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I. INTRODUCTION

Sexism and racism are social phenomena that perpetuate the subordination of women and blacks in American society. Discrimination in the employment context has traditionally functioned to hinder the equal participation of women and blacks in the workforce, thus maintaining and exacerbating their inferior positions in the social hierarchy. When employment or employment benefits are conditioned upon sexual favors or when an abusive work environment is created through inappropriate sexual conduct, women are treated as sex objects and their merit as workers is disregarded. Likewise, when racial hostility pervades the workplace and racial epithets are subsumed within the daily vernacular, the injustice to and disadvantage of African Americans workers are perpetuated. To prevent such egregious practices, federal civil rights law has made sexual harassment and racial harassment legally cognizable injuries. The proper inquiry to determine if an actionable hostile work environment claim has been met is the subject of this paper.

The role of Title VII in sexual and racial harassment litigation is discussed in Section II. The cases that first recognized and set forth the parameters of harassment law are introduced and the elements required to state a claim are briefly discussed. Section III criticizes the traditional application of the reasonable person test in sexual harassment litigation. The reasonable person test is applied in a male-biased manner and, thus, preserves the status quo that tolerates the subordinate position of women in both society and the workplace. An alternative reasonableness inquiry, the reasonable woman test, is then introduced. The reasonable woman test demands the application of a gender-conscious inquiry into claims of sexual harassment to dismantle the institutionalized notions of sexism that allow inappropriate workplace behavior to go unchecked. Section IV criticizes the reasonable person standard in cases of racial harassment. The reasonable person test, in this context, is prone to

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depict only the traditional white perspective and, thus, ignores the perspective of minorities who are more susceptible and sensitive to racial discrimination. A reasonable black person test recognizes that the different social experiences of minorities and non-minorities are relevant to their perspectives and reactions to racially harassing conduct. Section V introduces the unique problem black women face in the workforce. Black women are potentially the victims of both sexual discrimination and racial discrimination. This dual vulnerability, however, does not simply mean that the burdens black women face are double. Rather, the intersection of race and gender in their lives creates experiences that are both qualitatively and quantitatively different from either white women or black men. This unique position must be accommodated in employment law. The introduction of a reasonable black woman standard and the ability to argue an aggregate sexual/racial harassment claim is necessary. Finally, Section VI asserts that courts can recognize the experiential differences of harassment victims within a workable methodology of judging employment discrimination claims.

II. TITLE VII AND THE HOSTILE WORK ENVIRONMENT

Title VII of the 1964 Civil Rights Act makes it an unlawful employment practice for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[1] *Rogers v. EEOC*,[2] a Fifth Circuit decision, was the first case to recognize that a racially hostile work environment, without any accompanying loss or denial of a tangible job benefit, is an actionable claim under Title VII.[3] Speaking for the majority, Judge Goldberg stated that "employees' psychological as well as economic [well-being] are statutorily entitled to protection from employer abuse, and that the phrase 'terms, conditions, and privileges of employment'...is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination."[4]

In *Meritor Savings Bank v. Vinson*,[5] the Supreme Court held that sexual harassment constitutes sex discrimination in violation of Title VII.[6] The Court recognized two forms of sexual harassment: (1) *quid pro quo*; and (2) hostile

1. 42 U.S.C. § 2000e-(2)(a)(1) (1964).
2. 454 F.2d 234 (5th Cir. 1971).
3. Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971).
4. *Rogers*,454 F.2d at 238.
5. 477 U.S. 57 (1986).
6. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986).

or abusive work environment.[7] *Quid pro quo* sexual harassment occurs whenever a supervisor bases any employment decision affecting an individual on that individual's submission to or rejection of some sexual conduct.[8] In order to state an actionable *quid pro quo* claim, the plaintiff must suffer a tangible economic loss.[9] Hostile work environment harassment occurs when an individual is subjected to unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.[10] The denial of a tangible job benefit does not necessarily accompany this type of misconduct.[11] For hostile work environment harassment to be actionable, it is enough that the harassment is " sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" even in the absence of adverse economic consequences.[12]

The Supreme Court has suggested the appropriateness of a single standard in judging both race-based and sex-based abusive work environment claims. In *Harris v. Forklift Systems, Inc.*,[13] the Court discussed in general terms "a work environment abusive to employees because of their race, gender, religion or national origin" without any indication that a different standard might apply depending on the protected category at issue.[14] Justice Ginsburg's concurrence in *Harris* made the analogy between racial harassment and sexual harassment even more explicit by importing the standard used in a lower court's decision regarding a race-based discrimination claim to explicate the proper standard for actionable sexual harassment.[15]

A plaintiff proves the existence of a hostile work environment when he/she demonstrates that (1) he/she was subjected to discriminatory intimidation because of his/her race or sex, (2) the conduct was unwelcome and (3) the conduct was sufficiently severe or pervasive as to alter the terms or conditions of the victim's employment and create an abusive work environment.[16]

This analysis includes both a subjective and objective inquiry. Not only must the victim find the conduct unwelcome, but the conduct must also be "severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or

7. *Meritor*, 477 U.S. at 65.
8. 477 U.S. at 65.
9. *Id.* at 69.
10. *Id.* at 65.
11. *Id.*
12. *Id.* at 67.
13. 510 U.S. 17 (1993).
14. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).
15. *Harris*, 510 U.S. at 25-26.
16. Ellison v. Brady, 924 F.2d 872, 875-876 (9th Cir. 1991).

abusive."[17]

Thus, the objective component of the analysis requires courts to conduct a reasonableness inquiry. The courts are in disagreement, however, as to the proper perspective by which to evaluate allegedly discriminatory conduct. Some judges apply the traditional reasonable person standard, while others feel that a reasonable woman or reasonable African American standard is more appropriate. Which of these standards (or possibly an alternative standard) will best effectuate Title VII's goal of removing the obstacles that have traditionally limited women's and African Americans' access to employment is a significant and relevant topic of debate. Once it is found that an actionable hostile work environment exists, the court must then determine whether the employer is liable for such discriminatory behavior.[18]

III. SEXUAL HARASSMENT – REASONABLENESS STANDARDS

A. The Reasonable Person Standard

The reasonable person is a hypothetical person used as a legal standard to assess certain conduct. It is most commonly used in tort to determine whether someone has acted with negligence. The rationale underlying the reasonable person standard is that by reflecting upon and adhering to the generally accepted standards of society, judges can make neutral and unbiased decisions. In theory, the test is gender-neutral.

In practice, however, the reasonable person standard tends to be male-biased. When judges are asked to consider how a reasonable person would act or react in a certain situation, it is natural for them to refer to their own intuitions and experiences to inform their judgment. Since judges are

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

18. Unfortunately, the issue of employer liability and how it may be affected by the application of the various reasonableness standards is beyond the scope of this article. It should be briefly noted, however, that in *Burlington Industries Inc. v. Ellerth*, the Supreme Court found that an employer could be liable for the hostile work environment harassment committed by either the victim's supervisors or co-workers. *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 759, 765 (1998). Title VII attaches liability to "employers" and "employer" liability for actions of its employees is determined by ordinary common law rules of agency as tempered by the remedial goals of Title VII. *Id.* at 754. An employer is subject to vicarious liability for an abusive environment created by a supervisor with higher authority over the plaintiff employee. *Id.* at 765. However, when no tangible employment action is taken by the supervisory employee, (as is the case in hostile work environment harassment), the employer can raise an affirmative defense to liability. The defense is comprised of two elements: (1) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. *Id.* When, on the other hand, the harassment is committed by a co-worker of the plaintiff employee, the employer can be liable on the theory of negligence if the employer knew or should have known about the harassing conduct and failed to take prompt measures to stop it. *Id.* at 759.

predominantly white males,[19] the potential for the reasonable person standard to morph into a reasonable man standard is likely. As a result, the experiences of historically disempowered groups, in this case women, are systematically ignored. The ramifications of this phenomenon are particularly ironic and disheartening in the realm of employment discrimination law. Though the intention of Title VII is to eradicate discrimination in the workplace and protect the employment opportunities of marginalized groups, a male-biased reasonable person standard tends to preserve the status quo of a work environment that favors white males and treats "others" unfairly.

The application of a reasonable person/man standard in hostile work environment cases (in which the victims are overwhelmingly female) proves problematic. The proper inquiry in a hostile work environment allegation is not the intention of the harasser, but how harassment affected the victim.[20] Some might question the capability of a male judge to objectively assess the effects of harassment from the vantage point of the harassed. Scholars assert that, overall, judges do not analyze harassment in this manner.[21] Rather than looking *for* the victim's perspective on what conduct she affirmatively accepts and what conduct is actually harmful to her, judges look *at* the victim (her appearance, dress, behavior) to determine the reality of the situation.[22] Thus, the courts have been criticized for judging harassment claims "through the eyes of the perpetrator."[23]

The judicial analyses of many sexual harassment claims support this criticism. Judges have declared that a woman welcomes sexual harassment when she fails to confront her harasser or does not report the harassment immediately after it occurs.[24] The Supreme Court considers provocative speech or dress to be relevant as to whether the harassment is unwelcome.[25] The High Court has even sanctioned inquiry into the victim's sexual activity and sexual fantasies to determine if there was a hostile work environment.[26] All these determinations were made under the guise of the reasonable person

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19. Excluding the Supreme Court, as of June 2001, 20.6% of federal judges were women. This was up from only 9.5% in 1997. Furthermore, there is little ethnic diversity in the federal judiciary. Eighty-three percent of federal judges are Caucasian. *GenderGap In Government, at* http://www.gendergap.com/governme.htm (last modified June 6, 2001).

20. This is different from *quid pro quo* harassment in which the intent of the perpetrator, and not the effect on the victim, is the legally significant issue.

21. Toni Lester, *The Reasonable Woman Test in Sexual Harassment Law — Will it Really Make a Difference?*, 26 IND. L. REV. 227, 239 (1993).

22. *Id.* at 240.

23. Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 62 (1990).

24. Waltman v. International Paper Co., 875 F.2d 468, 484 (5th Cir. 1989).

25. *Meritor*, 477 U.S. at 67.

26. *Id.* at 69.

standard.

The application of the reasonable person standard has been an injustice to the female victims of sexual harassment. This is apparent in the Sixth Circuit's opinion in *Rabidue v. Osceola Refining Co.*[27] In this case, a male employee routinely referred to female workers as "whores," "cunt," "pussy" and "tits."[28] Of the plaintiff, he remarked, "all that bitch needs is a good lay" and called her "fat ass."[29] Additionally, numerous pornographic posters of partially nude women were displayed throughout the workplace.[30] The court held that these conditions did not constitute a hostile work environment.[31]

Even more shocking than the court's decision was its reasoning. Speaking for the majority, Judge Krupansky articulated the reasonable person test that the court was to adhere to in its analysis:

> In the absence of conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances, a plaintiff may not prevail on asserted charges of sexual harassment anchored in an alleged hostile and/or abusive work environment regardless of whether the plaintiff was actually offended by the defendant's conduct.[32]

But rather than determining whether the hypothetical person or society-at-large would consider the male employee's vulgar and misogynistic language and pornographic displays sufficiently severe and pervasive, the court instead focused on weaknesses of the plaintiff's personality as an explanation for the tension that existed in her workplace. It found that she was "abrasive, rude, antagonistic, extremely willful, uncooperative" and unable "to work harmoniously with co-workers."[33] It is ironic that the court also described Rabidue as "capable, independent [and] ambitious."[34] It did not, however, attempt to reconcile these conflicting characterizations or even consider that Rabidue's hostility may have resulted from her co-worker's abusive language and her supervisors' toleration of it.[35]

The court also found that the pre-existing social attitudes of both the workplace and society in general were relevant to the reasonableness inquiry.

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27. 805 F.2d 611 (6th Cir. 1986).
28. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 624 (6th Cir. 1986).
29. *Rabidue*, 805 F.2d at 624.
30. *Id.* at 623-624.
31. *Id.* at 622.
32. *Id.* at 620.
33. *Id.* at 615.
34. *Id.*
35. Lester, *supra* note 21, at 241.

In assessing whether an actionable hostile work environment existed, the majority asserted that important factors to consider are "the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment."[36] From this statement, the court seems to assert that a woman cannot succeed on the merits of a sex harassment claim if she assumes the risk of working in a pre-existing hostile or abusive environment.[37] Even worse, the court intimates that a woman cannot state a hostile work environment claim if she chooses to live in a society that condones the behavior of which she complains. The majority concluded that:

> The sexually oriented poster displays had a de minimis effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places.[38]

The *Rabidue* court's analysis is flawed on many levels. Its proposition that the social context (represented by both the victim's particular workplace and pop-culture at large) in which the harassment occurs can diminish the harassing impact of inappropriate behavior is not only ludicrous, but it is contrary to Title VII and its promise to remove the obstacles that keep women from participating in the workforce on an equal basis as men. Places of employment that are characterized by sexually abusive behavior are at the core of hostile environment theory. A pre-existing atmosphere that deters women from entering or continuing in a profession is no less destructive of and offensive to workplace equality than formal exclusion.[39] Furthermore, the recognition of sexual harassment as a form of sex discrimination, in violation of Title VII, means exactly that conduct that may be condoned in some settings can be abusive and intolerable in the workplace.

To state that conditions in the workplace are a reflection of conditions in society and therefore do not constitute sexual harassment is a Catch-22. For it is traditional patterns of society (i.e. female subordination) that victimizes women when it occurs unchecked at the workplace. As Catherine MacKinnon has stated, "if the pervasiveness of an abuse in society makes it non-actionable, no inequality sufficiently institutionalized to merit a law against it would be

36. *Rabidue*, 805 F.2d at 620.
37. Lester, *supra* note 21, at 241.
38. *Rabidue*, 805 F.2d at 622.
39. Robinson v. Jacksonville Shipyard, 760 F. Supp. 1486, 1526 (M.D. Fla. 1991).

actionable."[40]

The reasonable person standard, as applied by the Sixth Circuit in finding that the pin-up poster displays had only a *de minimis* effect on the plaintiff's work environment, is analytically defective. Diminishing the harassing impact of the pin-ups in light of society's commercialization of sex either overestimates the public's consensus on pornography or equates the term "society" with "prurient men" or, according to the dissenting opinion, "the unenlightened."[41] Judge Keith, the sole dissentor in *Rabidue,* described a poster, typical of the overall display that the majority had innocuously labeled as "sexually oriented."[42] It showed a prone nude woman with a golf ball on her breast and a man standing over her, golf club in hand, yelling "Fore!"[43] Judge Keith considered daily exposures to such images as more likely constituting a shocking assault on the senses than a *de minimis* effect.[44]

Furthermore, as Professor Kathryn Abrams argues, "the fact that many forms of objectionable speech and conduct are protected against interference by public authorities in the world at large does not mean that pornography should be accepted as appropriate in the workplace."[45] Pornography in the workplace is more threatening to women than it is to the public at large.[46] In the public realm, pornography can be largely avoided.[47] In a confined work-space where pin-ups are plastered all over the walls of common areas, this may not be a possibility. Additionally, the message a pornographic image takes on differs depending upon the context in which it is viewed. Publicly disseminated pornography remains the expression of the editors of nudie magazines and the directors of skin-flicks.[48] On the walls of an office, it becomes the expression of a co-worker or boss as well.[49] The depiction of women in these images, that of sex object to be acted upon, is in sharp opposition to the manner in which most women want to be viewed in the workplace.[50]

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40. CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 115 (1987).
41. *Rabidue*, 805 F.2d at 627.
42. *Id.* at 624 (Keith, J., dissenting).
43. *Id.*
44. *Id.*
45. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms,* 42 VAN. L. REV. 1183, 1212 (1989).
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*

B. The Reasonable Woman Test

It should come as no surprise that because of the respective positions men and women occupy within the power structure of society, their experiences with and reactions to sexual harassment are likely to differ markedly. Some scholars argue that these differing perceptions need to be acknowledged and that the distinct perspective women hold should be incorporated into the reasonableness inquiry of hostile environment cases.

The Ninth Circuit approved of this position in *Ellison v. Brady*[51] when it held that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct that a reasonable *woman* would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment.[52] The court adopted this new standard upon its recognition that the theoretically sex-blind reasonable person standard is inclined to be male-biased.[53] A gender-conscious examination of harassment claims, the majority argued, will not establish greater protection for women than men but will be more efficient in enabling the sexes to participate equally in the workforce.[54]

Acknowledging that viewpoints among women diverge, the Ninth Circuit still asserted its belief that women, as a group, share certain common concerns and experiences which set them apart from men in their attitudes towards sexual harassment.[55] As the majority noted, women are disproportionately the victims of rape and sexual assault. Thus, while men, who are generally not the victims of such crimes, can view sexual harassment in a vacuum, women have a reasonable basis from which to fear that any sexual conduct may be a prelude to sexual violence.[56]

The *Ellison* court also justified its gender-conscious analysis as necessary to dismantle the prevalent notions of sexism that have been absorbed into and become "normal" aspects of employment environments. The reasonable woman standard is consistent with the goals of Title VII because it undermines and challenges those accepted but faulty notions of "reasonable" behavior. The court stated:

> Congress did not enact Title VII to codify prevailing sexist prejudices. To the contrary, Congress designed Title VII to prevent the perpetuation of

51. 924 F.2d 872 (9th Cir. 1991).
52. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).
53. *Ellison*, 924 F.2d at 879.
54. *Id.*
55. *Id.*
56. *Id.*

> stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women ... When employers and employees internalize that standard of workplace conduct we establish today, the current gap in perception between the sexes will be bridged.[57]

The advantages of the reasonable woman standard are obvious. It responds to the fact that over the course of the development of our legal justice system, the reasonable person standard has become infused with the male viewpoint.[58] Furthermore, it exposes the false neutrality and universality that has become characteristic of judicial analyses and that, more often than not, work to the detriment of minority and underrepresented groups.

There are also, however, some potentially significant shortfalls to the reasonable woman test. To begin with, the new standard may prove to be entirely ineffective within a judiciary that remains (for all intents and purposes) an old boys' club. Regardless of what standard they apply, male judges still have the same experiential and intuitive deficiencies that hinder them from understanding why or how a woman objects to sexual harassment.[59] In other types of litigation where judges lack the direct knowledge to analyze the reasonableness of a party's actions (for example, in a medical malpractice case), they rely upon expert testimony to inform their judgments. The courts remain, however, extremely reluctant to admit expert testimony as to the reasonableness of a woman's action, as has been demonstrated by the controversy surrounding the Battered Women's Syndrome defense.[60]

Furthermore, even if judges acknowledge that men and women perceive harassment differently, there is the danger that they will ascribe the differences to biology. Ascribing the differences between the sexes to nature is likely to stigmatize women rather than promote equality. Kathryn Abrams warns that this could result in the courts attributing women's perception of sexual conduct in the workplace to a natural proclivity for modesty and chastity rather than as a consequence of longstanding discrimination in the workplace and the high incidence of sexual violence targeted at women.[61]

Another disadvantage to the reasonable woman theory, articulated by some feminist scholars, is that it falsely generalizes about women. Abrams cites the public debate surrounding the Thomas-Hill hearings as supporting the proposition that women do not think about sexual harassment in the same

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57. *Id.* at 881.

58. Kathryn Abrams, *Social Construction, Roving Biologism, and Reasonable Women: A Response to Professor Epstein*, 41 DEPAUL L. REV. 1021, 1034 (1992).

59. *Id.* at 1033.

60. *Id.* at 1034.

61. *Id.* at 1034-35.

way.[62] Relying on anecdotal evidence, Abrams found that working-class women had less sympathy for Anita Hill than professional women.[63] Having themselves navigated through coercive working environments, these women faulted Professor Hill for not doing the same.[64] Abrams contends that individual attitudes towards sexual conduct in the workplace are shaped by one's personal sense of security in the workforce as well as the construction of one's own sexuality.[65] These factors are likely to vary not just between men and women, but also among women.

It should be noted, however, that the former criticism of the reasonable woman standard is just a smaller-scale version of the problem created by the reasonable person standard. While the reasonable woman standard may over-generalize about the perspectives of women, the reasonable person standard over-generalizes about the perspectives of people — usually equating those perspectives with white male viewpoints. Therefore, although the reasonable woman standard may be vulnerable to challenges, it nonetheless comes closer to redressing and rectifying the unique obstacles hindering women in the workforce than does the existing reasonable person standard.

Angela Harris has criticized the feminist theory of gender essentialism because it permits a small group of women — white, middle-class women — to describe their own perceptions and experiences and claim them as the norm.[66] As a result, she contends, the voices of poor, black and lesbian women are largely ignored and their experiences are acknowledged as differing only in degree and not quality.[67] In the realm of employment law, gender essentialism may cause the reasonable woman standard to transform into a reasonable, white, heterosexual, middle-class, professional woman standard. The reasonable woman test will be of meager value if it fails to address the perceptions and experiences of the majority of women in the workforce.

C. Salvaging the Reasonable Woman Standard

The ineffectiveness of the reasonable person test in recognizing and punishing sexual harassment necessitates an alternative standard. Although the reasonable woman test may not be the perfect solution, it will be a more effective tool in dismantling the sexism that has become institutionalized

62. *Id.* at 1036.
63. *Id.*
64. *Id.*
65. *Id.*
66. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).
67. *Id.* at 596.

within the American workforce. However, in order to avoid the problem of attributing to nature the differences between the sexes and over-generalizing the experiences of women, a structured and consistent methodology of how to apply the reasonable woman standard must be generated. A method that takes the dynamics of socialization and the social construction of gender into account is needed.

In *Robinson v. Jacksonville Shipyards,*[68] the Middle District of Florida implemented a promising method by which to apply a new reasonable woman standard.[69] *Robinson* concerned the grievance of Lois Robinson, one of the few female skilled craftworkers employed at the Jacksonville Shipyards.[70] Robinson sued for sexual harassment on the basis of a hostile work environment after being subjected to particularly egregious harassing conduct. She was called "honey," "baby," "sugar," and "momma" by her co-workers and was subjected to vile comments such as "hey pussycat, come here and give me a whiff," and "the more you lick it, the harder it gets."[71] Additionally, Robinson's workplace was bombarded with extremely graphic and explicit pornography.[72] On occasion, Robinson's male co-workers would wave these pictures in front of her or place them in her personal workspace to upset her.[73] Abusive graffiti, including such comments as "eat me," and "lick me you whore dog bitch" were written over Robinson's locker.[74] The court recognized that the shipyard's environment was extremely hostile to women and awarded a judgment in favor of the plaintiff.[75]

In enunciating the reasonableness inquiry, the court considered the sex of the victim a significant consideration: "The objective standard asks whether a reasonable person of Robinson's sex, that is, a reasonable woman, would perceive that an abusive working environment has been created."[76] This standard is not dissimilar from that articulated in *Ellison.* The court here, however, further emphasized that, at least in sexual harassment cases, the reasonable person test must take sex into account.

To determine whether a reasonable woman would consider the working

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68. 760 F. Supp. 1486.

69. *Robinson*, 760 F. Supp. at 1486.

70. The shipyards' annual report of 1986 indicated that, at the time, there were six women and 846 men who worked as skilled craftworkers at the company. *Id.* at 1493.

71. *Id.* at 1498.

72. *Id.* at 1495-96. The court described the content of some of these images in its findings of fact. Two typically offensive images included one of a nude black woman, pubic area exposed to reveal her labia, seen in the public locker room, and the other, a picture of a woman's pubic area with a meat spatula pressed on it, observed on a wall next to the sheetmetal shop. *Id.* at 1495.

73. *Id.* at 1495-1496.

74. *Id.*at 1499.

75. *Id.* at 1539.

76. *Id.* at 1524.

environment of the shipyards abusive, the court turned to the testimony of two experts: Dr. Susan Fiske and K.C. Wagner. Dr. Fiske testified on the subject of sexual stereotyping and its manifestation at the Jacksonville shipyards.[77] She defined sexual stereotyping as a process of perceiving people as divided into groups, maximizing the differences among groups and minimizing the differences within groups.[78] This categorization leads to an in-group/out-group phenomenon and can produce discriminatory results in employment settings when a person in that job setting judges another person based on some "group" quality unrelated to job performance.[79] Thus, when a female employee is evaluated in terms of characteristics that comport with stereotypes assigned to women, she may be evaluated poorly if she does not conform to those stereotypes regardless of how competently she performs her job.[80]

Fiske identified four preconditions that tend to encourage stereotyping in the workplace: (1) rarity, when an individual's group is small in number in comparison to its contrasting group; (2) priming, the process in which specific stimuli in the work environment prime certain categories for the application of stereotypical thinking; (3) the nature of the power structure in the workplace; and (4) the ambience of the work environment.[81] Fiske found the shipyards to be rife with sexual stereotyping. She described it as a "sex role spillover, where the evaluation of women employees by their coworkers and supervisors [took] place in terms of the sexuality of the women and their worth as sex objects rather than their merit as craft workers."[82] Fiske found that the nude photographs and sexual slurs were stimuli that encouraged a significant portion of the men at the shipyards to view and interact with their female coworkers as if those women were sex objects.[83] Furthermore, she pointed out that the group affected by the sexualized work environment were women and those who decided how to handle their grievances were men.[84] The in-group/out-group phenomenon diminished the impact of the women's concerns.[85] Supervisors tolerated unprofessional conduct that promoted the stereotyping of women in terms of their status as sex objects.[86]

K.C. Wagner testified as to common patterns and responses to sexual

77. *Id.* at 1502-1505.
78. *Id.* at 1502.
79. *Id.*
80. *Id.* at 1502-1503.
81. *Id.* at 1502.
82. *Id.* at 1503.
83. *Id.* at 1504.
84. *Id.*
85. *Id.*
86. *Id.*

harassment.[87] She explained that how women respond to sexual harassment can differ depending on the woman's individual personality, the type of incident and the woman's expectation as to whether the situation will be resolved.[88] Typical coping methods include: (1) denying the impact of the event and blocking it out; (2) avoiding the workplace harasser; (3) confronting the harasser; (4) engaging in joking or other banter in the language of the workplace to defuse the situation; and (5) making a formal complaint.[89] According to Wagner, victims of harassment rarely make formal complaints because they fear that it will cause the problem to escalate or the harasser to retaliate.[90] As for the effects of harassment, Wagner cited studies conducted by the American Psychiatric Association to articulate the documented emotional and physical stress victims of harassment often suffer.[91] She also relied on her own experiences and survey research to explain how men and women perceive harassment differently. She found that male co-workers often fail to see harassment in their own behavior because they falsely believe that only supervisors can contribute to a hostile work environment.[92] Furthermore, she found that the higher a person is in the managerial chain of command, the more likely he is to regard sexual harassment as an exaggerated problem.[93]

The court concluded that the expert testimony provided a reliable basis upon which to conclude that the cumulative and corrosive effects of the shipyard environment would affect the psychological well-being of a reasonable woman placed in those conditions."[94] The deference the court gave to the testimony of Dr. Fiske and Ms. Wagner in assessing the hostility of the work environment is significant. By relying on expert testimony, the court seemed to acknowledge that it lacked the requisite knowledge, experience and intuition by which to independently determine whether a hostile work environment existed. Thus, it implemented the reasonable person/woman test in a manner similar to the courts' application of the reasonable person test in cases where expert testimony is required.

As exemplified by the *Robinson* case, the introduction of expert testimony in sexual harassment cases should become standard practice. Continued empirical work and documentation on the cause and effect of hostile work environment harassment would encourage the judiciary to more freely admit

87. *Id.* at 1505-1507.
88. *Id.* at 1506.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 1524.

expert testimony. Indeed, the Supreme Court has acknowledged the appropriateness of such testimony. In *Price Waterhouse v. Hopkins*,[95] the Supreme Court relied on the testimony of Dr. Fiske to conclude that sex stereotyping is a form of sex discrimination.[96]

Although the Supreme Court has not explicitly sanctioned a gender-conscious reasonableness inquiry, an inquiry of this nature is appropriate, as sexual harassment is a gender-conscious offense. Sexual harassment, when ignored and even condoned, perpetuates the inequities of a patriarchal society. It relegates women to a subordinate position, labels them sex objects, disregards their merit as workers and is, therefore, disruptive and potentially psychologically damaging. Since sexual harassment is an offense that is made possible by traditional patterns of socialization, the reasonableness inquiry must recognize the placement of the victim of harassment within the power structure of society. Therefore, expert testimony needs to assess and examine the social context in which harassment exists, as well as the relegated role of the victim in society.

The presentation of expert testimony should become a standard practice in sexual harassment cases and should be utilized regardless of whether the presiding judge is a man or a woman. Although a female judge may have a more intuitive understanding of the deleterious and injurious effects of workplace harassment on the advancement of women, expert testimony should, nonetheless, be relied upon to inform the considerations of both judge and jury. Regular use of expert testimony will better educate the public about the widespread problem of sexual harassment and its undermining effect on female workers, thereby making greater strides to alter (or correct) social norms. Furthermore, an adjudication that requires an objective inquiry will be resolved in a more just and equitable manner if the final judgment is grounded in quantitative and qualitative evidence based on fact rather than on an individual judge's personal characterization of an alleged offense.[97]

In establishing the framework from which to implement the reasonableness inquiry, the experts must articulate the variation in experiences and perspectives between and among men and women. When appropriate, these characterizations should be linked to the relevant social construction that generates the differences. In doing so, the experts need not banish all traces of biological influences. Where biology is a justifiable factor, it can be

95. 490 U.S. 228 (1989).

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

97. Although the use of expert testimony has been advocated for in this article as a method of transcending personal biases, the implementation of the reasonable woman standard is not limited to the use of expert testimony alone. For example, the reasonable woman standard may also entail the use of jury instructions.

acknowledged. However, where biology is influenced or amplified by social constructs, explanatory testimony must be provided.[98] Furthermore, the differences among women must be explored and assessed. As pointed out earlier, people's attitude towards sexual harassment is shaped by their sense of security in the workplace and the construction of their own sexuality.[99] These factors differ among women and are likely to be influenced by the race, ethnicity, religion, and/or sexual orientation of the woman. These factors must be incorporated within the reasonableness inquiry.

The reasonable person/woman test advocated in this paper requires both the consideration of the commonalities between women and the source of differences among women. As a result, the inquiry is susceptible to both an over-generalization and an over-particularization of the experiences of women. There are tactics by which to mitigate the effects of either phenomenon. The body of information collected regarding the differences among women should be used as the factual base from which to draw generalizations about women.[100] Although this does not completely avoid the problem of essentialism, it is likely to diminish the disparities of power.[101] The generalizations agreed upon will reflect a range of experiences of women, and not just the experiences of a small, privileged group of women.[102]

Since it will be impossible to account for all the differences among women in constructing a reasonable woman standard, another approach that is recommended by some feminist scholars is simply to make a categorical, normative choice about how to characterize women for litigation purposes.[103] Furthermore, dismantling the societal preconceptions that perpetuate the existence of sexual harassment need not only take place within the context of litigation. The most effective solution may be to implement policies and practices within companies to sensitize employees to the nature and effects of harassment. Toni Lester recommends that companies address sexual harassment by promulgating a policy statement that explicitly describes examples of harassment, penalties that will be applied to offenders and the grievance procedure available to victims.[104] Additionally, educational programs that rely on narrative strategies and expose male employees to women's accounts of their experiences of sexual harassment might produce greater flexibility and sensitivity by highlighting the variety of women's

98. Abrams, *supra* note 58, at 1038.
99. *See supra* note 66 and accompanying text.
100. Abrams, *supra* note 58, at 1038.
101. *Id.* at 1039.
102. *Id.*
103. *Id. See also* Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation,* 1 TEX. J. WOMEN & L. 95 (1992).
104. Lester, *supra* note 21, at 261-262.

perceptions and experiences.[105]

Even though the reasonableness standard argued for in this paper has been labeled the "reasonable woman test," it is, in some sense, a correct application of a reasonable person or reasonable victim standard. These latter tests advise the courts to judge a situation or event in light of the "totality of the circumstances." For the inquiry to be fully probative, the circumstances of the victim must be included within the totality. Therefore, if the victim is a woman, this fact should be incorporated into the reasonable person/victim inquiry. It may, however, be preferable as a matter of semantics, to maintain the label "reasonable woman standard" in the realm of hostile work environment harassment. It acknowledges the fact and reminds the court that the victims of harassment are overwhelmingly women and that in the hierarchical structure of society, women have not achieved parity. As a result, it will force (male) judges to make a more probing inquiry and thus avoid decisions influenced by their personal biases.

The reasonableness inquiry argued for here is not inconsistent with the existing precedent regarding hostile work environment harassment. In *Harris v. Forklift Systems*,[106] the Supreme Court held that the reasonableness inquiry in hostile work environment harassment requires both a subjective and objective examination.[107] The subjective standard is satisfied if the victim of the harassment subjectively perceives the conduct to be abusive.[108] The objective standard is satisfied if the environment is one that a reasonable person would find hostile or abusive.[109] The Court explains that the only way to determine if a hostile environment exists is by looking at all the circumstances, which "*may* include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[110] This is not at exhaustive list. It can accommodate the reasonable woman standard introduced here. Furthermore, incorporating the reasonable woman standard will clarify and add certainty to the reasonable person standard enunciated in *Harris* that Justice Scalia criticized as "vague" and "add[ing] little certitude."[111]

105. Abrams, *supra* note 58, at 1039.
106. 510 U.S. 17 (1993).
107. Harris v. Forklift Sys. Inc., 510 U.S. 17, 21-22 (1993).
108. *Harris*, 510 U.S. at 21-22.
109. *Id.* at 21.
110. *Id.* at 23.
111. *Id.* at 24 (Scalia, J., concurring).

IV. RACIAL HARASSMENT – REASONABLENESS STANDARDS

A. The Reasonable Person Standard

As in cases premised on sexual harassment, judges dealing with racial harassment have also been confronted with the task of choosing the appropriate reasonableness inquiry to inform their analyses. Courts must decide whether the existence of an abusive work environment should be objectively judged from the perspective of a race-blind reasonable person or a race-conscious reasonable person. The race-blind reasonable person standard has been criticized as representing only the majoritarian view. [112] Sarah McLean asserts that ways of looking at what is and what is not reasonable inevitably derive from the point of view of those who dominate law-making in a given society.[113] Therefore, it should come as no surprise that the reasonable person test as applied to cases of racial harassment is prone to accommodate the white male viewpoint, leaving the perspectives of minorities unrecognized and ignored.

Scholars, however, contend that when assessing sufficient levels of harassment, the question of perspective is vital in recognizing the distinct experiences of black and white Americans and in effectuating the goals of employment discrimination law.[114] It is argued that differences in the perspectives of minorities and non-minorities stem from their differences in experience.[115] Those who have long-suffered the indignities of racial animus are likely to view incidents of discriminatory conduct differently than those who have never been victims of racial bias.[116]

The choice of perspective is also related to the goal sought to be achieved. If the aim of Title VII is to protect prevailing workplace norms and make unlawful only that conduct that all persons (both black and white) find offensive, then a race-neutral test is the appropriate standard.[117] Alternatively, if the goal of employment discrimination law is to challenge prevailing workplace norms by revealing that conduct considered common or trivial to some is actually profoundly harmful to others, then a race-conscious test

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112. Tam B. Tran, *Title VII Hostile Work Environment: A Different Perspective*, 9 J. CONTEMP. LEGAL ISSUES 357, 368 (1998).

113. Sarah McLean, *Harassment in the Workplace: When Will the Reactions of Ethnic Minorities and Women be Considered Reasonable?*, 40 WASHBURN L.J. 593, 599 (2001).

114. Tran, *supra* note 112, at 368.

115. McLean, *supra* note 113, at 608.

116. Tran, *supra* note 112, at 368.

117. L. Camille Herbert, *Analogizing Race and Sex Workplace Harassment*, 58 OHIO ST. L.J. 819, 858 (1997).

should be employed.[118] As will be demonstrated below, the choice of perspective is often outcome-determinative.

Courts that have employed the race-neutral reasonableness standard have trivialized the experiences of African Americans, thus producing inequitable and unjust results. In *Davis v. Monsanto Chemical Co.*,[119] two African American males brought a hostile work environment claim in response to considerably severe discriminatory conduct at the factory for which they worked.[120] The evidence cited by the plaintiffs in support of their allegation of a discriminatory environment was considerable.[121] Racially offensive graffiti was scribbled on the restroom walls.[122] A training poster depicting the plight of an inept worker was shaded to represent a black person and labeled with plaintiff Davis' name.[123] A co-worker spit on and partially erased Davis' time card.[124] Racial epithets were commonly used in conversations and white employees refused to eat lunch with black employees and refused to shower in the stalls that black workers used.[125] Despite the seeming severity of this conduct, the court concluded that it did not rise to the level of actionable racial harassment.[126]

Relying on *Rabidue*,[127] the court explained that offensive terms and posters do not make out a Title VII claim if they merely reflect the pre-existing attitudes of the factory workers.[128] Speaking for the majority, Judge Cohn stated that "it is not the function of the courts to pass upon the morality or appropriateness of conduct in the workplace but only to assess whether the proofs establish an environment of conduct that rises to a level that meets the standards of the statute."[129] The court then concluded that the alleged racial graffiti and insulting poster fell "squarely within the holding of *Rabidue*, where offensive language and posters were found in a factory environment not to constitute a violation of Title VII."[130]

Similarly, the court flippantly dispatched the allegation that the workers' expressed and manifested personal racial biases constituted an abusive work

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118. *Id.*
119. 1987 U.S. Dist. LEXIS 15759 (E.D. Mich. 1987).
120. Davis v. Monsanto Chem. Co., No. 85-LU-74031, 1987 U.S. Dist. LEXIS 15759, *2 (E.D. Mich. May 6, 1987).
121. *Davis*, 1987 U.S. Dist. LEXIS 15759 at *10 - *14.
122. *Id.* at *10.
123. *Id.* at *11.
124. *Id.* at *12.
125. *Id.* at *13.
126. *Id.* at *14.
127. *Rabidue*, 805 F.2d at 624.
128. *Davis*, 1987 U.S. Dist. LEXIS 15759, at *9.
129. *Id.* at *9 -*10.
130. *Id.* at *11.

environment. It found it significant that the racial slurs used by the workers were "part of the workaday world of the factory"[131] and never directly addressed to the plaintiffs.[132] Furthermore, as in *Rabidue,* the court reasoned that the plaintiffs assumed the risk of working in a pre-existing hostile environment because they had been warned of the biases exhibited by older white workers when they were originally hired.[133] Judge Cohn explained that "the reasonable expectation of plaintiffs upon voluntarily entering that environment must further detract from the gravity of the case they describe."[134] Not even the patently racist refusal to shower in stalls blacks had used persuaded the court otherwise.[135] "The elimination of 'Archie Bunker' types from the factory environment carries Title VII too far" [136] appears to summarize the majority opinion.

The *Davis* court's analysis and reasoning is vulnerable to the same line of criticism expressed against the *Rabidue* decision in the previous section. In rejecting the racial harassment claim on the grounds that bigoted "Archie Bunker"-esque attitudes already existed at the factory upon plaintiffs' hiring is to turn Title VII and, indeed, the entire Civil Rights Act on its head. It is one thing to concede that the personal "opinions" of individuals are beyond the scope of Title VII. To extend this same protection to the manifestations of "opinions" in the form of verbally expressed racial hatred and practices of segregation in the workplace is simply preposterous. This type of anti-social behavior has an extremely intimidating effect that serves to limit the employment opportunities of African Americans, thus preventing their achievement of equality. It is exactly this scenario that Title VII seeks to remedy.

In *Vaughn v. Pool Offshore Co.*,[137] the Fifth Circuit found that rampant harassment aboard an oil rig resulted not from an environment polluted with racial discrimination, but from an "atmosphere replete with instances of humiliating acts shared by all."[138] Vaughn, an African American male, was a roustabout working and living on an oil rig in close-quarters with eleven other men.[139] He brought an abusive work environment claim against his employer based on allegations that he was referred to as "nigger," "coon" and

131. *Id.* at *9.
132. *Id.* at *13.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. 683 F.2d 922 (5th Cir. 1982).
138. Vaughn v. Pool Offshore Co., 683 F.2d 922, 924 (5th Cir. 1982).
139. *Vaughn*, 683 F.2d at 923.

"blackboy,"[140] was doused with ammonia while showering, had hot coffee poured into his back pocket, and that, during a hazing ritual, he was stripped down naked and had his genitals greased with oil.[141] A toolshed on the rig had "KKK headquarters" written across its façade.[142] Furthermore, in response to a news report about a black man that had shot several people in New Orleans, a crew member on the rig stated, "that's just like a nigger; give him a gun and he shoots anything that moves."[143]

In ruling that the elements of actionable racial harassment had not been met, the Fifth Circuit assumed a boys-will-be-boys attitude. It cited with approval the district court's conclusion that "hazing and practical joking should be viewed realistically as male interaction and not atypical of the work environment involved."[144] Since the genital-greasing hazing was frequently accorded to new offshore rig workers, the court characterized it as a "seeming rite of passage" and not racially motivated.[145] Neither was the court persuaded by the fact that the pranks and practical jokes directed at Vaughn were often accompanied by racially derogatory remarks.[146] The court found that Vaughn's own use of racial slurs and the crew members' "expressed amicable feelings towards Vaughn" negated a characterization of the rig environment as dangerously charged with racial discrimination.[147]

In rejecting the existence of harassment based in part on the plaintiff's use of racial slurs, the *Vaughn* court teeters too close to the regrettable practice in sexual harassment cases of blaming the victim. In hostile work environment claims based on sex, court decisions often turn on whether or not the victim "welcomed" or "incited" the harassing conduct. This line of reasoning is as misguided in the race context as it is in the context of sex. To reiterate, in the *Robinson* case, expert witness K.C. Wagner explained that women react to sexual harassment in a variety of ways, including to respond to the harasser with jokes or banter of a similar sexual nature in order to defuse the situation. The *Vaughn* court, however, fails to consider the possibility that the plaintiff's use of racially-charged language may have been for a similar purpose. The court's opinion does not explain the nature of or the context within which the plaintiff's alleged racial slurs were made. It does not specify to whom the comments were targeted and it completely ignores the possibility that plaintiff's racial remarks may have been provoked by the admittedly frequent

140. 683 F.2d at 924.
141. *Id.* at 923.
142. *Id.* at 924 n.2.
143. *Id.* at 924.
144. *Id.*
145. *Id.* at 923 n.1.
146. *Id.* at 925.
147. *Id.* at 924-925.

racially derogatory conduct aimed at him.[148] These considerations would have been relevant in judging the claim. The element of "welcomeness" has traditionally been absent from judicial inquiries of actionable racial harassment.[149] It would be a grave misfortune for the *Vaughn* decision to legitimize the notion that minority group members are responsible for the harassing conduct directed towards them.

B. Reasonable Black Person Standard

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role.[150] The economic survival of the American colonies was contingent upon human bondage, and Africans and later African Americans were brutalized in the slave trade. Following emancipation, lynching and the terrorism of the Ku Klux Klan were imposed on black communities to maintain white power and superiority. State-sanctioned segregation continued to perpetuate the denial to black americans of their constitutionally granted political and social rights and further exacerbated the racial divide. Even if modern society can recognize and admit that its nation's history is contaminated by its legacy of racism, it is still undeniable that this history has influenced the collective consciousness and psyche of black society in a fundamentally different way than that of white society.

As the two cases in the preceding section demonstrate, the reasonable person standard, which encompasses the viewpoint of the white male, is a gravely inadequate standard by which to judge the perceptions and experiences of racial minorities. African Americans often fear that racial slurs or jokes can develop into more dangerous and threatening racially motivated conduct.[151] This fear is warranted and understandable given the history of violence targeted at Black Americans.[152] Meanwhile, racially motivated comments and conduct commonly go unnoticed by non-target group members.[153] A great disparity exists between those who have suffered racial prejudice and those who have not experienced discrimination and are, therefore, less likely to recognize its damaging nature.[154] A race-conscious test – the reasonable black person or reasonable African American standard –

148. Herbert, *Supra* note 117, at 819, n.127.
149. *Id.* at 850.
150. McLean, *supra* note 113, at 608.
151. *Id.* at 607.
152. *Id.*
153. *Id.*
154. Tran, *supra* note 112.

considers these differences in experience and the perceptions that can be drawn from them.

Courts that have employed the reasonable black person standard have more successfully addressed the often unique perspective of African Americans and given greater force to the purpose of Title VII – to eradicate discrimination in the workplace and protect the employment opportunities of marginalized groups. In *Harris v. International Paper Co.*,[155] the plaintiffs alleging a hostile work environment were three black male mill workers who were transferred from the defendant's paper mill in Mobile, Alabama to its mill in Jay, Maine, following a strike by the unionized Maine mill workers.[156] The discrimination suffered by the plaintiffs upon entering their new place of work included verbal, visual and physical abuse.[157] The plaintiffs were invariably addressed as "lazy nigger,"[158] "black ass,"[159] "black son of a bitch,"[160] "Buckwheat,"[161] "barbecue,"[162] "watermelon man,"[163] and "porch monkey."[164] Co-workers complained about the plaintiffs' work in racial terms[165] and made comments about the stereotyped food preferences of black people.[166] White workers who were friendly to the plaintiffs were labeled "nigger lovers."[167] Racially offensive graffiti also abounded. "KKK" appeared on a steel support.[168] Other racist graffiti, such as "Buckwheat,"[169] "black sucks"[170] and "nigger go back south" was written in the bathrooms used by both workers and supervisors.[171] Plaintiff Minor was given a mock express ticket to Africa containing a derogatory characterization of a spear-carrying

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155. 765 F. Supp. 1509 (D. Me. 1991).

156. Harris v. Int'l Paper Co., 765 F. Supp. 1509, 1516 (D. Me. 1991). Although the plaintiffs sued under the Maine Human Rights Act (MHRA), the court noted that the MHRA is the state analogue to Title VII and that federal anti-discrimination precedent would guide its analysis. *Id.* at 1511-12.

157. *Harris*, 765 F. Supp. at 1516-1521.

158. 765 F. Supp. at 1517.

159. *Id.* at 1518.

160. *Id.* at 1517.

161. *Id.* at 1518.

162. *Id.* at 1519.

163. *Id.* at 1518.

164. *Id.* at 1519.

165. *Id.* at 1517.

166. *Id.* at 1519-1520. The following are examples of other racist comments or "jokes" to which the plaintiffs were exposed:

"What's the hardest thing on a black man? The third grade."

"What did God say when he made the first black man? Oh, I burned one."

"How do you find a black person? You have to see if they smile."

"Why do black people keep their children inside? They don't want the cat to bury the kids in the yard because they are the color of shit." *Id.* at n. 25.

167. *Id.* at 1520.

168. *Id.* at 1518.

169. *Id.* at 1519.

170. *Id.*

171. *Id.* at 1518.

black man.[172] The plaintiffs were also confronted with more overtly threatening behavior. On more than one occasion, their work was sabotaged.[173] Two co-workers dressed in white suits and white hats, "pranc[ed]" around Plaintiff Harris at his workstation.[174] Another co-worker donned a white cone-shaped hat and attempted to push plaintiff Pugh toward a repulping machine.[175] Even more shocking, a co-worker yelled "you fucking nigger" at plaintiff Minor, picked up a sledge hammer and grabbed him around the neck.[176] On another occasion, this same co-worker again yelled "you fucking nigger" at Minor and pushed him on the catwalk between a pulper (comprised of steel blades) and a calendar stack (made up of steel pressing rolls).[177]

The court found for the plaintiffs.[178] Relying on Title VII jurisprudence, Judge Carter articulated the well-settled principle that for racial harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment.[179] In implementing this analysis, the court relied on a reasonable black person standard.[180] It stated that "[t]o give full force to [the] basic premise of antidiscrimination law ... 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 white Americans and black Americans."[181] The court relied on and quoted from a significant body of scholarly works in discussing the different manners blacks and whites respond to racial harassment.[182] It pointed to the existence of a society ingrained with cultural and race-based stereotypes as the source of negative racial attitudes in America.[183] The results of these often unconsciously held racial prejudices, the court argued, are racial incidents that blacks interpret as manifestations of intense racism or preludes to violence that whites consider to be nothing more than isolated and non-threatening pranks.[184] "Even an inadvertent racial slight unnoticed either by its white speaker or white bystanders will reverberate in

172. *Id. at* 1521.
173. *Id.* at 1517.
174. *Id.* at 1518. The court found the reference to the KKK unmistakable. *Id.*
175. *Id.* at 1519.
176. *Id.* at 1520.
177. *Id.*
178. *Id.* at 1522.
179. *Id.* at 1513. (quoting Meritor Savings Bank v. Vinson 477 U.S. 57, 67 (1986)).
180. *Id.* at 1516.
181. *Id.* at 1515.
182. *Id.* at 1515-1516.
183. *Id.* at 1515.
184. *Id.* at 1516.

the memory of its black victim," Judge Carter noted.[185] Finally, the court concluded that since the concern of Title VII is to redress the effect of conduct and speech on their victims, "the fact finder must walk a mile in the victim's shoes to understand those effects and how they should be remedied."[186]

In *Williams v. New York City Housing Authority*,[187] the Southern District of New York also applied a reasonable black person standard in upholding a claim of hostile work environment harassment.[188] Although the United States Supreme Court stated that a single racist epithet will rarely meet the requisite standard of unwelcomeness and pervasiveness,[189] the *Williams* Court found that the single act of prominently suspending a hangman's noose in the workplace was sufficiently severe to constitute a claim.[190] The court referred to sociological studies, statistical studies and scholarly articles to inform its discussion on the significance of the hangman's noose to black culture. It explained that after the abolition of slavery, lynchings were employed by whites to reaffirm their mastery over blacks and to prevent blacks from expanding beyond the established contours of their subordination.[191] The hangman's noose, the court asserted, is the most repugnant of all racist symbols because it is itself an instrument of violence.[192] In order to fully appreciate its intimidatory impact on the black viewer, the hangman's noose must be understood within the context of this country's legacy of violence against African Americans.[193] The court further stated:

> The hangman's noose remains a potent and threatening symbol for African Americans, in part because the grim specter of racially motivated violence continues to manifest itself in present day hate crimes. Moreover, persistent inequality in this country resuscitates for modern African Americans many of the same insecurities felt years ago. It is for this reason that the Civil Rights Act of 1964 was enacted. The courts have a responsibility to be vigilant in enforcing the provisions of this Act to facilitate the eradication of obstacles that currently prevent African Americans from achieving equality.[194]

The implementation of a reasonable black person inquiry, as demonstrated

185. *Id.*
186. *Id.*
187. 154 F. Supp. 2d 820 (S.D.N.Y. 2001).
188. Williams v. New York City Hous. Auth., 154 F. Supp. 2d 820, 825 (S.D.N.Y. 2001).
189. *Harris*, 510 U.S. at 21.
190. *Williams*, 154 F. Supp. 2d at 825-826..
191. *Id.* at 825..
192. *Id.*
193. Id.
194. *Id.*

by the courts in the District of Maine and Southern District of New York, acknowledges the experiential differences of different racial groups and makes real progress in the struggle for racial equality. Verbal abuse, physical intimidation and fear-provoking use of symbols were found to be egregious acts.

The reasonable black person standard is, however, vulnerable to attack. Potential criticisms will fall into the same pattern as those targeted at the reasonable woman standard. It could be argued that the experiential and intuitive deficiencies of white judges will prevent them from "standing in the shoes" of a black victim in analyzing the severity of racial harassment. However, in reality this "deficiency," unlike in the context of sexual harassment, may actually be a benefit because it will enhance judges' objectivity. It is likely that the white judge presiding over a racial discrimination case, with his privileged lifestyle and private-school education, has never come into meaningful contact with members of the black community. On the other hand, he has interacted with women every day of his life. The white male judge is less likely to identify with the racial harasser than the sexual harasser and, therefore, is less likely to find a need to justify the harassing conduct.

There is also the risk 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.[195] This danger, however, would be mitigated by the appropriate application of the reasonable black person standard by decisionmakers sensitive to the special experiences of minorities with respect to workplace harassment.[196] As previously discussed in reference to the reasonable woman standard, the use of expert testimony could be paramount in this regard. This practice was evidently employed in the *Harris* and *Williams* decisions with great success. Both opinions frequently cited scholarly works and statistical and sociological studies to inform their analyses and buttress their conclusions.

Another potential problem is that the reasonable black person standard will falsely essentialize the experience and perceptions of African Americans. It has already been discussed how the reasonable woman standard, as presently applied, ignores the experiences of black women. That the reasonable black person standard is vulnerable to the same criticism is the subject of the next section of this article.

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

196. Herbert, *supra* note 117, at 859.

V. A SPECIAL PROBLEM: WHAT DO YOU DO WHEN THE PLAINTIFF IS A BLACK WOMAN?

A. Discrimination Targeted at Black Women

Black women are not only vulnerable to race discrimination and sex discrimination, but are susceptible to a combination of both. The two forms of discrimination, however, do not combine merely quantitatively to make the burdens of black women twice as severe as those suffered by white women or black men. It would be misleading to assert that black women share the same experiences as white women with only an additional burden of belonging to a racial minority. Likewise, black women do not simply suffer the same obstacles as black men with the added hindrance of belonging to the more vulnerable gender. Rather, the sex and race discrimination targeted at black women work in tandem to create a level of discrimination that is both quantitatively and qualitatively different and exponentially more severe in its degree of harm than that suffered by either white women or black men.[197] This unique form of discrimination suffered by black women stems from, at least in part, a unique history of racial and sexual abuse as well as from the continued existence of negative stereotypes created and perpetuated by a white patriarchy to maintain its dominance and perceived superiority in a changing society.

During slavery, the sexual abuse of black women by their white male owners was rampant. Indeed, the rape of slave-women was an institutionalized aspect of slavery that was essential to its continuation.[198] The forced sexual access to black women was justified and rationalized by the myth that black women were sexually voracious and indiscriminate.[199] It was a commonly held belief that black women copulated with animals.[200] Consistent with the myth of black women's rampant promiscuity, both white men and white women accused black women of inviting the sexual and physical abuses they suffered.[201]

The stereotypes that justified the sexual abuse of black women in the past

197. Kimberle Crenshaw, *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings: Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1468 (1992).

198. *Id.* at 1469.

199. *Id.*

200. *Id.* Crenshaw states that it was common belief that black women would and did have sex with apes and monkeys.

201. Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775, 785 (1991).

remain an influential force in current society.[202] Kimberle Crenshaw argues that the continuing myth of black female promiscuity has influenced how black women are treated in the workplace by their co-workers and supervisors, in the legal system by judges and jurors, and in popular culture by screenwriters and directors.[203] Crenshaw points out that in sexual harassment cases in which black women are plaintiffs, conduct directed toward them often represents a merging of racist myths with their vulnerability as women.[204] Insults that are sometimes directed at any woman, such as "cunt" or "beaver" are prefaced with "nigger" or "jungle" when the victim of the harassment is black.[205] Thus, the sexual harassment becomes racialized or, conversely, the racial harassment becomes sexualized.

In the judicial context, Crenshaw argues, the stereotypes of black women influence the perceived credibility of black female plaintiffs and the objectionability of crimes targeted against them.[206] Historically, in our legal system, there was considered to be a direct relationship between veracity and chastity.[207] The commonly believed notion of black female promiscuity, therefore, led to the presumption that black women were not likely to testify truthfully.[208] This skepticism as to the integrity of the black female plaintiff and/or witness, Crenshaw asserts, remains a commonly held attitude.[209] Crenshaw goes on to argue that even when black female plaintiffs are believed, myths about their sexuality influence whether the injury they suffered is considered relevant.[210] She points to studies that reveal that assailants who attack black women are less likely to receive jail time than those who assault white women.[211] Furthermore, when black women's assailants are jailed, the average sentence is two years, while the average sentence for white women's assailants is ten years.[212] These findings suggest that criminal behavior directed at black women is considered less objectionable than that directed at white women.

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202. Crenshaw, *supra* note 197, at 1469.
203. *Id.* at 1469-1471.
204. *Id.* at 1469.
205. *Id.*
206. *Id.* at 1470.
207. *Id.*
208. *Id.*
209. *Id.* In asserting that the credibility of black women is still questioned in present society, Crenshaw relies on a study of jurors in rape trials which revealed that black rape victims are often discredited by jurors. She quotes the comment of one juror: "You can't believe everything they [black women] say; they're known to exaggerate the truth."
210. *Id.*
211. *Id.*
212. *Id.*

Crenshaw also points to media representations of black women as a source of the perpetuation of negative stereotypes.[213] The black female prostitute is a stock character in any "gritty, 'realistic,' urban scene."[214] Crenshaw asserts that while movie portrayals of black men as criminals and white women as sex objects have been criticized as perpetuating racism and sexism, the portrayal of black women as "sexual deviants – a combination of the criminal and the sexual," has not been the subject of a similar critical debate.[215]

The negative association of black women with prostitution and its portrayal to the public is not, however, limited to the greedy world of movie-making — it is also manifested in the supposedly enlightened world of scholarship and academia. Washington and Lee University holds a mock convention every four years in which student delegates attempt to predict the presidential nominee of the political party currently out of the White House. The festivities include speeches by politicians, a presidential gala and a grand parade in which student delegates representing the various states ride through town in decorated floats. As part of the 2000 Mock Republican Convention, a t-shirt logo designed for the Idaho delegation featured a derogatory depiction of a scantily-clad black woman accompanied by the phrase "I Da Ho." The university administration responded to the Idaho logo in an appropriately indignant fashion by compelling the resignation of the part-time coach who oversaw its production. Nonetheless, it remains shocking and embarrassing that this blatantly racist and sexist depiction of a black woman was designed, approved, ordered and worn by members of the Idaho delegation until fellow university students protested its display.

As the above discussion demonstrates, racial and sexual oppression and negative stereotyping of black women result in forms of racial and sexual discrimination that are unique to black women. The color of a black woman's skin is a factor in how or why she is sexualized. Conversely, the victim's gender, as well, may be a factor that shapes the form of the racially offensive conduct directed against her.[216] The intersection of race and gender defines the experience of the black woman as fundamentally different than that of the white woman or black man. In the realm of discrimination, specifically workplace harassment, the intersectional experience is greater than the sum of racism and sexism. The judicial analysis used in hostile work environment cases, however, fails to take this intersectionality into account and, therefore, fails to address the particular manner in which black women are subordinated.

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213. *Id.* at 1471.
214. *Id.*
215. *Id.*
216. Tran, *supra* note 112, at 372.

B. Judicial Treatment of Discrimination Based on Race and Sex

In most jurisdictions, the law characterizes workplace harassment as either entirely race-based or gender-based, but not a combination of both. Therefore, when a black female plaintiff brings a Title VII claim, she must decide whether to sue under either race or sex discrimination.[217] Crenshaw describes this decision as putting black women between "rocks and hard places" — between racism and sexism — because it requires them to deny one dimension of their reality that is intricately tied to another.[218] Working women who are racial minorities are discriminated against precisely because they are women of color. The either/or approach of judicial analysis forces these victims to separate aspects of their identity that cannot, in fact, be separated. The rocks and hard places that prevent black women from fully articulating their experiences, according to Crenshaw, however, are not simply racism and sexism, but also the "oppositional politics of mainstream feminism and antiracism."[219] She asserts that "[b]ecause each movement focuses on gender or race exclusive of the other, issues reflecting the intersections of race and gender are alien to both movements. Consequently, although Black women are formally constituents of both, their intersectional interests are addressed by neither."[220]

Likewise, since the reasonable woman standard adopted by some courts is a product of mainstream feminism and the reasonable black person standard arose from the advocacy of mainstream anti-racism groups, both of these standards are also vulnerable to the criticism that they fail to accommodate the intersectional aspects of racism and sexism experienced by black women. This intersection, however, will not be accounted for simply by promulgating a reasonable black woman standard (though such a standard, indeed, should be adopted).

In order to fully appreciate and recognize the combined form of race and sex discrimination targeted at black women there needs to be a hybrid harassment *claim* that does not consider racism exclusive of sexism or vice versa. Under this proposed solution, a black female plaintiff can prevail without fully satisfying the elements of either a traditional racial harassment claim or sexual harassment claim. She prevails if she alleges incidents that rise to an actionable level of a compound form of race and sex discrimination.

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217. She may also sue under both race and sex discrimination, but must establish the elements of each discrimination separately in order to prevail on both claims.

218. Crenshaw, *supra* note 197, at 1468.

219. *Id.*

220. *Id.*

The pervasiveness and severity of this combined discrimination must then be viewed in light of the intersectional aspect of race and gender and, therefore, from the perspective of a reasonable black woman.

The proposal to allow black female plaintiffs to bring a hybrid claim of race and sex discrimination has met with mixed results in the courts. The opinion in *DeGraffenreid v. General Motors Assembly Division*[221] demonstrates that some courts refuse to recognize that the discrimination black women suffer emanates from the intersection of racism and sexism.[222] In *DeGraffenreid,* five black female plaintiffs brought a disparate treatment claim against GM, alleging that its seniority system perpetuated the past effects of discrimination against black women.[223] As a result of not hiring black women before the passage of the Civil Rights Act of 1964, all of GM's black female employees hired after 1970 lost their jobs in a seniority-based layoff during an economic downturn.[224] Speaking for the majority, Judge Wangelin refused to allow the plaintiffs to bring the claim specifically on behalf of black women.[225] The court stated:

> The plaintiffs allege that they are suing on behalf of black women, and that therefore this lawsuit attempts to combine two causes of action into a new special sub-category, mainly a combination of racial and sex-based discrimination. The plaintiffs are clearly entitled to a remedy if they have been discriminated against. However, they should not be allowed to combine statutory remedies to create a new 'super-remedy' which would give them relief beyond what the drafters of relevant statutes intended.[226]

The court then analyzed the lawsuit to determine whether it stated a cause for either sex or race discrimination. Based on the fact that women (albeit, white women) were hired by GM before the enactment of Title VII in 1964, the court dismissed the claim of sex discrimination.[227] The court also made reference to a consent decree between GM and the EEOC entered into in 1973 with respect to the hiring of female employees as a further indication that the employment practices of GM did not discriminate on the basis of sex.[228]

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221. 413 F. Supp. 142 (E.D. Mo. 1976).
222. DeGraffenreid v. General Motors Assembly Div., 413 F. Supp. 142,142 (E.D. Mo. 1976).
223. *Id.* at 143.
224. *Id.* at 145.
225. *Id.*
226. *Id.*
227. *Id.* at 144.
228. *Id.* Alternatively, one might consider the need for a consent decree to be fairly conclusive evidence that there had been a practice of discriminating based on sex at GM before 1973. If the consent decree had in fact prompted GM to incorporate more women (black and white) into its labor force it still would not save black female employees from the last-hired first-fired policy since it was not entered into

Following the rejection of the sex discrimination claim, the court turned to consider whether the lawsuit alleged a claim for discrimination based on race.[229] The court found that the plaintiffs did indeed state a claim with regards to racial discrimination, but it dismissed the claim without prejudice.[230] To serve the "goal of judicial economy," Judge Wangelin suggested that plaintiffs consolidate their action with another lawsuit pending at the time that raised broad allegations of racial discrimination against GM employment facilities.[231] The court remained unconvinced by the plaintiffs' argument that the consolidation of the cases would defeat the purpose of their suit which was premised on a combination of race *and* sex discrimination and not on racial discrimination alone.[232] The court reasoned:

> The legislative history surrounding Title VII does not indicate that the goal of the statute was to create a new classification of "black women" who would have greater standing than, for example, a black male. The prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box.[233]

This statement implies that when enacting Title VII, Congress either did not contemplate that black women would be discriminated against as "black women" or that it did not intend to protect them when such discrimination occurred.[234] Thus, the *DeGraffenreid* court's refusal to acknowledge the intersection of racism and sexism, despite the obvious disparate impact of the last-hired first-fired policy on GM's black female workers, indicates that sexual discrimination is defined solely by the experiences of white women and that racial discrimination is confined to the experiences of black men.[235] Under this view, black women can only expect protection from discrimination to the extent that their experiences coincide with that of either group.[236]

Other courts, however, have allowed the aggregation of racial and sexual discrimination claims. In *Hicks v. Gates Rubber Co.*,[237] a black female

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until 1973.

229. *Id.* at 144-145.

230. *Id.* at 145.

231. *Id.* at 144-145.

232. *Id.* at 145.

233. *Id.*

234. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL. F. 139, 142 (1989).

235. *Id.* at 143.

236. *Id.*

237. 833 F.2d 1406 (10th Cir. 1987).

security guard brought a hostile work environment claim against her employer.[238] Incidents of racial harassment alleged by Hicks included her supervisor directing a comment at her regarding "lazy niggers and Mexicans" and his general practice of referring to African Americans as "niggers" and "coons."[239] Another security guard referred to Hicks as "buffalo butt."[240] The sexual harassment suffered by Hicks was more physical in nature. On one occasion a supervisor rubbed her thigh.[241] On another, a different supervisor touched her buttocks and said, "I'm going to get you yet."[242] A separate incident, perpetrated by this same supervisor, occurred when he grabbed Hicks' breasts, causing her to fall over, and he "got on top of her."[243]

The district court rejected Hicks' racial harassment claim due to insufficient proof of inappropriate racial conduct and denied the sexual harassment claim on the basis that the element of *quid pro quo* harassment did not exist.[244] On appeal, the Tenth Circuit upheld the rejection of the racial harassment claim.[245] Speaking for the majority, Chief Judge Holloway stated that to establish a hostile work environment claim based on race, the plaintiff must allege more than a few isolated incidents of racial animus.[246] The evidence of racial hostility introduced by Hicks could not be characterized as a steady barrage of objectionable comments but as merely occasional and incidental.[247]

The Tenth Circuit did, however, remand the sexual harassment claim for reconsideration. It criticized the lower court for assuming that Hicks had to demonstrate *quid pro quo* harassment in order to state a claim of discrimination based on sex, and instructed the district court to analyze the "unwarranted touching. . . and familiarities" to which Hicks was subjected in the context of a hostile work environment claim.[248] Furthermore, the Court of Appeals also directed the District Court to consider the racial slurs used in the workplace and targeted at Hicks in its determination of whether there was a sufficiently pervasive discriminatory atmosphere.[249] Judge Holloway justified this instruction by explaining that harassment does not have to be sexual in

238. Hicks v. Gates Rubber Co., 833 F.2d 1406, 1408 (10th Cir. 1987).
239. *Hick*, 833 F.2d at 1409.
240. *Id.*
241. *Id.*
242. *Id.* at 1410.
243. *Id.*
244. *Id.* at 1412.
245. *Id.*
246. *Id.*
247. *Id.* at 1412-1413.
248. *Id.* at 1414.
249. *Id.* at 1416.

nature to be considered sexual harassment.[250] The court asserted that "[a]ny harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII."[251]

Although the *Hicks* court did not explicitly recognize a hybrid sexual/racial harassment claim, it did allow the plaintiff on remand to buttress her claim of hostile work environment harassment based on sex with the incidents of racial discrimination she suffered. Why the court decided to frame the incidents of racial harassment within a sex discrimination claim rather than including the sexual harassment in a race discrimination claim is not clear. Indeed, the presumption that such sexual versus racial harassment can be so easily demarcated is itself problematic. In this vein, Judith Winston criticizes the Tenth Circuit for its inability to conceive of race as being a primary or equal basis for the hostility directed towards a black woman when the manifestation of that hostility appears sexual in nature.[252] Just because the most severe incidents of harassment directed at Hicks were sexual this does not necessarily lead to the conclusion that the discrimination she suffered was based on sex. It is just as plausible that Hicks was chosen as the target of such inappropriate conduct because of her race. More likely still, she was victimized precisely because she was both black and a woman. Under the *Hicks* approach, however, the black female plaintiff is limited to phrasing her complaint as a gender-based Title VII action.[253]

A more desirable approach was introduced by the Fifth Circuit in *Jefferies v. Harris County Community Action Ass'n*.[254] In *Jefferies,* the black female plaintiff brought a disparate treatment claim based on race and sex against her employer for failing to promote her.[255] The plaintiff was originally hired as secretary to the director of programs and later promoted to personnel interviewer.[256] She applied for several promotions to various positions but was always unsuccessful.[257] Every position she applied for was filled by either a man or a non-black female.[258]

250. *Id.* at 1415.
251. *Id.*
252. Winston, *supra* note 201 at 800.
253. *Id.*
254. 615 F.2d 1025 (5th Cir. 1980).
255. Jefferies v. Harris County Comty. Action Ass'n, 615 F.2d 1025, 1028 (5th Cir. 1980).
256. *Id.* at 1028-1029.
257. *Id.* at 1029.
258. *Id.*

The District Court addressed Jefferies' claims separately.[259] It found that no race discrimination existed because one of the employees promoted to a position Jefferies sought was a black man.[260] The District Court also dismissed the sex discrimination claim.[261] It found the evidence that sixteen out of thirty-six supervisory positions at the agency were held by women clearly demonstrated that the defendant did not discriminate based on sex in hiring or promoting decisions.[262]

The Court of Appeals arrived at a different outcome. Speaking for the majority, Judge Randall criticized the district court for failing to address Jefferies' claim of discrimination based on a combination of race and sex and held that discrimination against black females can exist even in the absence of discrimination against black men or white women.[263] The court explicitly recognized black females as a "distinct, protected subgroup" for the purposes of Title VII.[264] It found support for its holding in the actual statutory language and legislative history of Title VII.[265] The court explained that Title VII provides a remedy to employees who are discriminated against on the basis of their "race, color, religion, sex, or national origin."[266] Judge Randall focused on the use of the word "or" as evidence of Congress' intent to prohibit employment discrimination based on any or all of the listed characteristics.[267] The court also referred to the legislative history of the Act to bolster its argument.[268] It noted that the House of Representatives' refusal to adopt an amendment which would have added the word "solely" to modify the word "sex" is further evidence that Congress did not intend to restrict the application of multiple characteristics.[269] The Fifth Circuit's most persuasive argument in support of its holding, however, seems to be grounded in simple common sense:

> Black females represent a significant percentage of the active or potentially active labor force. In the absence of a clear expression by Congress that it did not intend to provide protection against discrimination directed especially toward black women as a class separate and distinct from the class of women and the class of blacks, we cannot condone a result which leaves black

259. *Id.* at 1030-1031.
260. *Id.* at 1030.
261. *Id.*
262. *Id.* at 1030-1031.
263. *Id.* at 1032.
264. *Id.* at 1034.
265. *Id.* at 1032.
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*

> women without a viable Title VII remedy. If both black men and white women are considered to be within the same protected class as black females for purposes of [Title VII], no remedy will exist for discrimination which is directed only toward black females.[270]

The *Jefferies* court thus recognized the intersection of race and gender discrimination as a distinct and separate cause of action available to black female plaintiffs.[271] By identifying black women as a discrete class requiring a synthesized consideration of both race and sex discrimination, the Fifth Circuit has come the closest to applying the reasonable black woman standard, thereby appreciating and responding to the unique experiences and perspectives of African American women.

C. Advantages and Disadvantages of the Reasonable Black Woman Standard and the Hybrid Discrimination Claim

The implementation of the reasonable black woman standard and the hybrid claim of race and sex discrimination in the context of employment discrimination law recognizes the intersection of race and gender in the lives of minority females and will effectively redress forms of discrimination that have been practiced unchecked and unpunished for far too long. The acknowledgment of the intersectional aspects of black women's identities will not only redress the prejudice targeted at black women by the white majority, it will also reveal and redress the *intra*-racial discrimination suffered by black women at the hands of black men.

Kimberle Crenshaw presents a revealing discussion of how the sexual stereotypes and myths of black women have been incorporated into the black male psyche and therefore used as a justification for inappropriate and abusive behavior that occurs within the black community.[272] As an example, Crenshaw refers to a statement made by Orlando Patterson, a well-respected black male Harvard Professor, during the aftermath of the Clarence Thomas confirmation.[273] Professor Patterson argued that even if the testimony about Thomas's pornography-laden harassment was true, he was justified in lying about it because such conduct was acceptable to (reasonable) black women as merely a form of "down home courting."[274] Crenshaw finds this statement by Patterson to be "enlightening," not only because it reveals that a shared

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270. *Id.* at 1032-1033.
271. Winston, *supra* note 201 at 801.
272. Crenshaw, *supra* note 197 at 1471-1473.
273. *Id.* at 1472.
274. *Id.*

racial identity does not make black men more sensitive to the false stereotypes of black female sexuality, but that it also might explain why harassers of both races treat women differently on the basis of race.[275] Crenshaw explains:

> [W]hite harassers may believe that certain behavior is acceptable to Black women because "they" are different, while Black harassers may believe that certain behavior is acceptable because "we" are different.[276]

What is most troubling to Crenshaw about the Patterson statement is that it manipulates and subverts the axiom of "cultural difference" to validate the hostile and abusive workplace harassment of black women when it is perpetrated by members of the same race.[277]

The hybrid claim, with its acknowledgement of the intersection of race and gender, will challenge the reliance on this purported "cultural difference" as a justification for inappropriate conduct perpetrated by men of any race. Discussions of false stereotypes and their origins will dispel the myth of black female promiscuity and make strides in guaranteeing that African American women are accorded greater dignity by all.

The contention that instances of alleged employment discrimination should be viewed from the unique perspective of black women (when the plaintiff is an African American female) has been the subject of some criticism. Mary Ann Weiss criticizes this standard as effectively eliminating the objective component of the workplace harassment analysis because it takes the personal dimensions of the victim into account.[278] Taken to the extreme, if every distinctive characteristic of the victim is considered, the standard will become completely individualized.[279] This criticism is without merit because the application of the reasonable black woman standard will be limited to analyses of race and gender – not every distinctive characteristic an individual can lay claim to. Furthermore, the standard will represent only a consensus view of the race and gender group, articulated and explained by experts, to which the plaintiff belongs. The standard will not take into account the individualized characteristics of the plaintiff. As discussed in the context of the reasonable woman and reasonable black person standards, a structured and consistent methodology to apply the reasonable black woman standard can

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275. *Id.* at 1471.

276. *Id.*

277. *Id.* at 1472.

278. Mary Ann Weiss, *Ninth Circuit Broadens Reasonableness Standard for Hostile Work Environment Sexual Harassment: Fuller v. City of Oakland*, 31 U.S.F. L. REV. 665, 684 (1997).

279. Deborah Zelesne, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who is the Reasonable Person?*, 38 B.C. L. REV. 861, 880 (1997).

also be achieved through the use of expert testimony and empirical research.

Another criticism is that the reasonable black woman standard will perpetuate the stereotypes of women and minorities.[280] The contention is made that such a standard will require courts to formulate and adopt certain "norms" about black women which will ultimately just maintain existing racial and sexual oppression.[281] This criticism is unwarranted because the underlying purpose of the reasonable black woman standard and the adoption of the hybrid discrimination claim is exactly to articulate and dispel the myths and negative stereotypes of black women. Furthermore, over time, as more black women bring hybrid claims, judges and juries will gain a better understanding of the sources of negative stereotypes that hinder black women. They will also become more familiar with the intersectional association of race and gender and ultimately reject the stereotypical "norms" that have hindered the advancement of minority women.[282]

VI. CONCLUSION

This article has argued for the specific adoption of three reasonableness standards to be used in the analysis of Title VII hostile work environment claims: (1) the reasonable woman standard; (2) the reasonable black person standard; and (3) the reasonable black woman standard. In the context of the reasonable black woman standard, this article has also argued for the adoption of a hybrid discrimination claim that accounts for the combination of racial and sexual hostility experienced by black women. The reasonableness inquiries and forms of hybrid discrimination actions used in Title VII analyses need not, however, be limited to the specific recommendations set forth in this paper. The unique perspectives of other groups should also be incorporated into reasonable victim inquiries. So too, should the intersectional aspects of certain characteristics be considered relevant when analyzing the employment discrimination claims of other protected minorities. For example, in some circumstances a reasonable Black Muslim standard may be appropriate. Accompanying this inquiry should be an analysis of the intersection of race and religion and the unique experiences of and perceptions about Black Muslims in America. Along this vein, a similar analysis may be appropriate for Arab Muslims. This is especially true in light of recent world events that have had the most unfortunate result of inciting baseless hostilities towards a

280. Robert Unikel, *"Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 NW. U. L. REV. 326, 366-370 (1992).

281. Zelesne, *supra* note 279, at 880.

282. Tran, *supra* note 216, at 380.

segment of the American population that coincidentally shares a common ethnic and religious background with a few violent zealots.

A skeptic may criticize this recommendation as opening the "hackneyed Pandora's box."[283] Surely, the argument goes, it will be impossible to account for all the different characteristics and experiences of American citizens in a comprehensible and systematic way. Indeed, if there were no limit to the types of characteristics that could be considered in an employment discrimination analysis, this criticism would be perfectly sound. There is, however, a limit, and it is explicitly provided for by the statutory language of Title VII. The only immutable characteristics that can be incorporated into a reasonable victim standard and hybrid harassment claim are those protected categories specifically named in Title VII: race, color, religion, sex and national origin.

One still might argue that a purely neutral reasonable person standard will be easier to understand and apply and will better maintain the distinction between the objective and subjective inquiries required in a hostile work environment analysis. This is only true to the extent that there is such a thing as a purely reasonable person standard; or that there is such a thing as objectivity. Whether or not such a neutral reasonableness standard and purely objective inquiry exist, they have certainly not been discovered by the American judiciary. Rather, as this paper has demonstrated, what is considered "reasonable" or "objective" is simply what coincides with the majoritarian point of view. And as long as a white patriarchy continues in power, the perspective of white men will be privileged as "objective reasonableness." Once, therefore, it is acknowledged that no reasonableness standard will ever be truly objective and the existence of a slight bias in an objective reasonableness inquiry is inevitable, a value judgment must be made as to whom the bias should favor — those who are least likely to need the protection of antidiscrimination laws or those who are most likely to require such protection. Title VII was not enacted to maintain the supremacy of white men in the social hierarchy. Its purpose is to redress the injustices that have been perpetrated against underrepresented minorities in this country by the white majority. Therefore, reasonableness standards that incorporate the characteristics of race, color, religion, sex and national origin into employment discrimination analyses are fundamental to the purpose of Title VII and to the ultimate goal of achieving equality.

283. *DeGraffenreid*, 413 F. Supp. at 145, *see supra* note 234 and accompanying text.