Hybrid
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Notes to Preface


3. See Webster's New Collegiate Dictionary (1979) (defining hybrid as "an offspring of two animals or plants of different races, breeds, varieties, species or genera").


Notes to Chapter One


3. Commonalities, supra note 2, at 305.

4. Linda Alcoff, Mestizo Identity in AMERICAN MIXED RACE: EXPLORING “MICRODIVERSITY” (ed. Naomi Zack, 1995). Although Alcoff describes herself in this chapter as both white and Latina, she has told me that she recently discovered that she also has African ancestors. Thus, I make that observation although it is not contained in her chapter.

5. Id. at 278.

6. Id.


11. See infra chapter 8.


13. See, e.g., Obesity Bias Lawsuit: Woman Sues Movie Theater Over Access, NEWSDAY, Feb. 25, 1994, Business Section, Nassau & Suffolk Edition, at 53 (woman who went with her niece to see Jurassic Park not allowed to use her own chair in the wheelchair section).

14. Our tort system, by contrast, gives people an incentive to be labeled as “white” rather than “black” when race-based tables are used to determine lost compensation. See generally Martha Chamallas, Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument, 63 FORDHAM L. REV. 73 (1994).
Notes to Chapter Two


3. Marjorie Garber's six hundred page discussion of bisexuality makes only two references to multiracial categories and then only in quotation. She does not discuss other hybrid categories. See MARJORIE GARBER, VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE 48, 88 (1995).


5. Id. at 6.

6. GARBER, supra note 3, at 49.

7. See Dvora Zipkin, Why Bi? in CLOSER TO HOME, supra note 2, at 55–73 (describing an experience where women were asked to join one of four groups—bisexual, heterosexual, or choose not to label; twice, she picked “choose not to label”).

8. Ruth Gibian, Refusing Certainty: Toward a Bisexuality of Wholeness, in CLOSER TO HOME, supra note 2, at 5.


11. See id. at 148 (reporting that black men in a prison population were more likely than white males to engage in anal intercourse with another man).

12. Id. at 150. This failure to identify as homosexual or bisexual despite the experience of same-sex sexual relationships may be reflective of the racism within the white gay movement. Id. at 152. Thus, bisexuality within the African-American male community might be-
come more evident if the larger society in which we live were not so racist. Sexual identity and racism therefore may be deeply connected.

13. I have not seen any discussion of sexual behavior within the female African-American community. Discussions of "women" do not distinguish between African-American and white women.

14. As Brenda Marie Blasingame has noted: "I once talked with a Latino male doing AIDS education in the Latino community about his approach to educating the community about safe sex. He said there was no word for bisexual per se, but that bisexuality existed in the community and that this had to be addressed in order to teach safe sex. It was very much like the black community. When they talk about safe sex they have to refer to it as 'when you have sex with another man.'" Brenda Marie Blasingame, The Roots of Biphobia: Racism and Internalized Heterosexism, in CLOSER TO HOME, supra note 2, at 51–52.

15. Id. at 51–52.


17. I carefully use the word "some" because nearly all individuals who identify as black have a multiracial heritage. The majority of those individuals comfortably identify as black. A subgroup of those individuals identify as multiracial along with individuals who consist of other multiracial backgrounds. In this book, I focus on individuals who are black/white multiracial, but the category of multiracial, of course, involves endless combinations of ethnic and racial backgrounds.

18. GARBER, supra note 3, at 37.

19. Stacey Young, Breaking Silence About the "B-Word": Bisexual Identity and Lesbian-Feminist Discourse, in CLOSER TO HOME, supra note 2, at 77.

20. Nina Silver, Coming out as a Heterosexual, in CLOSER TO HOME, supra note 2, at 45.

21. Id. at 84 (quoting Micki Siegel, Bisexual Invisibility, GAY COMMUNITY NEWS, Mar. 11–17, 1990).

22. WEINBERG, supra note 4, at 19–20.

23. Further experiences perpetuated that pattern. A lesbian activist reportedly said that it was unfortunate that I was involved with a man because I was such a good role model for lesbian law students. As a
bisexual, I apparently could no longer be a good role model. Problems with role model theory will be discussed in chapter 4.

24. For further discussion, see Stacey Young, in CLOSER TO HOME, supra note 2, at 75–87.

25. See BI ANY OTHER NAME, supra note 2 and CLOSER TO HOME, supra note 2.


27. Id.


30. See WEINBERG, supra note 4, at 402–3 (reporting incidence of celibacy, monogamy, and multiple relationships among bisexuals, heterosexuals, and homosexuals).

31. GARBER, supra note 3, at 66.

32. BETTY FAIRCHILD AND NANCY HAYWARD, NOW THAT YOU KNOW: WHAT EVERY PARENT SHOULD KNOW ABOUT HOMOSEXUALITY 75 (1989).

33. Id. at 76.

34. Interestingly, homosexuality also is often invisible. Polls consistently report that few adults in the United States believe that they know any gay or lesbian people. Sylvia Law, Homosexuality and the Social Meaning of Gender, WIS. L. REV. 187 (1988). I know of no poll, however, that has even asked people if they know anyone who is bisexual. Poll data also show that people who report that they know gay or lesbian people tend to be more tolerant of them. Id. at 194. The invisibility of bisexuality therefore probably contributes to stereotypical attitudes but, again, it is hard to prove this assertion since researchers do not even ask questions about bisexuals.

35. A major contributor to that myth was Freud. Although he believed that all humans have a bisexual capacity and that even people who are heterosexual retain homosexual tendencies, he did not challenge the dichotomous categories of heterosexual and homosexual. For further discussion, see Law, supra note 34, at 204.
37. WEINBERG, supra note 4, at 319.
38. Id., at 288 (emphasis in original).
40. For example, in Pennsylvania, children with disabilities can receive services through the Early and Periodic Screening, Diagnosis and Treatment program (“EPSDT”). Money for this program goes directly to the health care provider, not to the parent or guardian. See generally PA. STAT. ANN. t.t. 62 5001.701 (1992).
42. Id. at 534 n. 13.
43. Id. at 536 n. 17.

Notes to Chapter Three

2. Watkins v. United States Army, 837 F.2d 1428, 1446 (9th Cir. 1988), opinion withdrawn, 825 F.2d 659 (9th Cir. 1989).
3. The first ballot initiative against homosexuals surfaced in 1979 in Dade County, Florida, when Anita Bryant successfully mounted a campaign to overturn Dade County’s ordinance prohibiting sexual orientation discrimination. More recent attempts include a ballot initiative in 1992 in Oregon which attempted to restrict the rights of gay men, lesbians, and bisexuals. In 1994, ballot initiatives were attempted in ten states. See generally William E. Adams, Jr., Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy, 55 OHIO ST. L.J. 583 (1994).
5. This is the language of the proposed Charter amendment: “NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS. The City of Cincinnati . . . may not enact, adopt, enforce or administer any
ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment." See Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 264 (6th Cir. 1995) (quoting proposed Article XII to City Charter).

6. 54 F.3d at 266 (describing trial court's opinion).
8. 54 F.3d at 268.
11. 530 A.2d at 24.
12. Id. at 24.
14. The ambiguity problem did not end with this case. Foster parents unsuccessfully challenged the new rules on grounds of ambiguity. See Stuart v. State Division of Children and Youth Services, 597 A.2d 1076 (N.H. 1991). The foster parents unsuccessfully argued that they could not certify that there were no homosexuals in their household because the definition of homosexuality in the statute was so vague.
15. The FBI and CIA also have had their share of problems in trying to restrict gay and lesbian people from employment. See, e.g., Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987). The current official policy of the FBI and CIA, however, is not to exclude individuals from employment based on sexual orientation.
16. 632 F.2d 788 (9th Cir. 1980).
17. Id. at 794.
18. Id. at 794.
19. Id. at 794.
20. Id. at 802 n. 9.
21. Id. at 802.
22. Id. at 802 n. 9 (quoting SECNAV Instruction 1900.9C).
24. *Id.* at 1389.
25. *Id.* at 1398.
26. *Id.* at 1398.
27. 489 F. Supp. 964 (E.D. Wis. 1980).
28. *Id.* at 969.
29. *Id.* at 969.
30. *Id.* at 974.
31. *Id.*
32. These regulations are codified at 10 U.S.C. 654 (1993).
34. 871 F.2d 1068 (Fed. Cir. 1989).
37. 871 F.2d at 1974 n. 6.
40. 871 F.2d at 1069.
41. *Id.* at 1070.
42. *Id.* at 1070.
43. 837 F.2d at 1430.
45. 837 F.2d at 1446.
46. *Id.* at 1446.
47. 875 F.2d at 707.
48. *Id.* at 711.
49. *Id.* at 710.
50. 690 F. Supp. 774 (E.D. Wis. 1988).
51. 881 F.2d at 456.
52. *Id.* at 457.
54. 881 F.2d at 460.
55. *Id.* at 460.
56. Elaborating further on that issue, the Court of Appeals said: "Plaintiff’s lesbian acknowledgment, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct. Such an assumption cannot be said to be without individual exceptions, but it is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct. To this extent, therefore, the regulation does not classify plaintiff based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future." Id. at 464.

60. 847 F. Supp. at 1042.
62. Id. app. A at 709.
63. Id. app. A at 709–10
64. Id. at 698 (footnotes omitted).
65. Murphy and Ellington are not alone in proposing new initiatives to penalize gay, lesbian, and bisexual people. Recent initiatives in Oregon, Colorado, and elsewhere have tried to repeal the minimal nondiscrimination advances made by gay, lesbian, and bisexual people in the last twenty-five years. See id. apps. B-C at 710–11 (Oregon and Colorado initiatives).


70. Id.

71. See Egan v. Canada, File No. 23636 (Supreme Court of Canada, decided May 25, 1995). The Attorney General of Canada conceded the argument that sexual orientation is a suspect class, entitled to protection under Canada’s equality provision.

72. Id. The Supreme Court of Canada ruled that federal pension benefits did not need to be available to same-sex couples, despite the fact that sexual orientation is a suspect class. The Court’s reasoning focused on the “fact” that heterosexual partnerships “uniquely [have] the capacity to procreate children and generally care[ ] for their upbringing.” Id. at 25.

73. Id., at 25.

74. These examples appear in MATTHEW A. COLES, SEXUAL ORIENTATION AND THE LAW (Boalt Hall Law School, Spring 1993).


76. Id. at 71–72.


78. The term “spouse” was defined as: “(a) a person to whom the person is married, or (b) a person of either sex with whom the person is living in a conjugal relationship outside marriage, if the two persons, (i) have cohabited for at least one year, (ii) are together the parents of a child, or (iii) have together entered into an agreement under section 53 of the Family Law Act.”

79. FINEMAN, supra note 68.

80. Id. at 230.


82. See generally MARGARET MAHONEY, STEPFAMILIES AND THE
LAW 130 (1994) (reporting that one-third of all states confer visitation rights to stepparents).

83. See Jeffrey S. Byrne and Bruce R. Deming, On the Prudence of Discussing Affirmative Action for Lesbians and Gay Men: Community, Strategy, and Equality, 5 STAN. L. & POL'Y REV. 177, 179 (1993). Proposed federal legislation to create nondiscrimination protection on the basis of sexual orientation explicitly prohibits affirmative action. See A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation Sec. 6 (“A covered entity shall not give preferential treatment to an individual on the basis of sexual orientation”) (103d Cong. 2d Sess.) (available from author). If this bill became law, the institutions that have publicly announced use of affirmative action for lesbians and gay men arguably would be violating the statute.

84. Byrne and Deming, supra note 83. Northeastern University has also recently announced an affirmative action program for lesbians and gay men. See Glen Johnson, University Starts Recruiting Gay Faculty, THE RECORD A06 (June 27, 1994); Alice Dembner, Northeastern Takes Steps to Hire More Gays, BOSTON GLOBE, June 28, 1994, Metro/Region Section, at 20. Nonetheless, some institutions have tried to distance themselves from suggestions that they engage in affirmative action on the basis of sexual orientation. See, e.g., Anthony Flint and Kay Longcope, Kennedy School Shows Caution on Gay Initiative, BOSTON GLOBE, Feb. 28, 1991, Metro/Region Section, at 25 (school spokesman released a statement saying that institution does not recruit or admit students, staff, or faculty on the basis of sexual orientation despite a report recommendation that the institution engage in affirmative gay and lesbian recruitment).

85. Byrne and Deming, supra note 83, at 186.


87. See id. at 92.

88. Id. at 93.


90. Someone could make up stories of disadvantage but those
stories will often be verifiable. Even if fraud problems existed with my proposal, I still believe that it is the fairest approach.


Notes to Chapter Four

5. Id. at 794.
6. See id. at 795 n. 5 (distinguishing between a transsexual, homosexual, and transvestite). Gay and lesbian groups recently seem to have become concerned with transgender issues. The 1993 March on Washington for lesbian and gay civil rights, for example, included transgender concerns in its list of concerns. See Dan Levy and David Tuller, *Transgender People Coming Out*, S.F. CHRON., May 28, 1993, at A1. Nonetheless, transgendered individuals report that they have faced many obstacles from mainstream homosexuals who say that the presence of cross-dressers at gay marches and parades offends straight people and undermines overall support for the gay rights movement. Id.

9. Id. at 19–20.
10. Id. at 46–47.
11. Id. at 47.
12. Hermaphrodites constitute three sub-groups: (1) they possess one testes and one ovary, (2) they possess testes and some aspects of female genitalia but not ovaries, or (3) they have ovaries and some aspects of male genitalia but lack testes. Anne Fausto-Sterling, *How Many Sexes Are There?*, N.Y. TIMES, Mar. 12, 1993, at A29.
13. See supra chapter 5.
14. See infra Part IIIC.
16. Id.
18. Id. at 60 (transsexual bisexual challenges the assumption that “gender identity and sexual preference fit together in some necessary way”).
21. Id.
23. Id. at 20.
24. Id. at 20.
25. Id.
27. Id. at 66.
29. As recently as 1991, the Tennessee Court of Appeals in Jones v. Leisure, 1991 WL 10971 (Tenn. Ct. App., Feb. 5, 1991), noted that the “tender years” doctrine is a positive factor for consideration in a mother’s lawsuit for custody of her young daughter.
30. See, e.g., In re Diehl, No. 2–90–1217, 1991 Ill. App. LEXIS 1972, *22 (Ill. Ct. App., Nov. 22, 1991) (denying custody to an alleged lesbian and stating that because of the child’s “tender years . . . it is in her best interest not to be exposed to a lesbian relationship”).
32. 457 S.E. 2d 102 (Va. 1995).
35. Id. at 7.
40. Id.
41. See Testimony of Mary Beth Harrison, Defense Advisory Committee on Women in the Services, 1988 Spring Conference (Apr. 16–20, 1988).
45. Sodomy statutes sometimes also are used to prosecute female prostitutes who engage in oral sex with their clients. They are never used to prosecute more traditional heterosexual relationships.
46. 478 U.S. 186 (1986).
48. See, e.g., DeSantis v. Pacific Telephone & Telegraph Co., Inc., 608 F.2d 327 (9th Cir. 1979) (sexual orientation discrimination not recognized as gender-based under Title VII).
49. I believe that it would be more coherent for the courts to acknowledge that the discrimination is gender-based and then decide whether that discrimination can be justified. At present, the courts allow their conclusion that the discrimination can be justified to color their conclusion as to whether the discrimination is gender-based. They seem to be afraid to let cases proceed to the stage of justification.
50. 852 P.2d 44 (Haw. 1993).
51. Id. at 52 n. 11.
Notes to Chapter Four

52. Id. at 52 n. 12.
53. BORNSTEIN, supra note 47.
54. Id. at 24.
55. Id. at 27.
57. Id. at 533.
58. Id. at 534.
59. Id. at 537.
60. Ulane v. Eastern Airlines, 742 F.2d 1081 (7th Cir. 1984).
61. 667 F.2d 748 (8th Cir. 1982).
63. Id.
68. 388 U.S. 1 (1967).
74. Mary Whisner, Gender-Specific Clothing Regulation: A Study in Patriarchy, 5 HARV. WOMEN’S L.J. 73, 102 (1982).
76. Fountai n v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir. 1977).
78. See, e.g., Carroll v. Talman Federal Savings and Loan Association, 604 F.2d 1028 (7th Cir. 1979) (demeaning for women to be required to wear uniforms and men only required to wear customary business attire); O'Donnell v. Burlington Coat Factory Warehouse, 656 F. Supp. 263 (S.D. Ohio 1987) (demeaning for female sales clerks to be required to wear a “smock” and for male sales clerks to be required to wear business attire consisting of slacks, shirt, and a necktie).
80. Id. at 2146.
82. See Woman Is Acquitted in Trial for Using the Men's Room, N.Y. TIMES, Nov. 3, 1990, Section 1, at 8.
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v. Mark B., 355 N.Y.S.2d 712 (1974) (post-operative female to male transsexual could not succeed on divorce claim as no valid marriage had been entered into, since he had no male sex organs); Daly v. Daly, 715 P.2d 56 (Nev. 1986) (parental rights of post-operative female to male transsexual terminated).

86. 355 A.2d at 210.
87. Id. at 207.
88. See, e.g., In re Declaratory Relief for Ladrach, 513 N.E.2d 828 (Ohio Probate Ct. 1987) (denying marriage license to post-operative male to female transsexual to marry male).

89. See, e.g., Pinneke v. Preisser, 623 F.2d 546 (8th Cir. 1980) (Iowa’s policy of denying medicaid benefits for sex reassignment surgery found not to be consistent with the objectives of the medicaid statute); Doe v. Lackner, 145 Cal. Rptr. 570 (Ct. App. 1978) (Medi-Cal benefits found to cover radical sex conversion surgery for treatment of transsexualism); G.B. v. Lackner, 145 Cal. Rptr. 555 (Ct. App. 1978) (Medi-Cal claimant entitled to benefits for surgery to treat transsexualism); Doe v. State Department of Public Welfare, 257 N.W.2d 816 (Minn. 1977) (decision to deny medical assistance benefits to adult male transsexual found to be arbitrary and unreasonable); Denise R. v. Lavine, 364 N.Y.S.2d 557 (1975) (denial of benefits for sex conversion operation found to be arbitrary and capricious). Prison inmates, however, have not been successful in obtaining estrogen therapy as a treatment for transsexualism. See Farmer v. Carlson, 685 F. Supp. 1335 (M.D. Pa. 1988); Meriwether v. Faulkner, 821 F.2d 408 (7th Cir. 1987); Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986); Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977); Lamb v. Maschner, 633 F. Supp. 351 (D. Kan. 1986).
90. See Richard Green, Spelling “Relief” for Transsexuals: Employment Discrimination and the Criteria of Sex, 4 Yale L. & Pol’y Rev. 125 (1985). Nonetheless, the American Psychiatric Association, at its 1993 annual conference proposed that well-adjusted transsexuals not automatically be considered to have a mental disorder. Levy and Tuller, supra note 6, at A1.

91. See, e.g., Farmer v. Carlson, 685 F. Supp. 1335 (M.D. Pa. 1988) (transsexual inmate found to be denied proper medical care by being denied conjugated estrogens); Phillips v. Michigan Dept of
Corrections, 731 F. Supp. 792 (W.D. Mich. 1990) (transsexual inmate entitled to preliminary injunction ordering correctional officials to provide her with estrogen therapy); White v. Farrier, 849 F.2d 322 (8th Cir. 1988) (summary judgment not appropriate on issue of whether transsexual inmate subjected to deliberate indifference through failure to be given estrogen therapy); Meriwether v. Faulkner, 821 F.2d 408 (7th Cir. 1987) (transsexual inmate stated claim under Eighth Amendment for failure to provide estrogen therapy); Lamb v. Maschner, 633 F. Supp. 351 (D. Kansas 1986) (inmate not found to have constitutional right to pre-operative hormone treatment and sex change operation).

92. See supra note 90.

93. In order for plaintiffs to prevail in the prison context, they typically have to attempt to commit suicide or remove some of their own sexual organs. For example, in Supre v. Ricketts, 596 F. Supp. 1532, 1533 (D. Colo. 1984), plaintiff attempted to remove his testicles six times, attempted to kill himself by hanging, and incised and removed a portion of his scrotum. Before successful judicial intervention occurred, the prison took the position that treatment for gender dysphoria could not occur in a penal setting. In concluding that medical treatment was appropriate, the judge ruled that “plaintiff’s life was in jeopardy.” Id. at 1535. It is appalling that an individual has to attempt mutilations, castrations, and suicide before a court can find that he or she is entitled to medical treatment for gender dysphoria.

94. See Fausto-Sterling, supra note 12.

95. Id.

96. There are life-threatening conditions that can occur as a result of being a hermaphrodite: hernias, gonadal tumors, and adrenal malfunction. Id.
characteristics. When those differences are substantial enough, races are said to have developed. The point to keep in mind, however, is that 'the level of differences used as a threshold is entirely arbitrary.' Ultimately, if differentiation increases, interfertility decreases between the various races of a species. Human race differentiation has not proceeded to the point where interfertility has decreased, and, given current interaction between races, a decrease in interfertility between human races is unlikely to develop. Race is therefore principally a social construct that gives meaning to certain characteristics of groups within a species." James Lindgren, Seeing Colors, 81 CAL. L. REV. 1059, 1084–85 (1993) (footnotes omitted). See also Lawrence Wright, One Drop of Blood, NEW YORKER, July 25, 1994, at 46, 50 (noting that scientific research indicates that the genetic variation among individuals from accepted racial groups was only slightly greater than the variation within the groups).

4. Id.
5. Id.
6. Wright, supra note 2, at 46, 49.
9. See supra chapter 1.
17. Id. at 10.
18. GREENBERG, supra note 15, at 585.
19. 52 So. 500 (La. 1910).
20. The court does not specify Treadway's first name; he is referred to as the "defendant" throughout the case.
21. 52 So. at 508.
24. Id. at 917.
26. Id. at 812–13 (Barham, J., dissenting).
27. Id. at 812.
28. For example, in Messina v. Ciaccio, 290 So. 2d 339 (La. Ct. App. 1974), the court of appeals upheld a lower court order requiring the birth certificate be issued designating an adopted child to be white. It found that the Bureau could not meet its burden of proving that the child was more than 1/32 Negro, as required by Louisiana law, because of the imprecise categories that were used to determine racial heritage.
29. 479 So. 2d at 372.
30. See LA. REV. STAT. ANN. 40:34 (West 1992) (repealed 1988) ("race or races of parents as reported by the parents").
31. Although I call these individuals "light-skinned blacks" during this discussion, they could more accurately be considered to be mixed-race individuals. I use the term "light-skinned" because we never had discussions with these individuals about their racial heritage. My discussion of "light-skinned" blacks could also apply to other characteristics that blacks may have which may make them more acceptable to whites. For example, a colleague of mine has told me that his
African-American wife was told at a job interview with a bank that they would consider hiring her if she would “relax” her hair. Similarly, African-American men are often requested to shave their beards in order to be hired or retained at a job. In both cases, blacks are being asked to conform their physical appearance to a “white” standard. Light skin color is therefore not the only trait that might make some blacks more acceptable to white society.

32. To the best of my knowledge, this case was never litigated on the merits. I was not involved with the case when it finally was resolved.


34. Id. at 1710.

35. I also wonder if the grandmother truly “passed” in the way that Harris describes. Did any of her co-workers suspect her black racial background? Had they been taught that it was alright to ignore such background when a person was light-skinned? In the gay rights context, it has often been my experience that people who think they are “passing” as heterosexual are not really passing. Many people may know of their homosexuality but have been taught to tolerate it so long as the person does not “flaunt” it. The grandmother certainly tried to hide her black heritage but we cannot fully tell from Harris’s account whether she truly “passed.” Finally, I want to emphasize that by discussing the spectrum on which race may be experienced that I am not trying to discount that Harris’s grandmother suffered disadvantage because of her race. My point is simply that her skin color allowed her to mitigate some of those disadvantages while she still faced other disadvantages. Harris’s grandmother, for example, probably attended racially segregated, black schools and lived in racially segregated, black neighborhoods.

36. See infra Part IB.


38. See infra note 105.

39. Michael Rezendes, *Debate Intensifies on Adoptions across Racial Lines*, BOSTON GLOBE, Mar. 13, 1994, Metro Section at 1 (reporting that Randall Kennedy says that “race should never be consid-
ered in adoptions, even if there comes a day when enough black families can be found to adopt all the black children waiting for families to call their own.”). See also Randall Kennedy, Racial Critiques of Legal Academic, 102 HARV. L. REV. 1745, 1819 n. 305 (1989) (describing a race conscious placement as “scandalous”).


41. The classification problem also frequently occurs for the label “Hispanic.” See generally Alex M. Saragoza et al., Concepcion, 5 LA RAZA L.J. 1 (1992) (discussing question of whether Spaniards should be included in the Hispanic category for the purposes of affirmative action). See also Ian F. Haney Lopez, The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice, 29 HARV. C.R.-C.L. L. REV. 1 (1994) (describing how he and his other brother, both of whom had a fourth-generation Irish father and Salvadoran immigrant mother chose different racial identities).

42. Elizabeth Kulbert, White Officers Seek Minority Status N.Y. TIMES, Dec. 6, 1985, Metropolitan Desk, at B16.


44. See Wright, supra note 2, at 47 (quoting the mother of multiracial children who said that multiracial individuals know “to check the right box to get the goodies”). Even for groups that are recognized as “minorities,” which minority classification they are put in can make a big difference in terms of social or economic entitlements. For example, some Native Hawaiians have sought to be labeled as Native Americans rather than as Asian or Pacific Islanders, which would entitle them to enjoy privileges concerning gambling concessions that they would not otherwise enjoy. Id.

45. 59 Fed. Reg. 29,831–01 (June 9, 1994).

46. Id.

47. Id.

48. Id.

49. Id.

50. Id.

51. The Columbia Law School application contains the following
categories: American Indian/Alaskan; Black/African-American; White/Caucasian; Chicano/Mexican-American; Asian/Pacific Islander; Puerto Rican; Other Hispanic; East Indian; Other; Unknown. The accompanying instructions state: "If you wish to have our Admissions Committee consider your racial or ethnic background in its evaluation of your candidacy for admission, please indicate your status by checking one or more of the following categories. Also, please attach a separate statement describing your ethnic, cultural and linguistic heritage, and how this identification may have found expression in your academic, extracurricular or community undertakings."


52. Lindgren, supra note 2, at 1084.
54. Id. at xii.
55. Id. at xiii.
56. Id. at xii.
58. Id. at 312.
59. Id. at 316–17.
60. Id. at 317.
61. See Kennedy, supra note 39. See also CARTER, supra note 37, at 27 (arguing that blacks should insist on an affirmative action "that rewrites the standards for excellence, rather than one that trains us to meet them").
63. Id. at 624 n. 5.
67. Id. at 270.
68. Id. at 267.
69. Id. at 268.
70. Id. at 269.
74. 476 U.S. at 275.
76. 476 U.S. at 279.
77. *Id.* at 279.
78. *Id.* at 276.
79. 438 U.S. at 369.
80. *Id.* at 371.
81. *Id.* at 377.
82. *Id.* at 310.
83. *Id.* at 365–66.
85. 438 U.S. at 377.
86. *See* Laura Brown, *Small-Business Group Slammed as Ineffective*, BOSTON HERALD, June 14, 1995, News Section at 6 (reporting that one-third of the businesses assisted through a Massachusetts program that targets disadvantaged businesses were non-minority, male-owned firms); Richard Whitt, *Minority Deals Raise Grady Price*, ATLANTA CONSTITUTION, May 21, 1991, at D1 (reporting that William Coleman, owner of a white-owned company qualified as a disadvantaged business enterprise).
87. Limited evidence existed that some minorities were periodically found not to be disadvantaged. *See, e.g.*, Autek Systems Corp. v. United States, 835 F. Supp. 13 (D.D.C. 1993) (upholding determination that Native American was not “disadvantaged” under Small Business Administration regulations). *See generally* Brief Amicus Curiae of the Latin American Management Association in Support of Respondents, *Adarand v. Pena* No. 93–1841 (filed Dec. 5, 1994) (providing examples of small businesses owned by minorities and found not to be disadvantaged). The *Autek* case is cited in the *Adarand* briefs as reflecting a case where a Native American was disqualified for not being disadvantaged. Others, however, have described the case as not involving an “authentic” Native American. Hacker reports, for
example, that in "one egregious case, a white contractor won an award because he claimed he had a Native American great-grandmother." HACKER, supra note 65, at 128. Thus, some of the "disadvantage" cases may actually be "mixed-race" cases where the Small Business Administration is also questioning the validity of the racial presumption.

88. 115 S.Ct. at 2130 (Stevens and Ginsburg, J.J., dissenting).
89. HACKER, supra note 65.
91. Id. at 109–10.
92. 438 U.S. at 376.
93. Id. at 377.
98. Finis Welch, Black-White Differences in Returns to Schooling, 63 AM. ECONOMIC REV. 893 (1973).
101. CARTER, supra note 37, at 252.
103. 476 U.S. at 315 (Steven, J., dissenting).

106. Id.


108. Although I have not seen figures on the number of mixed-race children available for adoption, it appears that the number of such children is increasing. The number of black-white interracial marriages has increased from 65,000 in 1970 to 218,000 in 1988. Perry, supra note 107, at 52 n. 4. In 1984, there were approximately one million mixed-race children in the United States. Kathi Overmier, Biracial Adolescents: Areas of Conflict in Identity Formation, 14 J. Applied Soc. Sci. 157 (1990).

109. By “mixed-race” children, I will be referring to children who are part “black” and part “white,” because that is the most common example of “mixed-race” discussed by the courts. Interestingly, I have found no cases involving, for example, a child with an Hispanic parent and African-American parent, although that combination probably is not unusual. It seems that racial classification issues most frequently arise when the child is white and black, which probably reflects our culture’s preoccupation with the purity of the white race.


112. See, e.g., Drummond v. Fulton County Department of Family
and Children's Services, 547 F.2d 835 (5th Cir. 1977); Reisman v. State of Tennessee Department of Human Services, 843 F. Supp. 356 (W.D. Tenn. 1993).

113. The literature on the construction of race typically argues that white society unilaterally has defined the category “black.” See, e.g., Gotanda, supra note 8. The labeling of mixed-race children in the adoption context, nonetheless, has not occurred exclusively by white society. Some members of the black community have insisted on considering mixed-race children to be black for adoption purposes. See, e.g., Fenton, supra note 107.


115. In Drummond v. Fulton County Department of Family and Children's Services, 547 F.2d 835 (5th Cir. 1977), the agency belatedly acknowledged the adoptive child’s mixed-race heritage when, after removing him from the white family where he had lived happily for two years, they attempted at least two placements with mixed-race couples before he reached the age of five, one of which was apparently unsuccessful. Larry I. Palmer, Adoption: A Plea for Realistic Constitutional Decisionmaking, 11 COLUM. HUM. RTS. L. REV. 1, 7 (1979). The agency’s belated recognition of the child’s mixed-race heritage accentuated “foster care drift” but did little for the well-being of child. Randall Kennedy has called race-conscious placements like in the Drummond case “scandalous.” Kennedy, supra note 39, at 1819 n. 305.

116. Moreover, it is not unusual in our society for a child to be raised by one parent. A mixed-race child who is raised by one parent will therefore often be raised by a white parent or a black parent, not a mixed-race couple. Accordingly, a mixed-race couple adoption rule often does not replicate the family structure that that child would have had in the absence of adoption.

117. As Professor Harris notes: “It is not at all clear that even the slaves imported from abroad represented ‘pure Negro race’. . . . many
of the tribes imported from Africa had intermingled with peoples of the Mediterranean, among them Portuguese slave traders. Other slaves brought to the United States came via the West Indies, where some Africans had been brought directly, but still others had been brought via Spain and Portugal, countries in which extensive interracial sexual relations had occurred. By the mid-nineteenth century it was, therefore, a virtual fiction to speak of ‘pure blood’ as it relates to racial identification in the United States.” Harris, *supra* note 33, at 1791 n. 141.

118. See, e.g., Fenton, *supra* note 107.
120. Since my argument is premised on the need to engage in more individualized understandings of our racial heritage, I do not have sufficient information to know how important it may be to some or many black children to have black adoptive parents. In talking to my friends who have engaged in what is commonly described as a “transracial” adoption, I have been struck by how many of them indicate that the biological mother was white and the biological father was black. In one case, a friend, who is an adoptive mother, told me that the white biological mother of her adoptive daughter had two children by the same black man to whom she was not married. One of the children was dark and the other was light. The mother relinquished only the darker child for adoption. My friend, however, who was considered to have engaged in a transracial adoption, shared many physical characteristics with the biological mother who would have otherwise raised the child as a single parent. I believe that the term “transracial adoption” is a misnomer in that context, because the child was transferred from one white mother to another white mother. Although it is important for the white mother in this context to fully respect the child’s racial heritage, there is no reason for her to face a higher burden to qualify for adoption because of the purportedly “transracial” nature of the adoption.
121. Zack has therefore argued, “it is now clear that the form of black family history is inherently problematic in comparison with the form of white family history. Not only does black family history contain self-undermining recollections of being oppressed, but its racial diversity may lead a descendant to an irreconcilable slave and
slave-owning genealogy. If one would liberate oneself through identification by means of family history, one may also have to liberate one’s ancestors.” Zack, supra note 53, at 65.

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5. Id.
6. Id.
7. “Overweight” refers to individuals who exceed their “ideal weight” as defined by insurance tables. “Medically significant obesity” includes those who are at least twenty percent above their “ideal weight” as defined above. “Morbidly obese” refers to an individual who weighs more than twice his or her optimal weight, or more than 100 pounds over optimal weight. See Scott Petersen, Discrimination against Overweight People: Can Society Still Get Away with It?, 30 GONZ. L. REV. 105 (1994); Steven M. Ziolkowski, Case Comment, 74 B.U. L. REV. 667 (1994).
13. Id.
14. See, e.g., Scott Petersen, Discrimination against Overweight People: Can Society Still Get Away with It?, 30 GONZ. L. REV. 105
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19. *Id.* at 496.

20. *Id.* at 496.


22. *Id.*


25. *Id.* at 189.


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34. See, e.g., Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982).

35. Id.

36. 856 P.2d 1143 (Cal. 1993).

37. Id. at 1153.

38. Cook v. State of Rhode Island, 10 F.3d 17 (1st Cir. 1993).

39. Id. at 23 n. 7.

40. Id. at 23.

41. See generally Sheryl McCarthy, No Apologies for Being Fat, NEWSDAY, Feb. 29, 1994, News Section, at 8.


43. See, Dianne Neumark-Sztainer, Excessive Weight Preoccupation: Normative But Not Harmless, NUTRITION TODAY, April 1995, at 68.

44. See, e.g., Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993).

45. See, e.g., Bryne v. Board of Education, 979 F.2d 560 (7th Cir. 1992).

46. See, e.g., Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985); Roth v. Lutheran General Hospital, 5 A.D.D. 458 (N.D. Ill. 1994).


51. Id. at 11.


53. Id. at 1272.


56. Vogler and Bartz, supra note 50, at 15.
58. 951 F.2d 511 (2d Cir. 1991).
59. Id. at 517.
62. Vogler and Bartz, supra note 50.
63. Id. at 141–42.
64. This stigma is quite complicated in the disability context. We tend to think of individuals with disabilities in the educational context as “retarded” or “stupid.” Children with physical disabilities that do not affect their mental capacity therefore often find it difficult to find an appropriate educational setting, since the special programs are usually for “retarded” children. In such a case, our shortsightedness in defining “disability” leaves a child with physical disabilities few acceptable educational choices. See generally Engel, infra note 77, at 185 (describing difficulties in finding placement for an intelligent handicapped child, because school districts often assume that “the physically handicapped person is automatically retarded”).
65. This example comes from my own experience in a ninth-grade biology class as well as my experience teaching in a classroom with some blind students.
67. Id. at 201.
68. Id. at 198.
69. Federal nondiscrimination law does just the opposite. An individual, for example, is not “disabled” in some circumstances under section 504 of the Rehabilitation Act or the Americans with Disabilities Act unless the impairment substantially limits an individual’s employment potential. Thus, an individual with strabismus who is discharged because he cannot perform one discrete function at a job is not sufficiently impaired to come under the statutory definition of disability. See Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985). I am arguing, by contrast, that we examine the concrete situation to see if a disability poses a disadvantage rather than
worry about whether the individual experiences disability in other facets of his or her life. To the unemployed postal worker in Jasany, it is no solace to realize that his disability does not impair his ability to perform other employment.

70. Title I of the ADA prohibits discrimination against a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position such individual holds or desires. A reasonable accommodation is required unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. The term “qualification standards” may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace. See 42 U.S.C. 12111 (1991) (definitions); 12113 (1990) (defenses).


72. Hindman v. GTE Data Services, 3 A.D. Cases 641 (M.D. Fla. 1994).

73. Hindman v. GTE Data Services, 4 A.D. Cases 182 (M.D. Fla. 1995).

74. Under the IDEA: “The term ‘children with disabilities’ means children (A) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (B) who, by reason thereof need special education and related services.” 20 U.S.C. 1401(a)(1) (1988).

75. Under the IDEA: “The term ‘individualized education program’ means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate education unit who shall be qualified to provide, or supervise who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian.
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of such child, and, whenever appropriate, such child, which statement shall include [six criteria]." 20 U.S.C. 1401(a)(20) (1988).

76. Nonetheless, there is a policy decision contained within the statute that education in an integrated setting (both able-bodied and disabled children being educated together) is preferable, if possible. See 28 U.S.C. 1412(5) (safeguarding that “to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily”).


78. Engel found that most parents stopped attending their individual hearing after the first few years. See Engel, supra note 77, at 188.


80. For example, the section on eligibility requirements states that each state must have procedures “to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory.” 28 U.S.C. 1412(5) (1988).

81. See Delgado et al., Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 WIS. L. REV. 1359, 1389 (arguing that racial prejudice is more likely to occur in informal, discretionary settings than in formal, adjudicatory settings because the “human propensity to prejudge and make irrational cate-
governments is . . . checked by procedural safeguards found in an adversarial system”).

82. Id. at 1389 (footnote omitted).

83. In Pittsburgh, for example, we have the Education Law Center which tries to provide those services for free to children with disabilities. Nonetheless, it takes a sophisticated parent or guardian to find such services and use them aggressively.

84. See Engel, supra note 77, at 194–203.

Notes to Chapter Seven


3. 42 Title VII of the Civil Rights Act of 1964 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.” 42 U.S.C. 2000e-2(a)(1).

4. Martha Chamallas, Jean Jew’s Case: Resisting Sexual Harassment in the Academy, 6 YALE J. L. & FEMINISM 71, 82 (1994) (Jew was retroactively promoted to full professor, given back pay, compensated for a related state defamation judgment, and awarded $895,000 in attorney’s fees).


6. Id. at 81.


10. See Dreyfuss and Lawrence supra note 9, at 24.
11. 42 U.S.C. 2000(d) et seq.
12. U.S. CONST. amend. XIV.
13. The Supreme Court granted Bakke the injunction enforcing his admission and invalidated the Medical School’s special admissions program. Bakke, 438 U.S. at 320.
15. Although this trend might apply to women who are perceived to be lesbians, the cases reflect the pattern that courts assume that women are heterosexual even when accused of being lesbians. See, e.g., McCoy v. Johnson Controls World Services, 878 F. Supp. 229 (S.D. Ga. 1995); Jew v. University of Iowa, 749 F. Supp. 946 (S.D. Iowa 1990).
18. See, e.g., DeSantis v. Pacific Telephone & Telegraph Co., Inc., 608 F.2d 327 (9th Cir. 1979).
20. Id. at 1320.
21. Id. at 1321.
22. Id. at 1322.
23. Id.
24. Id. at 1327.
25. Id.
27. Id. at 1557.
28. Id. at 1562.
32. “[T]he company’s response to the alleged harassment was sufficiently prompt and adequate to negate any liability.” Id. at 759.
33. Id. at 762 n. 9.
35. Id. at 952.
36. Id. at 958.
37. Id. at 958.
38. Id. at 958.
40. Id. at 1335.
41. Id.
42. Id.
43. Id. at 1337.
44. Id. at 1338.
45. See generally Chamallas, supra note 4.
47. Id. at *3.
49. See, e.g., Garcia v. Elf Atochem North America, 28 F.3d 446 (5th Cir. 1994) (Freddy Garcia was approached from behind by Rayford Locke, a plant supervisor, who grabbed “Garcia’s crotch area and made sexual motions from behind Garcia”); Benekritis v. Johnson, 882 F. Supp. 521 (D.S.C. 1995) (David Benekritis was approached by fellow teacher R. Earl Johnson at two school basketball games where Johnson placed “his genitals against Plaintiff’s backside” and placed “his hand on Plaintiff’s genitals”).
50. Dillon, 1992 U.S. App. LEXIS 766 at *22 (“Thus, Dillon cannot escape our holding, and those of the other circuits, that homosexuality is not an impermissable criteria on which to discriminate with regards to terms and conditions of employment”). Carreno, 54 Fair Empl. Prac. Cas. (BNA) at 82 (“The issue before the court is..."
whether a homosexual male may recover under Title VII of the Civil Rights Act of 1964).


53. For example, Jean Jew was called a "lesbian" as part of the sexual harassment she faced at the University of Iowa. She ultimately prevailed. Jew, 749 F. Supp. 946. For a compelling account of the Jean Jew case, see Chamallas, supra note 4.


56. Id. at 229, 231.


58. Id. at 369.

59. Id.

60. "When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victims employment and create an abusive working environment,' Title VII is violated" (internal citations omitted). Id. at 370.


62. Id. at *2.

63. Id. at *3 (Harris was awarded $151,435).

64. 51 F.3d 591 (5th Cir. 1995).

65. Id. at 592.

66. Id. at 595.

67. Id. at 593.

68. Id. at 597.

69. Id. at 595.

70. Id. at 597 n. 6.

71. Id. at 596.

72. Id. at 596.

73. Hall v. Gus Construction Company, 842 F.2d 1010 (8th Cir. 1988).
74. The purportedly nonsexualized episodes included calling one of the women “herpes,” male crew members urinating in one of the plaintiff’s gas tanks, and failing to fix the pilot truck that gave off fumes. Id. at 1013–14. Of course, the first two of those episodes could have been characterized as sexual. Therefore, the court’s ruling had limited application to this fact pattern.

75. Although about a dozen courts have cited Gus Construction for the proposition that women can prevail for sexual harassment solely on the basis of gendered comments, few of these women have, in fact, prevailed. See, e.g., Trotta v. Mobil Oil Corp., 788 F. Supp. 1336, 1347 (S.D.N.Y. 1992) (concluding that plaintiff would have resigned whether or not the events that allegedly created a sexually hostile work environment occurred); Ott v. Perk Development Corporation, 846 F. Supp. 266, 274 (W.D.N.Y. 1994) (concluding that examples of purportedly nonsexualized harassment were, in fact, examples of legitimate, nondiscriminatory actions); EEOC v. A. Sam & Sons Produce Company, Inc., 872 F. Supp. 29 (W.D.N.Y. 1994) (concluding that female employee who was called a “whore” could recover for sexual harassment but that second female employee who was not directly called a “whore” could not recover); Cram v. Lamson Sessions Co., 49 F.3d 466, 474 (8th Cir. 1995) (concluding that defendant’s “interactions with [plaintiff] . . . were brief, sporadic, nonsexual, nonthreatening, and polite” thereby not meeting the required showing of “sustained, severe harassment required to make a claim of hostile working environment”). But see Cronin v. United Service Stations, Inc., 809 F. Supp. 922, 929 (M.D. Ala. 1992) (finding liability where comments and behavior were derogatory and insulting to women generally, and overtly demeaning to the plaintiff personally but where comments were not overtly sexual); Laughinghouse v. Risser, 754 F. Supp. 836 (D. Kansas 1990) (denying summary judgment for defendant where most of the comments were not sexual in nature).

76. Hicks, 113 S. Ct. 2742.

77. Hicks v. St. Mary’s Honor Ctr., 970 F.2d 487, 490 (8th Cir. 1992).

78. Id. at 489 (“Plaintiff’s supervisors had consistently rated his performance as competent. He had not been suspended, written up, or otherwise disciplined”).
80. *Id.* at 1248.
81. *Id.* at 1248 n. 10.
82. *Id.* at 1247.
83. *Id.* at 1248.
84. *Id.*
85. *Id.*
86. *Id.* at 1247 n. 7.

87. By failing to differentiate between the actions of Powell and Long, which were instituted by white men who had considerable power at St. Mary’s, and the actions of the black members of the discipline board, who appeared to have little authority at St. Mary’s, the court confused participation with power. The fact that blacks participate in a process does not mean that they have a powerful role in that process.


89. The trial court record does not specifically indicate whether the Director of the Missouri Department of Corrections and Human Resources had read the Davis study. It only states that none of the witnesses at the trial had read the Davis study before 1984; it is not clear whether the Director testified at the trial.

90. Although no witnesses at trial admitted to having seen the Davis study at the time of the 1984 personnel changes, someone at the Department of Corrections’s central office must have seen the report. More importantly, that report must have been written to reflect information that the writer collected from some supervisory personnel at St. Mary’s; recommendations rarely arise out of “thin air.”

91. 756 F. Supp. at 1246.
92. *Id.* at 1246.
93. *Id.*

94. The court offered the following explanation: “The fact that most of the supervisory staff was terminated or transferred is not alarming given the widespread problems that St. Mary’s experienced under their control. . . . It is not unusual that several black supervisors were replaced by whites because blacks held nearly all the supervisory positions before January, 1984.” *Id.* at 1252.

95. *Id.* at 1252 (calling the comments “personally motivated”).
98. Id. at *24.
99. Id. at *18.
100. See, e.g., Daniels v. Essex Group, 937 F.2d 1264 (7th Cir. 1991) (black plaintiff called “Buckwheat,” criticized for conversing with white women at work, and confronted with a human-sized black dummy hanging from a doorway); Daniels v. Pipefitters’ Association Local Union No. 597, 945 F.2d 906 (7th Cir. 1991) (blacks at workplace called “nigger,” “porch monkeys,” “baboons,” “ghetto assholes,” “super nigger” and other epithets in Italian). In Daniels, however, the court also explicitly considered a physical threat that was not specifically racial in nature as part of the claim for a hostile work environment. Id. at 1273.
102. Id. at 677.
103. Bolden v. PRC Inc., 43 F.3d 545 (10th Cir. 1994).
104. Id. at 549.
105. Davis v. Northrop Corporation, 24 F.3d 245 (9th Cir. 1994) (not published but available on LEXIS and WESTLAW).
107. Id. at 299 (Marshall, J., dissenting).
108. Arguably, the courts did not consider her qualifications because this was only phase one of the trial. Her merits would be considered at the relief stage. But, as we will see with the Bakke case, courts fail to consider the merits of the white plaintiff even in cases involving individual acts of discrimination rather than class actions.
110. Hicks v. St. Mary’s Honor Center, 970 F.2d 487 (8th Cir. 1992).
111. Hicks, 113 S. Ct. 2742.
112. Hicks v. St. Mary’s Honor Center, 2 F.3d 265 (8th Cir. 1993).

115. Id. at 13.
116. Id.
117. Id.
118. 438 U.S. at 279 (describing trial court decision).
119. Id. at 281.
120. Id. at 280 n. 14.
121. Id. at 280–81 n. 14.
123. Id. at 782 (Brennan, J., dissenting).
126. Id.
127. Id.
128. Another case that follows this pattern is Johnson v. Transportation Agency, 480 U.S. 616 (1987). Although the white male plaintiff, Paul Johnson, lost his reverse discrimination case, the Court never questioned whether he was, in fact, less qualified on nongendered grounds. Diane Joyce, who was selected for the position, had more experience than Johnson, and appears not to have been selected initially because of overt gender bias. Two of the three members of the interview panel (which was the only factor on which she scored lower than the male plaintiff), had treated Joyce in overtly negative ways because of her gender. For example, one of them had described her as a “rebel-rousing, skirt-wearing person.” Id. at 624 n. 5. Joyce had had to seek guidance from the affirmative action officer to be treated in a nondiscriminatory manner so that she could attain a promotion that was rightfully hers. Rather than recognize the blatant discrimination that had precluded Joyce from initially being selected for the position, the Supreme Court characterized the case as one of lawful affirmative action, suggesting that Joyce only became more qualified than Johnson by giving her a “plus” for her gender. The fact that Johnson’s case was even treated as a “reverse discrimination” case reflects the presumption of qualification that is accorded to white male plaintiffs.
130. Id.
131. Id. at 580.
132. Id. at 580.
133. See, e.g., Fields v. Clark University, 966 F.2d 49 (1st Cir. 1992), cert. denied, 113 S. Ct. 976 (1993); Broussard-Norcross v. Augustana College Association, 935 F.2d 974 (8th Cir. 1991); Namenwirth v. Board of Regents of University of Wisconsin System (7th Cir. 1985), cert. denied, 474 U.S. 1061 (1986); Zaborik v. Cornell University, 729 F.2d 85 (2d Cir. 1984); Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980).
135. Id. at 55.
138. Id.
139. See Id. (Guidelines withdrawn, however).
140. The proposed guidelines stated that “harassing conduct” includes, but is not limited to: “(I) epithets, slurs, negative stereotyping, or threatening, intimidating, or hostile acts that relate to race, color, religion, gender, national origin, age, or disability; and (ii) Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of race, color, religion, gender, national origin, age, or disability and that is placed on walls, bulletin boards, or elsewhere on the employer’s premise, or circulated in the workplace.” Id. at 51,268.
142. Id. at 454.
143. Under the Burdine-Hicks framework, a plaintiff must first allege a prima facie case of discrimination. The burden of proof stays with the plaintiff, but the burden of coming forward with evidence then shifts to the defendant. The defendant must then articulate a legitimate, nondiscriminatory explanation for the employment action.
Plaintiff is then given an opportunity to rebut the explanations offered by defendant. Even if plaintiff successfully rebuts each of defendant's explanations, the court is not required to rule for plaintiff. Despite disproving each of defendant's explanations, plaintiff still has burden of establishing that unlawful factor (i.e., race or gender) was the true explanation for the adverse employment action. In a sense, the prima facie case disappears from the case once the defendant comes forward with evidence, even if that evidence is found not to be credible. *Hicks*, 113 S. Ct. 2742; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

144. The doctrinal importance of this framework is that a plaintiff is not subject to the burden shifting regime of *Burdine-Hicks*. In a sexual harassment case, a plaintiff will prevail if she can demonstrate that: the conduct was gender-based, it was severe and pervasive, it was unwelcome, and management had legal liability for the conduct. In contrast to *Hicks*, a court cannot find for the defendant on the theory that the conduct just reflected a "personality dispute." *Hicks*, 756 F. Supp. at 1252.

145. This presumption is particularly problematic in light of a recent governmental study indicating that black federal employees are more than twice as likely to be dismissed as their white, Hispanic, or Asian counterparts. See Karen De Witt, *Blacks Prone to Dismissal by the U.S.*, N.Y. TIMES, Apr. 20, 1995, at A19.

Notes to Chapter Eight

3. *Id.* at 221.
4. *Id.* at 228.
5. *Id.* at 276.
6. *Id.* at 276.
8. *Id.* at 77.
9. ALTERMAN, supra note 2, at 233.
10. *Id.* at 233.
12. Id. at 79.
13. Id. at 79.
14. Id. at 80.
15. Id. at 83.
16. Id. at 83–84.
17. Id.
18. Id. at 82.
19. Id. at 82.
20. Id. at 83.
21. 59 FR 29831.
22. HACKING, *supra* note 1, at 263.