*University of Pittsburgh School of Law*
University of Pittsburgh School of Law Working Paper Series

*Year* 2007 *Paper* 54

# Freeing Racial Harassment from the Sexual Harassment Model

Pat K. Chew*

*University of Pittsburgh, chew@law.pitt.edu

# Freeing Racial Harassment from the Sexual Harassment Model

Pat K. Chew

**Abstract**

Judges, academics, and lawyers alike base their legal analyses of workplace racial harassment on the sexual harassment model. Legal principles derived from sexual harassment jurisprudence are presumed to be equally appropriate for racial harassment cases. The implicit assumption is that the social harms and public policy goals of racial harassment and sexual harassment are sufficiently similar to justify analogous scrutiny and remedies. Parties to racial harassment cases cite the reasoning and elements of sexual harassment cases without hesitation, as if racial harassment and sexual harassment are behaviorally and legally indistinguishable.

This Article, however, questions the assumption that there should be a monolithic model for discriminatory workplace harassment. In particular, it questions whether the currently dominant sexual harassment model should be used automatically as the paradigm in racial harassment disputes. Part I begins by acknowledging and explaining why the legal community analogizes racial harassment claims and jurisprudence to sexual harassment claims and jurisprudence. Part II posits that this analogy is problematic given the fundamental differences between racial harassment and sexual harassment. While empirical evidence of these differences is currently limited, Part II identifies and discusses two pioneering examples. The first documents important dissimilarities between racial harassment litigation and sexual harassment litigation; the second chronicles the differences between the dynamics and theoretical explanations for racial harassment and sexual harassment in the law firm context.

Given the dominance of the sexual harassment model and the presumption of its applicability to other harassment disputes, including racial harassment, it is not surprising that comparatively little research and study of racial harassment and

other forms of harassment have been done. The discussion and analysis here contributes to the research on the topic. Finally, Part III explores the implications of freeing racial harassment from the sexual harassment model.

Pat K. Chew*

# Freeing Racial Harassment from the Sexual Harassment Model

Judges, academics, and lawyers alike base their legal analyses of workplace racial harassment on the sexual harassment model. Legal principles derived from sexual harassment jurisprudence are presumed to be equally appropriate for racial harassment cases. The implicit assumption is that the social harms and public policy goals of racial harassment and sexual harassment are sufficiently similar to justify analogous scrutiny and remedies. Parties to racial harassment cases cite the reasoning and elements of sexual harassment cases without hesitation, as if racial harassment and sexual harassment are behaviorally and legally indistinguishable.

This Article, however, questions the assumption that there should be a monolithic model for discriminatory workplace harassment. In particular, it questions whether the currently dominant sexual harassment model should be used automatically as the paradigm in racial harassment disputes. Part I begins by acknowledging and explaining why the legal community analogizes racial harassment claims and jurisprudence to sexual harassment claims and jurisprudence. Part II posits that this analogy is problematic given the fundamental differences between racial harassment and sexual harassment. While empirical evidence of these differences is currently limited, Part II identifies and discusses two pioneering examples. The first documents important dissimilarities between racial harassment litigation and sexual harassment litigation; the second chronicles the differences between the dynamics and theoretical explanations

for racial harassment and sexual harassment in the law firm context.

Given the dominance of the sexual harassment model and the presumption of its applicability to other harassment disputes, including racial harassment, it is not surprising that comparatively little research and study of racial harassment and other forms of harassment have been done. The discussion and analysis here contributes to the research on the topic. Finally, Part III explores the implications of freeing racial harassment from the sexual harassment model.

## I

## Understanding the Analogy

### *A. Analogizing Racial Harassment and Sexual Harassment*

The preeminent legislative purpose of the Civil Rights Act of 1964 was to rectify racial discrimination; the last-minute inclusion of gender discrimination was reported as a desperate

attempt to defeat the proposed legislation.[1] Similarly, the judiciary first recognized the harassment doctrine under Title VII of the Civil Rights Act in a landmark racial harassment case,[2] not in a sexual harassment case.

Scholars such as Catharine MacKinnon and Lin Farley, however, reframed workplace harassment as sexual harassment, introducing a provocative conceptual model for sexual harassment as impermissible intentional discrimination.[3] An extensive and impressive array of other scholars continued to develop the legal and public policy issues of sexual harassment, thus further establishing sexual harassment as the paradigm for harassment in the workplace.[4] Also, a line of important Supreme Court cases began drawing the jurisprudential principles for harassment law in the context of sexual harassment disputes, beginning with Meritor and continuing with the Harris, Oncale, Ellerth, and Faragher cases.[5] In addition, the public has been

mesmerized by highly publicized and tantalizing stories of sexual harassment.[6] Fueled in part by these events, the study of sexual harassment as a social phenomenon and the development of sexual harassment jurisprudence has significantly evolved.

Sexual harassment has considerable public and academic visibility. Employee training programs on "what is sexual harassment" are widespread. In contrast, despite its prominence in Title VII's legislative history and its ongoing social pervasiveness, the study of racial harassment and its jurisprudence has languished. In comparison to sexual harassment, research on racial harassment is minuscule.[7]

The lack of a distinctive jurisprudential model for racial harassment, however, has not prompted jurists or others to propose one. Instead, they simply apply the legal principles developed in the context of sexual harassment to complaints of racial harassment.[8] It appears they view the jurisprudential

model for workplace harassment as monolithic, and that the monolithic model should be the one designed for sexual harassment.

It is not surprising that federal courts take this approach, given the Supreme Court's implicit endorsement. In its recognition of sexual harassment as a violation of Title VII, Justice Rehnquist draws direct parallels to racial harassment.[9] Quoting from Henson v. Dundee, Justice Rehnquist wrote:

> Sexual harassment . . . is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.[10]

Justice Ginsburg, concurring in Harris, also pointedly refers to the equivalency of sexual and racial harassment jurisprudence.[11]

### *B. Rationalizing the Analogy*

Analogizing racial harassment claims to sexual harassment claims is not totally unreasonable. Analogizing from one type of fact pattern to another and from one type of claim to another is a fundamental analytic tool of lawyers and academics.[12] Social scientists also observe that there is the human tendency to analogize and generalize.[13] When one is confronted with an unfamiliar or complex situation, he or she tries to make sense and create order by comparing the circumstances to what is familiar and by simplifying the issues to what is understandable.

In addition to these more generic legal and human tendencies to analogize, particular reasons to analogize in the context of racial and sexual harassment exist. Both types of harassment claims originate from the same legislative source and share the common goal of eliminating a hostile working environment for those who have historically been disadvantaged in employment.[14] Both victims of sexual harassment and victims of racial harassment are deprived of the right to a nondiscriminatory working environment and are debilitated by that deprivation.[15]

Analogizing racial harassment (and other forms of harassment) to sexual harassment also serves varied political agendas. For instance, politicians who believe that Title VII and other antidiscrimination laws should be interpreted restrictively may find that confining harassment claims to one monolithic model is an expedient way to limit protection of

disadvantaged groups. All harassment claims, no matter their character, would be tied to the same set of requirements. To the extent that those requirements are burdensome, all claims would be similarly burdened.[16]

Feminist activist scholars also may prefer that sexual harassment retain center stage. Given that women are the most likely targets of sexual harassment, ongoing scholarship on and judicial attention to sexual harassment would better serve a feminist political agenda. The research on sexual harassment is focused on the rights of women and tends to take into account race only when it is framed as a variant of sexual harassment.[17]

II

**The Problem with the Analogy**

Despite these rational reasons for so believing, the assumption that the legal analysis for sexual harassment and

racial harassment should be the same is untested. Given the pervasiveness of racial harassment in the workplace and the increasing number of racial harassment lawsuits, it seems imperative to question this assumption.

Furthermore, L. Camille Hébert asserts that analogizing racial harassment cases to sexual harassment cases may bolster the sexual harassment plaintiffs' claims, but analogizing sexual harassment cases to racial harassment claims may have the opposite result for racial harassment plaintiffs.[18] She notes characteristics of sexual harassment jurisprudence: courts require plaintiffs show the harassment was "unwelcome," impose a very high standard for "severe or pervasive" harassment, defer to a "gender-neutral" rather than a "reasonable woman's" perspective of what constitutes harassment, and find even explicit sexually related behavior to be not motivated by sex.[19] Importing these standards into racial harassment classes,

Professor Hébert argues, might be inappropriate and might harm legitimate racial harassment claims.[20] A recent study of racial harassment cases suggests that Hébert's concerns are justified. The study indicates that courts in racial harassment cases do indeed impose a very high standard for "severe or pervasive" harassment, defer to a race-neutral perspective on what constitutes harassment, and find even explicit racially related harassment to be not motivated by race.[21]

Moreover, one would guess intuitively that sex discrimination (including sexual harassment) and race discrimination (including racial harassment) are fundamentally different social phenomena with distinct causes, manifestations, and remedies. Simply put, prejudice on the basis of gender is not the same as prejudice on the basis of race.[22] Given these fundamental differences, one would also guess that racial

harassment litigation and sexual harassment litigation are distinctive.

Like many things that seem obvious on their face, substantiating an intuition with empirical evidence that racial harassment and sexual harassment are distinct is challenging. While there is some research contrasting sex discrimination and race discrimination in general,[23] there is surprisingly little that expressly studies the differences between sexual harassment and racial harassment. In theory, one also could identify studies on sexual harassment and studies on racial harassment and look for appropriate ways to compare the data gathered in these studies. However, the paucity of racial harassment research limits this approach.

There is one study, however, that compares sexual harassment and racial harassment in law firms. In addition, there are two empirical studies, one on sexual harassment

litigation and one on racial harassment litigation, that enable a comparison of the plaintiffs' profiles and the judicial outcomes in each type of lawsuit. While more study of this topic would be helpful, this emerging research clearly illustrates that there are fundamental differences between the two forms of harassment. As the evidence below indicates, racial harassment litigation and sexual harassment litigation are distinguishable in very fundamental ways. As this Article will subsequently discuss, theories explaining sexual harassment and racial harassment in law firms are distinct. These dissimilarities evidence the problem with automatically analogizing between the two types of harassments.

### *A. Racial Harassment Litigation and Sexual Harassment Litigation*

Ann Juliano and Stewart Schwab studied all federal sexual harassment cases between 1986 and 1996.[24] In a separate research project, Robert Kelley and I analyzed a representative sample of all federal racial harassment cases between 1976 and 2002.[25] Among other topics, these studies consider the plaintiffs and judicial outcomes in these lawsuits. A comparative analysis of these two studies reveals striking variations between sexual harassment and racial harassment cases:[26] Gender and racial profiles of the plaintiffs in the two types of cases contrast; judges in the two types of cases reach dramatically different conclusions about whether harassment occurred.

*1. Distinctive Plaintiffs' Profiles*

Table 1 shows that the plaintiffs' gender profile in racial harassment cases contrasts dramatically with the plaintiffs' gender profile in sexual harassment cases. This research

indicates that men are slightly more likely than women to be the plaintiffs in racial harassment lawsuits, while women are almost always the plaintiffs in sexual harassment cases.

Table 1. Characteristics of Racial Harassment and Sexual Harassment Cases[27]

| | As % of All Racial Harassment Cases | (N of Cases) | As % of All Sexual Harassment Cases | (N of Cases) |
|---|---|---|---|---|
| Plaintiffs' Gender: | | | | |
| Women | 41.5 | (108) | 94.8 | (616) |
| Men | 58.5 | (152) | 5.2 | (34) |
| Plaintiffs' Race: | | | | |
| African American | 81.6 | (191) | 51.9 | (55) |
| Hispanic American | 4.7 | (11) | 17.0 | (18) |
| Asian American | 4.7 | (11) | 2.8 | (3) |
| Native American | .4 | (1) | .9 | (1) |
| White American | 8.6 | (20) | 27.4 | (29) |

Table 2. Gender and Race as Percentage of Labor Force[28]

| | |
|---|---|
| Gender: | |
| Women | 46.6 |
| Men | 53.4 |
| Race: | |
| African American | 11.9 |
| Hispanic American | 13.4 |
| Asian American | 3.9 |
| Native American | .9 |
| White American | 70.0 |

In racial harassment cases, 58.5% of the plaintiffs are men and 41.5% are women. These percentages approximate the gender ratio in the general labor force, which is shown in Table 2, suggesting that racial harassers do not disproportionately target individuals of either sex. In the alternative, it could be that these percentages in racial harassment cases underestimate the number of women who are actually harassed. First, there is evidence that women are more hesitant than men to complain.[29] Second, plaintiffs who are targets of both sexual and racial harassment may not file a racial harassment complaint, instead incorporating racial harassment incidents into their sexual harassment claim. Lawyers may advise them to follow this litigation approach because, like everyone else, lawyers are more familiar with and more readily identify with the sexual harassment model. Furthermore, lawyers may see harassment that includes both sexual and racial harassment more

as a variant of sexual harassment than as separate, distinct racial and sexual harassment claims. Finally, framing a lawsuit as a sexual harassment rather than a racial harassment claim may have strategic advantages.[30]

Among the cases in which the plaintiffs' race and ethnicity are known, there are striking differences in the plaintiffs' racial profiles.[31] Minority plaintiffs, particularly Black plaintiffs, outnumber White plaintiffs in both types of cases. Moreover, the gap between Black and White plaintiffs in racial harassment cases is greater than in sexual harassment cases. The very high percentage of Black plaintiffs indicates that Blacks disproportionately bring racial harassment lawsuits, suggesting that they perceive they are being racially harassed and act on that perception much more frequently than other racial groups.[32]

Given the racial composition in the national labor force, which is shown in Table 2, the racial representation in these cases raises puzzling issues. For example, while one might expect that Blacks would be overrepresented to some extent in racial harassment cases (81.6%), it is unclear why their percentage in sexual harassment cases (51.9%) is so much higher than their percentage in the labor force (11.9%). Similarly, while one might expect that Whites would be underrepresented to some extent in racial harassment cases (8.6%), it is unclear why their percentage in sexual harassment cases (27.4%) is so much lower than their percentage in the labor force (70.0%). In contrast, both Hispanic American and Asian American representation among plaintiffs in sexual harassment cases more closely approximates their representation in the labor force. Could it be that Black women are particularly targeted for sexual harassment?[33]

Plaintiffs in these two types of cases also describe their harassment differently. While plaintiffs accuse both racial and sexual harassers of using verbal comments, physical objects, physical conduct, and employment decisions—the degree and content of these harassing behaviors differ. Offensive oral comments, such as derogatory and belittling language, are commonly reported by plaintiffs in both racial and sexual harassment cases, but the content of these comments reflects different prejudicial stereotypes.[34] In the relatively small percentage of cases in which plaintiffs report the use of physical materials and objects, such as letters, posters, graffiti, and clothing—the particular objects used also differs, depending on the form of harassment.[35]

Finally, the differing degrees to which plaintiffs in the two types of harassment identify management and other work-related decisions as a form of harassment are striking.

Plaintiffs in racial harassment cases are much more likely to cite work-related decisions as an example of harassment (with 65.8% citing less favorable treatment in work assignments and conditions)[36] than plaintiffs in sexual harassment cases (with 27.0% citing less favorable treatment in work assignments and conditions).[37] This data suggests that racial harassment plaintiffs are more sensitive than sexual harassment plaintiffs to the possibility that supervisors and coworkers use employment decisions and management discretion as forms of harassment and discrimination. In the alternative, it could be that these management decisions and discretion are used more as a form of racial harassment than as a form of sexual harassment.

In summary, the plaintiffs' gender and racial profiles in racial harassment cases are notably different than the plaintiffs' profiles in sexual harassment cases. Plaintiffs in the two types of litigation also describe their harassment in

distinguishable ways.[38] Furthermore, to the extent that plaintiffs in these cases are a proxy for racially and sexually harassed employees in general,[39] these studies support the distinctiveness of these groups.

*2. Disparate Judicial Outcomes*

While courts repeatedly state that the same legal principles and purposes apply to both sexual harassment and racial harassment cases, courts in fact treat these claims disparately. This Article's comparative analysis of the outcomes of sexual harassment and racial harassment proceedings reveals that plaintiffs in sexual harassment cases fare much better than plaintiffs in racial harassment cases. This finding is surprising given the societal belief that racial discrimination and harassment is at least as offensive as sexual discrimination and harassment.

Summarizing the legal proceedings helps provide the litigation context. First, while plaintiffs in harassment cases technically have a right to a jury trial,[40] in practice, they rarely reach this stage in litigation. Instead, their complaints are typically resolved at pretrial judicial proceedings.[41] The most common proceeding at the district court level for both types of cases is a pretrial motion dealing with the substance of the claim.[42] As demonstrated in Table 3, the types of proceedings parallel one another, although the outcomes of the proceedings differ.[43] In sexual harassment proceedings, plaintiffs are successful 48.2% of the time (in 321 cases).[44] In contrast, plaintiffs in racial harassment proceedings are successful only 21.5% of the time (in 57 cases).[45] Judges in racial harassment cases are much more likely than judges in sexual harassment cases to grant defendants' pretrial motions and consequently keep plaintiffs from moving past that gate

toward a trial. Overall, plaintiffs in sexual harassment proceedings are more than twice as likely to be successful as plaintiffs in racial harassment cases, which indicates that judges are much less likely to be persuaded by racial harassment plaintiffs than sexual harassment plaintiffs. Thus, while some legal scholars suggest that judges are more sympathetic to plaintiffs in racial harassment cases,[46] the evidence from these studies is contrary to that proposition.

Table 3. Plaintiffs' Success Rates in Harassment Cases[47]

| | Plaintiffs' Success Rates in Racial Harassment Cases | (N of Successful Cases) | Plaintiffs' Success Rates in Sexual Harassment Cases | (N of Successful Cases) |
|---|---|---|---|---|
| Of All Cases | 21.5 | (57) | 48.2 | (321) |
| By Plaintiffs' Gender: | | | | |
| Women | 20.8 | (21) | 48.1 | (296) |
| Men | 22.8 | (33) | 38.2 | (13) |
| By Plaintiffs' Race: | | | | |
| African American | 19.3 | (37) | 45.5 | (25) |
| Hispanic American | 54.5 | (6) | 55.6 | (10) |
| Asian American | 18.1 | (2) | 66.7 | (2) |
| Native American | 0.0 | (0) | 0.0 | (0) |
| White American | 35.0 | (7) | 27.6 | (8) |

Table 3 compares in more detail how the outcomes in racial harassment and sexual harassment cases differ. For instance, one can contrast how men and women plaintiffs fare across and within each type of case. While women plaintiffs in sexual harassment cases have only a 48.1% chance of winning their cases,[48] they are still more than twice as likely to win than women plaintiffs in racial harassment cases (20.8% are successful). Male plaintiffs in sexual harassment cases also are much more likely to win (38.2% are successful) than their counterparts in racial harassment cases (22.8% are successful).[49]

Among racial harassment cases, there are not significant gender differences. That is, both men and women racial harassment plaintiffs lose approximately the same percentage of cases (about 80%).[50] In contrast, there is approximately a 10% difference in the success rates of men and women sexual harassment plaintiffs, with women being more likely to win.

Considering the race and ethnicity of the plaintiff reveals some intriguing contrasts.[51] In particular, African American sexual harassment plaintiffs are more than twice as likely (45.5%) as their racial harassment counterparts (19.3%) to be successful. Moreover, Black plaintiffs are more successful than White plaintiffs in sexual harassment suits (45.5% versus 27.6%), but less successful than White plaintiffs in racial harassment suits (19.3% versus 35%). Courts do not appear to find Blacks' claims of racial harassment particularly credible. White and Hispanic American plaintiffs have much more similar

success rates across both types of cases, with Hispanic plaintiffs having an approximately 55% success rate and Whites between a 27.6% to 35% success rate in the two types of cases.

Both studies also keep track of the composition of the alleged harassers, tracking whether the harassers consist of only supervisors, only coworkers, or both supervisors and coworkers. In almost half of the racial harassment cases[52] and over half of the sexual harassment cases,[53] plaintiffs accused only supervisors. However, the studies also indicate that harassment by both supervisors and coworkers is not rare, with this claim being made in just under 20% of sexual harassment cases and over 30% of racial harassment cases.[54] This data hints that harassment may be more of a group and socially-accepted activity than most would like to think.

The effect of the composition of the alleged harassers on outcome is also revealing. Sexual harassment plaintiffs have

better luck when their alleged harassers are only supervisors (48% success rate) rather than only coworkers (33.3% success rate).[55] In contrast, the courts in racial harassment cases appear to be indifferent to this distinction.[56] However, judges in racial harassment cases appear particularly influenced when both supervisors and coworkers allegedly participate in the harassment.[57] Perhaps the suggestion that everyone is "ganging up" on a victim significantly bolsters the case for racial harassment plaintiffs, almost doubling the odds that judges will find in their favor.[58]

Considering more specific information about the harassing behavior in the two types of cases is interesting but less conclusive. For example, in racial harassment cases, plaintiffs have a higher success rate when they claim blatant race-linked verbal and physical harassment than when they claim more contextual and subtle harassment.[59] It is not clear if judges in

the sexual harassment cases are similarly more persuaded by blatant sex-linked harassment, but there is evidence to suggest they are.[60]

What explains the dramatic disparity in overall judicial outcomes (21.5% plaintiffs' success rate in racial harassment cases versus 48.2% plaintiffs' success rate in sexual harassment cases)? There are a number of possibilities. One might speculate that the studies do not include representative cases. Perhaps the sexual harassment study consists of stronger cases with particularly favorable plaintiffs' facts than sexual harassment cases in general; or in the alternative, that the racial harassment study consists of weaker cases with particularly unfavorable plaintiffs' facts than racial harassment cases in general. Given the research methods used in both studies,[61] however, there is no reason to think that the cases are not representative of each type of case.

It could also be that sexual harassment plaintiffs in general have stronger cases that lead to more favorable outcomes. For instance, because of the attention given to sexual harassment laws, it may be that lawyers are better able to gauge and only proceed with cases that have more reasonable chances of success. In contrast, given the lack of attention and information on racial harassment laws, it may be that lawyers are not as skillful at selecting stronger cases, and therefore proceed with a broader range of cases.

In addition, while the two types of cases presumptively have the same legal elements, in practice, some of the elements are more salient. Courts and lawyers apparently find some elements more applicable to one type of harassment than another. At the same time, this difference in salience may make sexual harassment plaintiffs more successful. For example, except for cases with allegations of same-sex harassment, courts do not

seem to question plaintiffs' claims that the harassment was "because of" their sex. In contrast, courts appear more skeptical that harassment was "because of" the plaintiff's race, finding plausible a multitude of alternative justifications for negative treatment of minority employees.[62] Sexual harassment plaintiffs also have an additional basis for imposing liability, quid pro quo harassment, while lawyers do not currently consider this a viable claim for racial harassment plaintiffs.[63] On the other hand, there are also situations in which the differences in the elements' salience would not logically result in more successful sexual harassment plaintiffs. For example, sexual harassment plaintiffs have a more onerous legal challenge given that courts require that they show the harassment is "unwelcome," while courts do not appear to impose this requirement on racial harassment plaintiffs.

It could also be that judges treat these cases differently because, for a range of reasons not yet fully understood, they find racial harassment plaintiffs' claims of harassment less credible. Perhaps judges, who are mostly male, find sexual harassment more plausible because they can imagine their wives and daughters as hypothetical plaintiffs. In contrast, given that judges are mostly White, it might be more difficult for them to identify with minority plaintiffs in racial harassment lawsuits and to share their perception of discriminatory harassment. The reality is that individuals of different races perceive discrimination and harassment differently,[64] and there is no reason to think that judges would be any different.

### *B. Distinctive Theories*

There is very little research that specifically compares racial harassment and sexual harassment, but the little that

exists offers striking contrasts between the two. Aravinda Nadimpalli Reeves' study of gender and race dynamics in Chicago law firms exemplifies.[65] While her sociological research considers the range of gender and race dynamics broadly, it prominently includes an analysis of racial harassment and sexual harassment. Furthermore, in explaining the dynamics of racial harassment and sexual harassment at the firms, she finds a different theoretical framework appropriate for understanding each form of harassment. Her reference to Rosabeth Moss Kanter's theory of tokenism to explain racial harassment and Barbara Gutek's sex-role spillover theory to explain sexual harassment illustrates the need for distinctive theories to understand the distinctive dynamics of the two forms of harassment.[66] Her work also demonstrates that harassment, both racial harassment and sexual harassment, may be understood best

in the specific workplace context (i.e., law firms) in which they occur.

*1. Dynamics of Racial Harassment*

Reeves reports that both White and African American attorneys feel the culture in law firms has changed so that blatant racism is less likely. However, both groups also acknowledge that occasional incidents of blatant racism still occur and numerous inferences of inferiority and other subtle racial harassment exist.[67] White attorneys tellingly assess the inappropriateness of racist incidents based on whether a racial minority hears the remark or whether the comment occurs in the workplace, rather than on the racialized content of the remark itself.[68] Thus, White attorneys appear most focused on the firm's legal and financial liability risks, as well as their own.[69] The following are excerpts from Reeves' study; the race

and gender of the speaker is noted at the beginning of each quote.

> [White male:] [T]here was a group of lawyers sitting around in one . . . lawyer's office and they were talking about welfare reform and one of the lawyers said something about "those lazy bums on welfare—why can't they get off their asses and get jobs?" And another lawyer said something to the effect that everyone on welfare was Black and maybe there was a laziness in Black culture. When he said that, everyone looked around like, whoa, glad no one who would be offended heard that. People are very careful about liability.[70]

> [White female:] I was sitting in a client meeting . . . one of our clients actually started to tell an off color joke [about racial minorities] . . . and the opposing client said, "this is an inappropriate place to tell that joke." And it made me feel better because I would have felt very uncomfortable telling my client that I think you're a pig. I think most lawyers know well enough. I mean, their personal feelings aside, hopefully they know well enough that in the law firm you don't say things that are inappropriate.[71]

Reeves finds Rosabeth Moss Kanter's theory of tokenism particularly appropriate for understanding the causes of racial harassment and its effects on African American attorneys.[72]

Kanter's theory focuses on work groups in which there is a numerically dominant group and a smaller token group.[73] She posits that the dominant group often treats the tokens as symbolic representatives of its category rather than as individuals, and perceives them through the particular frames of visibility, contrast, and assimilation.[74] As applied to the law firm context in Reeves' study, Kanter's theory would consider White attorneys the dominants, given their high proportional representation at the firms, and African Americans and other racial groups as the tokens, given their minority representation.

Consistent with Kanter's theory, Reeves finds that because African Americans, as tokens, are so visible, they experience performance pressures that those in the dominant group are less likely to experience.[75] White attorneys, as dominants, also perceive African Americans in contrast to their own identities,

prompting White attorneys to be self-conscious of and exaggerate attributes of their culture to strengthen the boundaries between them and the tokens. The following examples demonstrate Reeves' findings.

> [White male:] I did serve on the hiring committee at the larger firm. I noticed that a lot more questions and doubts were expressed about minority candidates. A lot of comments about affirmative action and "needing to get our numbers up." [Comments on] that we needed to increase the number of minorities at the firm. Would minorities have a difficult time fitting in? Do we have any clients that would have a problem working with African American lawyers? Whose responsibility would it be to watch them? Yes, watch them . . . make sure that they don't screw up. These

were the kinds of comments made. Both firms had a very difficult time holding onto minority attorneys they did hire. So they were always looking for the "right fit." [76]

[White male:] One firm I was at had no minorities on the hiring committee. And, whenever we would hire another minority associate, I think we had around four or five, there were partners that called them "$A^2$s" [pronounced A squared] for affirmative action cases . . . The Black candidates weren't necessarily any less qualified than any other candidates we hired . . . we were under the gun from a large client to get our minority stats up, and we weren't a popular firm for minority candidates to apply to . . . so, we hired the ones we got apps [applications] from . . . some

were good candidates . . . but we called them all "A$^2$s." I had one Black associate in my group, and once in a while a partner would ask me, "how's the A$^2$ doing?" [77]

White attorneys' possibly benign or even complimentary intent in distinguishing African American attorneys did not prevent the minority attorneys from feeling insulted:

[White female:] I had a very good friend [an African American male] . . . when we were summer associates together, we went to a founders' luncheon . . . well, you go around the table and you answer questions that the partner[s] have. And [the African American male lawyer] answered a question, and one of the partners said "that's so articulate." So, of course we get

back to the office, and he's just exploding in his office . . . he's Stanford educated and went to Northwestern law school . . . why would he not be articulate? He was also on the debate team, he's gone to nationals . . . . Yeah, to get "so articulate" with nothing about substance . . . . "Oh look, he can speak." So he did feel that always he was underestimated.[78]

[African American male:] Sometimes the White partners will say things that they think are compliments. Like one partner came to me one day and said "go find me some more lawyers like you." And in the context of the conversation, "like you" meant African American. Why couldn't he just say "go find me some good lawyers" . . . the perception of you as the exception

to the rule is what is hardest to deal with sometimes.[79]

[African American male:] No blatant remarks at a law firm. People are too careful. They use codes instead. Like they will say that they like the minorities as people, but their work product is not quite up to par. Or they will say that about the Black judges . . . that they're nice people but they're incompetent. I don't hear them make the same comments about White judges or attorneys. Also, I have White attorneys say that the Black judges have personal biases that affect their rulings, the outcomes. That has always amazed me because that is never said about White judges . . . it's like the White judges' rulings are never affected by their

> biases . . . . The same for minority attorneys—if you're on the plaintiff side of a race-discrimination suit, it's "oh well, he's only pushing the suit because he's Black." And if you're on the defense side, it's "oh, what an obvious move by the firm or the defendant to put a Black man out there for this suit." You never have the opportunity to get past the codes to be judged on the merits.[80]

Kanter's theory also asserts that "the characteristics of tokens as individuals are often distorted to fit preexisting generalizations about their category as a group"—a process Kanter calls assimilation.[81] Reeves' work illustrates that these stereotypes may differ depending on the occupation. In the context of lawyering, African American attorneys believe there are preexisting generalizations about them as incompetent,

having substandard writing skills, and having been hired because of preferential affirmative action treatment.[82]

These stereotypes lead to a cycle of subtle disparate treatment. While firms have positive expectations of entering White attorneys' performance, African American attorneys report that the firms' stereotypes of their incompetence and substandard writing skills are quite real and active.[83] Moreover, they report that these stereotypes combined with their token status lead to their work being more scrutinized.[84] Given these circumstances, African American attorneys felt they were more scrutinized and had to work considerably harder to achieve a comparable level of credibility as White attorneys.[85] At the same time, the stereotypes of their incompetence resulted in lower quality assignments that ultimately lead to conclusions of their unsuitability for partnership.[86]

Reeves concluded that this cycle was a substantially different one than the one a White attorney would undertake in his or her progression towards a partnership in a law firm.[87] In contrast, many White attorneys did not feel that there were different expectations or standards for Whites and African Americans.[88]

Finally, Reeves' data suggests that African American attorneys are subject to racial harassment in their organizations more frequently than they would like to admit. Respondents reported that their experiences are "a rare incident on the racial radar screen," but their interviews in the aggregate reveal a prevalence of racialized comments.[89] As other social scientists have found, there appears to be a tendency for minorities to downplay racial incidents in their workplace.[90]

*2. Dynamics of Sexual Harassment*

Both men and women attorneys report a change in organizational climate in the wake of Supreme Court cases drawing attention to the possibility of organizational liability. While more blatant and direct sexual harassment, such as quid pro quo harassment, has decreased substantially, it has not disappeared. Women attorneys still report unwanted touching and incidents of being propositioned. At the same time, more subtle and indirect forms of harassment are quite prevalent.

While Reeves uses Kanter's token theory to explain racial harassment, she uses alternative theories to explain sexual harassment in the law firms. In particular, she finds Barbara Gutek's sex-role spillover theory effective for studying subtle and indirect forms of sexual harassment.[91] Gutek's theory asserts that socially-constructed, gender-based expectations of women spill over into the workplace, prompting men to view women

as sexual objects rather than as work colleagues.[92] The gender-ratio also makes a difference: women in male-dominated jobs are more likely and women in gender-integrated jobs are less likely to experience sex-role spillover.[93]

In particular, many male attorneys report sexualized conversations outside the presence of women attorneys; in effect, harassment has gone "underground." These attorneys' comments evidence the spill-over theory that women are viewed as sexual objects:

> [White male:] I've probably even said things that if my wife heard them, she would feel it's inappropriate. Nothing disrespectful, but I have commented on a woman's physical appearance, and I have joined in conversations with other men commenting on women's appearance . . . about female attorneys and female

staff. But we would never make comments to them directly. That was actually one of the things that we would discuss, how you can't compliment women anymore because of the fear of complimenting a woman who will be offended.[94]

[White male:] Men discuss the female associates. The conversations are always couched in "we shouldn't be talking about this, but" or "this is really inappropriate, but." Women's sexuality, their attractiveness, their bodies, whether or not we would want to have sex with them, how they would be in bed, etc. I'd really like to think it's just harmless innocuous macho talk, but some men make these kinds of comments so frequently. And the more someone talks about this, the more you do wonder if he can see women

> as colleagues, as equals. You start wondering if some men can actually talk to women instead of just talking about them because they will tell you about conversations that they have had with women where they were thinking about her breasts the whole time.[95]

Also consistent with Gutek's theory are attorneys' reports of firm-sanctioned social events in which the sexuality of women is the basis of the entertainment.[96] Reeves notes the bind that women attorneys experience.[97] On one hand, they can go to these events and be uncomfortable, angry, or humiliated.[98] On the other hand, they can refuse to go to these events and be excluded from networking and sponsorship opportunities that these events provide and be criticized as "not one of the gang."[99]

[White female:] In some ways, it's almost too many to name, but I'll tell you two egregious incidents. The first one was when a male partner turned 50 . . . the firm wanted to throw him a birthday party, and per his request, he wanted the party to be at a strip bar. Everyone was invited . . . the men and the women. When some of the male associates talked about the party, they referred to the bar as a "titty bar" and it was fine because it was a firm sanctioned event. It was absolutely absurd. Most of the women did not go. I definitely did not go. So how do we evaluate it? Is it that women aren't team players? That incident made me very angry, but who are you going to complain to . . . the response is going to be that that was where he wanted it. Another partner's birthday party . . . some of the male associates sent

> a belly dancer to the bar for the party . . . their reasoning was that they checked with his wife first, and she was fine with it, so no one else should have a problem with it. The women associates were clearly very uncomfortable. Again, if you complained, you just would not be invited again . . . I mean, it was really weird being around a group of guys watching this woman dance and they were cheering her on. The price you pay [for complaining] is too high.[100]

Reeves also describes pornographic emails as a source of blatant sexual harassment.[101] Although firms often have policies on the appropriate uses of emails, these policies have not stopped these incidents.[102]

> [White Female:] [T]here was a period of time when the emails would come around at least once or twice a day. I would erase them immediately, but there would be a second or two where I would have to see it because those emails looked like any other office email until you opened it, and some of them were very graphic, sexually I mean. I got so sick of it that I went to one of the associates who was sending them and told him to take me off the list. He told me to loosen up and not take it so seriously.[103]

Thus, while Reeves uses Kanter's token theory to help explain racial harassment, she finds Gutek's spillover theory more appropriate for understanding sexual harassment. As the above interview excerpts illustrate, Reeves finds ample support

for Gutek's theory that men's casting of women as sexual objects spills over into the workplace, leading to sexual harassment.

## III

## Implications

Sexual harassment jurisprudence serves as the model for all kinds of harassment, including racial harassment. The cornerstones of harassment law as delineated by the Supreme Court are built around sexual harassment fact patterns. Courts and commentators routinely assume that these same legal principles and their interpretations are appropriately applied to racial harassment claims.

Analogizing racial harassment to sexual harassment in the absence of further study, however, is problematic. One intuitively suspects that racial harassment and sexual harassment have fundamental differences regarding, for instance,

their causes, targets, and consequences. Rather than relying only on intuition, this Article presents empirical evidence of some of those differences.

In particular, this Article substantiates that individuals who bring racial harassment lawsuits are distinct in ethnicity and gender, and describe their harassment differently than those who bring sexual harassment litigation. Moreover, it finds that judges reach very different conclusions in racial harassment lawsuits than sexual harassment lawsuits. While sexual harassment plaintiffs only win approximately half their cases, racial harassment plaintiffs fare even worse. In addition, drawing on sociological research on gender and race dynamics in law firms, different theories are effective in explaining the variations of harassment, suggesting that the causes and manifestations of each type of harassment are distinct.

While research comparing racial harassment with sexual harassment is still in its early stages, tentative observations indicate significant dissimilarities between the two. While much attention has appropriately been focused on sexual harassment, it is now time to develop a jurisprudential model specifically for racial harassment that is cognizant of its distinct attributes and complexity. As this model evolves, there are many issues to address. To what extent should the elements of a racial harassment claim be reinterpreted? To what extent are the elements of a sexual harassment claim ever appropriate to a racial harassment claim? As the legal community begins to puzzle through these major jurisprudential issues, two relevant issues discussed in the concluding remarks of this Article should be considered. Neither issue is easily resolved, but it is critical that the legal community addresses both.

*A. Varied Racial Perspectives on What Constitutes Harassment*

Given that the purpose of Title VII is to remove hostile, debilitating work environments, it is essential to understand when targeted racial groups consider their workplace hostile and debilitating. This task, however, is complicated because Whites and minority Americans have different perceptions of what constitutes racial discrimination and harassment. At the same time, Whites' perspectives are important because Whites are typically supervisors and coworkers of minority employees and are also the most likely defendants in racial harassment cases.[104]

Citing others' research of employees at large companies, Katherine Naff notes that "black and white managers may hold cognitively different theories to explain what happens in the organizational world in which they live."[105] She continues:

"That Euro-Americans and people of color often live in very different perceptual worlds has been continually demonstrated by polling data."[106] Based on her own research, Naff reaches the same conclusion about employees of the federal government.[107] She asked thousands of federal employees for their opinions on how minorities and nonminorities are treated in their organizations.[108] Table 4 shows that the most dramatic differences are consistently between African Americans and Whites. In comparison to Whites, African Americans generally describe a work environment with more discrimination of minorities. For example, 61.4% of African Americans, but only 23.4% of Whites, strongly agree or agree that "[m]inority women face extra obstacles to advancement."

Table 4. Federal Employees' Perceptions of How Minorities Are Treated in Their Organizations (Percent)[109]

| | African American | Asian Pacific American | Latino/a | Native American | White American |
|---|---|---|---|---|---|

| | | | | | |
|---|---|---|---|---|---|
| *In my organization, nonminorities receive preferential treatment compared to minorities.* **Strongly agree/agree** | 58.0 | 34.6 | 40.0 | 26.0 | 8.2 |
| *Minority women face extra obstacles to advancement.* **Strongly agree/agree** | 61.4 | 34.4 | 48.7 | 37.2 | 23.4 |
| *The viewpoint of a minority is often not heard at a meeting until it is repeated by a nonminority.* **Strongly agree/agree** | 50.9 | 25.7 | 38.2 | 25.3 | 8.3 |
| *Once a minority assumes a top management position, that position often loses much of its power and prestige.* **Strongly agree/agree** | 44.1 | 18.2 | 24.7 | 25.9 | 7.5 |
| *My organization is reluctant to promote minorities to supervisory or management positions.* **Strongly agree/agree** | 46.2 | 26.5 | 27.5 | 20.8 | 7.7 |

Naff's research confirms another complicating but important factor in understanding when targeted racial groups consider their workplace environment hostile and debilitating. Each racial and ethnic group has its own unique perceptions. Assuming a single minority perspective risks gross overgeneralizations. To illustrate from Table 4, a different percentage of each racial group agrees with the statement: "In my organization, nonminorities receive preferential treatment

compared to minorities." For example, 40% of Hispanic Americans, but only 26% of Native Americans, strongly agree or agree with that statement.

Each racial and ethnic group is harassed in particular ways in part because society imposes myriad stereotypes.[110] Each racial group also has had different experiences of discrimination in American history.[111] Considering these stereotypes and histories, each racial group is likely to find distinct comments and conduct insulting, intimidating, and demeaning. Hispanic Americans, for instance, are more vulnerable to harassment on the basis of their suspected immigration status and English language abilities; African Americans about their work habits and general intelligence; Asian Americans about their cultural traditions and social skills; and Native Americans about their reliability and sobriety.[112]

Racial stereotyping and discriminatory treatment also affect individuals of each group differently.[113] Furthermore, all individuals of a given racial group do not necessarily perceive their workplace in the same way. Just as there is no single minority perspective, there is not a single perspective of members of any racial group. Lawrence Bobo and Susan Suh, for instance, consider how a host of factors (including nativity—United States or foreign, gender, age, education, occupation, and income) affect individuals of each racial group's reporting of personal experience of racial discrimination in the workplace.[114] They find, for instance, that African Americans born overseas are much less likely to report racial discrimination than African Americans born in the United States; that less-educated Asian Americans are much less likely to report discrimination than the most highly-educated Asian

Americans; and that younger Latinos/as are less likely to report discrimination than older Latinos/as.[115]

Finally, despite the common societal belief that racial harassment is essentially a White on Black phenomenon, the reality is more multicultural. Bobo and Suh's research illustrates that harassers and their targets are of all racial backgrounds and combinations. In fact, African Americans are most likely to report personal experiences of discrimination when their coworkers are Asian Americans, and Asian Americans are most likely to report discrimination when their coworkers are African Americans.[116] Kelley's and my research on racial harassment cases also confirms that, while judicial opinions most typically report alleged White harassers and Black targets, there are other pairings. Harassers and targets may be of the same race or of different minority groups; alternatively, minorities might harass White targets.[117]

### *B. Relationship Between Racial Harassment and Sexual Harassment*

While emerging empirical evidence shows that racial harassment and sexual harassment are not the same thing, that does not mean that no relationship between the two forms of harassment exists. By explicitly acknowledging that they are distinct, however, one can begin to explore more seriously how they are related. Understanding their relationship will help one to better understand each form of harassment. It will also prompt one to explore the relationship between sexual harassment, racial harassment, and other forms of harassment such as religious, age, disability, or national origin harassment.[118]

Racial harassment and sexual harassment, for instance, may share some commonalities despite their distinct characteristics.

Their illegalities are based in part on the same legislative foundation.[119] Some harassers may target "outsiders" without particular regard to whether that outsider status is based on race or gender.

Some harassing incidents may be exclusively sexual harassment or exclusively racial harassment. Other incidents may be a combination. Some researchers, for instance, study the sexual harassment of minority women, suggesting that there are elements of both forms of harassment.[120] They point to harassers' use of such degrading phrases as "Black bitch" to demonstrate this possible intersection.[121] The concerns raised in this Article about presumptively using sexual harassment as the model encourage the rethinking of whether the analysis of such cases should be reframed. Rather than assuming that the harassers and victims perceive their harassment as primarily sexual—and wondering how it might differ for minority women,

perhaps the legal community should instead consider whether the harassers and victims perceive their harassment as primarily racial—and wonder how it might differ because of the gender of the target. This shift to first considering a race-based model, rather than a gender-based model, is not merely procedural. It may well be that considering racial harassment as gendered rather than sexual harassment as raced will provide more accurate insight into harassers' motivations and into why targets feel humiliated and degraded. Harassment of minority targets might be more complex and nuanced than originally thought.

In Reeves' research of lawyers, for instance, African American women report less sexual harassment than White women.[122] They conjecture that White men racialize them more than sexualize them:

> [African American female:] I think there's a difference between how White women and Black women are treated. . . . [T]he majority of men at a firm are White men, and they have no idea how to deal with you, but they definitely don't deal with you as a sexual person. . . . They can't bond with me over sports like they can with Black men . . . so I'm in this weird category where they awkwardly negotiate their interactions with me instead of dealing with me like a whole human being.[123]

In other research, however, African American and other minority women feel particularly targeted for harassment, including sexual harassment, and attribute their targeting to their color.[124] These research examples suggest that harassers'

motivations and targets' harms are interwoven with race (and gender) in ways that are not currently understood.

---

As employees, employers, judges, and juries consider the viability of a racial harassment complaint, this Article argues that they should not feel bound to the sexual harassment model. They should instead affirmatively question the appropriateness of analogizing one form of harassment to another. In order to fulfill the goals of Title VII, they should carefully consider the nuances of racial harassment, rather than rotely assuming that harassing behavior in the workplace is monolithic.

[*] Professor at the University of Pittsburgh School of Law. This Article is the second in a series of three articles on workplace racial harassment law. The first article, Pat K. Chew & Robert E. Kelley, Unwrapping Racial Harassment Law, 27 **Berkeley J. Emp. & Lab. L.** 49 (2006), provides an empirical baseline on racial harassment case law. This second Article compares racial harassment and sexual harassment laws. The third article will focus on the relationship between judge characteristics and outcomes in racial harassment cases. I thank Robert Kelley for reviewing this Article and his ongoing consultation and support of this research agenda. I am grateful to my excellent research assistants Kathleen Bulger, Claire Lobes, and Jennedy Santolla, and to my Managing Editor, Caryn Ackerman, and her team of editors at Oregon Law Review. I also appreciated the opportunity to discuss this research at a program sponsored by

the Association of American Law Schools Women in Legal Education Section in January 2006.

[1] **Barbara Lindemann & David D. Kadue, Sexual Harassment in Employment Law 3** n.2 (1992); Kim M. Blankenship, Bringing Gender and Race in: U.S. Employment Discrimination Policy, 7 **Gender & Soc.** 204, 205, 219-20 (1993); see also 110 Cong. Rec. 2577, 2577-84 (1964), reprinted in **U.S. Equal Employment Opportunity Comm'n, Legislative History of Titles VII and XI of Civil Rights Act of 1964**, at 3213-28 (1968); Francis J. Vaas, Title VII: Legislative History, 7 **B.C. Indus. & Com. L. Rev.** 431, 441 (1966). But see Jo Freeman, How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy, 9 **Law & Ineq.** 163 (1991) (suggesting inclusion of sex was more purposeful than commonly believed).

[2] See Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234 (5th Cir. 1971).

[3] See, e.g., **Lin Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job** (1978); **Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination** (1979).

[4] See, e.g., Kathryn Abrams, The New Jurisprudence of Sexual Harassment, 83 **Cornell L. Rev.** 1169 (1998); Martha Chamallas, Writing About Sexual Harassment: A Guide to the Literature, 4 **UCLA Women's L.J.** 37 (1993); Katherine M. Franke, What's Wrong with Sexual Harassment?, 49 **Stan. L. Rev.** 691 (1997); Vicki Schultz, Reconceptualizing Sexual Harassment, 107 **Yale L.J.** 1683 (1998).

[5] See Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (offering guidelines on employer liability); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (exploring the

evolving conception of sexual harassment by considering the motivational link in harassment cases; that is, whether the harassment was "because of sex"); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (clarifying the elements of a hostile environment claim, including the critical requirement that the harassment must be sufficiently "severe or pervasive" to alter the work environment); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (first Supreme Court case recognizing sexual harassment as a form of sex discrimination under Title VII).

[6] See, e.g., Dianne Rucinski, A Review: Rush to Judgment? Fast Reaction Polls in the Anita Hill-Clarence Thomas Controversy, 57 **Pub. Opinion Q.** 575 (1993) (surveying public opinions on Anita Hill's accusations of sexual harassment against her former employer Clarence Thomas). For example, one case that caught the public's attention was Weeks v. Baker & McKenzie, in which an appellate court in California held a large law firm liable

for $50,000 in compensatory damages and $3.5 million in punitive damages for sexual harassment by a partner who was a serial harasser of law firm employees. 74 Cal. Rptr. 2d 510 (Cal. Ct. App. 1998).

[7] See Pat K. Chew & Robert E. Kelley, Unwrapping Racial Harassment Law, 27 **Berkeley J. Emp. & Lab. L. 49** (2006) (summarizing the limited research on racial harassment).

[8] Chew & Kelley, supra note 7, at 57 (noting the pervasive citing of the Harris case in racial harassment cases); L. Camille Hébert, Analogizing Race and Sex in Workplace Harassment Claims, 58 **Ohio St. L.J.** 819, 821-36 (discussing judicial analogizing of racial harassment and sexual harassment); Debra Domenick, Comment, Title VII: How Recent Developments in the Law of Sexual Harassment Apply With Equal Force to Claims of Racial Harassment, 103 **Dick. L. Rev.** 765 (1999). My review of numerous

racial harassment cases, in Chew & Kelley, supra note 7, also reveals this pattern.

[9] Meritor, 477 U.S. at 66-67 (quoting Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

[10] Id. at 67.

[11] Harris, 510 U.S. at 24 (Ginsburg, J., concurring).

[12] See **Lloyd L. Weinreb, Legal Reason: The Use of Analogy in Legal Argument** (2005); Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, 109 **Harv. L. Rev.** 923, 1016-18 (1996).

[13] See, e.g., **Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law** 1, 3-4 (1990) (discussing consequences of categorization); Kevin Avruch and Peter W. Black, Conflict Resolution in Intercultural Settings: Problems and Prospects, in **The Conflict & Culture Reader** 7, 7-14 (Pat K. Chew ed., 2001) (describing the tendency to explain an "opaque"

culture with logic from our own "transparent" culture); Ronald Chen & Jon Hanson, Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory, 77 **S. Cal. L. Rev.** 1103, 1145-63 (2004) (explaining the categorization process and its effects).

[14] See sources cited supra note 1. See also Serena Mayeri, Note, "A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective, 110 **Yale L.J.** 1045 (2001) (describing a purposeful analogy between gender and race in civil rights over time).

[15] See generally **Theresa M. Beiner, Gender Myths v. Working Realities: Using Social Science to Reformulate Sexual Harassment Law** (2005); **Mia L. Cahill, The Social Construction of Sexual Harassment Law** (2001); **Joe R. Feagin, Racist America: Roots, Current Realities, and Future Reparations** (2000); **Measuring Racial Discrimination** (Rebecca M. Blank, Marilyn

Dabady, & Constance F. Citro eds., 2004); Maria P. P. Root, The Consequences of Racial and Ethnic Origins Harassment in the Workplace, in **Race, Culture, Psychology, & Law** 125 (Kimberly Holt Barrett & William H. George eds., 2005).

[16] See Hébert, supra note 8, at 860-62 (describing this risk for racial harassment plaintiffs); Rhonda M. Reaves, One of These Things is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases, 38 **U. Rich. L. Rev.** 839 (2004) (arguing that analogizing ageism to racism creates similar burdens on age discrimination plaintiffs).

[17] See, e.g., Nicole T. Buchanan & Alayne J. Ormerod, Racialized Sexual Harassment in the Lives of African American Women, in **Violence in the Lives of Black Women: Battered, Black, and Blue** 107 (Carolyn M. West ed., 2002); Tanya Katerí Hernández, Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race, 4 **J. Gender Race & Just.** 183 (2001); Audrey J.

Murrell, Sexual Harassment and Women of Color: Issues, Challenges, and Future Direction, in **Sexual Harassment in the Workplace: Perspectives, Frontiers, and Response Strategies** 51 (Margaret S. Stockdale ed., 1996).

[18] Hébert, supra note 8, at 860.

[19] See id. at 848-66.

[20] See id. at 878-79.

[21] See Chew & Kelley, supra note 7, at 87-88. For instance, when the plaintiffs claimed defendants used obvious racist objects, such as nooses or Ku Klux Klan-associated attire, the plaintiffs were successful in their judicial proceedings only a third of the time. Id. at 87-88 & tbl.14.

[22] See generally Trina Grillo & Stephanie M. Wildman, Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -Isms), 1991 **Duke L.J.** 397;

Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 **Stan. L. Rev.** 581 (1990).

[23] The extensive research on sex discrimination and race discrimination tends to study each form of discrimination independently of one another. See sources cited supra note 14. Some researchers, however, consider the relationship between sex and race discrimination. See, e.g., Blankenship, supra note 1; William A. Darity, Jr. & Patrick L. Mason, Evidence on Discrimination in Employment: Codes of Color, Codes of Gender, **J. Econ. Persp.**, Spring 1998, at 63 (describing evidence of discriminatory treatment as a major cause of racial and gender employment disparities); Mark Pogrebin, Mary Dodge & Harold Chatman, Reflections of African-American Women on their Careers in Urban Policing: Their Experiences of Racial and Sexual Discrimination, 28 **Int'l J. Soc. L.** 311, 314-19 (2000) (describing the gender discrimination and the racial

discrimination faced by African American women police officers). Darity and Mason include separate discussions of research studies on race, Darity & Mason, supra, at 70-76, and gender, id. at 68-70.

[24] Ann Juliano & Stewart J. Schwab, The Sweep of Sexual Harassment Cases, 86 **Cornell L. Rev.** 548 (2001).

[25] Chew & Kelley, supra note 7, at 53-54. The project included 260 cases randomly selected to be representative of the universe of cases. See id. (explaining research methodology).

[26] While the two studies are comparable in a number of ways, there are differences as well. The sexual harassment study covers only ten years (1986-1996), Juliano & Schwab, supra note 24, at 550, whereas the racial harassment study essentially covers the entire litigation history of racial harassment cases up through 2002, Chew & Kelley, supra note 7, at 53-54. Although we assume that the cases in the sexual harassment study

are representative of all cases, we cannot be certain that the cases between 1976 and 1985 or between 1997 and 2002 have the same characteristics as those in the study. Also, the two studies differ in some of the research methodologies utilized. Both types of litigation had approximately the same percentage of district court and appellate court cases (the percentage of racial harassment cases at the district court level is 79.2% and at the appellate court level is 20.4%; the percentage of sexual harassment cases at the district court level is 75.4% and at the appellate court level is 24.6%). Compare Chew & Kelley, supra note 7, at 76 tbl.9, with Juliano & Schwab, supra note 24, at 556. In addition, the sexual harassment study focuses on the differences between district court and appellate court cases, see Juliano & Schwab, supra note 24, at 554, 560-76, while the racial harassment study tends to summarize the cases as a whole, see Chew & Kelley, supra note 7, at 53-54. With some simple

calculations, however, we are able to use the data available about the sexual harassment cases to compute aggregate data about the cases as a whole. At other times, the differences in methodologies limited the possible comparisons.

[27] The statistics regarding racial harassment draw from Chew & Kelley, supra note 7, at 64 tbl.1, and the statistics concerning sexual harassment are derived from Juliano and Schwab, supra note 24, app.A, at 594-97.

[28] See **U.S. Census Bureau, Statistical Abstract of the United States: 2002**, at 16 tbl.14, 368 tbl.562 (122d ed. 2002). For further explanation of how these percentages are derived, contact the author.

[29] See, e.g., Deborah L. Brake, Retaliation, 90 **Minn. L. Rev.** 18, 25-42 (2005) (summarizing social science research on employees' reluctance to acknowledge and report discrimination).

[30] See infra Part II.A.2 (discussing outcomes of cases).

[31] One consideration in interpreting this data is that the availability of plaintiffs' race differs in the two types of cases. Plaintiffs' races are identifiable in a high percentage of the racial harassment cases (90%), Chew & Kelley, supra note 7, at 63 n.62, 64 & tbl.1, but were available in only a comparatively small percent of the sexual harassment cases (15.9%), Juliano & Schwab, supra note 24, app.A, at 594. Thus, the percentages in Table 1 are based on 106 cases in the sexual harassment study, Juliano & Schwab, supra note 24, app.A, at 594, and 234 cases in the racial harassment study, Chew & Kelley, supra note 7, at 63 n.62. The race of many plaintiffs in the sexual harassment cases is unknown. See Juliano & Schwab, supra note 24, app.A, at 594. To the extent that a number of these unknown plaintiffs are White, the actual racial composition may differ substantially.

[32] See infra text accompanying notes 105-108.

[33] For further discussion on this inquiry, see Buchanan & Ormerod, supra note 16, Hébert, supra note 8, Hernández, supra note 17, and Pogrebin et al., supra note 23.

[34] Plaintiffs in sexual harassment cases claim, for instance, that harassers make oral comments about their physical appearance and sexual comments in over 47% of the cases. Juliano & Schwab, supra note 24, app.A, at 596. These percentages on the nature of sexual harassment are based on all 666 sexual harassment cases. See id. Plaintiffs in racial harassment cases instead report ethnic and racial slurs associated with their race. Chew & Kelley, supra note 7, at 72-74 & tbl.8.

[35] For example, objects such as nooses and Ku Klux Klan attire are used in 5.8% of racial harassment cases. Id. In contrast, sexual materials are left for the plaintiff in 5.1% of the sexual harassment cases. Juliano & Schwab, supra note 24, app.A, at 596. Physical contact of a sexual nature (such as

grabbing and pinching) is cited in 43.2% of sexual harassment cases; physical contact of a nonsexual nature is cited in 9.0% of sexual harassment cases. Id. In contrast, physical contact in racial harassment cases such as shoving and hitting is reported in only 15% of the cases. Chew & Kelley, supra note 7, at 74 tbl.8.

[36] Id.

[37] Juliano & Schwab, supra note 24, app.A, at 596.

[38] I attempted to compare the plaintiffs' occupations. The two studies categorize occupations in different ways, however, so it is not possible to compare the differences among specific occupations. What is clear, however, is that both alleged racial harassment and sexual harassment occur across many occupational areas. They are not limited to those in clerical or blue-collar positions; individuals in professional and management occupations bring a notable percentage of the racial

harassment cases (19.3%), Chew & Kelley, supra note 7, at 66 tbl.3, and sexual harassment cases (28.1%), Juliano & Schwab, supra note 24, app.A, at 594. Both types of litigation also had approximately the same percentage of cases dealing with private and public sector employment settings. Compare Chew & Kelley, supra note 7, at 70 tbl.6 (the percentage of racial harassment cases in the private sector is 69.6% and in the public sector is 30.4%), with Juliano & Schwab, supra note 24, app.A, at 595 (the percentage of sexual harassment cases in the private sector is 71% and in the public sector is 29%). Thus, it appears that sexual and racial harassment occurs throughout the workforce. See Chew & Kelley, supra note 7, at 66 tbl.3, 70 tbl.6; Juliano & Schwab, supra note 24, app.A, at 594-95.

[39] Chew & Kelley, supra note 7, at 52 n.7 (explaining caveats in generalizing from a study of judicial opinions on racial

harassment complaints to generalizing about racial harassment in the workplace).

[40] 42 U.S.C. § 1981a(c) (2000).

[41] See Theresa M. Beiner, The Misuse of Summary Judgment in Hostile Environment Cases, 34 **Wake Forest L. Rev.** 71 (1999); Chew & Kelley, supra note 7, at 77.

[42] Chew & Kelley, supra note 7, at 77; Juliano & Schwab, supra note 24, app.A, at 597.

[43] It is also interesting that both types of cases published in the Federal Reporters have a higher plaintiffs' win rate than cases in general. The plaintiffs' success rate in sexual harassment cases published in the official reporter is 53% compared to the average success rate of all sexual harassment cases of 48.2%. Juliano & Schwab, supra note 24, app.A, at 594. The plaintiffs' success rate of racial harassment cases published in the official reporter is 30.7% compared to the

average of 21.5%. See Chew & Kelley, supra note 7, at 84, 91 tbl.16.

[44] The plaintiffs' success rate is 51.2% in district court proceedings and 39% in appellate court proceedings. Juliano & Schwab, supra note 24, app.A, at 594.

[45] The plaintiffs' success rate is 20.8% in district court proceedings and 24.5% in appellate court proceedings. Chew & Kelley, supra note 7, at 90 tbl.15.

[46] See, e.g., Robert J. Gregory, You Can Call Me a "Bitch" Just Don't Use the "N-Word": Some Thoughts on Galloway v. General Motors Service Parts Operations and Rodgers v. Western Southern Life Insurance Co., 46 **DePaul L. Rev.** 741, 742-43 (1997); Judith J. Johnson, License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment, 62 **Md. L. Rev.** 85, 87-89 (2003); John D. Johnston, Jr. & Charles L.

Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 **N.Y.U. L. Rev.** 675, 676 (1971). But see Hernández, supra note 17.

[47] The statistics in Table 3 are derived from Chew & Kelley, supra note 7, at 86 tbl.13, and Juliano & Schwab, supra note 24, app.A, at 594-95. There was only one case in each study in which the plaintiff was identified as Native American. The plaintiff was unsuccessful in both those cases. For further detail on the calculations in Table 3, see note 48.

[48] To illustrate how the author calculated the numbers for Table 3 for the sexual harassment cases, consider the following. (The raw data for the calculations are provided in Juliano & Schwab, supra note 24, app.A, at 595.) To determine the effect of the sex of the plaintiff on the plaintiffs' success rate in sexual harassment cases, one adds the number of cases won by female plaintiffs at the district court level (464 cases times 50.9% =

236.2) to the number of cases won by female plaintiffs at the appellate court level (152 cases times 39.5% = 60) and divides that sum by the total number of cases in which the plaintiff is female (296.2 divided by 616 = 48.1%). This formula is repeated for the cases in which the plaintiff is a male and the result is a 38.2% win rate, etc.

[49] However, male plaintiffs in sexual harassment cases at the appellate level have a win rate of only 14.3%. Id.

[50] However, in more recent racial harassment cases, women tend to lose more cases than men. Chew & Kelley, supra note 7, at 103-04 & fig.7.

[51] See supra note 31 (describing caveat in interpreting race data).

[52] Chew & Kelley, supra 7, at 70 tbl.6.

[53] Juliano & Schwab, supra note 24, app.A, at 595.

[54] See Chew & Kelley, supra note 7, at 70 tbl.6; Juliano & Schwab, supra note 24, app.A, at 595.

[55] Juliano & Schwab, supra note 24, app.A, at 595.

[56] See Chew & Kelley, supra note 7, at 86 tbl.13 (finding a success rate of approximately 17% in both types of cases).

[57] Id.

[58] See id. (plaintiff success rate increases to 32.9%).

[59] See id. at 87-88 & tbl.14. For instance, plaintiffs are successful in 33.3% of their cases when they report harassers' use of ostensibly race-linked objects such as nooses, white robes, and pointed hats—compared to an average plaintiffs' win rate of 21.5%. See id. at 84, 88 tbl.14. Perhaps what is most striking is that plaintiffs still lose two-thirds of the time in those cases.

[60] For example, plaintiffs that complain of pornographic descriptions and sexual materials left in their private space

(such as their desks or lockers) have a significantly higher success rate (68% and 67.6% respectively) than the average plaintiffs' success rate of 48.2%. Juliano & Schwab, supra note 24, app.A, at 596. Similarly, plaintiffs who complain of physical contact of a sexual nature have a higher success rate (55.9%) than plaintiffs who complain of physical contact of a nonsexual nature (48.3%). Id.

[61] The Juliano & Schwab study included the universe of cases in the designated time period. Id. at 555-56. The Chew & Kelley study used a stratified random sampling method. Chew & Kelley, supra note 7, at 53-54.

[62] See id. at 81-82, 94-95.

[63] Id. at 62 n.54.

[64] See infra text accompanying notes 104-115 (discussing relevant research).

[65] Aravinda Nadimpalli Reeves, Gender Matters, Race Matters: A Qualitative Analysis of Gender & Race Dynamics in Law Firms (June 2001) (unpublished Ph.D. dissertation, Northwestern University) (on file with author). This research is based on sixty-five in-depth interviews of African American and White attorneys in medium-size and large law firms. Id. at 60. There are comparable numbers of African American men, African American women, White men and White women. Id. Half of the interviewees were randomly selected through attorney directories; the other half were referred by other attorneys, i.e., an adapted "snowball strategy." Id. at 60-64.

[66] See infra text accompanying notes 72-88, 91-103.

[67] Reeves, supra note 65, at 222-23, 225.

[68] Id. at 217-18.

[69] See id. at 218-20.

[70] Id. at 218.

[71] Id.

[72] See id. at 216-47.

[73] See **Rosabeth Moss Kanter, Men and Women of the Corporation** 206-42 (1977).

[74] See Reeves, supra note 65, at 216 (summarizing Kanter's theory).

[75] See id. at 219.

[76] Id.

[77] Id. at 219-20.

[78] Id. at 220.

[79] Id. at 221.

[80] Id.

[81] **Kanter**, supra note 72, at 230; see Reeves, supra note 65, at 233-39.

[82] Id. at 233-34.

[83] Id. at 234.

[84] Id. at 234-35.

[85] Id.

[86] Id. at 236.

[87] Id.

[88] Id. at 233.

[89] Id. at 222-23.

[90] See, e.g., **Katherine C. Naff, To Look Like America: Dismantling Barriers for Women and Minorities in Government** 137-39 (2001); Reeves, supra note 65, at 222-23.

[91] Reeves, supra note 65, at 151-70. See **Barbara A. Gutek, Sex and the Workplace** (1985); Barbara A. Gutek & Aaron Groff Cohen, Sex Ratios, Sex Role Spillover, and Sex at Work: A Comparison of Men's and Women's Experiences, 40 **Human Relations** 97 (1987); Barbara A. Gutek & Bruce Morasch, Sex-Ratios, Sex-Role Spillover, and Sexual Harassment of Women at Work, 38 **J. Soc. Issues**, Winter 1982, at 55. In addition to the sex-role

spillover model, Theresa Beiner describes three other major social science theories of sexual harassment: the sociocultural or power model (focusing on male dominance), the organizational model (emphasizing the role of hierarchical power structures in organizations), and the natural/biological model (emphasizing biological and evolutionary instincts). **Beiner**, supra note 15, at 114-32.

[92] **Gutek**, supra note 91, at 15-18. Men may also view women coworkers as a mother, daughter, sister, or wife, but Reeves' work did not report the spillover of these roles. Gutek also notes that men are subject to sex-role spillover, but men's stereotypes as leader or financial provider do not invite others to harass them. See **Gutek**, supra note 91, at 15-18.

[93] See **Beiner**, supra note 15, at 118-19; **Gutek**, supra note 91, at 129-51.

[94] Reeves, supra note 65, at 154.

[95] Id. at 155.

[96] Id. at 160.

[97] Id.

[98] Id.

[99] See id. at 160-61.

[100] Id. at 161.

[101] Id.

[102] Id.

[103] Id.

[104] A supervisor's perception of a situation affects not only his or her assessment of racial harassment, but also the appropriate institutional response. See **Naff**, supra note 90, at 135-37.

[105] Id. at 135 (quoting Clayton P. Alderfer et al., Diagnosing Race Relations in Management, 16 **J. Applied Behavioral Science** 135, 148 (1980)).

[106] Id.

[107] See id. at 146-53.

[108] Naff's research is based on 6251 employees of color responding to a workforce diversity survey. Id. at 150. While she uses the term "Euro-Americans," I use the term Whites or White Americans in this Article.

[109] Table 4 is a partial reproduction of Naff's Table 6.3. Id. at 147 tbl.6.3. In contrast to this Article's Table 4, Naff's table also shows the percentage of each racial group that "[n]either agree nor disagree" or "[s]trongly disagree/disagree." Id.

[110] See generally Richard Delgado & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, 77 **Cornell L. Rev.** 1258 (1992) (describing negative stereotypes of each racial group).

[111] These writings, for example, describe the history of Asian Americans including their experiences of discrimination: **Frank H. Wu, Yellow: Race in America Beyond Black and White** (2002); Pat K. Chew, Asian Americans: The "Reticent" Minority and Their Paradoxes, 36 **Wm. & Mary L. Rev.** 1 (1994); and Faye K. Cocchiara & James Campbell Quick, The Negative Effects of Positive Stereotypes: Ethnicity-Related Stressors and Implications on Organizational Health, 25 **J. Organizational Behav.** 781 (2004) (suggesting that positive stereotypes, such as Asian Americans being stereotyped as the "model minority," may create adverse effects).

[112] See Delgado & Stefancic, supra note 110, at 1260-81.

[113] See **Naff**, supra note 68, at 148-49 tbl.6.4.

[114] Lawrence D. Bobo & Susan A. Suh, Surveying Racial Discrimination: Analyses from a Multiethnic Labor Market, in **Prismatic Metropolis: Inequality in Los Angeles (**Lawrence D.

Bobo, Melvin L. Oliver, James H. Johnson Jr., & Abel Valenzuela, Jr. eds., 2000) 523, 529 tbl.14.3.

[115] Id.

[116] Id. at 531 tbl.14.4.

[117] Chew & Kelley, supra note 7, at 71-72.

[118] For example, I teach a seminar at the University of Pittsburgh School of Law entitled "Harassment in the Workplace," in which each student selects a form of harassment to study in detail. After their research, the class collaborates as a group on commonalities and dissimilarities in the causes, manifestations, and legal remedies of the varied forms of harassment.

[119] Title VII of the Civil Rights Act of 1964 is directed at both racial and sexual harassment. See 42 U.S.C. § 2000e (2000). In contrast, the Civil Rights Act of 1866, from which §§ 1981 and 1983 derived, only addressed racial harassment. See Civil

Rights Act of 1866, ch. 31, 41 Stat. 27 (1866) (current version at 42 U.S.C. §§ 1981, 1983 (2000)).

[120] See **Beiner**, supra note 15, at 23, 211; Reeves, supra note 65, at 40-46. See also sources cited supra note 17.

[121] E.g., **Beiner**, supra note 15, at 23, 211.

[122] See Reeves, supra note 65, at 168-70. At the same time, Black male attorneys describe their bind as individuals with "male privilege" yet lack of the protection of "White privilege."

> [African American male - describing an informal conversation between male attorneys:] They get very graphic, but most of the time, they are talking about White women, and can you imagine the reaction if I were to join in on that conversation. As a Black man, I have to be very careful about how I negotiate those conversations. On one hand, I am "privileged" because I am being included in the

> conversation, and inclusion is the name of the game in law firms. But on the other hand, if they were to hear a Black man talk about these White women in the same way, as sexual objects, the perception of that conversation is dramatically different.

Id. at 167-68.

[123] Id. at 170.

[124] See sources cited supra note 17. See also Tara E. Kent, Sexual Harassment in a Multicultural Workplace 22-28 (May 2002) (unpublished Ph.D. thesis, Purdue University) (on file with author) (summarizing research on sexual harassment of women of color).