32.

²²⁸ While the term "gender-neutral" suggests inclusion, so that the perspectives of both genders are taken into account, use of that standard has been asserted to perpetuate male biases about the appropriateness of sexual conduct in the workplace. See, e.g., *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 626-27 (6th Cir. 1987) (Keith, J., concurring in part, dissenting in part). The term "gender-blind" more accurately describes a standard that suggests that the gender is irrelevant to the issue being considered.

²²⁹ See *supra* text accompanying note 161.

²³⁰ See *supra* text accompanying notes 177-79.

²³¹ See *supra* text accompanying notes 192-94.

racially explicit conduct is not racially motivated, similar to the conclusions drawn by some courts that sexually explicit conduct is not motivated by gender.²³²

There are also other dangers of analogizing race and sex. One such danger is that analogizing race and sex threatens to obscure the importance that race plays in our society and the fact that there are real and important differences between race and sex. Professors Trina Grillo and Stephanie M. Wildman have pointed to the negative effects that the use of analogies between race and sex have had in the context of gatherings of legal academics:

When a speaker compared sexism and racism, the significance of race was marginalized and obscured, and the different role that race plays in the lives of people of color and of whites was overlooked. The concerns of whites became the focus of discussion, even when the conversation had been supposedly centered on race discrimination. Essentialist presumptions became implicit in the discussion; it would be assumed, for example, that all women are white and all African-Americans are men. Finally, people with little experience in thinking about racism/white supremacy, but who had a hard-won understanding of the allegedly analogous oppression (sexism or some other -ism), assumed that they comprehended the experience of people of color and thus had standing to speak on their behalf.²³³

Professor Angela Davis raises a somewhat similar concern about analogies drawn between race and sex by early feminists arguing for women's rights.²³⁴ She notes that white women arguing for women's suffrage and other rights often invoked the name of slavery to describe the institution of marriage. She notes:

The early feminists may well have described marriage as "slavery" of the same sort Black people suffered primarily for the shock value of the comparison—fearing that the seriousness of their protest might otherwise be missed. They seem to have ignored, however, the fact that their identification of the two institutions also implied that slavery was really no worse than marriage.²³⁵

²³² See *supra* text accompanying notes 214–26.

²³³ Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397, 399.

²³⁴ See DAVIS, *supra* note 69.

²³⁵ *Id.* at 33–34. Professor Davis notes, however, that there were also positive aspects of the comparison between race and sex as used by white women in the 1830s: the very use of the comparison indicates that even "white middle-class women felt a certain affinity with

Accordingly, one of the dangers that needs to be guarded against when analogizing race and sex is the suggestion that racism and sexism, or racial harassment and sexual harassment, are identical, rather than merely comparable in certain aspects. If drawing analogies between race and sex is seen as an attempt to belittle, or even has the unintended result of belittling, the importance of race and the evil of racism, then the use of analogies between race and sex could pose more dangers than are justified by the potential benefits of such comparisons.

But there are also some benefits that arise as a result of analogizing race and sex. Use of these analogies may help to clarify the discriminatory nature of both types of harassment and may help decisionmakers to see the harmful effects of both types of activities. In addition, the discomfort that occurs from application of standards created with sexual harassment in mind to claims of racial harassment may even serve to inform decisionmakers about the inappropriateness of those standards for the sexual harassment claims for which they are designed. For example, if decisionmakers find themselves objecting to even the question of whether racially degrading and demeaning conduct is "welcome" to its targets, perhaps those same decisionmakers might start to take issue with similar questions in the context of sexually degrading and demeaning conduct. Recognition of the absurdity of the assertion that racially offensive comments and actions are not racially motivated may well lead decisionmakers to question similar claims that use of sexual epithets toward women are not motivated by gender. Understanding that the experiences of racial minorities affect the way that they experience and perceive racially related behavior might trigger awareness that women's perceptions are also shaped by their experience of sexual conduct misplaced into the workplace. And the appreciation that even one incident of racially threatening conduct—such as hanging a noose over the workstation of a black employee or burning a cross in his or her presence—can itself create a racially hostile work environment may help decisionmakers to realize that a single incident of sexually offensive and degrading behavior, such as the touching of a woman on her breast or genitals against her will even a single time, can irreversibly alter her work environment.

These effects analogizing race and sex may act to the benefit of both employees bringing sexual harassment and those bringing racial harassment claims. To the extent that the Supreme Court's decision in *Harris* suggests that all claims of workplace harassment should be subject to the same legal standards, the realization that currently recognized requirements are inappropriate for sexual harassment claims may cause the EEOC and the courts to abandon those standards for all harassment claims, making it less difficult for all employees to establish the illegality of harmful and discriminatory workplace

Black men and women, for whom slavery meant whips and chains." *Id.* at 34.

harassment.

Recognition of the similarities and overlap between racial harassment and sexual harassment may also serve other purposes. A number of commentators have argued that the interests of black women are harmed and marginalized when racism and sexism are treated as two completely different types of discrimination, rather than recognizing the intersection of race and sex.²³⁶ As Professor Angela Harris asserts:

In this society, it is only white people who have the luxury of "having no color"; only white people have been able to imagine that sexism and racism are separate experiences. Far more for black women than for white women the experience of self is precisely that of being unable to disentangle the web of race and gender—of being enmeshed always in multiple, often contradictory, discourses of sexuality and color.²³⁷

Analogizing race and sex also may act to foster alliances that are useful in furthering the interests of both women and minorities. White women who have never been the target of racial animus or harassment may be better able to understand the harm caused by racially harassing behavior because of the similarities of that harm to the harm which they suffer by the humiliation and belittling effects of sexual harassment.²³⁸ Minority-group men may better understand the harm caused by sexual harassment—even their own participation in sexual harassment—if they are confronted with the comparison of that behavior to their own experiences of racial harassment and discrimination. Even majority-group men, who are less likely to have personally experienced either form of discrimination but who may be able to recognize the injuries caused by one or the other type of behavior, might be made to focus on the harmful nature of the analogous conduct.

²³⁶ See Crenshaw, *Demarginalizing Race and Sex*, *supra* note 107, at 139–40, 166–67. Professors Grillo and Wildman also argue that the assumption that race and sex are distinct categories ignores and renders invisible the experiences of black women, although they argue, as I do not understand Professor Crenshaw to do, that use of analogies between race and sex requires this assumption. Grillo & Wildman, *supra* note 233, at 404–05.

²³⁷ Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 604 (1990).

²³⁸ See Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, Working Paper No. 189, Wellesley College Center for Research for Women (1988), reprinted in BENDER & BRAVEMAN, *supra* note 204, at 22 (author, a white female, discusses how her understandings of male privilege and the reluctance of men to recognize the results of male privilege helped her to understand her similar reluctance to see and recognize how she benefited from white privilege).

Analogizing race and sex in the area of harassment law is indeed a "two-edged sword." Although the potential risks of use of this analogy are considerable, so are the benefits. Whether the benefits are worth the risks depends on whether decisionmakers can be made to understand that racially related and sexually related conduct, at least when it occurs in the context of the workplace, creates a harm that may not be immediately apparent to them because of their lack of experience as the target of such harmful behavior. Paradoxically, use of analogy can be a critical tool in furthering that understanding, because use of analogy can help decisionmakers to understand that conduct targeted at others is similar to conduct of which that decisionmaker himself or herself may have been the target. But without that understanding and willingness to take both sexually harassing and racially harassing conduct seriously, the use of analogies between race and sex can actually result in the trivializing of both types of activity.