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**\*195 WHORES, FAGS, DUMB-ASS WOMEN, SURLY BLACKS, AND COMPETENT HETEROSEXUAL  
WHITE MEN: THE SEXUAL AND RACIAL MORALITY UNDERLYING ANTI-DISCRIMINATION  
DOCTRINE**

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Dr. Jean Jew, an Asian American woman, is a tenured professor at the University of Iowa College of Medicine. [\[FN1\]](#) In the 1980s, she was subjected to a relentless campaign of racial and sexual slurs because of her purported relationship with her supervisor, Dr. Terence Williams. Jew was referred to as a "slut," "bitch," "whore," and "chink," and denied promotion to full professor. [\[FN2\]](#) Williams was forced to step down as Department Chair. Jew brought a Title VII [\[FN3\]](#) claim alleging sexual harassment and gender discrimination stemming from the denial of promotion. After a decade of litigation, she prevailed on the merits in a federal district court and obtained a favorable settlement from the University. [\[FN4\]](#)

J. Mario Carreno, a white man, was a licensed journeyman electrician. [\[FN5\]](#) He was subjected to derogatory comments such as "Mary" and "faggot," [\[FN6\]](#) and was physically harassed by having his genitals and buttocks caressed as well as by having people simulate sexual intercourse or sodomy with him. [\[FN7\]](#) He brought suit in federal court under Title VII alleging sexual harassment and a gender-based constructive discharge. He lost.

After Sylvia DeAngelis, a white woman, became the first female sergeant on the El Paso Police Department, monthly columns in the \*196 association newsletter called her a dingbat and persistently stated that all women police officers were inherently incompetent. [\[FN8\]](#) These comments were then repeated by some of her male subordinates. She brought suit in federal court under Title VII alleging sexual harassment. She lost.

Alan Bakke, a white man, was not admitted at two dozen medical schools including the University of California at Davis. [\[FN9\]](#) Because of his race, Bakke was not eligible to compete for sixteen slots at Davis Medical School that were reserved for disadvantaged racial minorities, and because of his socio-economic status, he was not eligible to compete for five slots reserved for applicants from wealthy families. [\[FN10\]](#) Bakke had also been informed at Davis and elsewhere that his age (33) was a negative factor in his application. He brought suit in state court under Title VI of the Civil Rights Act of 1964 [\[FN11\]](#) and the Equal Protection Clause of the United States Constitution [\[FN12\]](#) alleging race discrimination stemming from his failure to be admitted. [\[FN13\]](#) He won. [\[FN14\]](#)

Melvin Hicks, who was an African American shift commander, was suspended, reprimanded, and eventually discharged for rules infractions for which similarly situated whites were not even reprimanded. [\[FN15\]](#) These actions occurred after a report was authored recommending that blacks be demoted or discharged from supervisory positions to avoid racial tension within the prison system where he worked. He sued in federal court under Title VII, alleging race discrimination stemming from his discharge. He lost because the court concluded that he was fired due to a personality dispute rather than racism.

These five cases reflect the winners and losers under federal anti-discrimination law. Women who are presumed to be heterosexual, such as Jean Jew, frequently prevail [\[FN16\]](#) if they can show that they have been sexualized; [\[FN17\]](#) \*197 merely showing gender-based [\[FN18\]](#) but nonsexualized conduct, such as in the case of Sylvia DeAngelis, is usually not sufficient.

[FN19] Men who are presumed to be homosexual, [FN20] such as Mario Carreno, rarely prevail upon a showing that they have been sexualized even if it is clear that the conduct is also gender-based. [FN21] Whites who are presumed to be competent, such as Alan Bakke, frequently prevail upon a showing that race was a factor in an adverse decision. [FN22] Blacks who are presumed to be incompetent, such as Melvin Hicks, rarely prevail upon a showing that race was a factor unless they can also present evidence of racial slurs or epithets. [FN23] Accordingly, the subset of women and minorities who can prevail under anti-discrimination doctrine is exceedingly small. Moreover, anti-discrimination doctrine appears to shift its requirements depending upon the gender, race and sexual orientation of the plaintiff.

The inadequacies of the courts' interpretations of anti-discrimination doctrine have been widely reported. Kimberle Crenshaw argues that the "paradigm of sex discrimination tends to be based on the experiences of white women; the model of race discrimination tends to be based on the experiences of the most privileged Blacks." [FN24] Kathryn Abrams criticizes sexual harassment doctrine as reflecting "a pattern in which cultural recognition of sexual injury is met with cultural and legal backlash." [FN25] Others have documented the courts' unwillingness to develop anti-discrimination doctrine so that it can reach the individuals in our society who are most victimized by discrimination on the basis of race and gender. [FN26]

I agree with these assessments but add the observation that those individuals who are protected by anti-discrimination doctrine are an even smaller subset of the population than previously envisioned. I will argue that a gross distortion \*198 of sexual harassment doctrine has seeped into all of anti-discrimination law. Thus, plaintiffs other than white men have little chance of prevailing under current anti-discrimination doctrine unless they present direct evidence of sexualized or racialized comments. The role that sexual harassment doctrine plays in limiting the protections offered by anti-discrimination law has gone unnoticed. In this Article, I shall reveal that connection.

The connection between sexual harassment doctrine and the rest of anti-discrimination doctrine is important, especially because it has often been misunderstood by other commentators. Kathryn Abrams notes that sexual harassment doctrine contains some of the most progressive elements of anti-discrimination law, such as recognizing the importance of the victim's perspective. [FN27] Although it is true that sexual harassment doctrine contains some progressive elements, it is unfortunately also true that sexual harassment doctrine contains some troubling, limiting principles that have begun to influence the rest of anti-discrimination law. In particular, as this Article will document, anti-discrimination doctrine often requires female victims of gender-based harassment to demonstrate that they have been subjected to direct, sexualized epithets. Mere stereotypical and harassing treatment is not sufficient. Likewise, minority victims of race-based harassment are increasingly required to demonstrate that they have been subjected to direct, racialized epithets. This requirement, however, has not been applied similarly to white, heterosexual, male plaintiffs.

The point of this Article, of course, is not to suggest that the courts eliminate sexual harassment doctrine. Rather, I argue that sexual harassment doctrine should be strengthened so as to protect more fully all potential victims of gender-based discrimination. In addition, the burden of proof for women, racial minorities and gay and lesbian people should be no more rigorous than it is for white, heterosexual, male plaintiffs. [FN28] Only then can anti-discrimination doctrine become a framework that protects women, racial minorities, gay and lesbian people, as well as white heterosexual men.

This Article is designed to place sexual and racial harassment doctrine within the "big picture" of anti-discrimination doctrine. Many articles address either sexual harassment or anti-discrimination doctrine exclusively. Authors rarely note the connections and inconsistencies between these two areas of the law. Writers such as Kathryn Abrams who do try to make these connections convey too rosy a picture. This Article tells the story of a glass that is half empty rather than half full.

\*199 Harassment doctrine is a subset of the case law involving intentional employment discrimination. [FN29] Only by ex-

aming anti-discrimination doctrine as a whole -- including sexual harassment, racial harassment, discrimination claims brought by women or minorities, discrimination claims brought by gay and lesbian people, and discrimination claims brought by whites and men -- can we appreciate the inconsistencies between these various areas of the law. By presenting such a big picture, five previously unnoticed phenomena are revealed. First, sexual harassment doctrine has narrowed to include only the claims of a small subset of women who might face gender-based harassment at work. [FN30] These women's claims constitute "sexualized" harassment because of the explicit references to sexuality or body parts. Such a narrowing of sexual harassment claims is unwarranted when one remembers that anti-discrimination law promises to protect women from all forms of gender-based discrimination, not simply discrimination of a sexualized nature. Second, sexual harassment doctrine has not only narrowed to exclusively include sexualized claims but has narrowed to include only heterosexualized claims. [FN31] There is nothing in the statutory language of anti-discrimination law to support \*200 such a narrowing of the cognizable claims. A third consequence of this development in anti-discrimination law is that women who have not faced sexualized treatment at the workplace have great difficulty prevailing on a claim of nonsexualized, gender discrimination. [FN32] Sexualized treatment seems to have become a necessary (or very important) element in many cases of intentional gender discrimination brought by women, rather than simply representing one possible fact pattern for recovery. Fourth, race discrimination doctrine has followed a trend parallel to the one that I observe for gender discrimination. [FN33] Many courts are requiring minority plaintiffs to produce evidence of explicit racial epithets in order to recover. Rather than evidence of overt racial harassment being only one of a variety of ways that a plaintiff can obtain a successful judgment, such evidence seems to be necessary to satisfy the courts' stringent requirements in Title VII litigation. Finally, the claims by whites in race discrimination cases and claims by men in gender discrimination cases have not suffered from these doctrinal problems. [FN34] Whites and men are presumed to be competent and their claims meritorious when they file discrimination suits. Their causes of action for intentional discrimination have broadened while those of racial minorities and women have correspondingly narrowed.

Obviously, an article of this scope cannot purport to survey every anti-discrimination case brought in the last ten or twenty years. And, when appropriate, I have tried to acknowledge exceptions that I have found to these general patterns. But many of the arguments that I offer are based on case law of the United States Supreme Court which specifies the standards that apply for sexual harassment, intentional discrimination claims by women, gay and lesbian people and minorities, and intentional discrimination claims by men or whites. Although I have used vignettes to tell this story, it is important for the reader to recognize that the vignettes reflect doctrine developed by the highest courts. These are not isolated examples; they are the core of current anti-discrimination doctrine. And that core, I will argue, is very troubling. I recognize that others may see the glass as half full. [FN35] In this Article, however, I will argue that the glass is half empty. We need to confront that possibility, even if it is not true in every instance, if anti-discrimination doctrine is to become an effective mechanism to rid the workplace of discrimination.

\*201 I. Winner No. 1: Presumptively Heterosexual Women Barbara Stacks' employer had "closed parties" at which male employees were instructed to bring "dates" rather than their wives. These "dates" were called "road whores." [FN36] A party videotape showed two managers sitting in the front seat of an automobile with two female sales representatives in the back seat. After the men chanted, "Show us your tits," the women lifted their blouses and exposed their breasts. [FN37] Stacks' manager told another woman that she looked liked a "madam" and "would not be promoted unless she had breast reduction surgery." [FN38] Ultimately, Stacks was fired for reasons that she alleged were pretextual.

The federal district court ruled against Stacks, concluding that she was not harassed because of her sex. The court believed

that her supervisor was "unpleasant toward everybody." [FN39] As to her discharge claim, the trial court noted that Stacks was a "crackerjack salesperson" but nonetheless found for the defendant. [FN40] On appeal, the Eighth Circuit reversed. [FN41] Crediting Stacks' testimony that the harassment made her feel "less than human," the court found that the district court had erred and should enter judgment in Stacks' favor. [FN42] Being unpleasant toward everyone was not a proper defense of highly sexualized comments made to a woman.

Other courts have agreed with the Eighth Circuit that sexualized comments and behavior directed toward women constitute sexual harassment, even if men are also exposed to sexual banter or insulting comments. For example, in *Faragher v. City of Boca Raton*, [FN43] the district court found for the plaintiffs in a case involving harassment against female lifeguards. Male supervisors touched female lifeguards on their buttocks and breasts without consent, used offensive language such as "cunts" and "bitches," mimicked cunnilingus in the presence of some of the women, and made repeated sexually suggestive comments. [FN44] Though the court recognized "camaraderie among the lifeguards . . . border[ing] on boisterousness," it reasoned that "[c]amaraderie . . . is not synonymous with the lack of respect evidenced by [defendants] toward their female co-workers. . . ." [FN45] Because of the highly sexualized nature of the \*202 defendants' comments, the women were able to prove gender discrimination even though men were also the targets of sexual comments.

In other cases, defendants have tried to avoid liability by claiming that the alleged harasser was bisexual and therefore did not prey upon the plaintiffs because of their gender. In *Ryczek v. Guest Services, Inc.*, [FN46] Francine Ryczek alleged that defendant Catherine O'Brien had sexually harassed her by telling plaintiff about her sexual preference for females, inquiring about plaintiff's sexual practices, dipping plaintiff's finger into a pot of sauce and licking her finger, looking at plaintiff suggestively and leaning against her, and removing her shirt when she was riding with plaintiff in an elevator. [FN47] Defendant Guest Services defended the lawsuit by arguing that the actions were not gender-based because O'Brien was bisexual, not lesbian, and furthermore, that Title VII did not cover any same gender harassment. [FN48] The court did not rule on this issue, but noted the problems that the argument raised in Title VII litigation:

This would appear to produce an anomalous result: a victim of sexual harassment in the District of Columbia would have a Title VII remedy in all situations except those in which the victim is harassed by a particularly unspeakable cad who harasses both men and women. In addition to this troubling possibility, the prospect of having litigants debate and juries determine the sexual orientation of Title VII defendants is a rather unpleasant one. [FN49]

Rather than engage in such an inquiry in the case before it, the court ruled against Ryczek on other grounds. [FN50]

The court did, however, pause to consider how it could get around the bisexual supervisor defense. The court commented that it could simply "interpret [ ] the statute to cover sexual harassment by any individual, regardless of gender. This . . . interpretation would appear to require the court to interpret the word 'sex' as used in Title VII to mean something more than gender." [FN51]

In contending with the bisexual supervisor defense, the court misunderstood how that defense fits into Title VII doctrine generally. The word "sex" in Title VII already means something more than gender; it means sexualized \*203 harassment against heterosexual women. That is why women have been able to defeat the "he's mean to everyone" defense. If a woman is treated sexually, it does not seem to matter if men are also treated derogatorily. For example, Jean Jew, an unmarried woman, prevailed in her case against the University of Iowa, in part, because she was repeatedly referred to as a "slut" for allegedly having an affair with her male married supervisor, Dr. Williams. [FN52] The court acknowledged that the sexual relationship rumors also implicated Williams. [FN53] Under pressure to resign, Williams, in fact, stepped down as Head of the Department shortly before Jew's promotion was considered. [FN54]

The court found that Jew had been subjected to unlawful gender-based sexual harassment because: "Were Dr. Jew not a woman, it would not likely have been rumored that Dr. Jew gained favor with the Department Head by a sexual relationship with him." [FN55] This explanation, however, does not respond to the argument that Jew (a woman) and Williams (a man) were both maligned by the rumors of a sexual relationship. It only tells us that both Williams and Jew were considered to be heterosexual. Had their sexual orientations been different, such allegations would have been unlikely. Thus, there was no direct evidence that Jew's gender caused the rumors although the rumors did seem dependent on her and Williams' perceived sexual orientation.

The court also observed that the two men in Jew's Department who were friends with Williams were not similarly harassed. [FN56] Unlike Jew, the two male co-workers did not suffer adverse assessments of their professional competency because of their relationship with Williams. The two male co-workers, however, did not come up for promotion during this time period. It is impossible to determine whether a man's association with Williams would have had the same detrimental effect as Dr. Jew's. The court assumed that there would have been a difference in treatment without such evidence. The evidence that Jew was sexualized and the men were rarely sexualized was sufficient for the court to support that assumption.

Because of the weight attached to sexualized evidence in harassment cases involving female plaintiffs, courts have been willing to reach bisexual supervisors who harass women. A Wyoming district court held that Title VII can reach an "equal-opportunity harasser," finding liability when a supervisor verbally harassed members of both genders. [FN57] In *Chiapuzio v. BLT Operating Corp.*, two men and two women alleged that their supervisor subjected them to gender-based sexual harassment. Plaintiffs Dale and Carla Chiapuzio alleged \*204 that they were sexually harassed by their supervisor Eddie Bell's incessant sexually abusive remarks which usually referred to the fact that "Bell could do a better job of making love to Carla Chiapuzio than Dale could." [FN58] Plaintiff Clint Bean alleged sexual harassment because Bell subjected him and his wife, who was not an employee, to sexually abusive remarks. [FN59] On one occasion, Bell offered Bean's wife \$100 if she would sit on his lap. [FN60] Christina Vironet alleged sexual harassment because Bell subjected her to an incessant series of sexual advances, particularly while she was pregnant. [FN61]

Although Bell was an equal-opportunity harasser, [FN62] the court found him liable for sexually harassing both the male and the female plaintiffs. The court concluded that each of the plaintiffs was harassed because of his or her gender. Bell intended his remarks to demean the men as men by insulting their sexual prowess, and to demean the women as women by viewing them as sex objects. Through such logic, the court reached harassment of a man by another man, so long as the men were heterosexual. Hence, the court observed: "Bell never harassed male employees concerning sexual acts he desired to perform with them." [FN63]

The court's reasoning draws an illogical distinction between sexual orientation and gender. Bell's comments to the men and women did not relate solely to their gender; they also related to their sexual orientation. To the men, Bell was saying: 'I am a better heterosexual than you are because I could give your wife more sexual pleasure.' To the women, Bell was saying: 'I am a better heterosexual than your husband because I could give you more sexual pleasure.' The comments reflected Bell's sexual orientation and were intended as insults to the sexual prowess of the men. It is true that sexual-provess insults are also considered to be gender-based insults in our society. But it is wrong to say that Bell's comments were solely based on gender. The same analysis would apply if Bell had accused the men of being gay or had made sexual advances toward them. In both cases his comments would have been based on his perception of their sexual orientation and might have insulted their integrity as men.

The court had no difficulty in concluding that Bell's comments toward the women were based on gender rather than on sexual orientation. But why should it be gender discrimination to make sexual advances toward women but not toward men? If sexu-

al advances are gender-based because they are intended to demean and objectify the victim, then whether the source of the attraction is heterosexuality or homosexuality should be irrelevant.

**\*205** The Chiapuzio decision reflects one of the most awkward constructions of Title VII to preserve heterosexual chastity. Given Bell's character, it takes little imagination to speculate about the kinds of comments he would have made to an openly gay man or lesbian at the workplace. Undoubtedly, he would have found a way to insult their sexual practices with comments such as "pussy" and "faggot" to the men and comments about the lesbians just needing a "good lay." Such comments would have been demeaning and loaded with gender stereotypes, yet it appears as though the Chiapuzio court would have been unwilling to reach them even within the scope of its equal-opportunity harasser doctrine.

Evidence of sexualized comments directed toward women, however, is no guarantee of quick or easy success under Title VII. Barbara Stacks' harassment had begun in 1986. She initially lost in the trial court and did not obtain a favorable judgment from the court of appeals until 1994. Similarly, Jean Jew endured a decade of harassment before obtaining a favorable judgment in the federal district court. Even so, her fate was uncertain until a massive public-relations campaign was mounted to dissuade the University from pursuing its appeal of the decision. [\[FN64\]](#) Thus, while presumptively heterosexual women who have faced highly sexualized comments may be in the best position to prevail, even their cases can be difficult to win.

The cases involving female as well as male heterosexual plaintiffs reveal that the word "sex" already means far more than gender under Title VII. Sex discrimination can be proven with evidence of sexualized harassment even when there is not strong evidence of gender-based discrimination. But, as we shall see below, this generalization usually does not apply to cases involving homosexual sexual remarks and advances.

II. Loser No. 1: Presumptively Gay Men Ernest Dillon was an employee of the United States Postal Service. He was routinely called a "fag" at work, and told that he "sucks dicks." [\[FN65\]](#) He was subjected to repeated graffiti with statements such as "Dillon gives head." [\[FN66\]](#) He was physically assaulted at work, and received numerous injuries. After three years of enduring this treatment, he resigned upon advice from his psychiatrist and sued in federal court under Title VII for sexual harassment.

Mario Carreno had "his genitals and buttocks caressed," was "grabbed or held from behind while simulated sexual intercourse or sodomy was performed on him by virtue of pelvic thrusts by other employees," and was exposed to "constant, explicit, vulgar and **\*206** derogatory comments regarding sexual acts at his employment." [\[FN67\]](#) Carreno sued in federal court under Title VII for sexual harassment. [\[FN68\]](#)

These men did not prevail under sexual harassment doctrine because the courts concluded that their conduct was based on sexual orientation [\[FN69\]](#) rather than on gender. [\[FN70\]](#) In each case, they were targeted for sexualized comments and actions that were not directed at women in the workplace. No one seemed concerned if women "sucked dick" or were effeminate at the workplace. As men, however, those traits were unacceptable because they placed men outside their proper gender role. If a man is accused of "sucking dick," he is being called unmanly. It is a gender-specific insult. These were not cases like Stacks or Faragher where the employer could offer the defense that they mistreated everyone. But, like Stacks and Faragher, they were cases where the comments clearly offended the plaintiffs' dignity as persons.

The only defense in these cases was that the comments were homophobic rather than sexist. The line between homophobia and sexism, however, is invisible because homophobia frequently relies on sexual stereotyping about gender roles. Women who are perceived to be heterosexual frequently prevail under Title VII for what is called a "sexual stereotyping" theory even

when the sexual stereotyping includes allusions about their sexual orientation. In the landmark 1989 Supreme Court case establishing this doctrine, Ann Hopkins prevailed by showing that she was sexually stereotyped as being too "macho," and for being told that she should "wear make-up" and go to a "charm school." [FN71] She did not fit the proper gender roles for women, including that of heterosexuality. [FN72] Although Hopkins does not appear to have ever been explicitly accused of being a lesbian, other women who are considered to be heterosexual, such as Jean Jew, have faced such accusations. [FN73] It is rather \*207 peculiar for Title VII to protect women who are presumed to be heterosexual against sexual stereotyping when they are accused of being "macho" or "lesbian" but not to protect men, who are presumed to be homosexual, against sexual stereotyping when they are called epithets such as "Mary" and "fag." Dillon's and Carreno's perceived homosexuality was unacceptable, in part, because it did not fit the proper gender roles specified by society.

Courts have suggested that one would have to add the phrase "sexual orientation" to Title VII to reach cases like Dillon's and Carreno's. [FN74] In fact, the courts have added the word "heterosexual" to Title VII. The existing case law reads: a man can recover for being stereotyped as a "fag" and a woman can recover for being stereotyped as "macho" or "lesbian" if they are considered heterosexual. If Title VII protected against gender discrimination for all employees, then all employees, irrespective of their sexual orientation, would be protected against gender stereotyping epithets.

It would oversimplify the Dillon and Carreno cases, however, to conclude that men and women can never prevail under Title VII when harassment involves a perceived homosexual. When the harasser is a gay man or lesbian, and the person being harassed is considered to be heterosexual, the courts sometimes find that Title VII covers such conduct. [FN75] For example, Robin McCoy, a female, prevailed under Title VII because her female supervisor allegedly rubbed McCoy's breasts and between her legs, and forced her tongue into McCoy's mouth. The supervisor also routinely called McCoy "stupid poor white trash" and "stupid poor white bitch." [FN76] McCoy's supervisor subjected her to sexual taunts and physical assaults comparable to those faced by Dillon and Carreno. Unlike Dillon and Carreno, however, McCoy was considered to be heterosexual, so a ruling in her favor protected a plaintiff's heterosexual chastity while penalizing a purportedly lesbian supervisor.

One problem with this principle in this case law is that it requires a court to evaluate whether the plaintiff is a heterosexual or homosexual -- a problem similar to the one noted by the Ryczek court in the context of the bisexual supervisor defense. This evaluation seems particularly to harm male plaintiffs who are often presumed to be homosexual when they are the subject of explicit sexual advances. Women, by contrast, are often presumed to be heterosexual in such contexts. [FN77] The courts have developed a distinction between sexual orientation and gender that they claim is based on Title VII's coverage of \*208 sexism but not homophobia. The application of this principle, however, reflects the courts' own prejudices and stereotypes about who is homosexual rather than any consistent principles.

III. Loser No. 2: Nonsexualized Women Teresa Harris worked as a manager of Forklift Systems. [FN78] Charles Hardy, the President of the company, was her supervisor. From the beginning of her employment in April 1985 until mid-August 1987, he subjected her to the following taunts: "You're a woman, what do you know?" "We need a man as the rental manager." You are a "dumb ass woman."

They should "go to the Holiday Inn to negotiate [her] raise." She should get coins from his front pants pocket. She should pick up objects that he threw on the ground. [FN79]

In mid-August 1987, Harris complained to Hardy about his conduct. He said he was surprised that Harris was offended, claimed he was only joking, and apologized. Nonetheless, in early September, while Harris was arranging a deal with one of Forklift's customers, he said to Harris in front of other employees: "What did you do, promise the guy . . . some [sex] Saturday night?" [FN80] Harris soon quit, and filed a lawsuit for sexual harassment and constructive discharge.

After a hearing in the United States Supreme Court to clarify the standards in a sexual harassment case, [\[FN81\]](#) the Magistrate found on remand that the "workplace did not become permeated with abusive conduct that rose to the level of a Title VII violation until the middle of September 1987," when the sexual comments became explicitly unwelcome. [\[FN82\]](#) The district court affirmed these findings [\[FN83\]](#) and no further appeal ensued. These findings are problematic because they rely entirely on the unwelcome sexual comments directed at Harris, overlooking the derogatory gender-based comments made to her. At least two of the comments related to Harris' purported lack of intelligence as a woman. One suggested that all women are stupid; another suggested that Hardy, as a woman, was stupid. Such comments should have been per se gender-based (although nonsexualized) harassment. An employee should not **\*209** have to put a supervisor on notice that she finds the comment "dumb ass woman" offensive.

Teresa Harris was not alone in having the courts ignore the nonsexualized aspects of her complaint. Women with purely gender-based cases (without a sexual element) have not been so fortunate. The most recent example of this principle is a 1995 Fifth Circuit decision, *DeAngelis v. El Paso Municipal Police Officers Association*. [\[FN84\]](#)

Sylvia DeAngelis was the first female promoted to sergeant on the El Paso Municipal police force. Within a few months of being promoted, she was subjected to repeated ridicule in the newsletter of the El Paso Municipal Police Officers Association. [\[FN85\]](#) The newsletter reached at least 700 police-officer members each month. Most of the comments talked about women in general, dismissing them as incompetent with comments like "physically, the police broads just don't got it!," while four of the comments referred to the plaintiff personally with statements like she was a "dingy woman." [\[FN86\]](#) The comments repeatedly implied that women were not suited to be police officers, but none of the comments was sexual in nature. In a jury trial in a federal district court, DeAngelis was awarded \$10,000 in compensatory damages and \$50,000 in punitive damages. [\[FN87\]](#)

On appeal, the Fifth Circuit reversed. [\[FN88\]](#) The three-judge panel unanimously concluded that the "column did not represent a boss's demeaning harangue, or a sexually charged invitation, or a campaign of vulgarity perpetrated by co-workers: the column attempted clumsy, earthy humor." [\[FN89\]](#) The Fifth Circuit's desire to avoid First Amendment problems influenced it to conclude that an Association's newsletter could not trigger liability for sexual harassment under Title VII. But, even there, the Court depended on a sexualized/nonsexualized dichotomy. In a footnote, the Court commented: "We do not mean that sexual propositions, quid pro quo overtures, discriminatory employment actions against women or 'fighting words' involve the First Amendment." [\[FN90\]](#) In other words, had the columnist called women "bitches" or "cunts" instead of incompetent, DeAngelis probably could have prevailed without First Amendment problems.

To DeAngelis and Harris, however, being called incompetent may have been far more damaging than being called sexy or whorish. DeAngelis testified that the comments undermined her credibility at work. On two specific occasions following the publication of the first article (which maligned her personally), junior officers behaved insubordinately to her. [\[FN91\]](#) Further, these **\*210** columns so undermined her self-confidence that she was reluctant to apply for a promotion to lieutenant. Being repeatedly labelled incompetent harmed her dignity in ways that are similar to the harm suffered by plaintiffs in cases involving sexualized comments, but the court of appeals discounted her testimony on the nonsexualized discrimination, in part, because "no physical or sexual advances were made on DeAngelis." [\[FN92\]](#) In effect, the court interpreted the word "sex" in Title VII to exclude nonsexualized gender discrimination.

Fortunately, not every federal court has followed the principle typified by DeAngelis and Harris. In *Hall v. Gus Construction Co.*, [\[FN93\]](#) the plaintiffs alleged that the defendants had called one of the women "herpes," urinated in one of the plaintiff's gas tank, and failed to fix a pilot truck that gave off fumes. [\[FN94\]](#) The Eighth Circuit held that: "Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances." Accordingly,

it upheld the trial court judgment for the plaintiff in a case involving harassment of a nonsexualized nature. [\[FN95\]](#) Unfortunately, few women have been able to prevail under the Gus Construction standard. [\[FN96\]](#) As we will see in Part VI, the Equal Employment Opportunity Commission has been unable to codify the Eighth Circuit holding.

IV. Loser No. 3: African Americans Melvin Hicks began working as a correctional officer at St. Mary's Honor Center, a halfway house, in August 1978. [\[FN97\]](#) In less than two years, he was promoted to shift commander [\[FN98\]](#) although, unknown to Hicks at the time, a study was soon authored for the Department of \*211 Corrections recommending that blacks be demoted or discharged from supervisory positions to avoid racial tension within the prison system. [\[FN99\]](#) Until 1984, when Steve Long, a white man, became superintendent, and John Powell, a white man, became chief of custody, Hicks had a perfect work record with no suspensions or reprimands. [\[FN100\]](#) Shortly after Long and Powell took their positions, Hicks was targeted for reprimands and suspensions, and was ultimately discharged.

Hicks failed to prevail under Title VII despite strong evidence of intentional discrimination. For example, Hicks was treated unusually harshly for minor rules infractions. In one incident, Hicks ordered a correctional officer to use a St. Mary's vehicle but failed to record the vehicle's use in the log. Chief of Custody Powell recommended that Hicks be disciplined for failing to ensure the vehicle was correctly logged in. [\[FN101\]](#) A four-person disciplinary board voted to demote Hicks as a result of that incident; Powell, who was a member of that board, voted to terminate Hicks for that infraction. [\[FN102\]](#)

When white shift commanders committed far more serious infractions of the rules, they received much more lenient treatment. For example, after Michael Doss negligently allowed a prisoner to escape, he received only a letter of reprimand as discipline. Similarly, after Sharon Hefele failed to lock the doors to the main power room and annex building, she received no reprimand whatsoever. [\[FN103\]](#) Moreover, Powell, who had recommended Hicks's termination for the log-in error, praised a white transportation officer, Edward Ratliff, who had instructed an inmate, in violation of prison rules, to climb over a wall to obtain some keys from Superintendent Long's office. [\[FN104\]](#)

The second incident of discriminatory treatment ultimately led to Hicks' termination. On April 19, 1984 (only three months after the personnel changes were made), Hicks was notified of his demotion at a meeting with Powell and Long, as well as Vincent Banks, the only remaining black supervisor. Hicks was upset by the news and requested the rest of the day off. Long granted the request. Nonetheless, Powell followed Hicks to his open locker to obtain his shift commander's manual. In the court's words: "Plaintiff refused, and the two exchanged heated words. Plaintiff indicated he would 'step outside' with Powell, and Powell warned plaintiff that his words could be perceived as a threat. After several tense minutes, plaintiff left." [\[FN105\]](#)

\*212 Powell immediately sought disciplinary action against Hicks for these "threats." A disciplinary board met and voted to suspend Hicks for three days. Steve Long, however, disregarded their vote and recommended termination. One month later, Hicks was terminated. [\[FN106\]](#)

When a similar incident involving a white man occurred, Powell recommended that no disciplinary action be taken. Arthur Turney, a white man who was under Hicks' supervisory authority, "became indignant and cursed plaintiff with highly profane language" [\[FN107\]](#) after attending a meeting with Hicks to receive the results of his employment evaluation. In the court's words: "Powell concluded that Turney was merely venting justifiable frustration, and did not discipline Turney for the incident." [\[FN108\]](#) Thus, when a white man cursed a black male supervisor, no disciplinary action ensued. But, when a black man exchanged "heated words" with a white male supervisor, he was terminated despite an internal recommendation that he only

be suspended.

Discrimination against black male supervisors pervaded St. Mary's Honor Center. Black male supervisors were demoted and fired, and replaced with whites. Hicks was demoted and discharged for misconduct less serious than conduct for which whites received neither discipline nor a reprimand. Once Powell and Long became supervisors, they made every effort to undermine Hicks' authority. His attempts to reprimand others and to retain his authority were not validated by management. Instead, management seemed to work as quickly as possible to build a file that would lead to his termination. As early as the relatively minor log-in incident, Powell was recommending Hicks' discharge. Ultimately, Hicks was discharged only because Long imposed a harsher penalty than was recommended by the disciplinary board.

Despite evidence of discrimination, the district court held that Hicks had not been treated differently because of his race. To justify this conclusion, the court emphasized that at all times, two of the four persons on the disciplinary board were black.

[\[FN109\]](#)

The court incorrectly assumed that blacks had meaningful power on the board, and that blacks condoned the adverse treatment of Hicks. The Board included Long, who was responsible for making the final recommendation to the Department of Corrections; Powell, a white supervisor; Banks, a black supervisor; and one black who was not a supervisor. Long had the ultimate authority, which he exercised, to recommend to the Director of the Missouri Department of Corrections and Human Resources that Hicks be terminated. That decision did not result from the recommendation of the racially-balanced board. Powell was always one-fourth of the votes on the disciplinary board, \*213 and consistently used that authority to seek the harshest possible penalty for Hicks. The two blacks on the board at the time of the log-in incident voted inconsistently with Powell, and thereby achieved the result that Hicks was demoted rather than terminated. [\[FN110\]](#) Blacks, of course, can help perpetuate racism especially in a situation like the one at St. Mary's where they might be worried about losing their own jobs. But it is not fair to describe the trial court record as demonstrating that the black employees condoned the treatment of Hicks; [\[FN111\]](#) if anything, the record indicates that Powell and Long, both white men who had the cooperation of the Director of Corrections, engaged in a campaign systematically to remove nearly all black supervisors.

Race-related circumstantial evidence also strengthened Hicks' case. Unknown to Hicks at the time of his employment at St. Mary's, James Davis performed a study of the honor centers in St. Louis and Kansas City in 1980 and 1981 for the Missouri Department of Corrections. As the district court found: "In a section toward the end of the study Davis pointed out that too many blacks were in positions of power at St. Mary's, and that the potential for subversion of the superintendent's power, if the staff became racially polarized, was very real." [\[FN112\]](#)

Although the witnesses [\[FN113\]](#) at trial indicated that they were unaware of the Davis study, [\[FN114\]](#) dramatic personnel changes consistent with the study began occurring in 1984. During 1984 approximately twelve blacks and one white were terminated. [\[FN115\]](#) The supervisory staff changed from one white and five blacks to four whites and two blacks. The white superintendent was demoted; a white filled his position. The black chief of custody was demoted and transferred; a white filled his position. The two black shift commanders other than Hicks were fired and replaced by whites. Hicks was formally retained, but was subjected to pervasive harassment. Although blacks were hired during this reorganization, not one was hired for a supervisory position. [\[FN116\]](#) Until this time, Hicks had not been suspended, written up, or otherwise disciplined except for a mistaken reprimand for being absent when he was, in fact, on a scheduled vacation. [\[FN117\]](#) His record was considered entirely satisfactory. [\[FN118\]](#)

\*214 The court excused these dramatic race-based personnel changes by noting that they were "not unusual" [\[FN119\]](#) in light of the problems at St. Mary's. Implicitly, the court ratified the Davis study's conclusion that one way to respond to racial ten-

sion at the halfway house was to terminate black supervisors and replace them with whites. Such reasoning, however, should be unacceptable under Title VII's prohibition of race discrimination.

Ultimately, Hicks lost his case because the district court concluded that his discharge was the result of a personality dispute rather than racism. [FN120] This holding was upheld by the Supreme Court, which refined and tightened the burden of proof for plaintiffs in race and gender discrimination cases. Hicks had alleged that he was a black man who had been fired for entirely pretextual reasons, thereby raising a strong inference of race discrimination. At trial, the defendants had tried to explain their conduct by producing evidence that Hicks was fired for merit-based reasons. That proof, however, was unpersuasive, because Hicks presented evidence that similarly-situated whites were treated more favorably. One would therefore have expected Hicks to prevail in his claim that a nonmerit-based factor, such as racism, must explain his discharge.

The trial court and the Supreme Court, however, refused to presume that racism motivated his discharge. Instead, the trial court came up with an explanation for the discharge that had not even been offered by the defendants at trial: that Hicks had been fired due to a personality dispute rather than racism. Emphasizing that a plaintiff in a race discrimination case always maintains the burden of proving intentional discrimination, the court found and the Supreme Court upheld that Hicks had failed to meet this burden even though he had proven that the explanations offered by the defendant were pretextual. In a dramatic shift in Title VII case law, the Supreme Court made it clear that plaintiffs who allege discrimination face a virtually insurmountable assumption of incompetence. Even if the court finds that the employer's explanation lacks credibility, the plaintiff may still lose if the court chooses to find another non-discriminatory explanation for the plaintiff's termination.

The personality dispute defense has taken on added significance since Hicks, except in cases in which the plaintiff has evidence of explicit racial epithets. For example, Anita Bivens, a black woman, and Rodolfo Arzate, an Hispanic man, could not convince a judge to let them take their racial harassment cases to a jury. Bivens was not permitted to argue to the jury that pushing and shoving incidents along with loud altercations were due to her race in light of the fact that one employee did openly call her a "nigger." [FN121] \*215 Arzate was not allowed to argue that other employees "mocked" his Hispanic accent. [FN122] The court concluded that the plaintiff and his co-workers simply chose not to talk to each other, stating that "[t]he fact that co-workers do not like the plaintiff, or that he does not like them, is not the basis of a cognizable Title VII racially hostile-environment claim." [FN123] The court refused to connect this dislike and noncommunication to stereotypes about the plaintiff's Hispanic ancestry because of the absence of explicit racial epithets. [FN124]

Most African American plaintiffs who win racial harassment or discrimination cases provide evidence of racial epithets. [FN125] James Rodgers, a black man, prevailed in his racial harassment and discharge claims against Western-South Life Insurance. [FN126] He offered evidence that his supervisor, William Mann, referred to blacks as "too fucking dumb to be insurance agents," explicitly advised his superior not to hire any more blacks, and repeatedly called him and another black employee "nigger." As with the gender cases involving sexualized language, the defendants tried to argue that Mann insulted all of his employees. The evidence supported the conclusion that Mann regularly called his subordinates "knobheads," "knuckleheads," "dunderheads," and "goons," which contributed to much psychological anxiety. [FN127] Even though everyone seemed to suffer from Mann's abuse, the court found and the circuit court affirmed that "Mann's racist comments and taunts . . . contributed significantly to the stress condition that compelled Rodgers to resign from Western-Southern." [FN128] The court failed to inquire whether white employees also frequently resigned because of the stress caused by Mann's abusive personality. The racialized nature of the comments led the court not to make that comparison. Hicks, by contrast, could not prevail even though he had strong comparative evidence of different treatment, because he did not have evidence of racialized comments. Without such evidence, his lawyer did not even characterize his case as harassment.

Evidence of repeated racial epithets, however, does not guarantee that a plaintiff will prevail. James Bolden, a black man,

was called "honky" and "nigger," and subjected to comments such as: "you better be careful because we know people in the Ku Klux Klan." [FN129] Bolden lost because the court found that, although he was "tormented at work" and did report some events, "he did not alert his supervisor he felt he was being harassed because of his \*216 race." [FN130] In another case, the district court did not find credible the assertions of Vildred Davis, a black woman, which were supported by co-workers, that her supervisor "hurled racial epithets towards her, assigned her to difficult jobs without providing training, and otherwise verbally abused her in front of other employees." [FN131] Both decisions were affirmed on appeal. Evidence of racial epithets strengthens a race discrimination case but is certainly not a guarantee of success.

V. Winner No. 2: Whites Wendy Wygant, a white woman, was laid off from her job as a school teacher at a time of increasing racial tensions in the Jackson School District. [FN132] The union, which represented both black and white teachers, achieved a compromise where the burden of being laid off would fall proportionately on white teachers and minority teachers as a group. Each group would experience a portion of that burden equal to its portion of the faculty. [FN133] Because black teachers, however, had disproportionately less seniority than white teachers, strict seniority rules were modified to achieve this racial balance. Wygant was among the least senior white teachers but had more seniority than some of the black teachers who were retained. She and similarly situated white teachers successfully challenged the compromise agreement.

Wygant prevailed in her suit against the school district. The Supreme Court found this compromise to be unconstitutional even though the parties' intentions were to alleviate racial tension, provide role models for minority students, and maintain racial balance. Wendy Wygant's competence and abilities were considered irrelevant to the Court's resolution of the case; not once did a member of the Court even mention her full name in the hundreds of pages of opinions that were authored in the case. [FN134]

In Hicks, the racially conscious plan did not have the purpose of maintaining racial balance; rather, it was designed to reverse the gains that blacks had made at the supervisory level. In addition, the plan in Hicks had a disproportionate impact on "innocent" black third parties. Finally, the rationale articulated in Hicks seemed much more questionable than the rationale articulated in Wygant. In Wygant, the school district wanted to develop and \*217 foster positive black role models; in Hicks, the Department of Corrections appeared to be perpetuating the negative stereotype that black supervisors would sympathize with minorities who might engage in racial strife in a prison context. That kind of negative stereotype has no place in anti-discrimination doctrine.

Despite dramatic evidence of discrimination, Hicks lost his case. While Hicks had demonstrated that the reasons offered for his discharge were pretextual, he had not proven that race was the true explanation for his discharge. As the court stated: "In essence, although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated." [FN135] The court of appeals reversed, [FN136] but the Supreme Court overturned that decision [FN137] and remanded the case back to the court of appeals, which in turn remanded to the district court. [FN138] Hicks never proved to the satisfaction of the court that race was the cause of his gross mistreatment at St. Mary's.

Comparing discrimination cases brought by minorities and reverse discrimination cases brought by non-minorities reveals that courts are exceedingly strict with determinations of causation in the former, but quite generous with determinations of causation in the latter. For example, in the leading affirmative action case, Regents of the University of California v. Bakke, [FN139] the courts barely paused to consider whether Alan Bakke's race was the source of his failure to be admitted by Davis

Medical School. Bakke had applied to twenty-four medical schools over two years and had been turned down by all of them. [\[FN140\]](#) When he inquired as to why he was rejected, two medical schools indicated that the explanation was his age (thirty-three). The least prestigious of the two dozen schools was the University of California at Davis. [\[FN141\]](#) Because Bakke was aware that his age might be a negative factor at Davis, he wrote to Davis in 1971 asking how his age would affect his application. The associate dean responded that "when an applicant is over thirty, his age is a serious factor which must be considered." [\[FN142\]](#) Despite the reservation expressed in this letter, Bakke applied for admission late in 1972 and received an interview in the following March after most of the places in the class had been filled. [\[FN143\]](#) He was rejected for admission and his request to be wait-listed was denied.

Bakke sued in state court under the Equal Protection Clause of the United States Constitution, as well as Title VI of the Civil Rights Act. He argued that \*218 he had not been admitted because his race had precluded him from competing for sixteen positions that were set aside for racial minorities. The trial court held that the special admissions program was unlawful, but the court refused to order Bakke's admission, holding that he had "failed to carry his burden of proving that he would have been admitted but for the existence of the special program." [\[FN144\]](#) Bakke appealed from the portion of the trial court judgment denying him admission, and the University appealed from the decision that its special admissions program was unlawful. On appeal, the California Supreme Court ruled in favor of Bakke, because the University had conceded that it could not demonstrate that Bakke would not have been admitted in the absence of the special admissions program. Accepting this admission, the California Supreme Court directed the trial court to order that Bakke be admitted to the Medical School. [\[FN145\]](#) The United States Supreme Court affirmed the judgment.

Bakke's qualifications played a very peculiar role in this litigation. They became relevant to the question of whether Bakke had standing to bring suit. [\[FN146\]](#) Several amici suggested that the University had "fabricated" jurisdiction by conceding its inability to meet its burden of proving that Bakke would not have been admitted but for his race. [\[FN147\]](#) The Court rejected this suggestion and proceeded on the assumption that Bakke was qualified for admission, despite the strong evidence that his age had been an adverse factor. [\[FN148\]](#) For a white plaintiff, Alan Bakke, qualification and causation were presumed; for a black plaintiff like Melvin Hicks, incompetence and lack of causation were presumed even after Hicks had demonstrated that defendants' explanations were pretextual.

Contrast the willingness of the Court to stretch the facts to favor Bakke with its unwillingness to even grant standing to black parents. In *Allen v. Wright*, parents of black public school children alleged that the Internal Revenue Service helped perpetuate racially segregated schools, thereby depriving their children of an integrated education, by permitting segregated private schools to maintain their tax-exempt status. [\[FN149\]](#) The Supreme Court denied the parents standing, finding that the plaintiffs could not adequately demonstrate that the alleged injury of attending segregated schools was "fairly traceable" to the challenged actions of the IRS. [\[FN150\]](#)

\*219 Although the Davis special admissions program supposedly caused Bakke's harm of being excluded from fair consideration by the Medical School, the Court rejected the argument that the federal subsidy of segregated schools contributed to the harm of black children denied an integrated education. As Justice Brennan stated in his dissenting opinion in *Allen*: "More than one commentator has noted that the causation component of the Court's standing inquiry is no more than a poor disguise for the Court's view of the merits of the underlying claims. The Court today does nothing to avoid that criticism." [\[FN151\]](#) Thus, it may be true that the University of California made it easier for the Supreme Court to rule in Bakke's favor by not contesting Bakke's qualifications. On the other hand, the Supreme Court would probably have seen through that attempt if Bakke had been a black school child trying to gain access to a white school.

Moreover, the University of California probably would not have conceded Bakke's qualifications during litigation if he had

not been white and male. Likewise, the University of Iowa was unwilling to concede Jean Jew's qualifications for promotion during litigation, despite strong evidence that she had suffered sexual harassment. As an Asian American woman, Jean Jew did not garner the presumption of competence accorded to white men such as Alan Bakke.

There are occasional counter-examples. In *Hopwood v. State of Texas*, [FN152] a federal district court found that the University of Texas violated the Fourteenth Amendment by employing racial preferences in its admissions process. [FN153] In the liability phase, the court cited *Hicks* for the proposition that the "ultimate burden of persuasion" remains at all times with the plaintiff." [FN154] Then, citing *Bakke*, the court concluded that the plaintiffs should not prevail if the defendants could "establish legitimate grounds for the decision not to admit these plaintiffs, notwithstanding the procedure followed." [FN155] Applying these two cases, the court accepted the university's argument that the plaintiffs would not have been admitted even in the absence of the race-based admissions program.

Although the district court cites *Hicks* in its opinion, it was not really following *Hicks*' dictates. In *Hicks*, the Supreme Court concluded that a plaintiff in a race case never establishes a presumption of race discrimination even after he or she disproves the justifications offered by the defendant. In *Hopwood*, by contrast, the district court held that the burden of proof shifted where race was a factor in the admissions process. The plaintiffs would presumptively prevail unless the defendant could demonstrate that the plaintiffs were unqualified. Because the defendants in *Hopwood* met this burden, the \*220 plaintiffs lost at the liability stage. Had the *Hicks* court employed such a framework, *Hicks* would have won after the defendants failed to establish that he was unqualified. Thus, even when whites fail to obtain relief in reverse discrimination cases, they have played under an easier set of rules than have blacks.

Jean Jew's case unites the presumptions underlying claims brought by white and minority plaintiffs and the role that racialized evidence plays in such cases. Jew alleged two separate injuries: that she was a victim of sexual harassment and that she was not promoted because of her gender. [FN156] In claiming that her failure to be promoted was discriminatory, she lodged a difficult claim under existing law. Cases challenging tenure and promotion in the educational context are usually unsuccessful. [FN157] The plaintiff's presumed incompetence in race and gender discrimination cases is particularly strong in this context. Nonetheless, Jew prevailed on both her harassment and promotion claims based on the strong evidence of sexualized comments.

These comments, however, centered on Jew's sexuality, not her intelligence or abilities as a research scientist. She was called a "whore," not a "dumb broad." If the issue is whether harassment taints a promotion process, one would think that comments like "dumb broad" would be more powerful than comments like "whore" because they speak directly to an individual's ability to be a research scientist. Yet the remand decision in *Harris*, the Fifth Circuit's decision in *DeAngelis*, and the Supreme Court's decision in *Hicks* all suggest that nonsexualized and nonracialized comments are not particularly problematic in the workplace. They imply that only sexualized and racialized comments reflect lack of respect for an individual's ability to perform his or her work. Given that the words "sex" and "race" are unmodified in Title VII, one should be able to prevail on a claim of sex or race discrimination without evidence of sexual or racial epithets.

Ironically, when sexual harassment doctrine was first being developed, lower courts ruled against female plaintiffs under the misconception that sexual harassment does not constitute gender discrimination. [FN158] Those courts were wrong, because as Catharine MacKinnon has powerfully argued, "the sexual harassment of working women presents a closed system of social predation in which powerlessness builds on powerlessness." [FN159] Jean Jew was the victim of this social predation as her sexualization ultimately infected her promotion \*221 process when men who had openly made sexualized insults voted against her promotion. In their minds, she was a "slut" rather than a competent professional. It is therefore a positive development in Title VII jurisprudence for women like Jean Jew to prevail. Sexual harassment doctrine, however, should not limit re-

covery to cases of sexualized or racialized harassment. We must not forget that sexual harassment is only one form of discrimination that women and men may face at the workplace. Gender and race discrimination can and do happen in the absence of sexualized or racialized insults.

#### VI. Beyond the Moral Code

As we have seen, courts have overemphasized sexualized harassment while devaluing the non-sexualized component of gender-based harassment for claims brought by heterosexual women. Similarly, in race discrimination cases, courts increasingly require evidence of racial epithets for blacks to prevail. These distortions began with the first harassment guidelines issued by the Equal Employment Opportunity Commission (EEOC) nearly fifteen years ago. [\[FN160\]](#) The purpose of the Guidelines was to clarify that sexual harassment constituted gender-based discrimination, contrary to the holdings of many lower courts. However, the Guidelines failed to state clearly that harassment could be proven without evidence of sexual comments or actions.

As the EEOC has recently recognized, the focus on harassment that is sexual in nature has led to confusion as to whether harassment based on race, color, religion, gender, age, and disability "is egregious" and prohibited by civil rights acts. [\[FN161\]](#) Accordingly, the EEOC proposed to "put in guideline form the rule that sex harassment is not limited to harassment that is sexual in nature, but also includes harassment due to gender-based animus." [\[FN162\]](#) For example, the original EEOC Guidelines had focused on distinguishing sexual harassment from appropriate sexual interactions and, therefore, had included an inquiry as to whether the sexual conduct was "welcome." Because the proposed EEOC Guidelines emphasized non-sexualized, gender-based harassment, they did not include an inquiry as to whether the harassing conduct was "welcome." [\[FN163\]](#)

Unfortunately, the EEOC's attempt to highlight nonsexualized harassment has not been successful. First, the proposed Guidelines offered little guidance to courts on how to interpret statements and conduct to determine whether comments that are non-sexual nonetheless constitute "sex harassment." [\[FN164\]](#)

\*222 Second, the Guidelines gave no special instruction as to how to evaluate such comments to determine if they are sufficiently severe and pervasive to constitute unlawful harassment. Ultimately, the EEOC withdrew the proposed Guidelines after receiving much criticism that the Guidelines would violate employers' First Amendment rights.

The New Jersey Supreme Court, by contrast, has recognized that both gender-based and sex-based harassment should violate Title VII. In *Lehmann v. Toys 'R' Us, Inc.*, [\[FN165\]](#) the court stated that comments and actions of a nonsexualized nature that serve to degrade women's value at the workplace constitute gender-based harassment. The court provided the following framework for evaluating such comments:

When the harassing conduct is sexual or sexist in nature, the but-for element will automatically be satisfied. . . . However, not all sexual harassment is sex-based on its face. . . . When the form of the harassment is not obviously based on the victim's sex, the victim must make a prima facie showing that the harassment occurred because of her sex. . . . In such non-facially sex-based harassment cases a plaintiff might show that such harassment was accompanied by harassment that was obviously sex-based. Alternatively, she might show that only women suffered the non-facially sex-based harassment. All that is required is a showing that it is more likely than not that the harassment occurred because of the plaintiff's sex. For a female plaintiff, that will be sufficient to invoke the rebuttable presumption that the harassment did in fact occur because of the plaintiff's sex. [\[FN166\]](#)

The New Jersey doctrine represents an enormous advance over existing Title VII doctrine for two reasons. First, it recognizes that harassing conduct can be gender-based even if it is not "sex-based on its face." The doctrine therefore allows plaintiffs to

use circumstantial evidence to infer the gender-based aspect of harassing conduct. Under existing Title VII doctrine, cases involving such circumstantial evidence usually are required to utilize the more rigorous Burdine-Hicks doctrine. [\[FN167\]](#) Second, it recognizes that the gender-\*223 based aspect of harassing conduct can be inferred from evidence that other harassment or conduct was sex-based. This insight helps clarify that harassing conduct often is not exclusively and explicitly gender-based. The New Jersey doctrine allows a plaintiff to combine non-gender-based harassment with gender-based harassment to meet the threshold of "offensive and pervasive" that is required under Title VII. [\[FN168\]](#) If applied to Harris, this framework would expand the scope of Harris' recovery. The derogatory comments to Teresa Harris about her intelligence, because accompanied by overt sexualized comments, would easily constitute sex-based harassment.

Unfortunately, the New Jersey standard does not discuss how courts should apply the "unwelcomeness" standard to cases of mixed sexual and nonsexual gender-based conduct. Courts need to clarify that the "unwelcomeness" inquiry is only relevant to sexual conduct. As applied to Harris' situation, for example, comments about her purported stupidity should have been considered per se unwelcome; Harris should have had a successful claim based on those comments before her discussion with Hardy about the unwelcomeness of the sexualized comments. Moreover, under the New Jersey guidelines, those comments about her stupidity could be used to infer that the sexual comments were intended to harm her at the time they were uttered; they were not reflective of "joking" behavior. Alternatively stated, an individual who is making entirely unacceptable comments about stupidity, seemingly intended to cause harm, can be understood to be making contemporaneous comments about gender, also intending to cause harm.

Neither the proposed EEOC Guidelines nor the New Jersey Supreme Court decision addresses claims brought by individuals who are perceived to be gay men or lesbians. These individuals have not been afforded the protection of the long-standing sexualized harassment doctrine of Title VII. We should retain the principle that sexualized comments are prohibited by Title VII, but extend it to protect individuals perceived as gay or lesbian.

Moreover, while the EEOC and the New Jersey Supreme Court have reinvigorated nonsexualized, gender-based cases, even they have failed to address the parallel problem of racialized harassment. The stereotype that all blacks are incompetent and deserve to be discharged continues to affect the courts' reasoning. The EEOC has done nothing to level the playing field between white and black plaintiffs in race discrimination lawsuits. Thus, the modest steps taken by the EEOC and New Jersey Supreme Court are not enough to afford protection for all deserving plaintiffs under Title VII.

\*224 \* \* \* \* \*

Kathryn Abrams has observed that courts have developed various principles to limit the potentially far-reaching effects of Title VII's sexual harassment doctrine: the unwelcomeness requirement, the pervasiveness requirement and the rejection of the "reasonable woman" standard. [\[FN169\]](#) What she and other commentators have overlooked, however, is the emergence of a sexualized requirement as a limiting doctrine. By confining Title VII doctrine to a small portion of what might be considered gender-based harassment, sexualized harassment doctrine has come to protect an unacceptably small category of workplace victims of discrimination. It is time to expand that arena of protection.

Title VII must continue to redress sexual harassment in the workplace. It should reach equal-opportunity harassers who demean both men and women at the workplace with sexualized comments, because those comments are intended to cause gender-based injury. To the woman who is called a "slut" or a "whore" at the workplace, the injury is not lessened because men are also called sexually derogatory names. Since Title VII promises protection against discrimination to the "individual," an individual should be able to recover if she can demonstrate that comments reflect gender stereotyping or gender-based animus.

Nonetheless, our recognition that harassment, which includes conduct sexual in nature, is egregious should not blind us to the fact that harassment not sexual in nature also occurs at the workplace, and is equally egregious. It is as pernicious to call a woman "stupid" as it is to call her "sexy." Both comments should be illegal when based on gender stereotypes.

Race discrimination against minorities, irrespective of whether it includes the use of racial epithets, is also pernicious and should be redressed by Title VII. Given the direction in which Title VII case law has gone in the last decade, it is easy to forget that harassment doctrine originated with a recognition of the pernicious nature of racial harassment, and that Congress's primary motivation in passing Title VII was to rid the workplace of racism against blacks. [\[FN170\]](#) Hicks reflects a growing presumption that blacks do not face harassment and are discharged at work due to incompetence. [\[FN171\]](#) By contrast, the "reverse discrimination" cases reflect a presumption that whites discharged from their jobs are victims of race-based affirmative action that cheat them out of their entitlement to employment and advancement.

\*225 Three modifications to Title VII are greatly needed to solve the problems discussed above. First, the EEOC must implement, and the courts must follow, guidelines emphasizing the cognizability of claims based on race and sex harassment that are not overtly racial or sexual in nature. Second, Congress must overturn Hicks so as to place female and minority plaintiffs on equal footing with white male plaintiffs. In particular, the law should accord racial minorities and women the same presumption of competence that it currently accords to white men. If a woman or racial minority establishes a prima facie case of discrimination and a defendant can offer no credible nondiscriminatory explanation for its conduct, then a plaintiff should prevail as a matter of law. Third, courts must develop healthy skepticism toward the claims of reverse discrimination brought by white men. They should consider defendants' legitimate nondiscriminatory explanations for their failure to promote, employ or discharge white men, in the same way that courts do in cases brought by women and minorities. White men are denied certain jobs for many reasons other than reverse discrimination; courts must be cognizant of that reality when considering reverse discrimination cases. [\[FN172\]](#)

Some people speculate that a conservative Congress may try to repeal Title VII. There is, however, little need for conservatives to call for the repeal of Title VII: By further developing existing doctrine, Title VII can be transformed into a civil rights statute which only protects women who are victims of sexualized harassment and white men who are purported victims of reverse discrimination.

[\[FNd\]](#). Professor of Law, University of Pittsburgh. I would like to thank Martha Chamallas, Jules Lobel, and Lisa Brush for their helpful comments on an earlier version of this Article. I would also like to thank Colleen Zak (Pitt '97) for her remarkable and invaluable research. Finally, I would like to thank the University of Pittsburgh for its generous support of this research. Further elaboration of these ideas will appear in Ruth Colker, *Hybrid: Bisexuals, Multiracials and Other Misfits Under American Law* (New York University Press forthcoming 1996).

[\[FN1\]](#). [Jew v. University of Iowa, 749 F. Supp. 946 \(S.D. Iowa 1990\)](#).

[\[FN2\]](#). Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment at 20, [Jew v. University of Iowa, 749 F. Supp. 946 \(S.D. Iowa 1990\)](#) (No. 86-169-0-2) [hereinafter Plaintiff's Memorandum].

[\[FN3\]](#). 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. s 2000e-2\(a\)\(1\) \(1995\)](#). Although Title VII refers to "sex" discrimination, it is commonplace to replace the term "sex" with the word "gender" in describing the scope of Title VII's prohibition.

[FN4]. 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 civil rights claim, and awarded \$895,000 in attorney's fees.

[FN5]. *Carreno v. Local Union No. 226, IBEW*, 54 Fed. Empl. Prac. Cas. 81 (D. Kan. 1990).

[FN6]. *Id.*

[FN7]. Samuel A. Marcossou, [Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII](#), 81 *Geo. L.J.* 1, 1 (1992) (quoting Plaintiff's Response to Defendant Local Union No. 226's Motion for Summary Judgment at 13).

[FN8]. *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591 (5th Cir. 1995).

[FN9]. See [Regents of the Univ. of Cal. v. Bakke](#), 438 U.S. 265 (1978). See generally Joel Dreyfuss & Charles Lawrence III, *The Bakke Case: The Politics of Inequality* (1979).

[FN10]. See Dreyfuss & Lawrence, *supra* note 9, at 23-4.

[FN11]. [42 U.S.C. s 2000e](#) (1995).

[FN12]. [U.S. Const. amend. XIV](#).

[FN13]. Although this Article primarily focuses on claims brought under Title VII of the Civil Rights Act of 1964, its observations extend to disparate treatment and anti-discrimination doctrine generally. The courts interchangeably apply disparate treatment doctrine under Titles VI, VII, and the Constitution, especially in cases brought by whites or men alleging gender or race discrimination. See, e.g., [Wygant v. Jackson Bd. of Educ.](#), 476 U.S. 267 (1986) (Title VII and Constitution); [Regents of the Univ. of Cal. v. Bakke](#), 438 U.S. 265 (1978) (Title VI and Constitution). Thus, the Bakke case is used in this introduction as an example of favorable treatment to white plaintiffs in race discrimination suits although it was brought under Title VI and the United States Constitution; other cases will also be discussed in Part V that have been brought under Title VII that reflect favorable treatment to white plaintiffs in race lawsuits.

[FN14]. The Supreme Court affirmed the injunction enforcing Bakke's admission and invalidated the Medical School's special admissions program. [438 U.S. at 320](#).

[FN15]. [St.Mary's Honor Ctr. v. Hicks](#), 113 S. Ct. 2742 (1993).

[FN16]. See *infra* Part I.

[FN17]. I use the term "sexualized" to refer to cases in which plaintiffs claim that explicit reference to their sexuality or human anatomy has occurred at the workplace.

[FN18]. I do not believe that the distinction between "gender" discrimination and "sex" discrimination is clear. If a woman is treated as a "sex object," for example, through reference to the size of her breasts, I understand that treatment to have been based both on her biological sex and the viewer's understanding of her appropriate role in society. I, therefore, tend to use the terms gender and sex interchangeably, while using the term "sexualized" more narrowly, as discussed above.

[FN19]. See infra Part I.

[FN20]. I limit this observation to men, because courts tend to assume that women are heterosexual even when accused of being lesbians. See, e.g., [McCoy v. Johnson Controls World Servs. Inc.](#), 878 F. Supp. 229 (S.D. Ga. 1995); [Jew v. Univ. of Iowa](#), 749 F. Supp. 946 (S.D. Iowa 1990).

[FN21]. See infra Part II.

[FN22]. See infra Part V.

[FN23]. See infra Part IV.

[FN24]. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 151.

[FN25]. Kathryn Abrams, *Sexual Harassment at a Crossroads: Law and Culture in the Regulation of Sexual Injury* at 3 (unpublished manuscript, available from author).

[FN26]. See, e.g., [Jerome McCristal Culp Jr.](#), *The Michael Jackson Pill: Equality, Race, and Culture*, 92 Mich. L. Rev. 2613, 2629 (1994) (stating that "the ultimate problem is the view that this kind of micropill will ever work to attack race or racism .... The problem ... at the heart of our legal system is a reliance on microchoices that leave unresolved macroproblems."); Susan Estrich, [Sex at Work](#), 43 Stan. L. Rev. 813, 826 (1991) (the unwelcomeness standard in sexual harassment doctrine "has served as a vehicle to import some of the most pernicious doctrines of rape law into Title VII cases").

[FN27]. Kathryn Abrams, [Title VII and the Complex Female Subject](#), 92 Mich. L. Rev. 2479 (1994).

[FN28]. This Article will not address whether anti-discrimination doctrine should possibly contain more lenient burdens of proof for women, racial minorities, and gay and lesbian people, because of the likelihood that they have faced discrimination. At this time, as I will argue, a level playing field would constitute an enormous advance for women, racial minorities, and gay and lesbian people bringing anti-discrimination lawsuits.

[FN29]. Anti-discrimination cases generally fall into two categories: disparate treatment and disparate impact. Disparate treatment consists of claims of intentional discrimination. See, e.g., [Texas Dep't. of Community Affairs v. Burdine](#), 450 U.S. 248 (1981). Disparate impact involves a claim of a neutral selection device that has an impact on the basis of race or gender. See, e.g., [Griggs v. Duke Power Co.](#), 401 U.S. 424 (1971). Within the category of disparate treatment, there are generally considered to be two categories of cases: pretext cases and mixed motive cases. In mixed motive cases, the plaintiff proves that race or gender was a motivating factor in an employment decision, despite the existence of other, arguably permissible factors which also have motivated the employment decision. See, e.g., [Price Waterhouse v. Hopkins](#), 490 U.S. 228 (1989). In pretext cases, the focus of the court's inquiry is whether gender or race genuinely played a role in the employment decision; direct evidence of discrimination is usually required to make that showing. See [St. Mary's Honor Ctr. v. Hicks](#), 113 S. Ct. 2742 (1993). Harassment cases could be thought of as a category of pretext cases since they involve direct evidence of gender discrimination. Nonetheless, they also differ from standard pretext cases in that they do not necessarily involve an adverse employment action. See, e.g., [Meritor Sav. Bank, FSB v. Vinson](#), 477 U.S. 57 (1986). Historically, harassment cases arguably emerged as a subcategory of pretext cases. See [Rogers v. EEOC](#), 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

In recent years, harassment cases, especially "hostile environment cases" have taken on a life of their own and have not

closely tracked the legal developments in pretext cases. See generally *Meritor*. Hostile environment cases are generally distinguished from "quid pro quo" cases that involve a threat of job detriment for failing to comply with a sexual overture. See [Meritor, 477 U.S. at 65](#) (distinguishing quid pro quo and hostile work environment cases). This Article primarily refers to cases involving hostile environment, in part, because those cases are the most numerous and have been clarified by the United States Supreme Court in *Meritor* and [Harris v. Forklift Sys., Inc., 114 S. Ct. 367 \(1993\)](#). Nonetheless, some of the sexual orientation harassment cases that will be discussed in this Article could be characterized as combining elements of quid pro quo and hostile work environment when overt sexual propositions have been made at the workplace. That fact, however, does not have any bearing on the thesis of this Article regarding the narrow nature of sexual harassment doctrine because homosexual plaintiffs nearly always lose sexual harassment cases. Thus, whether a case is categorized as a harassment case or as a non-harassment intentional discrimination case can have enormous significance for a plaintiff. In particular, categorization as a harassment case allows a plaintiff to avoid the rigorous burden of proof that has been developed in *Hicks* for the pretext theory. Under *Hicks*, a court can find in favor of a defendant even if the plaintiff has disproved the legitimacy of the neutral explanation for an employment action offered by a defendant. That holding has no parallel under harassment doctrine. In this Article, I will, therefore, suggest that the courts have contracted the category of harassment doctrine, thereby leaving plaintiffs in the more rigorous *Hicks* category of pretext cases.

[\[FN30\]](#). See *infra* Part I.

[\[FN31\]](#). See *infra* Part II.

[\[FN32\]](#). See *infra* Part III.

[\[FN33\]](#). See *infra* Part IV.

[\[FN34\]](#). See *infra* Part V.

[\[FN35\]](#). One positive development in anti-discrimination doctrine that I readily acknowledge is the decision by the United States Supreme Court not to require evidence of tangible job detriment in hostile work environment cases. See [Harris v. Forklift Sys., Inc., 114 S. Ct. 367 \(1993\)](#). Had the Supreme Court insisted on a tangible job loss, as is typically required in pretext cases, hostile work environment cases would often not be a cognizable form of intentional discrimination.

[\[FN36\]](#). [Stacks v. Southwestern Bell Yellow Pages, 27 F.3d 1316, 1320 \(8th Cir. 1994\)](#).

[\[FN37\]](#). [Id. at 1320](#).

[\[FN38\]](#). [Id. at 1321](#).

[\[FN39\]](#). [Id. at 1322](#).

[\[FN40\]](#). [Id.](#)

[\[FN41\]](#). [Id. at 1316](#).

[\[FN42\]](#). [Id. at 1327](#).

[\[FN43\]](#). [864 F. Supp. 1552 \(S.D. Fla. 1994\)](#).

[FN44]. [Id. at 1557.](#)

[FN45]. [Id. at 1562.](#)

[FN46]. [877 F. Supp. 754 \(D.D.C. 1995\).](#)

[FN47]. [Id. at 756.](#)

[FN48]. [Id. at 761.](#) Defendants benefitted from the dicta of two District of Columbia Circuit Court cases in support of this argument. [Id.](#) ([Bundy v. Jackson](#), 641 F.2d 934, 942 n.7 (D.C. Cir. 1981); [Barnes v. Costle](#), 561 F.2d 983, 990 n.55 (D.C. Cir. 1977)).

[FN49]. [Id.](#) at 762.

[FN50]. [Id.](#) at 759 ("[T]he company's response to the alleged harassment was sufficiently prompt and adequate to negate any liability.").

[FN51]. [Id.](#) at 762 n.9. The court deemed this interpretation -- and two other possible interpretations -- "intellectually unsatisfying." [Id.](#)

[FN52]. [Jew v. University of Iowa](#), 749 F. Supp. 946 (S.D. Iowa 1990).

[FN53]. [Id.](#) at 958

[FN54]. [Id.](#) at 952.

[FN55]. [Id.](#) at 958.

[FN56]. [Id.](#) In fact, one of Jew's male co-workers was the subject of a graffiti attack, but the court considered it to be an isolated incident. [Id.](#)

[FN57]. [Chiapuzio v. BLT Operating Corp.](#), 826 F. Supp. 1334, 1336-38 (D. Wyo. 1993). But see [Hopkins v. Baltimore Gas & Elec. Co.](#), 871 F. Supp. 822, 835 (D. Md. 1994) (finding bisexual supervisor who was "crude, insensitive and offensive to all of his employees" not liable).

[FN58]. [Chiapuzio](#), 826 F. Supp. at 1335.

[FN59]. [Id.](#)

[FN60]. [Id.](#)

[FN61]. [Id.](#)

[FN62]. [Id.](#) at 1337.

[FN63]. [Id.](#) at 1338.

[FN64]. See generally Chamallas, *supra* note 4.

[FN65]. [Dillon v. Frank](#), No. 90-2290, 1992 U.S. App. LEXIS 766, at \*2 (6th Cir. Jan.15, 1992).

[FN66]. *Id.* at \*3.

[FN67]. [Marcosson](#), *supra* note 7, at 1 (quoting Plaintiff's Response to Defendant Local Union No. 226's Motion for Summary Judgment at 5, [Carreno v. IBEW Local No. 226](#), 54 *Fair Empl. Prac. Cas. (BNA)* 81 (D. Kan. 1990)).

[FN68]. Other men have filed similar claims of sexual harassment based on incidents involving sexual touching. See, e.g., [Garcia v. Elf Atochem N. Am.](#), 28 F.3d 446, 448 (5th Cir. 1994) (Freddy Garcia was approached from behind by Rayford Locke, a plant supervisor, who grabbed "[Garcia's] crotch area and ma[de] sexual motions from behind [Garcia]."); [Benekritis v. Johnson](#), 882 F. Supp. 521, 524 (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.").

[FN69]. The courts presumed, without evidence, that the plaintiffs were gay men.

[FN70]. See [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 impermissible criteria on which to[ ] discriminate with regard 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 ....").

[FN71]. [Price Waterhouse v. Hopkins](#), 490 U.S. 228, 235 (1989).

[FN72]. As Professor Elvia Arriola has argued, mainstream society views " 'gayness' [as] about crossing the strict sexual boundaries between men and women." Elvia R. Arriola, [Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory](#), 9 *Berkeley Women's L.J.* 103, 122 (1994).

[FN73]. For example, Jean Jew was called a "lesbian" as part of the sexual harassment she faced at the University of Iowa. See Plaintiff's Memorandum *supra* note 2 at 20. Nonetheless, she ultimately prevailed. [Jew v. Univ. of Iowa](#), 749 F. Supp. 946, 963 (S.D. Iowa 1990). For a compelling account of the Jean Jew case, see [Chamallas](#), *supra* note 4.

[FN74]. See [Dillon](#), 1992 U.S. App. LEXIS 766 at \*12 (citing [Williamson v. A.G. Edwards and Sons](#), 876 F.2d 69 (8th Cir. 1989), cert. denied, 493 U.S. 1089 (1990)); [DeCintio v. Westchester County Medical Ctr.](#), 807 F.2d 304 (2d Cir. 1986), cert. denied, 484 U.S. 825 (1987); [DeSantis v. Pacific Tel. & Tel. Co.](#), 608 F.2d 327 (9th Cir. 1979); [Smith v. Liberty Mut. Ins. Co.](#), 569 F.2d 325 (5th Cir. 1978)).

[FN75]. See, e.g., [McCoy v. Johnson Controls World Servs.](#), 878 F. Supp. 229 (S.D. Ga. 1995).

[FN76]. See, e.g., [id.](#) at 231.

[FN77]. See, e.g., [Price Waterhouse v. Hopkins](#), 490 U.S. 228 (1989); [McCoy v. Johnson Controls World Servs.](#), 878 F. Supp. 229 (S.D. Ga. 1995); [Jew v. University of Iowa](#), 749 F. Supp. 946 (S.D. Iowa 1990).

[FN78]. [Harris v. Forklift Sys.](#), 114 S.Ct. 367, 369 (1993).

[FN79]. *Id.*

[\[FN80\]](#). *Id.*

[\[FN81\]](#). The Court stated that "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." *Id.* at 370 (citations omitted).

[\[FN82\]](#). [Harris v. Forklift Sys., 66 Fair Empl. Prac. Cas. \(BNA\) 1886 \(M.D. Tenn. Nov. 8, 1994\)](#). Harris ultimately prevailed for a portion of the harassment she faced, because her complaint also contained sexualized elements. *Id.*

[\[FN83\]](#). *Id.* at 1887.

[\[FN84\]](#). [51 F.3d 591 \(5th Cir. 1995\)](#).

[\[FN85\]](#). *Id.* at 592.

[\[FN86\]](#). *Id.* at 595.

[\[FN87\]](#). *Id.* at 593.

[\[FN88\]](#). *Id.* at 597.

[\[FN89\]](#). *Id.* at 595.

[\[FN90\]](#). *Id.* at 597 n.6.

[\[FN91\]](#). *Id.* at 596.

[\[FN92\]](#). *Id.*

[\[FN93\]](#). [842 F.2d 1010 \(8th Cir. 1988\)](#).

[\[FN94\]](#). *Id.* at 1013-14.

[\[FN95\]](#). Of course, the first two of those episodes could have been characterized as sexual. Therefore, the court's ruling is arguably not a complete departure from the trend I have been discussing.

[\[FN96\]](#). 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., [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"); [Ott v. Perk Dev. Co., 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 Co., Inc., 872 F. Supp. 29, 35-36 \(W.D.N.Y. 1994\)](#) (concluding that female employee who was called a "whore" could recover for sexual harassment but that second female employee who was not directly called "whore" could not recover); [Trotta v. Mobil Oil Co., 788 F. Supp. 1336, 1347 \(S.D.N.Y. 1992\)](#) (concluding that plaintiff would have resigned whether or not events that allegedly created sexually hostile work environment occurred). But see [Cronin v. United Serv. Stations, 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 plaintiff personally, but where comments were

not overtly sexual); [Laughinghouse v. Risser, 754 F. Supp. 836, 840-41 \(D. Kan. 1990\)](#) (denying summary judgment for defendant where most of comments were not sexual in nature).

[\[FN97\]. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2746 \(1993\).](#)

[\[FN98\]. Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 488-89 \(8th Cir. 1992\).](#)

[\[FN99\]. Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1249 \(E.D. Mo. 1991\).](#)

[\[FN100\]. Hicks, 970 F.2d at 489](#) ("Plaintiff's supervisors had consistently rated his performance as competent. He had not been suspended, written up, or otherwise disciplined.").

[\[FN101\].](#) Notably, Hicks was not faulted for authorizing the use of the vehicle. He was disciplined solely for failing to record its use.

[\[FN102\]. Hicks, 756 F. Supp. 1244, 1247 n.7 \(E.D. Mo. 1991\).](#)

[\[FN103\]. Id. at 1248.](#)

[\[FN104\]. Id. at 1248 n.10.](#)

[\[FN105\]. Id. at 1247.](#)

[\[FN106\]. Id. at 1248.](#)

[\[FN107\].](#) Id.

[\[FN108\].](#) Id.

[\[FN109\].](#) Id. at 1252.

[\[FN110\].](#) Id. at 1247 n.7.

[\[FN111\].](#) 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.

[\[FN112\]. Hicks, 756 F. Supp. at 1249.](#)

[\[FN113\].](#) The trial court record does not indicate specifically whether the Director of the Missouri Department of Corrections and Human Resources had read the Davis study. It states only 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.

[\[FN114\].](#) 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' central office must have seen the report. More important, the report must have been written to reflect information that the writer collected from some supervisory personnel at St.Mary's, since recommendations rarely arise out of "thin air."

[\[FN115\]. Hicks, 756 F. Supp. at 1251.](#)

[\[FN116\]. Id. at 1246.](#)

[\[FN117\]. Id.](#)

[\[FN118\]. Id. at 1247.](#)

[\[FN119\].](#) 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.](#)

[\[FN120\]. Id.](#)

[\[FN121\]. Bivens v. Jeffers Vet Supply, 873 F. Supp. 1500 \(M.D. Ala. 1994\).](#)

[\[FN122\]. Arzate v. City of Topeka, 884 F. Supp. 1494 \(D. Kan. 1995\).](#)

[\[FN123\]. Id. at 1503.](#)

[\[FN124\]. Id. at 1501.](#)

[\[FN125\].](#) See, e.g., [Daniels v. Essex Group Inc., 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' Ass'n Local Union No. 597, 945 F.2d 906, 910 \(7th Cir. 1991\)](#) (blacks at workplace called "nigger," "porch monkeys," "baboons," "ghetto assholes," "super nigger" and other epithets in Italian).

[\[FN126\]. Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668 \(7th Cir. 1993\).](#)

[\[FN127\]. Id. at 671.](#)

[\[FN128\]. Id. at 677.](#)

[\[FN129\]. Bolden v. PRC Inc., 43 F.3d 545 \(10th Cir. 1994\).](#)

[\[FN130\]. Id. at 549.](#)

[\[FN131\].](#) Davis v. Northrop Corp., No. 92-56373, 1994 U.S. App. LEXIS 11238, at \*3 (9th Cir. May 6, 1994).

[\[FN132\]. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 \(1986\).](#)

[\[FN133\]. Id. at 299](#) (Marshall, J., dissenting).

[\[FN134\].](#) Arguably, the courts did not consider her qualifications because this was only the liability phase of the trial. Her merits would be considered at the relief stage. But the Supreme Court's decision in this case did not order a remand of the case to determine liability. The case has no subsequent history, suggesting that Wygant was automatically reinstated.

[\[FN135\]. Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1252 \(E.D. Mo. 1991\).](#)

[FN136]. [Hicks v. St. Mary's Honor Ctr.](#), 970 F.2d 482, 493 (8th Cir. 1992).

[FN137]. [Hicks v. St. Mary's Honor Ctr.](#), 113 S. Ct. 2742, 2756 (1993).

[FN138]. [Hicks v. St. Mary's Honor Ctr.](#), 2 F.3d 265, 267 (8th Cir. 1993).

[FN139]. [438 U.S. 265 \(1978\)](#) (plurality opinion).

[FN140]. [Dreyfuss & Lawrence](#), *supra* note 9, at 5.

[FN141]. *Id.* at 13.

[FN142]. *Id.*

[FN143]. *Id.*

[FN144]. [438 U.S. at 279](#) (describing trial court decision).

[FN145]. [Id. at 280-81.](#)

[FN146]. Although the standing discussion in *Bakke* may seem to be a technical discussion lying outside the scope of this Article, it reflects yet another doctrinal tool that the courts have manipulated for the benefit of white male litigants. Sometimes the courts manipulate the substantive requirements of anti-discrimination doctrine; other times, they manipulate procedural requirements like standing. The end result, however, is the same: white males face fewer hurdles in bringing discrimination lawsuits than similarly situated racial minorities or women.

[FN147]. [438 U.S. at 280-81.](#)

[FN148]. [Id. at 280 n.14.](#)

[FN149]. [468 U.S. 737 \(1984\).](#)

[FN150]. [Id. at 753.](#)

[FN151]. [Id. at 782](#) (Brennan, J., dissenting) (footnote omitted).

[FN152]. [861 F. Supp. 551 \(W.D. Tex. 1994\).](#)

[FN153]. [Id. at 581.](#)

[FN154]. [Id. at 580.](#)

[FN155]. *Id.*

[FN156]. Jew did not raise a race claim although some of the sexual epithets were racially charged.

[FN157]. See, e.g., [Fields v. Clark Univ.](#), 966 F.2d 49 (1st Cir. 1992), cert. denied, 113 S. Ct. 976 (1993); [Brousard-Norcross v. Augustana College Ass'n.](#), 935 F.2d 974 (8th Cir. 1991); [Namenwirth v. Board of Regents of Univ. of Wis. Sys.](#) (7th Cir. 1985), cert. denied, 474 U.S. 1061 (1986); [Zahorik v. Cornell Univ.](#), 729 F.2d 85 (2d Cir. 1984); [Smith v. University of N.](#)

[C., 632 F.2d 316 \(4th Cir. 1980\).](#)

[FN158]. Catharine MacKinnon, *The Sexual Harassment of Working Women* 59 (1979) (citing [Corne and DeVane v. Bausch & Lomb](#), 390 F. Supp. 161 (D. Ariz. 1975); [Miller v. Bank of Am.](#), 418 F. Supp. 233 (N.D. Cal. 1976); and [Tomkins v. Public Serv. Elec. & Gas Co.](#), 422 F. Supp. 552 (D.N.J. 1976)).

[FN159]. *Id.* at 55.

[FN160]. [45 Fed. Reg. 74,677 \(1980\)](#) (codified at [29 C.F.R. s 1604.11](#)).

[FN161]. [58 Fed. Reg. 51,266 \(1993\)](#) (guidelines subsequently withdrawn).

[FN162]. *Id.*

[FN163]. See *id.*

[FN164]. 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 premises, or circulated in the workplace.

*Id.* at 51,268 (footnote omitted).

[FN165]. [626 A.2d 445 \(N.J. Sup. Ct. 1993\)](#).

[FN166]. *Id.* at 454.

[FN167]. Under *Burdine* and *Hicks*, a plaintiff must first establish, by a preponderance of evidence, a prima facie case of discrimination. This gives rise to a presumption that the employer did, in fact, discriminate unlawfully. The court must then find for the plaintiff unless the defendant articulates a legitimate, nondiscriminatory explanation. The plaintiff is then given an opportunity to rebut the explanations offered by the defendant. Even if the plaintiff successfully rebuts each of the defendant's explanations, the court is not required to rule for the plaintiff. Despite disproving each of the defendant's explanations, the plaintiff still has burden of establishing that an unlawful factor (i.e., race or gender) was the true explanation for the adverse employment action. [Hicks v. St. Mary's Honor Ctr.](#), 113 S. Ct. 2742 (1993); [Texas Dept. of Community Affairs v. Burdine](#), 450 U.S. 248, 252-60 (1981).

[FN168]. The doctrinal importance of this framework is that a plaintiff is not subject to the burden-shifting regime of *Burdine* and *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. Under *Lehman*, in contrast to *Hicks*, a court cannot find for the defendant on the theory that the conduct just reflected a personality dispute. [Hicks v. St. Mary's Honor Ctr.](#), 756 F. Supp. 1244, 1252 (E.D. Mo. 1991).

[FN169]. See *Abrams*, *supra* note 25.

[FN170]. See generally Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 *Hastings L.J.* 305, 310-12 (1968).

[\[FN171\]](#). 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.

[\[FN172\]](#). As a heuristic tool, when evaluating reverse discrimination claims, courts might want to hypothetically consider how the facts would be evaluated if alleged by a black man. This exercise would ensure that the same level of scrutiny is applied to discrimination and reverse discrimination claims.

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