

***Carr, Before and After:
Power and Sex in Carr v Allison Gas
Turbine Division, General Motors Corp***

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Sexual harassment doctrine owes its primary theoretical impetus to the work of Catharine MacKinnon, who convincingly argued that sexual harassment is a form of sex discrimination. MacKinnon offered two different paradigms (the “difference” and the “dominance” paradigms) under which this form of discrimination could be analyzed.¹ Though she clearly preferred the latter framework, MacKinnon prudently argued that the former paradigm, too, provided sufficient resources to show that sexual harassment was a form of sex discrimination under Title VII. MacKinnon’s analysis had, and has, great power, but it did not answer absolutely every question that the law would ultimately need to resolve. This left room for judges to work out the doctrine creatively, extending the analysis to cases not entirely covered under the MacKinnon analysis.

Judge Posner’s opinion in *Carr v Allison Gas Turbine Division, General Motors Corp*,² I shall argue, is one of the most creative such extensions, establishing that harassment of a woman in the workplace can be “sexual harassment” even in the absence of any attempt to have sexual relations with the woman, or any meaningful reference to such relations, and establishing, further, that a difference of power in the workplace was part of the “facts” of such cases that any judge must recognize (an insight that lay deep in MacKinnon’s analysis, but one that previous courts had not recognized). In this Essay, I shall show the importance of Posner’s contribution in *Carr*. I shall argue, however, that the somewhat casual and undertheorized nature of his contribution made it unstable, even within the canon of his own opinions. Arriving at

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¹ See Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 106–27 (Yale 1979).

² 32 F3d 1007 (7th Cir 1994). I analyze the rhetoric of the opinion in detail in Martha C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* 104–11 (Beacon 1995), but here I focus on its legal contribution.

his analysis of *Carr* pragmatically and without explicit theoretical analysis, he lost sight of its insights in at least one subsequent case.

The word “sexual” in “sexual harassment” is multiply ambiguous, and its ambiguities have caused legal confusion. The word “racial” in “racial harassment” is also ambiguous, but in a simpler way, so it is helpful to start with the concept of racial harassment, despite the fact that it was worked out after and modeled on the doctrine of sexual harassment.

When we speak of “racial harassment,” we mean, first and foremost, harassment on the basis of race, harassment in which the fact of a person’s race leads to the person being targeted for harassing treatment, which has now been recognized as a form of racial discrimination. Usually, however, such harassment also involves the use of denigrating racial stereotypes, so it is “racial” in its typical content, as well as in its basis. The Equal Opportunity Employment Commission (EEOC) guidelines on racial harassment under Title VII focus on such cases, as does the case law. “Workers who are subjected to a higher level of criticism or who are subjected to racial or ethnic jokes, insults, graffiti, etc. may be able to establish a violation of Title VII.”³ Whether “subjected to a higher level of criticism” allows for harassment whose overt content is not racial, but whose basis is, has remained unfortunately unclear.

One can imagine instances of racial harassment in which the content is not, or not overtly, racial, in which the fact that race was the basis of the harassment could be inferred in other ways, most obviously from the facts of who is getting singled out. If, in a workplace of forty workers, three are African-American, and these three workers are all subject to degrading and intimidating jokes, threats, and other treatment that is not simply discriminatory but also harassing, it is a plausible hypothesis that the harassment is race-based, whether racial epithets and denigrating racial stereotypes are mentioned by the harassers or not. Often, such behavior will not be recognized as racial harassment, though it may possibly be recognized as racial discrimination. The difference, however, is significant, since a “hostile environment” harassment claim does not require the showing of a tangible harm in respect to one’s employment. Therefore, it seems as if there ought to be a place in the law for the recognition of a “hostile environment” with respect to race, even when racial slurs are not overtly used. This, however, has not always been the case.⁴ If a workplace ex-

³ *HR Guide to the Internet: EEO: Harassment*, online at <http://www.hr-guide.com/data/G703.htm> (visited Sept 12, 2007).

⁴ See Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine*, 7 *Yale J L & Feminism* 194, 215–16 (1995) (arguing that racial minorities usually do not succeed in a harassment claim unless they can show race-based slurs or racially insulting language).

hibits an environment that is threatening for minority employees, it seems correct to call the conduct harassment, whether or not the hostility is overtly racial in content. Some recent cases have begun to recognize this fact.⁵ Many prominent Title VII cases, however, do not sort this out, because, as in the EEOC guidelines, the analysis focuses on conduct involving racial slurs or stereotypes.⁶

“Sexual harassment” is ambiguous in this way, but in a further way as well. Like “racial,” “sexual” can refer either to the ground or basis of the harassment (the employee is being harassed because she is a woman) or to its content (she is being harassed using denigrating stereotypes of women and insulting epithets about women). That is already complication enough. But here is the further problem. “Sexual” harassment is also, at least much of the time, harassment in which the content concerns sexual relations, in which the woman is being treated as a sexual object, a person available for sexual overtures and likely sexual favors, in a way that is either extortionate (*quid pro quo*) or intimidating (“hostile environment”), or both. There is no analogue to this third meaning in the case of “racial.”

Harassment might be “sexual” in both basis and content without concerning sexual relations. Let us imagine a workplace in which there are three women among forty workers, and that these women are routinely told by their supervisor that women are weak and stupid, that they really cannot manage complicated tasks, and that their proper place is in the home. This harassment is surely sex-based, and also “sexual” in its content (meaning that its content uses derogatory sex-based stereotypes), but it has little to do with sexual relations. It may well be that at some deeper level it has a lot to do with sexual relations, in the sense that men may behave that way for reasons that are intimately bound up with their desire to continue to dominate women

⁵ See, for example, *Shorter v Memphis Light, Gas & Water Co.*, 252 F Supp 2d 611, 632 (WD Tenn 2003) (“Courts must consider the totality of the circumstances in determining whether, objectively, the alleged harassment constitutes a hostile work environment.”); *Aman v Cort Furniture Rental Corp.*, 85 F3d 1074, 1083 (3d Cir 1996) (noting that “overt racial harassment is not necessary to establish a hostile environment”); *Clark v Pennsylvania*, 885 F Supp 694, 711–12 (ED Pa 1995) (noting that whether an environment is hostile must be determined by evaluating “all of the circumstances,” and that the required elements include both objective and subjective factors); *Davis v Kansas City Housing Authority*, 822 F Supp 609, 615 (WD Mo 1993) (“A working environment dominated by racial hostility and harassment constitutes a violation of Title VII, regardless of any other tangible job detriment to an employee.”). Earlier cases showing the same reasoning include *Johnson v General Motors Corp.*, 692 F Supp 1003, 1005–06 (WD Wis 1987) (recognizing that a hostile workplace can form the basis for a racial harassment claim); *Denton v International Brotherhood of Boilermakers*, 650 F Supp 1151, 1159 (D Mass 1986) (describing the plaintiff’s claims of mistreatment in the workplace as harassment).

⁶ For a typical instance from the Seventh Circuit, see *Rodgers v Western-Southern Life Insurance Co.*, 12 F3d 668, 671 (7th Cir 1993), where Rodgers cited frequent uses of the word “nigger” and other denigrating remarks of a racial nature.

sexually and to have them available as sexual objects. I find that supposition eminently plausible. Nonetheless, it is supposition, and courts should probably not be encouraged to speculate on such questions unnecessarily, if they can analyze the case using simpler and less controversial tools. Here, we can say that the women are being harassed, and that their harassment is sexual (in the content and basis senses), without reaching the question whether that harassment has anything to do with sexual relations. It is probably good for courts to stop there. The legal question is whether the women are being discriminated against, and the answer is that they are.

In all too many cases, however, the harassment of women in the workplace is “sexual” in all three senses. Its basis is the femaleness of the employee. Its content alludes to that femaleness in denigrating and/or intimidating ways. And it has all too much to do with sexual relations. In the quid pro quo type of harassment, women are being propositioned for sexual compliance in extortionate ways pertaining to their employment. In the “hostile environment” type, women are treated as available for sex, belittled as sex objects who can always be approached for sex. The unwelcomeness of the sexual overtures does not stop there. It is, all too often, as if a woman, simply by setting foot into the once all-male workplace, has invited and encouraged the male’s predatory sexual behavior. As a leading Islamic cleric in Australia recently said of unveiled women, “If you take out uncovered meat and place it outside . . . and the cats come and eat it . . . whose fault is it, the cats’ or the uncovered meat?”⁷ The fault, he continued, is with the uncovered meat. Even though Americans (and Australians) plume themselves on the supposedly advanced state of their societies’ views of women, even though they proudly denigrate this cleric from the high vantage point of their allegedly advanced societies, the daily presence of predatory sexual behavior in American workplaces tells a different story.

Because widespread views of women as sex objects had made many people think that harassment that was “sexual” in the sense of being focused on sexual relations was not harassment at all, was just normal behavior between the sexes, the offense lacked both a name and an account. Catharine MacKinnon’s *Sexual Harassment of Working Women* provided both. MacKinnon demonstrated the ubiquity of unwanted sexual overtures in the workplace, their unwelcomeness, women’s typical powerlessness in regard to them, and the many ways in which they compromise women’s equality and dignity as workers.

⁷ *Australia Fury at Cleric Comments*, BBC News (Oct 26, 2006), online at <http://news.bbc.co.uk/2/hi/asia-pacific/6086374.stm> (visited Sept 12, 2007).

The book's influential argument was that this type of behavior should be seen as a form of sex discrimination. Thus the term "sexual harassment" was used by MacKinnon, in the first instance, to designate a group of offenses that were sexual in all three of my senses: they were addressed to women on the basis of their being women; their content involved denigrating stereotypes of women and language expressing such concepts; and they involved the topic of sexual relations and women's availability as sex objects. In so many cases, the three all went together: the way women were denigrated was to be treated as "meat" for male consumption, beings whose wishes did not matter; and this denigration was a form of sex discrimination.

MacKinnon then went on to argue that there were two different ways in which we might conceptualize the discrimination involved. One time-honored way would be to think in terms of differential treatment on grounds of sex: women were being treated in a way that men in the same positions were not. Another, more novel, account was one that focused on asymmetries of power, on domination and subordination: the discrimination in question issues from and reinforces longstanding hierarchies. Such an analysis was already familiar from the treatment of race under the Equal Protection Clause,⁸ and it was not a big stretch to extend it to sex discrimination under Title VII. MacKinnon showed how both ways of approaching discrimination could still recognize the abuse involved in sexual harassment, thus bringing it under Title VII's prohibition of discrimination, but she also gave reasons to favor the second approach, as giving a deeper account of the wrong involved. Discrimination is best understood as domination, though even the less adequate analysis of discrimination as differential treatment could still recognize sexual harassment as a form of discrimination.

MacKinnon did not focus on the type of harassment that is sexual in the way that discrimination based on the idea that "a woman's place is in the home" is sexual—that is, sexual in my first and second senses, but not in my third. Her aim was to get people to recognize that a form of behavior that was widely seen as "flirting," or "eroticism," or something else innocuous and symmetrically human, was really, in the cases she carefully demarcated, discrimination and an abuse of power. The problem she set herself was to convince people that what had long been thought of as "normal" male behavior was actually discriminatory. She focused on the cases that were sexual in

⁸ See *Loving v Virginia*, 388 US 1, 10 (1967) ("[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.").

the sense of being concerned with sexual relations, because those cases were both ubiquitous and seriously misunderstood. Taking on that whole area of human bad behavior was quite enough for one book, and I see no reason to fault MacKinnon for not offering an exhaustive account of all the many ways in which men harass women in the workplace.⁹ Moreover, given that MacKinnon was trying to show that the sort of harassment that was her theme could fit the “difference” paradigm as well as the (preferred) “dominance” paradigm, she needed to focus on the role of sexual desire in order to argue that a male similarly situated would not have been similarly treated.¹⁰

As time went on, law evolved in response to MacKinnon’s forceful analysis, and this meant that it typically focused on cases in which the harassment concerned sexual relations. The EEOC guidelines also focused on these cases, cases of the “sexual” in all three of my senses: harassment involved in “unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.”¹¹ Both quid pro quo and hostile environment discrimination were analyzed using that general conceptualization.

This paradigm did not always steer legal thinking well. It made it difficult to recognize as sexual harassment the sort of case I have described, where women are targeted in a way that plainly involves the use of denigrating stereotypes of women, but in a way that makes no sexual advances and does not seem focused on sexual relations. Where a workplace exhibited both forms of harassment, even toward the same employee, the “sexual relations” paradigm led courts to disaggregate and separately consider the two distinct sorts of harassment, treating only the “sexual relations” part as harassment, and only that

⁹ Thus, although I focus on the type of case that is central to the analysis in Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L J 1683 (1998), I have no sympathy with Schultz’s attack on MacKinnon in that article. See *id.* at 1705, 1710 (characterizing MacKinnon as partially responsible for the dominant legal account of sexual harassment as requiring explicit sexual advances, an account that fails to recognize much gender-based harassment). A fairer treatment of the difficulties is provided by Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in Catharine A. MacKinnon and Reva B. Siegel, eds., *Directions in Sexual Harassment Law* 1, 8–11, 19–26 (Yale 2004) (reviewing MacKinnon’s theoretical contributions to sexual harassment law and the subsequent application and misapplication of her theories by courts).

¹⁰ See *Barnes v Costle*, 561 F.2d 983, 989 n.49 (DC Cir. 1977), where Judge Robinson agreed with the appellant that “but for her gender she would not have been importuned,” and supported that allegation with the claim that “there is no suggestion that [the] allegedly amorous supervisor is other than heterosexual.” See also discussion in Schultz, 107 Yale L J at 1703–04 (cited in note 9) (analyzing *Barnes* and arguing that “in spite of the court’s own effort to ground the decision in analysis based on gender rather than on the sexual content of the conduct, the decision equated the pursuit of heterosexual sexual relations with gender discrimination”).

¹¹ Equal Employment Opportunity Commission, *Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, as Amended; Adoption of Final Interpretive Guidelines*, 45 Fed. Reg. 74676, 74677 (1980) (amending 29 CFR § 1604.11).

part as possibly involving the creation of a “hostile environment,” while treating the non-sexual-relations part as requiring a separate discriminatory treatment claim. This severing of two aspects of an employee’s harassment was particularly unfortunate because the two aspects of the employee’s harassment had to meet different standards. In a “hostile environment” claim, it need not be shown that the harassment affected the worker’s “terms or conditions of employment,” but in a “disparate treatment” discrimination claim the employee must show “a loss of a tangible job benefit.”¹²

A case that shows this problem clearly is *King v Board of Regents of the University of Wisconsin System*,¹³ heard in the Seventh Circuit in 1990.¹⁴ (Although Judge Posner was not part of the panel that heard the case, he was involved in the en banc denial of a rehearing, joining the unanimous negative vote.) King experienced work-related harassment of two distinct types from two different supervisors. One engaged in classic “sexual relations” harassment, making suggestive comments, forcibly kissing and fondling her, and so forth. When she resisted, he falsely charged her with inappropriate use of university photocopying equipment for personal purposes. The other supervisor contributed to the hostile environment in a nonsexual way, speaking to her abusively during meetings, giving her a heavier workload and a lower salary than male employees, and sabotaging her research efforts. Although the overt content of his harassment was not sexual, it appeared to be sex-based.¹⁵

The two aspects of King’s experience were closely connected. The hostility of her work environment was shaped by both, and it seems reasonable to see the two as working together. And yet the Seventh Circuit not only held that the two claims had to be brought separately, under different rubrics, it also held that only the “sexual relations” part could be conceived of under the concept of “hostile environment”—which does not require the showing of a tangible employment harm. Moreover, the court explicitly said that the presence of heterosexual desire was necessary in order to show that harassment was “[b]ecause of her sex” within the meaning of the law.¹⁶ The other harassment would

¹² Language from *King v Board of Regents of the University of Wisconsin System*, 898 F2d 533, 537 (7th Cir 1990).

¹³ 898 F2d 533 (7th Cir 1990).

¹⁴ *Id* at 533.

¹⁵ Notice that this example is sex-based without having content that clearly involves denigrating sexual stereotypes. The basis is inferred from the fact that the only woman in the group was systematically singled out for harassing treatment.

¹⁶ *King*, 898 F2d at 539 (citation omitted). See also Schultz, 107 Yale L J at 1708 (cited in note 9). The supervisor indicated that his propositions were based on desire for King as an individual, and were therefore not “because of sex” under Title VII. See Civil Rights Act of 1964, 42

have to be adjudicated not as “hostile environment” harassment, but under the rubric of (non-harassment) “discriminatory treatment,” and King would have to show a tangible harm.¹⁷ Had the court considered the two forms of harassment as related parts of a single hostile environment, it would have been far more likely to have found in King’s favor, because the second group of actions clearly contributed to the creation of a hostile environment, whether or not they brought about a tangible employment harm. Moreover, the hostility of the environment would have been seen as far more pervasive once the two forms of conduct were examined together for the environment they created.

A related problem with the emphasis on heterosexual desire was that a core concept in MacKinnon’s original analysis, the asymmetry of power between women and men in the workplace, was widely neglected. Because courts typically accepted MacKinnon’s (reluctant) invitation to fit the “sexual relations” type of harassment into the prevailing “difference” analysis of discrimination, rather than her cogent argument that a “dominance” analysis of discrimination would be more adequate, they typically failed to recognize a feature of many, if not most, workplaces that centrally constitutes women’s vulnerability to both “sexual relations” harassment and other less overtly sexual forms.¹⁸ Thus, cases of the “sexual relations” kind were analyzed as involving unwelcome sexual attentions, without mentioning the power dynamics that are central to the operations of both this type of harassment and the other type, dynamics that constitute the key link between the two types. In both the “sexual relations” type of harassment and the less overtly sexual type, women are being intimidated and harassed because of their sex, in a way that acts out and reinforces a longstanding asymmetry of power. The focus on desire suggested, however, that what was wrong was not the woman’s lack of power but simply the fact that she did not like the man the way he liked her. It was suggested, indeed, that so long as she returned the man’s desire all would have been well—whereas by now more or less all universities have understood that such is not the case. Even reciprocated desire is dangerous when it involves an asymmetry of power, and supervisors should never proposition their supervisees even when the supervisee gives them encouragement. The early desire-based analysis, under the “difference” paradigm, did not permit this useful insight to emerge, although it at least permitted a certain type of harassment to be seen as sex discrimination.

USC § 2000e (2000). The court responded by saying that his “actions were based on her gender and motivated by his libido.”

¹⁷ For an analysis, see Schultz, 107 Yale L J at 1706–08 (cited in note 9).

¹⁸ See Siegel, *Sexual Harassment* at 17 (cited in note 9).

Finally, as we have seen, there was no shared understanding of how to conceptualize cases that were clearly “sexual” harassment in both basis and content, but that did not involve the issue of sexual relations. Such cases seemed to belong under the “hostile environment” concept, but that had not yet been recognized.

When the Supreme Court got into the act, things did not get clearer. In *Meritor Savings Bank v Vinson*,¹⁹ the facts fit the “sexual relations” paradigm like a glove. Although the facts of the sexual relationship were disputed, there was no dispute about the fact that the claim concerned unwanted pressures for sex and their role in the creation of a hostile work environment. The primary contribution of the case was the articulation of the “hostile environment” concept as a separate cause of action under Title VII.²⁰ Nothing was said, however, about the range of types of harassment that could fall under that paradigm.

*Harris v Forklift Systems, Inc*²¹ went much further, with the help of MacKinnon, who was directly involved in writing the brief. The conduct of the employer’s president was held to amount to “abusive work environment” harassment on the basis of sex, but the “sexual relations” part of the harassment was not separated from its other aspects in a way that would clarify the point at issue. The Court made it clear that “tangible effects” need not be found: the “very fact that [] discriminatory conduct [is] so severe or pervasive that it create[s]” an abusive environment is sufficient.²²

Harris encountered a variety of forms of harassment. Gender-based insults, sexual innuendos, and denigrating stereotypes of women (she was called “a dumb ass woman”) were all part of it. So too was a mock proposition that the two of them “go to the Holiday Inn to negotiate [Harris’s] raise.”²³ This sexual relations aspect was much emphasized in the case. Even though it was clearly a joke-proposition and not a “real” proposition, it put the case squarely into the “sexual relations” analysis, and no effort was therefore expended on deciding how the case might have been treated if the supervisor had made all the denigrating remarks, “dumb ass woman” and the rest, but not any explicit allusion to sexual relations. Nor does the Court get into the issue of power dynamics. It focuses on the question whether actual

¹⁹ 477 US 57, 73 (1986) (holding that “a claim of ‘hostile environment’ sex discrimination is actionable under Title VII”).

²⁰ See *id.* at 63–69, 73 (evaluating the claim of “hostile environment” and agreeing with the assertion that sexual harassment creating a hostile environment is an arbitrary barrier to gender equality in the workplace).

²¹ 510 US 17 (1993).

²² *Id.* at 22.

²³ *Id.* at 19.

psychological injury is required (saying that it is not), and lets these other interesting questions slide. Along the way, the Court does introduce some criteria for deciding whether a work environment is hostile; these criteria include the frequency of harassing behavior, its severity, and the presence or absence of physical abuse or threat.²⁴

Carr came shortly after *Harris*, but it is a light-year away in analytical terms. From the start, Posner is just not interested in the question whether the men ever sought sexual relations with Carr; indeed, it is pretty clear that they did not, and that they did not try, even in jest. The harassment, however, was both based on the femaleness of this first woman to enter the tinsmith shop and suffused with gender stereotypes. Some of these were vulgar and offensive, and in that sense had a sexual relations content; but there is no suggestion that the workers were treating Carr as available for sexual favors. What they were doing is made all too patent in Posner's detailed and damning description: they were trying to intimidate her and drive her out of the workplace.²⁵ Their attempts to urinate on her, their defacement of her worker's overalls, all this was intimidation pure and simple, both based on sex and with a sexual content, but not having anything much to do with sexual relations and certainly not prompted by "heterosexual desire."

Posner does not pause to analyze the problem that he is tackling, in bringing this type of harassment within the framework of Title VII. Indeed, to all appearances he does not see the analytical problem I have described. In recent correspondence, he has said to me that it simply never occurred to him that sexual harassment had to be about sexual relations; it seemed obvious that this was harassment, and that it was sex-based, and he experienced no difficulty analyzing it with the tools already given him. But of course what Posner did is something very bold and something new, whether he consciously articulated its newness or not. It seems quite characteristic of Posner to march up to a quagmire and simply walk right across and over it, as if on some fine tightrope of his own making, not getting dragged down because he does not bother to look down.

On the other pending issue, Posner also makes decisive progress, recognizing that the asymmetry of power in the workplace is an important element of the case. Indeed, one very unusual feature of the case is that Posner finds the lower court clearly erred on its finding of fact that Carr invited her coworkers' conduct, an error that resulted because the lower court did not include the asymmetry of power in its

²⁴ *Id.* at 23.

²⁵ *Carr*, 32 F3d at 1009–10 (describing how Carr's coworkers called her derogatory names including "whore" and "cunt," covered her work area with sexually explicit graffiti, exposed their genitalia to her, urinated in her presence, and "threw a burning cigarette at her").

account of the facts of the case.²⁶ What was at issue was Carr's occasional use of a vulgarism. General Motors claimed that this showed that she was behaving in exactly the way the men behaved: there was a symmetrical kind of prank-playing and offensive joking. The lower court accepted GM's account. Posner scoffs:

The asymmetry of positions must be considered. She was one woman; they were many men. Her use of terms like "fuck head" could not be deeply threatening, or her placing a hand on the thigh of one of her macho coworkers intimidating We have trouble *imagining* a situation in which male factory workers sexually harass a lone woman *in self-defense* as it were; yet that at root is General Motors' characterization of what happened here. It is incredible on the admitted facts.²⁷

In other words, the power asymmetry is crucial to a correct analysis of the meaning of vulgar behavior. If the vulgarism comes from the powerless, it is not intimidating; if it is from the powerful, as part of a campaign of intimidation and humiliation, it is. (A substantial part of the opinion is devoted to the contention that the appellate court's scrutiny of findings of facts should be "deferential" to the district court, "not abject."²⁸)

Notice how Posner simply gravitates to MacKinnon's "dominance" paradigm as if it is the only sensible way to look at the situation. Not for a moment does he ask how he would show that Carr suffered intimidation on account of heterosexual desire. That seems to him a red herring, as it is. What are pertinent are the power relations, which give us the meaning of gestures and words. Again, Posner does not bring his significant theoretical contribution to the reader's attention, perhaps because he is not aware of making one; he simply is saying what seems, and is, sensible. A major contribution, however, it was and is.

Carr is vintage Posner: clear-eyed common sense, little concern for the interpretive problems of other judges and the theoretical binds into which they have gotten themselves. His seat-of-the-pants style of opinion writing has great virtues. Here it permitted him to boldly go where no judge had gone before, into the very heart of sexual harassment: power, not favors; intimidation, not eroticism. But the lack of an explicit theoretical analysis, or of any critique of prior confusions, leaves the opinion isolated and somewhat vulnerable. It did not revolutionize concepts in the way that it might have had he argued it more thoroughly. Its insights percolated into the legal literature bit by bit,

²⁶ See *id.* at 1011.

²⁷ *Id.*

²⁸ See *id.* at 1008.

but often from other sources and over time. There is still lots of confusion, both in the law and in the public mind, about what “sexual harassment” includes and about what can be “hostile” in a “hostile work environment.” A crisper analysis might have dispelled that.

Worse still, the incompleteness of the opinion left the judge himself vulnerable to misunderstanding of his own achievement. The problem with case-by-case pragmatism is that one can forget one’s own insights, given that they are not set down in the form of even a concrete and low-level principle. This, I believe, is what happened in a subsequent case, *Baskerville v Culligan International Co.*²⁹

Valerie Baskerville was a secretary in the marketing department of Culligan, a manufacturer of water treatment products. Over a seven-month period, she experienced acts of harassment at the hands of her supervisor, Michael Hall. Posner enumerates the instances of conduct in a numbered list, one through nine. He concludes: “We do not think that these incidents, spread over seven months, could reasonably be thought to add up to sexual harassment.”³⁰ He then brings forth an analysis that appears to neglect the insights of *Carr*. Sexual harassment, he says, is a concept “designed to protect working women from the kind of male attentions that can make the workplace hellish for women.”³¹ He evidently means pressure having to do with sexual relations, because he now goes on to divide such pressures into two categories: the grave (assaults, nonconsensual physical contact, obscene language or gestures, etc.), and, on the other side, “the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.”³² Concluding that the supervisor’s behavior fell into the latter category—it was “distasteful to a sensitive woman,” but deeply distressing only to “a woman of Victorian delicacy”—he concludes that a harassment claim has not been established.³³

Nowhere in Posner’s analysis does he recognize the possibility of sex-based intimidation whose content and goal does not somehow involve sexual relations. He does not ask whether the case included such features. The only question he poses is, how offensive was the sexual relations content of the supervisor’s behavior?³⁴ Nowhere, moreover, does he analyze the power dynamics in the Culligan work-

²⁹ 50 F3d 428 (1995).

³⁰ *Id.* at 430.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 431.

³⁴ *Id.* at 430–31 (finding that there was no harassment because the sexual content of the supervisor’s behavior was mild and his statements were harmless enough to be “repeated on primetime television”).

place, asking how the relevant asymmetries affected the meaning of the supervisor's words and gestures. "It is a little difficult to imagine a context that would render Hall's sallies threatening or otherwise deeply disturbing," he remarks, but without considering asymmetry of male-female power as an element in the context.³⁵ (We do not even learn how many female employees there were, for example.)

I think it likely that Posner decided this case correctly, unless there are highly significant facts that his opinion has simply omitted. The buffoonish behavior of the boss did not add up to a hostile work environment, even when all the structural insights of *Carr* are brought into the picture. What is distressing, however, is to see those useful insights neglected, and to see their author revert to a pre-*Carr* mode of analysis focusing entirely on sexual overtures and the ambience they, in and of themselves, create. I believe that we see here a problem inherent in pragmatic judging: if you gain an insight in the free-wheeling way that Posner gained insight in *Carr*, such insights may be will-o'-the-wisps, and when a new case strikes you in a different mood, you may not notice that the questions of *Carr* are at least there to be posed and answered.

There is a related worry, and it brings me to a somewhat embarrassing confession. This is that the very literary qualities of Posner's judging process that I praised in my earlier analysis of *Carr* may have contributed to the deficiencies of *Baskerville*. Posner likes to tell a good story, and he is highly responsive to issues of genre. *Carr* had all the makings of tragedy, or at least melodrama. The behavior of the workers was genuinely grave, the plaintiff's suffering palpable. Posner responds with sympathy toward Carr and with indignation toward the higher-ups who did nothing in response to her complaint. His telling of the tale, in the mode of melodrama, is a large part of his argument for his legal conclusion.

Baskerville's tale is another good story, but this time the genre is low comedy. Posner's numbered list of incidents is really very funny. The supervisor's bad jokes and his idiosyncratic use of language (for some reason, he likes to refer to a woman as a "tilly") create a picture of a loutish individual who is not very threatening, just because he is made to seem a buffoon. Posner tells the tale with relish, inviting us to laugh. In the process of casting the facts into a literary form, however, he shapes them, inviting us to think them not very grave. And because power asymmetry is an issue for tragedy, not comedy, he leaves that out. We see here how a literary judge's decisions about genre, in the absence of an explicit guiding theory, can skew the characterization of

³⁵ Id at 431.

the facts, in such a way as to prevent important questions from being straightforwardly posed.

Posner is a creative thinker about sexual harassment, and his creativity continues. In one very recent case he treats with great sensitivity the question of how a complainant's age affects the question of a hostile work environment.³⁶ His insights, moreover, have provided useful guidance for his colleagues on the court as they take sexual harassment doctrine further in other cases.³⁷ But the insights of *Carr*, major and bold, have not left their mark on doctrine as decisively and irrevocably as they might have—not even on Posner's own articulation of doctrine. This failure of influence can be attributed, I believe, to the fact that Posner, skeptical of theory, wrote the opinion in a way that was all too pragmatic, and, dare I say it, all too literary.

³⁶ See *Doe v Oberweis Dairy*, 456 F3d 704, 713–18 (7th Cir 2006) (finding the plaintiff's claim of workplace sexual harassment sufficiently strong to withstand summary judgment, and observing that working teenagers are often at greater risk of sexual harassment).

³⁷ See Judge Diane Wood's opinion in *Smith v Sheahan*, 189 F3d 529, 533 (7th Cir 1999), citing *Carr* and using its analysis of power dynamics.