MYTH OF THE COLOR-BLIND JUDGE: AN EMPIRICAL ANALYSIS OF RACIAL HARASSMENT CASES

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ABSTRACT

In this Article, we present an exploratory empirical study of federal workplace racial harassment cases that span a twenty-year period. Multiple analyses found that judges' race significantly affects outcomes in workplace racial harassment cases. African American judges rule differently than White judges, even when one takes into account their political affiliation or certain characteristics of the case. Our findings further suggest that judges of all races are attentive to the relevant facts of the cases but may reach different conclusions depending on their races. When race, political affiliation, and certain case characteristics are all considered simultaneously, the role that race plays loses some statistical significance (as one might expect given the increasing number of variables).

While we cannot predict how an individual judge might act, our empirical analysis suggests that African American judges as a group and White judges as a group perceive racial harassment differently. These findings counter the traditional myth that the race of a judge would not make a difference—a myth premised on a presumption of a formalistic and objective decision-making process.

Given the underrepresentation of minority judges, the growing minority population in the U.S., and minority skepticism of judicial fairness, this Article offers empirical support for a more racially diverse

judiciary. An increase in the number of judges of color promises to increase diverse perspectives in the judicial system and to help unveil the complex reality of racial dynamics in the workplace.

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Our experiences instantly become part of the lens through which we view our entire past, present, and future, and like any lens, they shape and distort what we see.[1]

I. INTRODUCTION

In today's political climate, congressional and presidential partisanship have created a gauntlet for any judicial appointee and a quagmire of unfilled judicial posts.[2] Legislators fight over the appropriate political, racial, and gender composition of the judiciary[3] and debate the projected rulings of candidates of particular political bona fides.[4]

While the judiciary has become more racially diverse, it remains homogeneously White and hardly reflects the diversity of the American society it serves.[5] Understandably then, a range of politicians, scholars, and the judiciary itself continues to press for a more racially diverse and representative bench.[6]

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1. DANIEL GILBERT, STUMBLING ON HAPPINESS 49 (2007).

2. For discussions of the contentious political maneuvering in this process, see generally LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS (2005); NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS (2005); Lisa M. Holmes, Research Note, *Why "Go Public"? Presidential Use of Nominees to the U.S. Courts of Appeals*, 38 PRESIDENTIAL STUD. Q. 110 (2008); Tajuana D. Massie et al., *The Timing of Presidential Nominations to the Lower Federal Courts*, 57 POL. RES. Q. 145 (2004).

3. For examples of disagreements over the gender and race of judicial nominees, see Theresa M. Beiner, *How the Contentious Nature of Federal Judicial Appointments Affects "Diversity" on the Bench*, 39 U. RICH. L. REV. 849, 851–55 (2005) (suggesting more contentious nature of confirmation process for women and minority nominees for the federal judiciary, as indicated by lengthier time periods from their nomination to hearing to confirmation); Angela Onwuachi-Willig, *Representative Government, Representative Court? The Supreme Court as a Representative Body*, 90 MINN. L. REV. 1252, 1252–58 (2006).

4. *See, e.g.*, CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006); Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995); Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q. 504 (2002); Roger E. Hartley & Lisa M. Holmes, *The Increasing Senate Scrutiny of Lower Federal Court Nominees*, 117 POL. SCI. Q. 259 (2002).

5. *See* discussion *infra* Part II.A–II.B.

6. *See, e.g.*, ELIZABETH CHAMBLISS, AM. BAR ASS'N, COMM'N ON RACIAL & ETHNIC DIVERSITY IN THE LEGAL PROFESSION, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 57 (2004); LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, ANSWERING THE CALL FOR A MORE DIVERSE JUDICIARY: A REVIEW OF STATE JUDICIAL SELECTION MODELS AND THEIR IMPACT ON DIVERSITY 2–3 (2005) [hereinafter LAWYERS' COMM.]; Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597 (2003); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997); Kevin R. Johnson & Luis Fuentes-Rohwer, *A*

What difference will it make if we have a more racially diverse judiciary? Some argue that greater diversity among judges would provide minority role models and that public confidence in the judiciary system would be enhanced.[7] Others argue that having more judges of color may substantively improve the judicial decision-making process by increasing judicial impartiality and yielding fairer legal outcomes.[8]

But do these benefits actually occur and are there accompanying costs? Researchers are just beginning to explore and answer these questions. In the past, so few minority judges sat on the bench that studying them would yield little generalizable information. While the numbers are still relatively small, there are enough judges that we can now begin to do preliminary analyses.[9] In addition, while empirical research is still fairly novel in legal scholarship, it is emerging as an important and relevant form of analysis.[10] At the same time, scholars have begun to deploy innovative research methods for understanding the cognitive processes of judicial decision making, including the possible roles of race and prejudice in those processes.[11]

Principled Approach to the Quest for Racial Diversity on the Judiciary, 10 MICH. J. RACE & L. 5 (2004); Patricia Yancey Martin et al., *Gender Bias and Feminist Consciousness Among Judges and Attorneys: A Standpoint Theory Analysis*, 27 SIGNS 665 (2002); Onwuachi-Willig, *supra* note 3, at 1252–58; Joy Milligan, Note, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1206 (2006).

   7. *See, e.g.*, Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 407 n.2 (2000) (citing others' recognition of these benefits); LAWYERS' COMM., *supra* note 6, at 2, 29.

   An increased number of minority judges may also increase the pool of minority lawyers in the pipeline for the judiciary. As the number of minority judges increases, they would be a more visible presence in the judiciary. This increased visibility might inspire minority individuals to enter legal training and allow them to envision themselves as future judges.

   8. *See, e.g.*, CHAMBLISS, *supra* note 6, at 57; Ifill, *supra* note 7, at 411 (arguing "racial diversity on the bench also encourages judicial impartiality"); Milligan, *supra* note 6, at 1240–45 (discussing how racial diversity of judiciary increase judges' openness to disparate answers); *see also* Beiner, *supra* note 6; Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113 (1999).

   9. *See infra* Parts III–IV.

   10. *See infra* Part III.

   11. *See, e.g.*, Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007) (describing how contemporary psychological research on the human mind and their own empirical research allowed them to posit a judicial "intuitive-override" model of decision making); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427, 431 (2007) (describing the "Implicit Association Test" which measures latency responses to different race-related stimuli). Nonetheless, very complex issues make the research process daunting, including determining the relevant factors when studying the role of judges' race in their decision making. Possible considerations are the type of court, the type of case, the legal issues, characteristics of the parties, and the racial and gender composition of an appellate judicial panel.

This Article begins with a brief overview of the racial diversity of the judiciary of both the federal and state courts, including the degree to which they reflect the racial diversity of American society.[12] Next follows an introduction to the social science research on judicial decision making.[13] In particular, we discuss studies on how personal attributes of judges, such as race, relate to their judicial deliberations.[14]

We then turn to our own empirical study of judges' race and their decision making in federal court cases on workplace racial harassment.[15] While we focus on the judges' race,[16] we also consider how the judges' political affiliation[17] and how the plaintiff-employees' particular claims of racial harassment affect who wins.[18] Racial harassment cases are a particularly appropriate context for these inquiries because the relevant laws require judges to tap their discretionary judgment on race-related matters.[19] In addition, the thousands of racial harassment claims[20] make understanding judicial decision making in these cases urgent.

Our exploratory empirical study, the first on the role of judges' race in racial harassment cases, resulted in striking findings.[21] We learned that judges' race matters very much in how cases turn out, but not necessarily in predictable ways. For example, African American judges rule quite differently from White judges. The judges' political affiliation and the merits of the case also can play a part. The study's results bring both comfort and consternation to those who think that judicial decision making is a totally rational and objective process.

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12. *See* discussion *infra* Part II.
13. *See* discussion *infra* Part III.
14. *See* discussion *infra* Part III.
15. *See* discussion *infra* Parts IV–VI.
16. *See* discussion *infra* Parts IV.B–V.A.
17. *See* discussion *infra* Parts IV.B, V.B.
18. *See* discussion *infra* Parts IV.B, V.C.
19. *See infra* notes 104–16 and accompanying text.
20. Over 7000 racial harassment complaints were filed in 2007. Telephone Interview with Stephanie Aiken Murphy, Program Analyst, U.S. Equal Employment Opportunity Comm'n (Mar. 7, 2008). For general statistics on all race-based complaints and all harassment-related complaints, see EEOC, Enforcement Statistics and Litigation, http://www.eeoc.gov/stats/enforcement.html (last visited Feb. 6, 2009).
21. *See* discussion *infra* Parts IV.B–VI.

II. COLOR OF THE JUDICIARY

A. *Racial Representation in the Judiciary*

Data on the racial diversity of the judiciary are now available from various sources.[22] These data reveal that, although a minority judge is not the rare phenomenon it was decades ago,[23] the American judiciary continues to be overrepresented by Whites. As we discuss below, this overrepresentation persists in both the federal and state courts.

In the federal courts, out of a total of 805 active judges, non-White judges constitute about 19% of the bench.[24] As shown in Chart 1, 11% of judges are African Americans, 7% are Hispanic,[25] and fewer than 1% are Asian Americans. Minority representation is lower at the federal appellate level than at the district court level.[26] Currently, no Native American judges sit on the federal judiciary at all,[27] and no Asian Americans sit at the appellate level.[28] As Lawrence Baca, a Native American and former

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22. CHAMBLISS, *supra* note 6, at 56 (discussing increase in sources). Data on the federal judiciary are accessible through the Federal Judicial Center. Federal Judicial Center, Judges of the United States Courts, Biographical Directory of Judges, http://www.fjc.gov/public/home.nsf/hisj (last visited Feb. 27, 2008) [hereinafter Directory of Federal Judges]. Its website provides biographical data about the federal judiciary, including, for example, judges' race, gender, and party of the nominating president. *Id.*

The Directory of Federal Judges indicates that judges' races, whenever possible, are based on self-definition. *Id.* (follow the About the Biographical Directory of Federal Judges link). *See also* CHAMBLISS, *supra* note 6, at 53–57. Data on the racial diversity of state judges are also online. American Bar Association, Standing Committee on Judicial Independence, National Database on Judicial Diversity in State Courts, http://www.abanet.org/judind/diversity/national.html (last visited Feb. 27, 2008) [hereinafter State Courts]. *See also* LAWYERS' COMM., *supra* note 6, at 9.

23. Two decades ago, there were only four African American federal judges, compared to eighty White judges and eighty-nine total judges. Thus, African Americans represented 4.5% of the federal bench at that time. These data were found by searching for active sitting African American judges, White judges, and all judges commissioned before January 1, 1989 on the Directory of Federal Judges. Directory of Federal Judges, *supra* note 22 (search last ran Mar. 10, 2009).

24. *See* Table A, *infra* note 31; Chart 1 (combining the percentages of the minority judges).

25. While we could have used the also prevalent term Latinos/Latinas, we chose Hispanic not as a political statement, but because the U.S. Census Bureau and the Federal Judicial Centers are key sources of data used in this Article, and they used the term Hispanic. ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. CENSUS BUREAU OVERVIEW OF RACE & HISPANIC ORIGIN: CENSUS 2000 BRIEF (2001); Directory of Federal Judges, *supra* note 22 (Hispanic category indicated when searching for race of judges). The U.S. Census Bureau uses the term "Hispanic" to describe individuals who self-identified as "Spanish/Hispanic/Latino" including those who further marked themselves as Mexican, Mexican American, Chicano, Puerto Rican, or Cuban. GRIECO & CASSIDY, *supra*, at 1.

26. Sixteen percent of the courts of appeals is minority, and 20% of the district courts is minority. *See* Table A, *infra* note 31 (calculating percentages from numbers given there).

27. *See* Table A, *infra* note 31. Two Native Americans had been appointed to the federal judiciary in the past, but none currently sit on the bench. Directory of Federal Judges, *supra* note 22 (identifying Billy Michael Burrage and Frank Howell Seay as the only two Native American jurists).

28. *See* Table A, *infra* note 31.

chair of the ABA Commission on Racial and Ethnic Diversity in the Profession, reports, he has been before a minority judge only once in his twenty-seven-year career at the Department of Justice.[29] Baca observed that he would likely retire from practice "'without ever once appearing before a judge of my own race.'"[30]

CHART 1: FEDERAL JUDGES BY RACE[31]
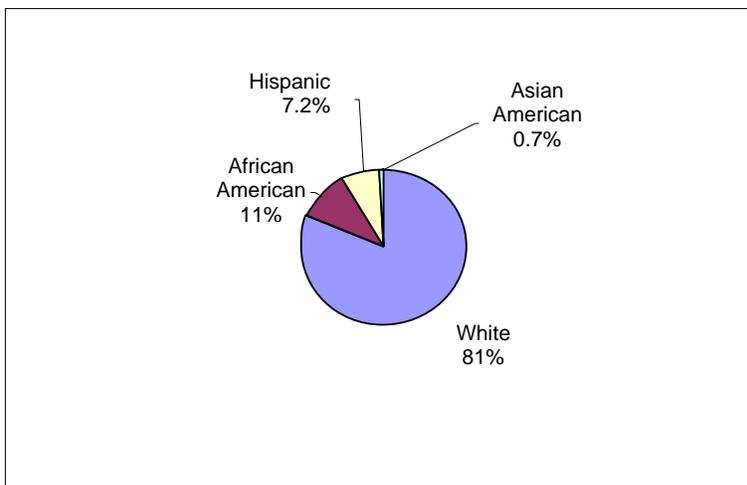
In the state courts, minority representation is even less than in the federal courts. Minority judges represent approximately 10% of the bench at all state court levels,[32] as shown in Chart 2. African Americans

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29. CHAMBLISS, *supra* note 6, at 57.

30. *Id*. (quoting Lawrence Baca, Observations on the Importance of Diversity in the Law Office: One Indian's Perspective 8 (unpublished essay on file with Elizabeth Chambliss)).

31. The percentages in Chart 1 are based on the numbers shown below in Table A, which the authors compiled from data in the Directory of Federal Judges, *supra* note 22, by searching for judges by race and court level.

TABLE A: FEDERAL JUDGES

Court	Federal Judges by Race (Numbers)					
	White	African American	Hispanic	Asian American	Native American	Total
Supreme Court	8	1	0	0	0	9
Courts of Appeals	137	14	12	0	0	163
District Courts	507	74	46	6	0	633
Total	652	89	58	6	0	805

32. This percentage is calculated from data provided in Table B, *infra* note 34. Minority representation is 9.8% at the trial court, 10.4% at the intermediate appellate court, 9.7% at the state supreme court, and 9.9% in the aggregate.

constitute fewer than 6%, Hispanics fewer than 3%, Asian Americans 1.1%, and Native Americans 0.1%. Minority judges predominantly serve in the state trial courts rather than state appellate courts.[33]

CHART 2: STATE JUDGES BY RACE[34]

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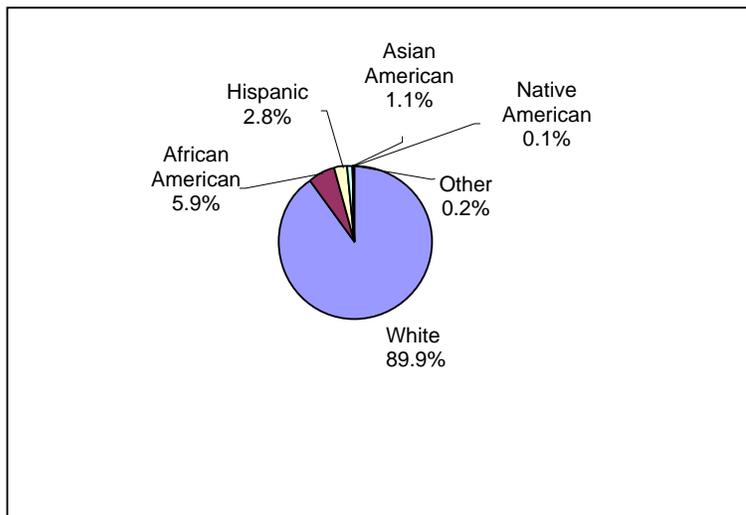
33. *See* Table B, *infra* note 34.

34. The percentages in Chart 2 are based on the numbers shown below in Table B, which the authors compiled from data from State Courts, *supra* note 22.

TABLE B: STATE JUDGES

Court	State Judges by Race (Numbers)						
	White	African American	Hispanic	Asian American	Native American	Other	Total
State Supreme Courts	307	20	8	5	0	0	340
Intermediate Appellate Courts	856	60	25	13	2	2	958
Trial Courts	9037	585	287	104	11	22	10,046
Total	10,200	665	320	122	13	24	11,344

CHART 3: ALL JUDGES BY RACE[35]
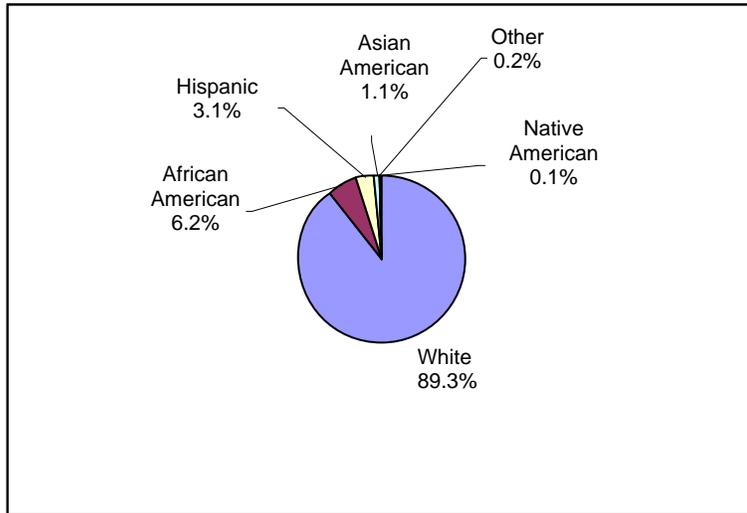
As shown in Chart 3, combining both federal and state courts, the percentages of judges by race are similar to those in the state courts. Of a total of over 12,000 judges, White judges constitute approximately 90% and minority judges constitute approximately 10%.[36] African American

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35. The percentages for Chart 3 are based on Table C below, which the authors compiled from the data given in Table A, *supra* note 31, and Table B, *supra* note 34.

TABLE C: ALL JUDGES

All Judges by Race (Numbers)			
	State Judges	Federal Judges	Total
White	10,200	652	10,852
African American	665	89	754
Hispanic	320	58	378
Asian American	122	6	128
Native American	13	0	13
Other	24	0	24
Total	11,344	805	12,149

36. These percentages are based on the percentages in Chart 3. Minority judges consist of African American, Hispanic, Asian American, and Native American judges.

and Hispanic judges together constitute about 90% of all the minority judges.[37]

B. Judicial Diversity in Context

1. Racial Underrepresentation Relative to the General Population

The practical significance of this paucity of minority judges comes into focus when one compares their representation to that of the general population. In theory, if the judiciary is open to all individuals regardless of race, one would expect minority representation in the judiciary to reflect minority representation in the general population. Instead, as described below, a dramatic discrepancy exists between minority representation on the bench and in American society generally.

TABLE 1: MINORITY REPRESENTATION IN GENERAL POPULATION[38]

African Americans	12.3%
Hispanics	12.5%
Asian Americans	3.6%
Native Americans[39]	1.0%

Comparing Table 1 and Chart 3, while minorities constitute about 30% of the general population, only about 10% of the judiciary is of color.[40] More specifically, over 12% of the general population is African American, while African American judges represent about 6% of the overall judiciary. Among Hispanics, Asian Americans, and Native Americans, the disparity is even greater. Hispanics represent about 12.5% in the general population, about four times their representation on the judiciary. Similarly, Asian Americans constitute 3.6% of the general population, over three times their representation on the bench. Meanwhile, Native Americans are underrepresented by a factor of ten. Moreover, this summary likely underestimates the underrepresentation of minority judges, given that the most current census data for the general population

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37. This percentage is calculated from data in Chart 3 and Table C, *supra* note 35.
38. Table 1 is compiled from data taken from GRIECO & CASSIDY, *supra* note 25, at 3.
39. This percentage includes both (1) American Indians and Alaska Natives, and (2) Native Hawaiians and other Pacific Islanders. *Id.*
40. Adding all the percentages in Table 1 equals 29.4%. Adding the percentages in Chart 3 for African American, Hispanic, Asian American, and Native American judges equals 10.5%.

are from 2000 and minority populations have markedly increased in the last eight years.[41]

Disaggregating the data on state and federal judges provides additional insights into racial diversity in the two systems. By comparing the data in Table 1 and Chart 2, we see that state court judges reflect extreme underrepresentation among every racial minority group. In contrast, by comparing the data in Table 1 and Chart 1, we find that while federal court judges also underrepresent minorities as a whole, the level of underrepresentation varies with each racial group. Hispanics number almost twice the representation in the general population as in the federal judiciary.[42] Asian Americans have over five times the representation in the general population than in the federal judiciary,[43] indicating the greatest underrepresentation among minority groups except for Native Americans. As indicated earlier, Native Americans are not represented at all on the federal bench.[44] On the other hand, the representation of African Americans in the federal judiciary suggests a positive direction, with 12.3% representation in the general population and 11.1% representation in the federal judiciary.

2. *Racial Diversity in the Bar and Among Presidential Appointments*

The racial diversity of lawyers is also relevant to our understanding of the diversity of judges. Judges are typically selected from among lawyers, so a lack of minority lawyers would make it more challenging to build a racially diverse judiciary and might explain in part the scarcity of minority judges. In fact, minorities are dramatically underrepresented among lawyers.[45] In 2000, about 4% of lawyers were African American, 3.3% were Hispanic, 2.3% were Asian American, and 0.2% were Native American.[46] Combined, minority lawyers constituted less than 10% of the

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41. *TIME Magazine*, for instance, reported in 2006 that Hispanics represented 14.8% and Asian Americans 4.4% of the population. Kathleen Adams et al., *America By the Numbers*, TIME, Oct. 30, 2006, at 44.

42. Hispanics represent 12.5% of the general population and 7.2% of the federal bench. *See supra* Chart 1; *see also supra* note 38 and accompanying text.

43. Asian Americans represent 3.6% of the general populations and 0.7% of the federal bench. *See supra* Chart 1; *see also supra* note 38 and accompanying text.

44. *See supra* note 27 and accompanying text.

45. *See* CHAMBLISS, *supra* note 6, at 5.

46. *Id.* Chambliss also indicates that minority representation among lawyers is less than in some other professions including physicians and surgeons, computer scientists, and accountants. *Id.* at 6–7.

bar even though minorities constituted nearly 30% of the general population.[47]

The small number of minority lawyers relative to the general population, however, is not a complete explanation for the lack of minority judges. Although having more minority lawyers has many benefits, including providing a bigger pool of talented judicial candidates, a lack of minority lawyers does not appear to be the real constraint on the appointment of more minority judges. Indeed, there are many minorities in the legal profession who would appear to have the prima facie qualifications to be judges. For example, between 2002 and 2003, there was a substantial pool of successful minority legal professionals to consider: 65 minority Congressional representatives, over 500 minority *full* professors in law schools, and over 18,000 minority partners in the country's largest law firms.[48] As further evidence that there already is a pool of qualified minority candidates, consider the fact that some Presidents were able to identify and appoint minority judicial nominees. As shown in Table 2, over 20% of the judicial appointments by Presidents Carter and Clinton were minorities.

TABLE 2: PRESIDENTIAL APPOINTMENTS BY JUDGES' RACE/ETHNICITY[49]

	Total	African American (%)	Hispanic (%)	Asian American (%)	Native American (%)	Total Minority (%)
Nixon (1969–74)	227	6 (2.6)	2 (0.9)	1 (0.4)	0 (0.0)	10 (4.4)
Ford (1974–76)	65	3 (4.6)	1 (1.5)	2 (3.1)	0 (0.0)	6 (9.2)
Carter (1977–80)	258	37 (14.3)	16 (6.2)	2 (0.8)	1 (0.4)	56 (21.7)
Reagan (1981–88)	378	7 (1.9)	13 (3.4)	2 (0.5)	0 (0.0)	22 (5.8)
Bush (1989–92)	192	11 (5.7)	8 (4.2)	1 (0.5)	0 (0.0)	20 (10.4)
Clinton (1993–2000)	378	62 (16.4)	24 (6.3)	5 (1.3)	1 (0.3)	92 (24.3)
Bush (2001–07)	276	20 (7.2)	27 (9.8)	2 (0.9)	0 (0.0)	49 (17.6)

The data in Table 2 also indicate that Presidents vary in the percentage of their judicial appointments that are minority. In contrast to Presidents Carter and Clinton, Presidents Reagan (5.8%) and George H. Bush (10.4%) appointed a much lower percentage of minority judges. The

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47.   *Id.* at 5, 63–64 (combining percentages of minority lawyers and discussing representation of each racial group); *supra* Table 1 (providing minority representation in the general population).

48.   CHAMBLISS, *supra* note 6, at 51, 58, 30.

49.   Table 2 was compiled from CHAMBLISS, *supra* note 6, at 55 (data for Presidents Nixon through Clinton), and the Directory of Federal Judges, *supra* note 22 (obtained on Feb. 27, 2008) (data for President George W. Bush).

second President Bush's appointment of minority judges (17.6%) was closer to the percentage of minority judges appointed by Presidents Carter and Clinton. In the aggregate, Democratic administrations contributed more to the racial diversity of the judiciary than Republican administrations between 1969 and 2007. Minority judges constituted approximately 23% of all judicial appointments by Democratic presidents in contrast to 9.5% of all judicial appointments by Republican presidents during that period.[50]

III. RESEARCH ON JUDICIAL DECISION MAKING AND JUDGES' RACE

While the empirical study of judicial decision making by legal scholars is fairly recent, researchers in other disciplines have produced a significant body of literature on this topic. Political scientists, in particular, have considered how certain characteristics of judges, such as their political affiliation, are indicators of their ideological attitudes and voting patterns.[51] Given their training, they are especially astute at observing judicial decision making in the political environment in which courts operate. For instance, numerous studies analyze the political affiliation of Supreme Court justices and its relationship to their voting patterns in different types of cases.[52]

Although new to this research area, legal scholars are uniquely positioned to contribute. Given their legal training, they are careful observers of the nuances of judicial decision making and are in a unique position to apply empirical analysis to legal issues.[53] Moreover, traditional legal scholarship tends to have little or no empirical content, so by comparison, the emerging empirical research by legal scholars is

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50. The percentages were calculated by taking the total number of judges appointed during this period, as shown in Table 2, and determining what percent were appointed by Republican Presidents and by Democratic Presidents.

51. *See, e.g.*, Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007); Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978*, 75 AM. POL. SCI. REV. 355 (1981).

52. *See supra* note 51.

53. In employment discrimination cases, for instance, courts have recognized the value of more sophisticated statistical methods, such as regression analysis. *See, e.g.*, Bazemore v. Friday, 478 U.S. 385, 400 (1986) (Brennan, J., concurring). Other key judicial opinions on employment discrimination laws value as evidence the results of more basic statistical methods, such as calculating frequencies, percentages, and cross-tabulations. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 306–13 (1977).

developing the particular blend of social science and legal research that is most appropriate to legal issues.

While both social scientists and legal scholars doing empirical research in this area may not state their beliefs directly, they implicitly make certain assumptions about the way judges reach decisions and how the law operates.[54] In particular, they adhere to a more realist model of judicial decision making, which argues that judges, like other people, are affected in their decision making by social forces and their own experiences and values.[55] Thus, judges' characteristics, such as their race, gender, and political affiliation, would be meaningful because they help us better understand how judges interpret the facts, apply often unclear legal principles, and reach legal conclusions.

This model of judicial decision making is an uncomfortable one for legal scholars who adhere to a more formalist model of judges.[56] Formalists tend to view judges as arbiters of justice who assess the facts and interpret the law in a rational and more mechanical way consistent with well-established legal principles.[57] Thus, judges are not likely

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54. A fundamental assumption is that an array of judicial characteristics is identifiable and measurable. Some characteristics, such as judges' race, age, sex, education, and work experiences are objectively determinable and typically self-reported. However, we recognize that some of these characteristics, such as race, are socially constructed, and that an ongoing debate about the usefulness and appropriateness of these commonly used categories continues. *See, e.g.*, PETER SKERRY, COUNTING ON THE CENSUS?: RACE, GROUP IDENTITY, AND THE EVASION OF POLITICS 51–59 (2000); Charles Hirschman et al., *The Meaning and Measurement of Race in the U.S. Census: Glimpses into the Future*, 37 DEMOGRAPHY 381, 381, 390 (2000). Other characteristics, however, are not typically self-reported, so they need to be measured in some other way. For example, since the political party of judges is not readily ascertainable, researchers use the political party of the nominating President as a reasonable proxy for the political affiliation of the judge. *See, e.g.*, Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995); Nancy E. Crowe, The Effects of Judges' Sex and Race on Judicial Decision Making on the U.S. Courts of Appeals, 1981–1996 (June 1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with authors). The reasoning is that a judge nominated by a Republican President is likely, even if not a member of the Republican Party, to share political ideology similar to Republicans.

55. There are parallels in social psychology to this model of judicial decision making. For instance, social psychologists explain human behavior and decision making in part by a consideration of social forces and life experiences. *See, e.g.*, HENRY GLEITMAN ET AL., PSYCHOLOGY 379–99 (6th ed. 2004) (describing social impact theory). In addition, there are also parallels to the realist model of judicial decision making, as described by legal scholars. *See, e.g.*, LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960 (1986); Guthrie et al., *supra* note 11, at 2–3; Burt Neurorne, Essay, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 420 (1992); Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1145–48 (1999) (reviewing ANTHONY SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998)).

56. For discussions on the formalist model of judicial decision making, see, for example, Guthrie et al., *supra* note 11, at 2–3; Leiter, *supra* note 55, at 1145–48; Neurorne, *supra* note 55, at 420.

57. *See* Leiter, *supra* note 55, at 1144–45.

influenced by personal attitudes and values because their role does not allow much discretion.

Increasingly, however, more legal scholars are acknowledging that judges have human inclinations and that judges' ability to be purely objective about the case may be largely theoretical.[58] Many sensitive questions remain, however, on what those human inclinations are, when they come into play, and how they affect judicial decision making.

A wide range of studies considers how the personal attributes and backgrounds of judges influences how they rule.[59] Some study federal courts while others consider state courts.[60] The subject of cases varies, ranging from criminal law cases to employment law.[61] Until fairly recently, research did not include the judges' genders or races. However, with a more diverse judiciary, researchers are beginning to focus on these

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58. *See, e.g.*, Guthrie et al., *supra* note 11, at 19–28; Linda Hamilton Krieger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 J. SOC. ISSUES 835 (2004); Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1278–79 (2005); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. REV. 1, 1–7 (1993).

59. *See, e.g.*, CASSIA L. SPOHN, HOW DO JUDGES DECIDE? 101–17 (2002); Ashenfelter et al., *supra* note 4; Sue Davis et al., *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129 (1993); John Gruhl et al., *Women as Policymakers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308 (1981); Josh Hsu, *Asian American Judges: Identity, Their Narratives, & Diversity on the Bench*, 11 UCLA ASIAN PAC. AM. L.J. 92 (2006); Carol T. Kulik et al., *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes*, 27 HUM. BEHAV. 69 (2003); Kenneth L. Manning et al., *Does Age Matter? Judicial Decision Making in Age Discrimination Cases*, 85 SOC. SCI. Q. 1 (2004); Patricia Yancey Martin et al., *Gender Bias and Feminist Consciousness Among Judges and Attorneys: A Standpoint Theory Analysis*, 27 SIGNS 665 (2002); Daniel M. Schneider, *Statutory Construction in Federal Appellate Tax Cases: The Effects of Judges' Social Backgrounds and of Other Aspects of Litigation*, 13 J.L. & POL'Y 257 (2003); Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425 (1994); Darrell Steffensmeier & Chester L Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749 (2001); Darrell Steffensmeier & Chris Hebert, *Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?*, 77 SOC. FORCES 1163 (1998); Thomas M. Uhlman, *Black Elite Decision Making: The Case of Trial Judges*, 22 AM. J. POL. SCI. 884 (1978); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisonmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005); Crowe, *supra* note 54; Elaine Martin & Barry Pyle, Taking Sides: The Impact of Judicial Gender on Decisions in Divorce Law (2004) (unpublished manuscript, on file with the *Washington University Law Review*); Tajuana Massie et al., The Impact of Gender and Race in the Decisions of Judges on the United States Courts of Appeals (2002) (unpublished manuscript, on file with the *Washington University Law Review*).

60. *E.g.*, Ifill, *supra* note 6 (state trial courts); Kulik et al., *supra* note 59 (federal cases); Manning et al., *supra* note 59 (federal district courts); Martin & Pyle, *supra* note 59 (state courts); Massie et al., *supra* note 59 (federal courts of appeal).

61. *E.g.*, SPOHN, *supra* note 59 (criminal sentencing decisions); Kulik et al., *supra* note 59 (sexual harassment law); Manning et al., *supra* note 59 (criminal law); Massie et al., *supra* note 59 (criminal procedure, civil rights cases); Schneider, *supra* note 59 (federal tax law).

traits, sometimes in combination with other attributes such as the judges'
ages or political affiliations.[62] The results of this empirical research are not
consistent. Some studies find little relationship between the judges'
attributes and their decision making, while others find significant
patterns.[63] This area of research is clearly in the early stages.[64]

Nonetheless, research on judges' race is emerging, as the small but
notable increase in minority judges has made empirical research more
meaningful. For example, researchers are wondering if disturbing legal
trends related to race and sentencing might be linked to the judge's own
race.[65] Could the disparities in the sentencing of criminal defendants from
different racial groups, for instance, be linked to the race of the presiding
judges, or do alternative explanations account for the disparities?[66]

The works of Cassia Spohn,[67] Nancy Crowe,[68] Adam Cox and Thomas
Miles[69] illustrate the emerging research on the role of the judge's race in
judicial decision making. Prompted in part by the racial disparities in the
sentencing of criminal defendants, Spohn reviewed others' research and
conducted her own studies on judicial decision making in this setting.[70] In
a survey of research on the judges' race, she found contradictory results.[71]
Some studies noted differences in the sentencing behavior of African
American and White judges, while others found little or none.[72] She found

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62. *E.g.*, SPOHN, *supra* note 59 (race and gender); Gruhl et al., *supra* note 59 (gender); Hsu, *supra* note 59 (race); Kulik, *supra* note 59 (gender, race, age, and political affiliation); Martin et al., *supra* note 59 (gender); Songer et al., *supra* note 59 (gender); Peresie, *supra* note 59 (gender); Martin & Pyle, *supra* note 59 (gender); Massie et al., *supra* note 59 (gender and race); Crowe, *supra* note 54 (gender and race).

Interestingly, research on the relationship of judges' gender to their decision making is already more prevalent and more varied than on judges' race. Perhaps this is because female judges outnumber minority judges, thus providing a larger base to study. Or, perhaps more researchers are interested in gender issues than race issues, despite the critical importance of both topics. *See* Pat K. Chew, *Freeing Racial Harassment from the Sexual Harassment Model*, 85 OR. L. REV. 615, 618 (2006) (noting the relative lack of research on racial harassment law, in comparison to research on sexual harassment law).

63. To illustrate, consider Spohn's discussion of research on the race of judges and its relationship to criminal sentencing. *See infra* notes 108–15 and accompanying text.

64. Given that this field is still in its development stage, scholars are debating the appropriate research methodology. *See, e.g.*, Lee Epstein & Andrew D. Martin, *Does Age (Really) Matter? A Response to Manning, Carroll, and Carp*, 85 SOC. SCI. Q. 19 (2004); Manning et al., *supra* note 59.

65. SPOHN, *supra* note 59, at 179–208.

66. *Id.* at 165–218.

67. SPOHN, *supra* note 59.

68. Crowe, *supra* note 54.

69. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008).

70. SPOHN, *supra* note 59, at 165–218.

71. *Id.* at 106–10.

72. *Id.*

in her own study of sentencing of violent felons in Detroit that judges as a group did discriminate and impose harsher sentences on African American than on White offenders.[73] Contrary to her expectations, however, both African American and White judges imposed these harsher sentences.[74] She speculated that both African American and White judges might think of African American offenders as more threatening and dangerous than their White counterparts.[75] In addition, at least some of the discriminatory treatment of African American offenders by African American judges might be attributable to their sympathy toward and identification with African American victims.[76] In other words, African American judges may see themselves more as potential victims of black-on-black crime and do not particularly empathize with African American criminals. In this connection, Spohn noted a study of sentencing by White and Hispanic judges in El Paso, Texas.[77] That study found that Hispanic judges imposed similar sentences on Hispanic and White offenders but that White judges gave more lenient sentences to White offenders.[78] Hispanic judges, like their African American counterparts, might view themselves as victims of crimes by both Hispanic and Whites perpetrators, while White judges might see Hispanic criminals as a greater threat than White ones.

Nancy Crowe studied the effects of judges' sex and race on judicial decision making in sex and race discrimination cases.[79] After looking at twelve federal courts of appeal over a fifteen year period, she found that the sex of judges makes a difference in sex discrimination cases but not in race discrimination cases.[80] In particular, female judges were more likely than male judges to vote in favor of the plaintiffs, who are most typically women,[81] in sex discrimination cases.[82] In contrast, female judges did not

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73. *Id.* at 108–10.

74. *Id.* at 109.

75. *Id.* at 110.

76. *Id.*

77. *Id.*

78. *Id.* As the authors of that study hypothesized: "'Anglo judges are not so much discriminating against Hispanic defendants as they are favoring members of their ethnic group.'" *Id.* (quoting M.D. Holmes et al., *Judges' Ethnicity and Minority Sentencing: Evidence Concerning Hispanics*, 74 SOC. SCI. Q. 496, 502 (1993)).

79. Crowe, *supra* note 54.

80. *Id.* at 80–81, 110–11. Crowe also found that judges' political partisanship played a role. Judges appointed by a Democratic President (both African American and White Democratic judges) were much more likely than those appointed by a Republican President to vote for plaintiffs in both sex discrimination and race discrimination cases. *Id.* at 80, 111.

81. *See* Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 595 (2001).

82. Crowe, *supra* note 54, at 80.

vote differently than male judges in race discrimination cases.[83] Crowe posited that the gender of the judge may "only matter in areas of law which deal explicitly with gender," and that "female judges [may] not generalize [their identification with] sex discrimination plaintiffs to other types of discrimination plaintiffs."[84] She found, however, that the race of judges does make a difference in both sex and race discrimination cases.[85] Significant differences appeared in voting patterns: African American judges held for plaintiffs nearly twice as often in sex discrimination cases and over twice as often in race discrimination cases, as compared to White judges.[86] As Crowe suggests, the race of the judge may be relevant in cases that deal with race discrimination but also in cases that deal with discrimination more broadly.[87] Perhaps African American judges are empathic to discriminatory experiences of all kinds.[88]

Finally, Adam Cox and Thomas Miles studied all published federal cases since 1982 that were decided under Section Two of the Voting Rights Act.[89] The Voting Rights Act was enacted principally in response to disenfranchisement of African Americans in the South,[90] and so, not surprisingly, plaintiffs are often African Americans.[91] After controlling for other factors, including the political party of the judges, Cox and Miles found that the race of judges makes a difference in case outcomes.[92] African American judges are more than twice as likely as non–African American judges (mostly White) to vote for Section Two liability.[93] Moreover, they investigated whether the presence of an African American judge on a judicial panel affects the votes of his or her colleagues.[94] They found that it made a significant difference, with White judges more likely

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83. *Id.* at 111.

84. *Id.* at 115.

85. *Id.* at 80–91, 110–11.

86. *Id.*

87. *Id.* at 134.

88. *Id.* at 116 (positing as a potential explanation that "African Americans, having been exposed to more and perhaps different kinds of discrimination, are primed to see discrimination in ways and in places that women are not.").

89. Cox & Miles, *supra* note 69, at 3.

90. South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966) (discussing how the enacting "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.").

91. Cox & Miles, *supra* note 69, at 54.

92. *Id.* at 45, 48–49.

93. *Id.* at 30. African American judges voted in favor of liability 56% of the time in contrast to the non–African American judges voting to impose liability only 26% of the time. *Id.* The authors note that, given the relatively small number of votes by African American judges, this finding should be interpreted cautiously. *Id.* at 30–31.

94. *Id.* at 34–37.

to vote in favor of liability when they sit with an African American colleague.[95] The researchers theorized that White judges' view of the merits of the case may change when they deliberate with African American colleagues who share their different experiences and information relating to discriminatory practices.[96]

IV. EMPIRICAL STUDY: JUDGES' RACE IN RACIAL HARASSMENT CASES

Noting the absence of research on the subject, we conducted the first study of the relationship between judges' race and the outcomes in racial harassment in the workplace cases. This study builds on an earlier empirical examination of the characteristics and patterns in racial harassment cases that analyzed judicial opinions from a twenty-one year time period—essentially the entire history of racial harassment case law under federal laws up to 2002.[97] This earlier study found that employees infrequently succeed in their racial harassment claims brought under federal law: plaintiffs succeeded only 21.5% of the time.[98] Examining the cases in more detail, this earlier study observed that plaintiffs in racial harassment cases are overwhelmingly minorities, and most typically African American, whose harassers tend to be White.[99]

This current study further probes racial harassment cases by considering whether the race of the judge is related to how these proceedings end. The judges in the racial harassment cases in our study, consistent with the racial profile of the federal judiciary generally,[100] are

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95. *Id.* at 34–35.

96. *Id.* at 35–36.

97. Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 53–54 (2006).

98. *Id.* at 54. The plaintiffs' success rates in studies of employment discrimination cases vary. *Compare* Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 916 (2006) (finding 27% overall plaintiff win rate in race and national origin discrimination cases), *with* Crowe, *supra* note 54, at 80, 110 (finding 48% plaintiff win rate in sex discrimination and 45% in race discrimination cases), *and* Juliano & Schwab, *supra* note 81, at 594 (finding 48.2% overall plaintiff win rate in sexual harassment cases, with 51.2% of the district court cases and 39% of the appellate court cases). These variations may occur for a number of reasons, including: the level of court (appellate versus district courts); the subject (e.g., all employment discrimination cases, sex discrimination, race discrimination, sexual harassment, or racial harassment); the publication source (official reporter system or all on-line cases); the time period studied; and the research methodology. Our earlier study and the study described in this Article included district court cases and appellate court cases, cases published in the official reporter system and those available only online, and cases over a twenty-year time period. Chew & Kelley, *supra* note 97, at 76, 78, 98. We included all these cases to obtain as representative a data set of racial harassment case law as possible.

99. *See* Chew & Kelley, *supra* note 97, at 96–109.

100. *See* discussion *supra* Part II.A.

overwhelmingly White. In a typical racial harassment case, therefore, a White judge hears an African American employee's complaint that White supervisors or coworkers harassed her or him because of race. This difference in the races of plaintiffs and judges is most meaningful, of course, if the race of the judge makes a significant difference in her or his decision making. As we subsequently demonstrate, our research indicates that it does.[101] Moreover, judges' race is meaningful even when we take into account judges' political affiliation.[102] For example, African American Democratic judges rule differently than White Democratic judges.[103]

   Racial harassment law is a particularly appropriate focus for this type of research. This area of law allows judges considerable latitude. While the fundamental legal principles for racial harassment cases are well known,[104] they continue to evolve and are subject to varied and subjective interpretations that may well yield different legal conclusions.[105]

   In *Meritor Savings Bank v. Vinson*,[106] the Supreme Court recognized that a discriminatory harassment claim, also called hostile environment claim, is actionable under Title VII of the Civil Rights Act of 1964: "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[107] Unlike other race discrimination cases where a particular employment practice or decision (e.g., decision to hire, fire, or promote) is the focus of the discrimination claim,[108] racial harassment cases more typically involve supervisors' and coworkers' day-to-day, often informal, use of abusive language and behavior toward an employee because of her or his race.[109] In a line of

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   101.   *See* discussion *infra* Parts IV.B–V.

   102.   *See* discussion *infra* Part V.B.

   103.   *See* discussion *infra* Part V.B.

   104.   Supreme Court cases have stated the key legal principles for the harassment doctrine. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 786–92 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751–54 (1998); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–82 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–23 (1993); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66–69 (1986). These cases and their contributions to harassment jurisprudence are described further in THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW 15–20, 97–114 (2005).

   105.   Our earlier study of racial harassment cases, for instance, demonstrates that there is great variability in how judges interpret the applicable legal principles. Chew & Kelley, *supra* note 97, at 81–82.

   106.   *Meritor Sav. Bank*, 477 U.S. 57.

   107.   *Id.* at 65.

   108.   *See* Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000e-2 (2000); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

   109.   *Meritor Sav. Bank*, 477 U.S. at 65–67. As the *Faragher* case makes clear, however, a "tangible employment action" can be an example of a supervisor's conduct, along with other harassing

cases, the Supreme Court set forth the claim's key elements.[110] First, the harassment must be sufficiently "severe or pervasive" to alter the victim's work conditions and result in a "hostile . . . environment."[111] This severe or pervasive standard must be met objectively (i.e., a reasonableness standard) as well as subjectively by the plaintiff.[112] Second, the harassment must be because of race rather than being motivated by a reason unrelated to race (such as an employee's incompetence or the boss's generally nasty personality).[113] Although terms such as "severe or pervasive," "hostile environment," and "because of race" are subject to myriad interpretations, the Court has failed to provide clear guidance on their meanings.[114]

Racial harassment law further enables one to study a rich and representative sample of cases from a range of federal circuits and states that span a significant time period.[115] Since reported judicial opinions on racial harassment cases arise most typically on defendants' motions for summary judgment,[116] these cases allow us to focus squarely on judges' rather than juries' decision making. Finally, this area of law presents the opportunity to study judicial decision making in cases where the racial paradigm is of judges who are typically White, plaintiffs who are typically minority, and legal issues that demand race-based factual analysis.

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conduct, that serves as the factual foundation for a harassment claim. *Faragher*, 524 U.S. at 807.

110. *See supra* note 104. While all these Supreme Court cases involve sexual harassment fact patterns, the Court has assumed that the principles laid out in sexual harassment cases and racial harassment cases are interchangeable. *See, e.g.*, *Meritor Sav. Bank*, 477 U.S. at 65–66; Chew, *supra* note 62, at 618–19.

111. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993); *Faragher*, 524 U.S. at 787.

112. *Faragher*, 524 U.S. at 787.

113. *See* 42 U.S.C § 2000e-2(a)(1); *see also* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (exploring this attributional requirement in the context of sexual harassment).

114. In *Harris*, Justice Scalia acknowledged that the majority opinion's explanation of the legal standards for a hostile environment claim were not very clear and left "virtually unguided" jurists and juries to decide these cases. *Harris*, 510 U.S. at 24 (Scalia, J., concurring).

115. *See, e.g.*, Chew & Kelley, *supra* note 97, at 96–97, 75–77.

116. *Id.* at 78 tbl.10; Krieger, *supra* note 58, at 839 (noting few civil cases go to trial; rather, most are disposed of through pretrial motions, most commonly motions for summary judgment). "To survive a defense motion for summary judgment" and proceed to trial, the "plaintiff must convince the judge that . . . a reasonable jury, drawing all reasonable inferences and resolving all credibility conflicts against the employer, could render a verdict in the plaintiff's favor." *Id.* at 840. If the plaintiff provides evidence "sufficient to create a genuine issue of material fact" on any element, the judge is supposed to deny the defendant's motion. *Id.* As Krieger explains, in deciding summary motions, judges use their intuition "to determine what inferences can 'reasonably' be drawn from any particular set of facts." *Id.*

A. Research Methodology

We designed a research process to identify representative cases and judges so that any inferences we drew from the data would be as generalizable as possible. We randomly selected forty percent of all reported racial harassment cases from six federal circuits between 1981 and 2003.[117] From these judicial opinions, we collected information on each case (including characteristics of the parties, the nature of the alleged harassment, and the outcome of the proceeding). We also collected detailed biographical information on the presiding judge in each case (including her or his race, gender, and political affiliation).[118] A single judge presided in district court cases, and a panel of three judges typically sat in appellate court cases. Our study included a total of 256 different judges, some of whom heard more than one case. Pairing each case with each judge hearing the case yielded a total sample of 428 judge/case pairs.[119] As indicated in Appendix A, for some variables we had data on every case and every judge in the study, while in others the data were less complete. We performed a number of descriptive and statistical analyses

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117. We randomly sampled judicial opinions from West and LEXIS, including opinions designated for the Federal Reporter system and opinions not so designated, from the First, Second, Fifth, Seventh, Ninth, and Eleventh federal circuits. These circuits represent different geographical regions and include large states with racially diverse populations. Chew & Kelley, *supra* note 97, at 53 & n.8. Building on the data set from our prior study, we added judges' biographical data and updated the cases an additional year, so that the data set for this study included cases between 1981 and 2003. However, judicial opinions in West and LEXIS are not all judicial opinions since federal judges do not release all their opinions to legal publishers, and these publishers do not necessarily publish all the opinions they receive from the judges. *See* Chew & Kelley, *supra* note 97, at 62 & n.58.

118. *See infra* Appendix A (listing the collected information).

119. If the same judge presided over more than one of the cases, she or he was included for each case. Therefore, it was possible for a particular judge in one case opinion to reach a decision that favored the plaintiff and in another case opinion that favored the defendant. If the case was presided over by three judges, which was the norm in appellate court cases, all three judges and their individual votes were included in the study as three separate judge/case pairs since each judge made a decision on the case before her or him. That is, each judge/case pair was considered to be an independent observation in our analyses. The data set included 326 judge/case pairs from the district courts (including opinions of magistrate judges) and 102 judge/case pairs from the appellate courts. *See* Federal Judicial History, Magistrate Judges: A Brief History, http://www.fjc.gov/history/home.nsf/ page/magistrate_judges (last visited Feb. 6, 2009) (defining federal magistrate judge). Most of the district court proceedings dealt with the defendant-employers' motion for summary judgment, and most of the appellate court proceedings dealt with a party's appeal of the district courts' holding on a motion for summary judgment. Chew & Kelley, *supra* note 97, at 77–78.

The data indicate similar case outcomes for judges in district courts (21.9% plaintiffs' success rate) as compared to appellate courts (22.5%); magistrate judges (23.4%) as compared to other judges (21.6%); single judges (22.4%) as compared to judges on panels (21.4%); and judges who heard more than one case (23.2%) as compared to judges who heard only one case (19.5%). None of these differences were statistically significant. Thus, we had further assurance that we could study all the judge/case pairs as a whole without distinguishing between these various categories of judges.

of the data, utilizing multiple methods to learn more about the relationship of the judges' race to their decision making.[120] These processes included cross-tabulations[121] and logistic regression modeling.[122] For our analyses,

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120. First, we summarized the data that we had collected ("the data set"). Specifically, we counted the number of judge/case pairs with particular characteristics ("frequency count" of each variable). These frequency counts help us determine if our sample of cases and judges resembles the universe of cases and judges. To the extent that our sample resembles the judiciary as a whole, then we have additional assurance that our sample is representative and that we might draw inferences about judges in all racial harassment cases with more confidence. In addition, the frequency counts help us decide if we have enough data on any given characteristic to analyze it meaningfully.

Our frequency counts indicated that our data set reasonably resembles the racial and gender composition of the federal judiciary as a whole, particularly when you take into account that the cases in this study cover a twenty-two year time period and that the percentages of minority judges were lower in the earlier part of this period than they are today. For instance, African American judges represented 7.8% of the federal judiciary in 1994 and 11% in 2008..*See supra* Chart 1. African American judges constituted 8.5% of our sample. Hispanic judges represented 4.8% of the federal judiciary in 1994 and 7.2% in 2008. *See supra* Chart 1. Hispanic judges constituted 5.3% of our sample. Thus, the number of cases with African American and Hispanic judges in our study, while small, is a respectable sample, particularly given that the universe of minority federal judges is small and evolving. In addition, the statistical procedures used in our study take into account the small sample sizes. *See infra* notes 121–22. In particular, it is more difficult to establish statistically significant differences when sample sizes are small. Thus, when significance is found under such conditions, we have confidence that significant differences exist. Nonetheless, we view our study as exploratory and make generalizations with care.

121. As a second step in our statistical analysis, we studied whether particular judges' characteristics (e.g. race, gender, or political affiliation) were associated with the probability of plaintiffs' success or defendants' success ("cross-tabulations"). Since we mostly had categorical variables, we used cell sizes and percentages as summary statistics rather than means and standard deviations. These cross-tabulations helped us assess the general decision-making patterns of different groups of judges. We focused on case outcomes because they are an objectively determinable measure of judges' decision making (i.e., whether they agreed with plaintiffs' or defendants' position), although future research may look at more nuanced aspects of judicial decision making. We used chi-square tests to determine whether these associations were statistically significant for tables where all cells had expected frequency greater than five. For tables with at least one cell with low expected frequency (≤ 5), we used Fisher's exact test instead.

"Statistical significance" is generally expressed as $p \leq .05$ or more stringently as $p \leq .01$. This expression means that the result occurs less than or equal to five times (or one time) out of a hundred. When a result occurs this seldom, statisticians assume it did not occur by chance. Each statistical test reported with the cross-tabulations compares a single group (e.g. African American judges) against all other groups combined (e.g. non–African American judges). As such, these tests are substantially overlapping (the comparison between African American and non–African American judges is similar to the comparison between White and non-White, for instance), and should not be taken to represent mutually independent findings about the relationships among judge characteristics and case outcomes. For non-statisticians desiring increased understanding of the above-mentioned statistical techniques, see ROBERTA GARNER, THE JOY OF STATS 132–34, 189–201 (2005). For discussion of Fisher's test, see JACOB COHEN ET AL., APPLIED MULTIPLE REGRESSION/CORRELATION ANALYSIS FOR THE BEHAVIORAL SCIENCES, 187–90 (3d ed. 2003).

122. Based in part on the results of the cross-tabulations, we identified judge and case characteristics that individually appeared to make a significant difference in whether plaintiffs succeeded or not. We tested these characteristics together in a series of multiple logistic regression models. Multiple logistic regression is a statistical procedure that allows us simultaneously to evaluate the statistical significance of the association (i.e., larger than would be expected due to chance)

we excluded those judge/case pairs with missing data.[123] Given that a preliminary analysis indicated that judges in federal district courts and appellate courts have comparable decision-making patterns in racial harassment cases, we decided to analyze all cases as one sample.[124]

B. Results of the Statistical Analyses

Our study explores how judge characteristics are related to judicial decision making. In particular, we examined whether judges' race affected the judges holding for plaintiffs or not. In part because other researchers have considered how judges' gender and political affiliation are related to case outcomes,[125] we also included these characteristics in our initial analysis. A more formalistic model of judicial decision making[126] also would predict that the factual merits of the case are critical, so we included in our study certain plaintiffs' claims of racial harassment that our earlier

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between multiple judge or case characteristics and whether plaintiffs are successful. DAVID W. HOSMER & STANLEY LEMESHOW, APPLIED LOGISTIC REGRESSION 70–79 (2d ed. 2000). By testing multiple variables simultaneously in this way, we can evaluate whether each characteristic has a statistically significant relationship with case outcome, while controlling for all others. Logistic regressions also provide a unified framework in which to examine and test interaction effects, which indicate whether two (or more) variables together have an effect different than would be expected from knowledge of their individual effects alone. Finally, we tested for statistical interactions between variables in the logistic regression models—that is, whether the effect of each variable on case outcome depends in magnitude and/or direction of the value of another variable. For non-statisticians desiring further understanding of the above-mentioned techniques, see GARNER, *supra* note 121, at 156–57; COHEN ET AL., *supra* note 121, at 354–86, 482–522.

Logistic regression allows us to quantify the strength of each association by providing estimates of the odds ratios ("OR") for each characteristic. The OR is the ratio between the odds of plaintiff's success with a certain judge/case characteristic to the odds of success without that characteristic. Logistic regression provides odds ratio calculations performed simultaneously for each variable in the model, while controlling for all other variables. *See generally* J. Martin Bland & Douglas G. Altman, *Statistics Notes: The Odds Ratio*, 320 BMJ 1468 (2000), *available at* http://www.bmj.com/cgi/content/full/320/7247/1468 (further explaining odds ratios).

If a variable has no effect on case outcomes, the probability of plaintiffs' success will be the same for both groups of judges, and the odds ratio would be 1.0. Departures from 1.0 in either direction indicate an association between that variable and case outcomes. An odds ratio greater than 1.0 indicates an increased likelihood that plaintiffs will be successful and an odds ratio less than 1.0 indicates an increased likelihood that plaintiffs will be unsuccessful.

We also performed a measure of the overall explanatory power of each model. We calculated Nagelkerke's generalized R^2 as a measure of the overall explanatory power of each fitted model. R^2 represents the proportion of the variance in case outcome explained by the variables in the model alone. N. J. D. Nagelkerke, *A Note on a General Definition of the Coefficient of Determination*, 78 BIOMETRIKA 691, 691–92 (1991).

123. *See infra* Appendix A.
124. *See supra* note 119.
125. *See supra* note 59.
126. *See* text accompanying *supra* note 56.

empirical work indicated as meaningfully related to case outcomes.[127] Finally, we analyzed whether the plaintiffs' race made a difference.

As we delve more deeply into the study's results, keep in mind that defendants are much more likely than plaintiffs to win these judicial proceedings. On average, as shown in Table 3, plaintiffs were successful about 22% of the time, or about one in five cases. This baseline measure helps put the decision-making patterns of any one group of judges into perspective. Thus, when a group of cases deviates considerably from this baseline, it is particularly noteworthy.

1. Analysis 1: Cross-tabulations of Individual Variables with Case Outcomes

a. Judges' Characteristics. Our data indicate very different decision-making patterns for judges of different races. In cases where African American judges presided, plaintiffs had the highest success rate (45.8%), as shown in Table 3. In other words, plaintiffs who appear before African American judges are almost as likely to win as to lose. This success rate is significantly higher than in cases presided over by judges of other races considered together (p = .004)[128] and is also remarkable because it is well above the baseline average of 22%. This result is consistent with other research that African American judges are more likely than White judges to find for plaintiff employees in employment discrimination cases generally.[129]

As shown in Table 3, in contrast to cases heard by African American judges, the plaintiffs' success rate with White and Hispanic judges is much lower. Cases with Hispanic judges had the lowest plaintiffs' success rate (19%), followed closely by White judges (20.6%). The plaintiffs' success rate for Hispanic judges was not significantly different from that for judges of all other races taken together,[130] while the plaintiffs' success rate for White judges was significantly different from that for all minority judges taken together (p = .05). The statistically significant results are driven primarily by the difference in success rate for African American and White judges, and indicate that this difference is unlikely to be due to chance alone.

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127. *See* Chew & Kelley, *supra* note 97, at 86–88, 106.
128. *See supra* note 120 (explaining "p" value).
129*. See supra* notes 79–87 and accompanying text.
130. When Hispanic judges are compared to all other judges, the latter group is composed mostly of White judges. Since plaintiffs' success rate for Hispanic judges is similar to that for White judges, it is not surprising that no statistically significant difference occurs.

Our data included too few cases with Asian American judges to make meaningful observations. Hopefully, as Asian American and Native American judges become more numerous, empirical studies will be able to analyze their decision-making patterns as well. As we observed, the number of cases in our study where African American and Hispanic judges preside is small, but the number is acceptable for most analyses in our exploratory study.[131] When they are not, we note it accordingly.

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131.   *See supra* note 120.

TABLE 3: CROSS-TABULATIONS OF JUDGE CHARACTERISTICS, CASE
CHARACTERISTICS, AND PLAINTIFFS' RACE BY CASE OUTCOMES

Comparison	Plaintiffs Successful		Plaintiffs Unsuccessful		χ^2 (1df)	p
	N	%	N	%		
All cases	94	22.0	334	78.0		
Judge characteristics						
African American judges vs. all other judges					8.3	**.004**
African American judge (N = 24)	11	45.8	13	54.2		
Others (N = 374)	77	20.6	297	79.4		
Hispanic judges vs. all other judges					*	1.00
Hispanic judge (N = 21)	4	19.0	17	81.0		
Others (N = 377)	84	22.3	293	77.7		
Asian American judges vs. all other judges					*	.53
Asian American judge (N = 3)	1	33.3	2	66.7		
Others (N = 395)	87	22.0	308	78.0		
White judges vs. all other judges					4.0	**.05**
White judge (N = 350)	72	20.6	278	79.4		
Others (N = 48)	16	33.3	32	66.6		
Female vs. Male judges					0.7	.40
Female judge (N = 78)	20	25.6	58	74.4		
Male judge (N = 348)	74	21.3	274	78.7		
Republican vs. Democratic judges					8.4	**.004**
Republican judge (N = 235)	40	17.0	195	83.0		
Democratic judge (N = 164)	48	29.3	116	70.7		
Case characteristics						
Racial slurs vs. no racial slurs					21.5	**<.001**
Racial slurs (N = 247)	74	30.0	173	70.0		
No racial slurs (N = 180)	20	11.1	160	88.9		
Both supervisor & coworker harassment vs. not both					21.0	**<.001**
Both supervisor & coworker harassment (N = 116)	43	37.1	73	62.9		
Not both (N = 311)	51	16.4	260	83.6		
Plaintiff characteristics						
African American plaintiff vs. all other plaintiffs					2.5	.12
African American plaintiff (N = 300)	59	19.7	241	80.3		
Others (N = 71)	20	28.2	51	71.8		
Hispanic plaintiff vs. all other plaintiffs					2.4	.12
Hispanic plaintiff (N = 20)	7	35.0	13	65.0		
Others (N = 351)	72	20.5	279	79.5		
Asian American plaintiff vs. all other plaintiffs					*	.32
Asian American plaintiff (N = 14)	1	7.1	13	92.9		
Others (N = 357)	78	21.8	279	78.2		
White plaintiff vs. all other plaintiffs					3.0	.08
White plaintiff (N = 37)	12	32.4	25	67.6		
Others (N = 334)	67	20.1	267	79.9		

* Fisher's exact test used for tables with at least one cell with expected frequency ≤ 5.

Like judges' race, political affiliation appeared significant to case outcomes. We, like other researchers,[132] use the party of the President that appoints that judge as a proxy for the political affiliation of the judge. As shown in Table 3, judges appointed by a Democratic President ("Democratic judges") held for the plaintiff in 29.3% of the cases, in contrast to judges appointed by a Republican President ("Republican judges") who held for the plaintiff only 17% of the time. These differences in decision-making patterns were statistically significant ($p = .004$).

What is striking about the judges' gender was its lack of relevance to case outcomes, as indicated in Table 3. Unlike Crowe's findings that judges' gender in sexual harassment cases made a difference to outcome,[133] our data did not indicate any significant differences between the way female judges and male judges decided racial harassment cases. Female judges found for the plaintiffs in 25.6% of the cases and male judges found for the plaintiff in 21.3% of the cases—a small difference that could be attributable to chance. Consequently, we dropped gender from all further analyses.

b. Case Characteristics. As we discussed earlier,[134] in order for plaintiffs to prove that an employer has violated Title VII of the Civil Rights Act of 1964, plaintiffs must show they experienced harassment that was "severe or pervasive" and "because of race." Thus, one could technically argue that the law would not be broken if a judge or jury believed that racial harassment had occurred but that it was not sufficiently severe or pervasive, or, in the alternative, if employees were severely or pervasively harassed but for reasons other than race. While the Supreme Court has stated these legal principles, federal appellate and district court judges continue to have substantial discretion in determining whether plaintiffs have met this burden. Judges are asked, for instance, to consider "all the circumstances" without clear guidance on the relevant factors.[135]

In our earlier study, judges appeared to pay particular attention to harassment that was blatantly racist, such as harassers who used racial slurs or brandished racist objects (such as nooses or Ku Klux Klan attire).[136] We speculated that judges considered this evidence of the severity and the racial basis of the harassment.[137] In addition, judges

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132. *See supra* note 54.
133. *See supra* text accompanying notes 79–87.
134. *See supra* text accompanying notes 107–14.
135. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
136. Chew & Kelley, *supra* note 97, at 87–88.
137. *Id.* at 106–07.

seemed mindful of whether plaintiffs were harassed by their supervisors and their coworkers, rather than one or the other.[138] We presumed judges considered this evidence of the pervasiveness of the harassment and general hostility toward the plaintiffs.[139] We specifically found that in cases with racial slurs or harassment by both the supervisors and coworkers, plaintiffs were significantly more likely to prevail (even though plaintiffs' overall success rate remained low).[140] In cases where plaintiffs did not make these claims, but instead argued that more subtle forms of racial harassment (such as demeaning comments, less attractive work assignments, and work/social isolation) had occurred, plaintiffs were likely to lose at a higher rate than the baseline.[141]

This current study added an additional year of data to the earlier one and retested the relationship between case outcomes and racial slurs or harassment by both supervisors and coworkers. As shown in Table 3, we confirmed the earlier patterns. When plaintiffs claimed racial slurs, judges found in their favor 30% of the time. In contrast, when plaintiffs did not make these claims, they were successful only 11% of the time. When plaintiffs claimed evidence of being harassed by both supervisors and coworkers, they were successful 37% of the time, in comparison to 16% of the time when they did not make this claim. These results were statistically significant (p = <.001).

c. Plaintiffs' Race. We considered whether the plaintiffs' race made a difference to judges of different races. As shown in Table 3, cross-tabulations between the plaintiffs' race and case outcomes resulted in some interesting comparisons. White and Hispanic plaintiffs exhibited the highest win rates (32.4% and 35%, respectively), African American and Asian American plaintiffs markedly lower ones (19.7% and 7.1%, respectively). However, these outcomes were not statistically significant and so could have occurred by chance.[142]

2. Analysis 2: Logistic Regression of Judges' Race on Case Outcomes

The cross-tabulations give us information about the general decision-making patterns of judges. Another versatile statistical method, logistic regression, provides an alternative process for assessing whether certain

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138. *Id.* at 86–87.
139. *Id.* at 106–07.
140. *Id.* at 86–87.
141. *Id.* at 86–88.
142. While not significant in these cross-tabulations, a logistic regression model did indicate a significant relationship between particular plaintiffs' race and case outcomes. *See infra* note 150.

variables, such as judges' race, are relevant to the outcome of these cases.[143]

We began our logistic regressions by testing the overall significance of judges' race without consideration of other variables. Because of the small number of Asian American judges, we included only White, African American and Hispanic judges in these and subsequent analyses. In each model, we tested the overall contribution of race (i.e., whether the model that takes race into account predicts outcomes significantly better than a model that does not). Given our interests in comparing White versus minority judges, we also investigated the specific differences between African American and White judges and between Hispanic and White judges.

Consistent with the findings in our cross-tabulations, the logistic regression indicates that judges' race in general is clearly associated with case outcomes. As indicated in the first line in Table 4, the overall association between race and outcome is statistically significant (p = .02).[144]

TABLE 4: MODEL WITH JUDGES' RACE

Variable	Odds Ratio	Significance Level
Judges' Race		.02
African American Judge v. White Judge	3.3	.006
Hispanic Judge v. White Judge	0.9	.87

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143. *See supra* note 122 (explaining logistic regression). We evaluated the explanatory power of each of our logistic regression models by calculating Nagelkerke's R^2. R^2 ranges from zero to one and can be interpreted as the proportion of the variation in the dependent variable (here, plaintiff success) accounted for by the independent variables (judges' race, judges' political party, presence of racial slurs and/or presence of both coworker and supervisor harassment). The values of R^2 observed in our models ranged from $R^2 = .03$ for the model which included only judges' race as an independent variable to $R^2 = .17$ for the model including all four independent variables. While these values may not seem very large and do not indicate that we can use these characteristics to predict the outcome of a specific case with very great accuracy, they are nevertheless typical of modest but real associations often reported in the social science literature. Indeed, the R^2 value of .17 corresponds to a "medium" effect size in the widely used nomenclature given by Cohen. JACOB COHEN, STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES 80 (2d ed. 1988). For further explanation of the meaning of R^2, see COHEN ET AL., *supra* note 121, at 91–95. A value of .03 is considered typical of a "small" effect in Cohen's classification. *Id.* at 79.

144. Appendix B provides more results for the logistic regression models, including confidence intervals for the odds ratio, chi-square, and degrees of freedom. *See also supra* note 120 (explaining "p" value).

A closer look at the data, moreover, show some of the same interesting distinctions between the races that we saw in the cross-tabulations. For instance, the cross-tabulations indicated that African American judges held for the plaintiffs much more often than White judges.[145] As shown in Table 4, the logistic regression further confirmed this result, finding that the odds are 3.3 times higher (the "odds ratio")[146] that plaintiffs will be successful when the judge is African American than when the judge is White. Furthermore, the analysis indicates that this relationship is highly significant (p = .006), and therefore is not likely to be a product of chance. In contrast, the logistic regression suggests that it does not make a significant difference to case outcomes whether the judge is Hispanic as compared to White.

3. Analysis 3: Judges' Race with Judges' Political Affiliation and Plaintiffs' Claims

While the cross-tabulations in Analysis 1 indicated that judges' race was relevant (as did the logistic regressions in Analysis 2), they also indicated that judges' political affiliation and certain case characteristics associated with the merits of plaintiffs' claims (claims of racial slurs and harassment by both supervisors and coworkers) also significantly affect cases outcomes. Thus, we performed more detailed analyses with judges' race to gain further insight into what might be occurring. For instance, we considered judges' race and political affiliation simultaneously (e.g., White Democratic judges or African American Republican judges) in relation to their decision making. Keep in mind, however, that this subgrouping results in smaller samples in each cell, resulting in reduced statistical power for significance tests. Consequently, we did not do the same type of cross-tabulation analysis for significance as we did in Analysis 1.[147]

Instead, the first table in each pair of tables below (for example, Table 5) only reports the number and percentage of cases in each cell. The second table of each pair of tables (for example, Table 6), however, is part of a series of logistic regression models that considered the effect of each of these additional variables with judges' race. Logistic regression allows us to test the effect of judges' race while controlling for the effect of other variables such as judges' political affiliation. In this way, we can isolate

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145. *See supra* Table 3.
146. *See supra* note 122 (explaining "odds ratio").
147. *See supra* note 121.

the effect of each variable on plaintiffs' success or failure, thus accounting for the possibility that judges' race is a proxy for something else, such as political affiliation.

Since the cross-tabulations in Analysis 1 indicated that judges' gender[148] and plaintiffs' race[149] did not significantly affect case outcomes, we do not discuss them further in the text of the this Article. Nonetheless, logistic regression modeling indicated some interesting results on plaintiffs' race that warrants revisiting in the future.[150]

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148. *See supra* Table 3.

149. *See supra* note 142 and accompanying text.

150. When we considered judges' race and plaintiffs' race simultaneously with case outcomes, we found that White judges were more likely to favor defendant-employers regardless of plaintiffs' race. Even so, White judges were much more inclined to hold for White plaintiffs (32%) and Hispanic plaintiffs (41%) than for plaintiffs of other races. When appearing before White judges, African American plaintiffs were about twice as likely to lose their cases as White and Hispanic plaintiffs, and Asian American plaintiffs lost all their eleven cases before White judges. These simple differences in case outcomes suggest that White judges are less likely to find credible allegations of racial harassment from African American and Asian American plaintiffs. Consequently, further research is warranted to test this finding.

TABLE D: PLAINTIFFS' SUCCESS BY JUDGES' RACE AND PLAINTIFFS' RACE

	African American Judges				White Judges			
	African American Pl.	Hispanic Pl.	Asian American Pl.	White Pl.	African American Pl.	Hispanic Pl.	Asian American Pl.	White Pl.
Pl. Successful	7 (43.8%)	1 (50.0%)	--	3 (60.0%)	46 (18.7%)	7 (41.2%)	0 (0%)	10 (32.3%)
Pl. Unsuccessful	9 (56.3%)	1 (50.0%)	--	2 (40.0%)	200 (81.3%)	10 (58.8%)	11 (100%)	21 (67.7%)
Totals	16 (100%)	2 (100%)	--	5 (100%)	246 (100%)	17 (100%)	11 (100%)	31 (100%)

In comparison, African American judges were more inclined than White judges to hold for the plaintiffs, with plaintiffs across all racial groups having closer to a fifty–fifty chance for success, which is much higher than the baseline of 22%. Although the number of cases is small, the data suggests that African American judges do not particularly distinguish among plaintiffs of different races, with White plaintiffs about as likely to be successful as African American plaintiffs. Again, further research is warranted. Because most plaintiffs are African American and most judges are White, the number of other judge and plaintiff combinations was very limited.

Our exploratory logistic regression modeling indicates some significant findings between plaintiffs' race and case outcomes. In a first model with judges' race and African American versus White plaintiffs, judges' race was significant but plaintiffs' race was not. However, a second model with judges' race and African American plaintiffs versus White and Hispanic plaintiffs indicated that judges' race was significant and also the contrast between African American plaintiffs versus White and Hispanic plaintiffs was significant. This suggests that White and Hispanic plaintiffs' relatively high win rate is not occurring by chance, and that being White or Hispanic increases one's chance of winning. At the same time, the significant effect of judges' race remains stable.

a. Judges' Race and Political Affiliation. As shown in Table 5, judges' political affiliation makes more of a difference for some racial groups than for others. African American Democratic judges and African American Republican judges have comparable decision-making patterns, both groups finding for the plaintiff much more frequently than average (47% and 43%, respectively). In contrast, plaintiffs coming before White Democratic judges have a notably higher win rate (27.1%) than those coming before White Republican judges (16.6%). While the sample is small, it also appears that the political affiliation of Hispanic judges results in different case outcomes, with Hispanic Democratic judges more likely to favor plaintiffs than Hispanic Republican judges. For both White and Hispanic Republican judges, the plaintiffs' win rate is well below the baseline for all cases of 22%. The number of cases with Asian American judges was too small to be meaningful.

TABLE 5: PLAINTIFFS' SUCCESS BY JUDGES' RACE AND POLITICAL
AFFILIATION

JUDGES' RACE

	African American		Hispanic		All Minorities		White	
	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.
Plaintiffs Successful	8 (47.1%)	3 (42.9%)	3 (30.0%)	1 (9.1%)	12 (40.0%)	4 (22.2%)	36 (27.1%)	36 (16.6%)
Plaintiffs Unsuccessful	9 (52.9%)	4 (57.1%)	7 (70.0%)	10 (90.9%)	18 (60%)	14 (77.8%)	97 (72.9%)	181 (83.4%)
Totals	17 (100%)	7 (100%)	10 (100%)	11 (100%)	30 (100%)	18 (100%)	133 (100%)	217 (100%)

TABLE 6: MODEL WITH JUDGES' RACE AND JUDGES' POLITICAL
AFFILIATION

Variable	Odds Ratio	Significance Level
Judges' Race		.07
African American Judge v. White Judge	2.72	.02
Republican Judge v. Democratic Judge	.53	.01

As shown in Table 6, the results of logistic regression analysis also are striking.[151] Having a Republican judge rather than a Democratic judge is negatively associated with the plaintiff's success. Specifically, the odds are .53 times less likely for the plaintiff to be successful when the judge is Republican than when she or he is Democratic. Logistic regression analysis, moreover, confirms that the effect of judges' race is generally stable even when controlling for political affiliation. While the overall effect of race narrowly missed the significant threshold of .05 in this model,[152] the effect of the judge being African American rather than White remains significant (p = .02) even after taking into account whether the judge is a Democratic or a Republican appointee and vice-versa. Since these relationships are statistically significant, they are unlikely to have occurred by chance.

b. Judges' Race and Racial Slurs. We also considered the association between judges' race and cases in which the plaintiff complains about an explicit form of racial harassment—the harasser's use of racial slurs. As we earlier discussed,[153] judges seem to consider racial slurs as evidence of two key elements of the claim: that the harassment was (1) sufficiently "severe or pervasive" and (2) "because of race." As shown in Table 7, minority judges are much more likely to find for the plaintiff if racial slurs are present. Indeed, there is a 60% success rate for these plaintiffs when before African American judges. Plaintiffs who complain of racial slurs before White judges are about twice as likely to lose than if they complain to African American judges, with a success rate of only 27.6%.

The percentage increase in plaintiffs' success rate when they claim racial slurs before African Americans judges or White judges, however, is comparable. Compared to African American judges' overall baseline of a 46% plaintiffs' win rate,[154] plaintiffs alleging racial slurs had a 60% win rate, representing a 30% increase. Compared to White judges' baseline of

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151. As indicated in Table 4, the difference between Hispanic judges and White judges in their case holdings was not statistically significant (i.e., the difference may be occurring by chance). Similarly, in the remaining logistic regression models, the difference also was not significant (p = between .78 and .99). To simplify the remaining tables in the text, we did not include this data in the tables here but the data is included in Appendix B.

152. The observation of the overall race effect losing significance with the addition of another variable to the model is a common phenomenon in regression models. Adding more variables entails estimating more model parameters, which in turn causes the uncertainty in all other estimates to grow. However, since the African American judge versus White judge comparison remained significant and the magnitude of the odds ratio for this comparison is relatively stable, we are confident in our conclusion that this racial effect is stable when controlling for political affiliation.

153. *See* discussion accompanying *supra* notes 133–35.

154. *See supra* Table 3.

20.6% plaintiffs' win rate,[155] plaintiffs alleging racial slurs had a 27.6%
win rate, representing a 34% increase.[156]

As shown in Table 8, when we consider the judges' race and the
plaintiffs' claim of racial slurs, the analysis indicates that plaintiffs who
make this claim increase their odds for success substantially (OR = 3.4).
Furthermore, the effect of the judge being African American rather than
White remains significant (p = .008).

TABLE 7: PLAINTIFFS' SUCCESS BY JUDGES' RACE AND CLAIMS OF
RACIAL SLURS

JUDGES' RACE

	African American	Hispanic	Asian American	All Minorities	White
Plaintiffs Successful When Racial Slurs Claimed	9 (60%)	4 (40%)	1 (33.3%)	14 (50%)	54 (27.6%)
Plaintiffs Unsuccessful When Racial Slurs Claimed	6 (40%)	6 (60%)	2 (66.7)%	14 (50%)	142 (72.4%)
Totals	15 (100%)	10 (100%)	3 (100%)	28 (100%)	196 (100%)

TABLE 8: MODEL WITH JUDGES' RACE AND RACIAL SLURS

Variable	Odds Ratio	Significance Level
Judges' Race		.03
African American Judge v. White Judge	3.3	.008
Racial Slurs	3.4	$\leq$.001

155. *See supra* Table 3.
156. Compared to Hispanic judges' baseline of 19% plaintiffs' win rate (shown in Table 3),
plaintiffs with racial slurs had a 40% win rate (110% increase). However, the number of cases is so
small that it is difficult to generalize from this result. *But see supra* note 120 (explaining small sample
sizes).

c. Judges' Race and Composition of Harassers. As we earlier discussed,[157] judges as a group appear to consider harassment by both supervisors and coworkers as an indicator of the pervasiveness of the harassment and the general hostility in the work environment, thus bolstering the plaintiff's case. In contrast to the results for racial slurs,[158] White and African American judges exhibited comparable decision-making patterns in cases where the plaintiffs made this claim, as indicated in Table 9. Plaintiffs are successful 37.2% of the time before White judges and 46.2% of the time before African American judges. These data suggest that both White and African American judges associate this claim with a finding of racial harassment. Keep in mind, however, that the increase in plaintiffs' success when this claim is present is much greater for White than for African American judges. Compared to White judges' baseline of 20.6% plaintiffs' win rate,[159] plaintiffs who claimed harassment by both supervisors and coworkers won 37.2% of the time (81% increase).[160] The percentage increase in plaintiffs' success for African American judges is very slight.[161] The number of these cases with Hispanic judges was too small to allow meaningful observations.

TABLE 9: PLAINTIFFS' SUCCESS BY JUDGES' RACE AND COMPOSITION OF HARASSERS

JUDGES' RACE

	African American	Hispanic	Asian American	All Minorities	White
Plaintiffs Successful When Both Supervisor & Coworkers Harassers	6 (46.2%)	1 (33.3%)	—	7 (43.8%)	35 (37.2%)
Plaintiffs Unsuccessful When Both Supervisor & Coworkers Harassers	7 (53.8%)	2 (66.7%)	—	9 (56.3%)	59 (62.8%)
Totals	13 (100%)	3 (100%)		16 (100%)	94 (100%)

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157. *See supra* discussion accompanying notes 140–41.

158. *See supra* Tables 7 and 8.

159. *See supra* Table 3.

160. Given the disproportionate number of White judges, their reaction to this claim is probably driving the impact on case outcomes as a whole.

161. 45.8% versus 46.2%.

TABLE 10: MODEL WITH JUDGES' RACE AND COMPOSITION OF
HARASSERS

Variable	Odds Ratio	Significance Level
Judges' Race		.12
African American Judge v. White Judge	2.5	.04
Harassment by Both Supervisors & Coworkers	3.1	<.001

As shown in Table 10, the plaintiffs' claims that both supervisors and coworkers harassed them also significantly improves their odds of success (OR = 3.1). Furthermore, the difference in outcome between African American and White judges remained significant (p = .04).

d. All Variables. Finally, we designed a logistic regression model to test simultaneously all the variables described above. As shown in Table 11, this cumulative analysis showed that plaintiffs' claims of racial slurs or harassment by both supervisors and coworkers increases the odds of plaintiffs succeeding, but having a presiding Republican judge harms the plaintiffs' chances for success. All of these relationships were statistically significant. In particular, this logistic regression model of all variables predicts the following:

(1) The odds are .5 times less likely for plaintiffs to be successful when the judge is Republican (rather than a Democrat);

(2) The odds are 2.7 times higher that plaintiffs will be successful when they allege racial slurs; and

(3) The odds are 2.5 times higher that plaintiffs will be successful if the alleged harassers are both supervisors and coworkers.

TABLE 11: MODEL WITH ALL VARIABLES

Variable	Odds Ratio	Significance Level
Judges' Race		.25
African American Judge vs. White Judge	2.2	.10
Republican Judge vs. Democratic Judge	0.5	.003
Racial Slurs	2.7	.001
Harassment by Both Supervisors & Coworkers	2.5	.001

The race of the judge continued to have a strong effect on the outcome of the case (OR = 2.2 for African American judges as compared to White judges), but this effect was no longer quite statistically significant in this model (p = .10). This means that we can have less confidence that the observed differences in success rate of cases heard by White and African American judges are not due to chance. As noted above,[162] a typical trait of regression models is that increasing the number of independent variables increases our uncertainty in the effect of each variable. However, we feel that the magnitude of the odds ratio for the comparison between African American and White judges and the consistent results of all the other models provide strong evidence that judges' race is meaningful to case outcomes, even when controlling for several other important variables.[163]

e. Interaction of All Variables. Our analyses thus far have indicated that each variable (judges' race, judges' political affiliation, and plaintiffs' claims of racial slurs and harassment by both supervisors and coworkers) is significant on its own in affecting case outcomes, a condition statisticians call "main effects."[164] Furthermore, our analyses assume that these effects are additive, so that judges' race, judges' political affiliation, and plaintiffs' claims are each independently meaningful. Thus, having a White judge decreases a plaintiff's chance for success, and having a Republican judge decreases a plaintiff's chance for success further and independently of having a White judge. Similarly, having an African American judge increases a plaintiff's chance for success; plus, claims of racial slurs increase the plaintiff's chances even more, independently of the judge's race. For example, our earlier logistic regression model predicted that plaintiffs appearing before an African American judge increase their odds of winning 3.3 times and having a case involving racial slurs increase their odds of winning by 3.4 times.[165] Thus, plaintiffs in cases with both conditions would benefit from the additive effect.

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162. *See supra* note 152.

163. The results of this final model do seem to indicate that accounting for judges' political affiliation, racial slurs and harassment by both supervisors and coworkers simultaneously does reduce the additional explanatory power of judges' race. This is in part attributable to the small number of African American judges as compared to White judges. As their absolute numbers and relative percentages increase to be comparable to the other variables, such as the Republican-Democratic comparison, we would expect their statistical effect to be more powerful.

164. *See supra* note 121.

165. *See supra* Table 8.

In addition to the above analyses, we also performed a series of multiple-logistic regression models to discover any interactive effects between the variables; that is whether a *multiplicative* effect exists. For instance, does the judge being African American while simultaneously having a case with racial slurs result in a heightened effect beyond the additive effect described above? Our analyses did not provide any evidence that it does. We tested every possible two-way interaction between the variables in Table 11 (judges' race, judges' political party, presence versus absence of racial slurs, and presence versus absence of harassment by both supervisors and coworkers). The results showed no statistically significant interaction effects between the judges' race and any of the other variables.[166] However, we stress that the small sample sizes for non-White judges limit the statistical power to detect all but the strongest interactions and, as such, our absence of interaction findings here should not be taken as positive evidence that such interactions do not, in fact, exist.

V. DISCUSSION AND IMPLICATIONS

While judges have historically been White, a modern influx of minorities into the judiciary has changed the institution's racial composition and resulted in a larger but still unrepresentative proportion of minority judges. Disagreement exists, however, about how a larger minority presence on the bench would affect legal institutions. Under a more formalist model of judicial decision making, all judges, whether White or minority, are guided by presumably objective and race-neutral legal principles and interpretations.[167] Thus, White and minority judges, even if they were inclined, do not have the discretion to affect judicial results in a unique way. The merits of the case are the key to case outcomes. Thus, under this formalist model, it makes little difference to case outcomes if all the judges are White, minority, or some combination.

In contrast, a realist model[168] would posit that the personal attributes of judges meaningfully affect the way they make judicial decisions. A homogeneous judiciary of Whites differs from one made up of a more racially diverse judiciary because each racial group has different viewpoints. Individuals' social location in our race-sensitive social system affects their experiences and their consciousness both within and beyond

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166. *See infra* Appendix C.
167. *See supra* text accompanying note 56.
168. *See supra* text accompanying note 55.

legal settings. Judges do not leave race "at the door" when entering the courtroom. Rather, their social and cultural experiences are the raw material for their interpretation of laws, just as they are for their ongoing construction of social life generally.

A. *Judges' Race and Case Outcomes*

Our empirical study of over 400 federal workplace racial harassment cases between 1981 and 2003[169] resulted in striking yet sometimes nuanced findings. In a nutshell, our results provide evidence of both the formalist model and the realist model of judicial decision making. We found that the race of judges matters, as does their political affiliation. On the other hand, our findings also indicate that judges of all races are attentive to the merits of the case.

Our work initially confirms certain characteristics of racial harassment cases: the vast majority of the judges are White; the vast majority of the plaintiff-employees are African American; the vast majority of accused harassers are White; and that, when studying case outcomes, plaintiff-employees have a very poor win rate in general—succeeding in only 22% of cases overall. Furthermore, the statistical analyses consistently showed that the race of the judge can make a significant difference. While plaintiffs have a poor win rate in general, they are much more likely to win if their cases come before African American rather than White judges. Plaintiffs are successful in 46% of their cases before African American judges but less than half as often before White judges; logistic regression analysis indicated that on average, plaintiffs before African American judges are 3.3 times more likely to win than before White judges.[170]

Thus, while we cannot predict how any individual judge might act, our study results strongly suggest that African American judges as a group and White judges as a group perceive racial harassment differently. Racial harassment law asks judges to determine if the claims of plaintiffs, who are most often African American, are credible. These determinations often boil down to two key inquiries: (1) Did the plaintiffs suffer harassment

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169. While the first case to recognize the racial harassment doctrine, *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), occurred in 1971, the first case in our sample occurred in 1981.

170. Interestingly, the decision-making patterns of Hispanic judges were very similar to White judges, holding for plaintiffs in only 19% of their cases. *See supra* Table 3. Keep in mind, however, that unlike the results for African American and White judges, the results for Hispanic judges were not significantly different from other races and therefore could have occurred by chance. *But see supra* note 130.

because of their race (rather than for some reason unrelated to racial animus)?; and (2) Was the harassment so "severe or pervasive" that it resulted in a hostile work environment? African Americans and Whites apparently subscribe to different worldviews. Our study results suggest that if presented with comparable facts, they often reach different conclusions about whether discrimination is present. Our findings indicate that judges are not different from people in general. Although society has made progress, racial harassment and discrimination continue to pervade American life.[171] African American judges can personally identify with instances of discriminatory treatment. Thus, when plaintiffs describe being racially harassed, African American judges can imagine that possibility— have a racial consciousness—in a way that White judges do not.[172]

Even in sexual harassment lawsuits, judges as a group are more likely to empathize with the female plaintiffs who claim that a male supervisor or coworker has sexually harassed them.[173] Female judges find sexual harassment a plausible possibility, given the pervasiveness of sexual harassment in American society. We hypothesize that male judges also are more open to plaintiffs' sexual harassment complaints because of their

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171. The recent presidential campaign process provided examples of explicit racism. *See* Jim Geraghty, *Just in Time for West Virginia, A Spotlight on Racist Anti-Obama Voters*, NATIONAL REVIEW ONLINE, May 13, 2008, http://campaignspot.nationalreview.com/post/?q=YjgwY2ZhMjg 0MWRiODgzMmFkOWRlMWZkNjQ1MDhlYzg=; Kevin Merida, *Racist Incidents Give Some Obama Campaigners Pause*, WASH. POST, May 13, 2008, at A01.

172. Furthermore, our analyses provide tentative evidence that White judges may find it more difficult to identify with plaintiffs of some races than others on their harassment claims. As described in detail above, *supra* note 150, before White judges, African American plaintiffs were about twice as likely to lose as White plaintiffs, and Asian Americans lost every case. Interestingly, White judges were about as favorably disposed toward Hispanic plaintiffs as White plaintiffs. This result could reflect White judges' ambivalence about Hispanics' racial identify, perhaps perceiving them as White, or it might be explained by particularly strong plaintiffs' arguments in the relatively small number of cases in which Hispanics were plaintiffs. Keep in mind, however, that the distributions of plaintiffs of different races against judges of different races for the most part produced small numbers of cases in each cell, making statistical conclusions difficult.

While there are fewer cases to study, it tentatively appears that African American judges can more readily empathize with plaintiffs across races. The win rate was about the same for White plaintiffs, African American plaintiffs, and Hispanic plaintiffs that came before them—with about half of all these plaintiffs winning, a rate well above the 22% baseline. *See supra* Table 3. Hispanic judges heard mainly cases with African American plaintiffs, and held in their favor only 20% of the time. *See supra* Table 3. It could be that Hispanic judges, like White judges, cannot readily identify with African American plaintiffs. It also could be that Hispanic judges are more likely to hold extremely high standards for racial harassment claims regardless of the plaintiff's race. In the absence of more cases with plaintiffs of other races before minority judges, we can only offer very tentative patterns to study further in the future.

173. *See, e.g.*, Juliano & Schwab, *supra* note 98, at 594 (indicating the plaintiffs' success rate as 48.2% in sexual harassment cases, considering 51.2% rate in district courts and 39% in appellate courts).

identification with or inclination to be protective of women in their lives, such as wives and daughters. In contrast, White judges in a racial harassment lawsuit may not identify with, or have any reason to be protective of, minority plaintiffs. They rarely, perhaps because of a general lack of close interpersonal relationships with African Americans, have a personal basis for connecting with or being sympathetic toward a minority plaintiff who claims racial harassment.

B. Judges' Race and Judges' Political Affiliation

Judges' political affiliation also plays a role in their decision making. A significant difference marks case outcomes for judges appointed by Democratic Presidents and judges appointed by Republican Presidents: Democratic judges are more likely to find for plaintiffs (29.3%) than their Republican peers (17%). Considering together the judges' race and the judges' political affiliations offers some interesting insights. Plaintiffs experience the highest win rate before African American Democratic judges (47%), but are followed closely by plaintiffs before African American Republican judges (43%). A greater contrast exists between the rulings of White Democratic (27%) and White Republican judges (17%).

However, the judges' race remains a stronger influence than the judges' political affiliation, as suggested by the 20% difference in plaintiffs' win rate between White Democratic judges and African American Democratic judges. Logistic regression analyses also confirm that both the judges' political affiliation and the judges' race are independently significant to case outcomes, and that the judge's race has more of an effect. For instance, the modeling indicates that while having a Republican judge *decreases* the plaintiff's chance of winning by an average of 0.5, appearing before an African American judge *increases* the plaintiff's chance of winning by about three times.

What explains these results? Judges' political ideologies may well affect their assessment of racial harassment cases given that racial discrimination is a subject on which citizens hold divergent political views. Research suggests those who identify as conservatives are less supportive of policies and laws that protect minorities.[174] For African American Republicans, however, their race seems more salient than their

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174. *See* Maria Krysan, *Prejudice, Politics, and Public Opinion: Understanding the Sources of Racial Policy Attitudes*, 26 ANNU. REV. SOC. 135, 146 (2000) (summarizing research indicating that "people who prefer a limited government or identify their ideology as conservative tend to oppose equal treatment policies, government spending on blacks, and preferences in hiring and promotion.").

political ideology, at least in the type of cases we have been considering. Perhaps African Americans, regardless of their political affiliation, can identify with being targets of racial harassment. After all, racial harassers presumably do not distinguish African American employees who are Democrats from those who are Republicans.

Our findings also help us better understand why the justice system in general seems so inhospitable to plaintiffs' racial harassment claims. In our study of judges, Republicans outnumbered Democrats and Whites substantially outnumbered African Americans, with about 60% of the cases heard by Republican judges and about 80% of the cases heard by White judges. Given the propensity for Republicans and for Whites to deny plaintiffs' claims, it is not surprising that plaintiffs as a group are successful in only one out of five cases.

C. Judges' Race and Merits of the Case

Our study also considered plaintiffs' specific allegations, in particular that harassers used racial slurs or that both supervisors and coworkers participated in harassing them. As in earlier research, our data indicated that judges as a group pay considerable attention to both claims, presumably because they are viewed as factual evidence that the harassment was sufficiently "severe or pervasive" and "because of race"— both key elements in the plaintiff's case. As compared to the baseline plaintiffs' success rate of 22%, when plaintiffs claim racial slurs, they win 30% of the time. When they claim harassment by both supervisors and coworkers, they win 37% of the time. Logistic regression analyses further indicated that these claims were independently significant from both judges' race and judges' political party. Furthermore, they had a substantial effect on case outcomes, with claims of racial slurs improving the plaintiffs' odds by a factor of three. Meanwhile, claims of harassment by both supervisors and coworkers increased the plaintiffs' odds for success by 2.8. A closer look at how judges of different races factored in these claims revealed some important patterns. Both African American and White judges paid comparable attention to racial slurs, being about one-third more likely to hold for the plaintiffs.

What occurs when plaintiffs make these claims? It appears that judges of all races have a heightened sensitivity to racial slurs. While White judges may not be attentive to more subtle forms of racism, racial slurs are by definition evidence of race-based harassment and are illustrative of severe and socially unacceptable abuse. While Hispanic judges may not generally identify with African American plaintiffs, they apparently

recognize the significance of racial slurs. Not surprisingly, African American judges also appreciated the clear derogatory intent of racial slurs.

It is also interesting to explore the judges' reaction to plaintiffs' claim of harassment by both supervisors and coworkers. White judges gave this claim the greatest weight, with the plaintiffs' success rate significantly improving by more than 80%. This claim did not seem to make much difference to African American judges, with plaintiffs' success rate with this claim being about the same as the rate before African American judges in general. Too few cases with this claim came before Hispanic judges to make a meaningful observation.

Perhaps White judges perceive harassment by both supervisors and coworkers as strong evidence of pervasive harassment and see this kind of "ganging up" on an employee as contrary to fair play. Furthermore, if a harasser acted alone, it may be easier to explain the harassment as interpersonal conflict or one person's crude attempt at humor, rather than as conduct motivated by racial animus. For African American judges, given their own experiences with broad-based societal discrimination, all these distinctions may not be particularly salient. Perhaps they perceive racial harassment as likely to be perpetrated by one person or a group and that supervisors are as likely as others to engage in it.

These results then suggest that judges pay attention to the factual merits of each case. Bear in mind, however, that even with these claims, judges do not automatically hold for the plaintiff. For instance, while plaintiffs' odds for success improve when they claim racial slurs, they still lose 40% of the time with African American judges and more than 70% of the time with White judges.

VI. CONCLUSION

Every year, thousands of employees, most of them African Americans, accuse their supervisors or coworkers of racial harassment. Many disputes find their way to the federal courts, where judges, most often White, have to decide whether these claims are credible or not. A formalist model of judicial decision making posits that it does not matter whether the judge is White or some other race because judges are required to decide cases on the merits of the case and that this process is objective. A realist model of judicial decision making proposes instead that judges' race does make a difference since judges, like everyone else, are products of their own societal experiences and social forces.

Our empirical study provides some comfort and consternation for both judicial models. Our multiple statistical analyses clearly indicate that judges of different races do exhibit significantly different decision-making patterns.[175] White judges are more likely than their African American counterparts to favor employer defendants, often granting their motions for summary judgment. African American judges are more likely to believe that employees have credible grievances of racial harassment. At the same time, it appears that both African American and White judges recognize relevant factual features of the case, such as whether the harassment included racial slurs or harassment by both coworkers and supervisors. Thus, neither group is inattentive to the legal principles; rather they differ in their interpretation and understanding of the dispute.

Our findings may disturb individuals across the political spectrum. Some may view it as evidence that African American judges are biased and pro-plaintiff in racial harassment cases, while White judges protect traditional judicial norms. Others may conclude that White judges are predisposed against racial harassment cases, discriminate against African American plaintiffs, and favor employer-defendants and accused harassers.

However, one message is clear from the data: race matters in judicial decision making. It affects outcomes even when we take into account the judge's political affiliation or case characteristics. While we might have intuitively expected the judge's race to make a difference, this study provides empirical proof.

The remaining question is why race matters. Our interpretation is that race affects a judge's ability to appreciate the perspective of a plaintiff of another race. Thus, White judges as a group are less able to identify and empathize with African American plaintiffs, making it inherently more difficult to find the plaintiffs' arguments plausible and credible. This interpretation helps explain why White judges deny African American plaintiffs' claims so often. In contrast, it appears that African American judges are more capable of transcending their own demography and do not let color influence their decision making. They can identify with African American plaintiffs, but also with plaintiffs of other races. At the same time, African American judges still discern between more or less credible claims, holding for plaintiffs only about half of the time.

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175. *See supra* text accompanying notes 128–63. As explained in text accompanying notes 164–65, when all variables were simultaneously considered, the role that judges' race plays loses some statistical significance (as one might expect with the larger number of variables).

Racial harassment cases often involve motions for summary judgment where judges are asked to study the facts to determine if the harassment was "because of race" rather than for a race-neutral reason and if the harassment was sufficiently "severe or pervasive" to result in a hostile and intimidating work environment. African American judges' experiences give them valuable knowledge, perspectives, and understandings of minority plaintiffs that many Whites lack (while White judges provide insights on the harassment of White employees). Since African American judges have likely experienced discrimination themselves, they can recognize more complex and subtle forms of racial harassment. Given that subtle and nuanced forms of discrimination are more prevalent today than blatant forms, the greater sensitivity of African American judges aids other judges in interpreting ambiguous interactions between plaintiffs and their alleged harassers. The multiple subjectivities of a racially diverse judiciary thus help unveil the complex reality and accurate "objectivity" of racial dynamics in the workplace.

Since our study found that the racial make-up of the judiciary affects outcomes, a more diverse judiciary will bring more diverse views on what constitutes racial harassment—ideally reflecting the range of views across all racial groups in society.[176] With 80% of all federal judges (and 89% of all state judges) being White and our findings that White judges rule less favorably for racial harassment plaintiffs (who are typically African American), it is not surprising that some minorities place little faith in the judicial system.[177] If people of all races are to believe in judicial fairness, a more diverse bench is a good place to start. Plaintiffs are less likely to feel marginalized when their experiences are viewed seriously. They are thus more likely to conclude the legal system is not biased. Legal principles prevail but are interpreted with the benefit of varied perspectives that are integral to the just resolution of racial harassment cases. Our study reinforces the need for the judiciary to be representative of the public it serves. Judges do not make decisions in racial harassment cases in a color-

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176. Likewise, given our findings regarding judges' political affiliation, it is not surprising that the judicial appointment process has become so politicized. Republicans want to appoint new judges that are "Republican" in their judicial orientation and Democrats want to appoint judges that are "Democratic" in their orientation.

177. *See* CHAMBLISS, *supra* note 6, at 57 (describing studies that indicate minorities are more likely than other groups to believe that unequal treatment in the courts occurs frequently and that court outcomes are "seldom or never fair").

blind legal system. As a legal community and as a diverse society, we should not be blind to the color of judges.[178]

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178. Additional information on research methodology is available from the authors and in Chew & Kelley, *supra* note 97.

APPENDIX A: DATA SET SUMMARY

	Number of Cases
Judges' Race	
White	351
African American	24
Hispanic	21
Asian American	3
All minority	48
Unknown	29
Judges' Gender	
Female	78
Male	349
Unknown	1
Mixed Race Judicial Panels	39
Mixed Gender Judicial Panels	60
Judicial Circuit	
First	9
Second	80
Fifth	68
Seventh	154
Ninth	65
Eleventh	52
Magistrate Judges	64
Foreign-born Judges	20
Judges' Birth	
Pre-1946	295
1946–1964	127
Post-1965	1
Unknown	5
Judges' Political Affiliation	
1st Appointment by Democratic President	169
1st Appointment by Republican President	231
Unknown	28
President Appointing Judges	
Reagan	128
Clinton	89
Carter	54
Bush (H.)	52
Nixon	32
All Other Presidents	45
Unknown	28
Judges with LLM Degree	32
Judges with Clerkship	143
Judges with Gov. Experience	289
Judges with Teaching Experience	128
Judges with Law Firm Experience	370
Judges with Military Service	183
Plaintiffs Successful	94
Defendants Successful	353

APPENDIX B: LOGISTIC REGRESSIONS FOR MAIN EFFECTS

Variable	OR*	LCL**	UCL**	x^2	df	p
Judges' Race				7.7	2	.02
African American Judge vs. White Judge	3.27	1.41	7.60	7.6	1	.006
Hispanic Judge vs. White Judge	0.91	0.30	2.78	<0.1	1	.87

$R^2 = .03$
 *Odds ratio
**95% Confidence interval for OR

	OR*	LCL**	UCL**	x^2	df	p
Judges' Race				5.4	2	.07
African American Judge vs. White Judge	2.72	1.15	6.43	5.2	1	.02
Hispanic Judge vs. White Judge	0.85	0.28	2.64	.08	1	.78
Republican Judge vs. Democratic Judge	0.53	0.33	0.87	6.3	1	.01

$R^2 = .05$
 *Odds ratio
**95% Confidence interval for OR

	OR*	LCL**	UCL**	x^2	df	p
Judges' Race				7.1	2	.03
African American Judge vs. White Judge	3.28	1.36	7.89	7.0	1	.008
Hispanic Judge vs. White Judge	1.00	0.32	3.15	<0.1	1	.99
Racial Slurs	3.35	1.93	5.82	18.4	1	<.001

$R^2 = .11$
 *Odds ratio
**95% Confidence interval for OR

	OR*	LCL**	UCL**	x^2	df	p
Judges' Race				4.3	2	.12
African American Judge vs. White Judge	2.54	1.05	6.13	4.3	1	.04
Hispanic Judge vs. White Judge	1.07	0.34	3.37	<0.1	1	.90
Harassers Both Supervisors & Coworkers	3.08	1.86	5.13	18.9	1	<.001

$R^2 = .10$
 *Odds ratio
**95% Confidence interval for OR

ALL VARIABLES

	OR*	LCL**	UCL**	x^2	df	p
Judges' Race				2.7	2	.25
African American Judge vs. White Judge	2.16	0.87	5.36	2.7	1	.10
Hispanic Judge vs. White Judge	1.06	0.33	3.45	<0.1	1	.92
Republican Judge vs. Democratic Judge	0.45	0.27	0.76	8.9	1	.003
Racial Slurs	2.69	1.49	4.85	10.8	1	.001
Harassers Both Supervisors & Coworkers	2.50	1.44	4.33	10.7	1	.001

$R^2 = .17$
 *Odds ratio
**95% Confidence interval for OR

APPENDIX C: LOGISTIC REGRESSIONS FOR TWO-WAY INTERACTIONS[†]

Interaction term	$\chi2$	df	p
Judge's race * Judge's political party	0.2	2	.89
Judge's race * Racial slurs	1.2	2	.55
Judge's race * Both supervisor and coworker harassment	1.5	2	.47
Judge's political party * Racial slurs	1.9	1	.17
Judge's political party * Both supervisor and coworker harassment	0.2	1	.65
Racial slurs * Both supervisor and coworker harassment	3.2	1	.08

† Each test represents the effect of the interaction term specified in a logistic regression model that also includes the main effects of a judge's race, a judge's political party, racial slurs, and both supervisor and coworker harassment.