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The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race

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THE REALISM OF RACE IN JUDICIAL DECISION MAKING: AN EMPIRICAL ANALYSIS OF PLAINTIFFS' RACE AND JUDGES' RACE

Pat K. Chew & Robert E. Kelley*

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American society is becoming increasingly diverse. At the same time, the federal judiciary continues to be predominantly White. What difference does this make? This article offers an empirical answer to that question through an extensive study of workplace racial harassment cases. It finds that judges of different races reach different conclusions, with non-African American judges less likely to hold for the plaintiffs. It also finds that plaintiffs of different races fare differently, with African Americans the most likely to lose and Hispanics the most likely to be successful. Finally, countering the formalism model's tenet that judges are color-blind, the results suggest that judges of one race are more likely to hold for plaintiffs of the same race, suggesting a tendency toward insider group preferences. These findings illustrate the complex race dynamics in judicial decision-making and the consequences of a judiciary that does not reflect the citizenry's racial diversity. The article concludes that an integrated judiciary would be more responsive and accountable to society, while still exercising its principled decision-making.

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I. INTRODUCTION

Given all the media attention dedicated to race, affirmative action, post-racial politics, and political correctness, it would not be surprising that people believe that the judiciary is diverse and that minorities fare well in the judicial system. The reality is more complicated and less heartening. For example, the federal judiciary remains predominantly White at 83% versus 17% minority composition.¹ Of these minority judges, the largest group is African American, followed by Hispanic, and Asian American at a distant third.² To put these percentages in a broader context, the cumulative 17% minority representation is not proportional to the minorities in the general population, which is double at approximately 34%.³ In fact, both the percentages of minority judges and minority lawyers⁴ are not reflective of American society's racial composition, with minority lawyers even more underrepresented than minority judges. So, although more minority judges sit on the federal bench today than fifty years ago,⁵ providing evidence of progress within the last half century, it still is a long way from representing the faces of America.

Unfortunately, diversification of the judiciary has stalled in more recent decades. Consider, for instance, that appointments of all racial minority judges in the George H. W. Bush administration added up to 10.2%,⁶ in the William Clinton administrations 24.6%,⁷ and in the George

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1. The descriptive statistics on federal judges in this article are based on calculations of information available from the comprehensive "History of the Federal Judiciary" database available through the Federal Judicial Center, http://www.fjc.gov/history/home.nsf/page/research_categories.html (last visited Feb. 1, 2012) [hereinafter Federal Judicial Center]. This website provides biographical data about the federal judiciary, including judges' race and gender, party of the nominating president, commission date, and service status (active, senior, sitting). The statistics cited here on current White and minority composition, for instance, were obtained by a search of the "race or ethnicity" and "query limited to sitting judges" categories.
 2. *Id.* African Americans constitute 5.2%, Hispanics 3.1%, and Asian Americans 0.71% of the federal bench.
 3. U.S. CENSUS BUREAU, *Resident Population by Race, Hispanic Origin, and Age: 2000 and 2008*, in STATISTICAL ABSTRACT OF THE UNITED STATES 2010: THE NATIONAL DATA BOOK 13 tbl.9 (129th ed. 2010). Based on the percentage representations of these groups of the total in 2008: 12.8% Black or African American alone; 1% American Indian, Alaska Native alone; 4.6% Asian alone and Native Hawaiian, Other Pacific Islander alone; and 15.4% Hispanic origin alone, all totaling 33.8%.
 4. Black, Asian, and Hispanic lawyers constitute 11.3% of total lawyers. U.S. CENSUS BUREAU, *supra* note 3, at 387 tbl.603 ("Employed Civilians by Occupation, Sex, Race, and Hispanic Origin: 2008").
 5. Federal Judicial Center, *supra* note 1. These statistics were obtained by searching the "race or ethnicity" and "confirmation date before Feb. 1, 1962" categories, showing five African American and one Hispanic judge in 1962. A search of "race or ethnicity" and "query limited to sitting judges" categories resulted in 120 African American, 83 Hispanic, and 17 Asian American judges as of Feb. 1, 2012.
 6. *Id.* Of these appointments, 5.9% were African American and 4.3% were Hispanic. There were no Asian American or American Indian appointments. The data for these statistics were obtained by a search of the "nominating president" and "race or ethnicity" of the judges categories.
 7. *Id.* Of these appointments, 16.6% were African American, 6.3% were Hispanic, 1.4% were Asian American, and 0.3% American Indian.

W. Bush administrations 17.9%.⁸ However, President Barack Obama has made a considerable effort to reverse this trend, diversifying the federal judiciary more than any other President.⁹ In its first three years, the Obama administration contrasted dramatically with its predecessors, with minorities totaling 36.6% of all of appointments.¹⁰ Thus, while 75% to 90% of his predecessors' appointments were White, less than two-thirds of Obama's appointments are of that racial background.

Exactly what would having more judges of color mean? A judiciary whose racial composition more closely reflects society's racial composition has important symbolic value,¹¹ and this symbolism would not go unnoticed. Journalist Mike Green puts it this way: "If people of all races are to believe in judicial fairness, a more diverse bench is a good place to start."¹² As recent events illustrate, race and its relationship to fairness in the U.S. justice system continue to be a hot-button issue.¹³

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8. *Id.* Of these appointments, 7.4% were African American, 9.3% were Hispanic, and 1.2% were Asian American. There were no American Indian appointments.
 9. These judicial appointments have not occurred without political difficulties and controversies. See, e.g., Charlie Savage, *Ratings Shrink President's List for Judgeships*, N.Y. TIMES (Nov. 22, 2011), <http://www.nytimes.com/2011/11/23/us/politics/screening-panel-rejects-many-obama-picks-for-federal-judgeships.html> (noting that the American Bar Association (ABA) has disqualified a higher percentage of Obama's nominations than those of Presidents Clinton or George W. Bush). See also Charlie Savage, *A Judge's View of Judging Is on the Record*, N.Y. TIMES (May 14, 2009), <http://www.nytimes.com/2009/05/15/us/15judge.html>; Carolina A. Miranda, *Just What is a 'Wise Latina,' Anyway?*, TIME, July 14, 2009, available at <http://www.time.com/time/politics/article/0,8599,1910403,00.html>; Sotomayor "Wise Latina" Quote — Not Very Wise, COMMON SENSE LOST?, (July 12, 2009, 11:33 AM), <http://commonsense-wherehasitgone.blogspot.com/2009/07/sotomayor-wise-latina.html>; and Charles H. Green, *Sotomayor Was Right the First Time: A Wise Latina Does Know More*, THE HUFFINGTON POST (July 27, 2009, 7:09 AM), http://www.huffingtonpost.com/charles-h-green/sotomayor-was-right-the-f_b_245216.html (accounting the controversy over the nomination of now-Justice Sonia Sotomayor).
 10. Federal Judicial Center, *supra* note 1. Of these appointments, 18.3% were African American, 11.9% were Hispanic, and 6.4% were Asian American. There were no American Indian appointments.
 11. Researchers label these symbolic and substantive values differently. See, e.g., Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 390 (2010) (calling symbolic value "social legitimacy" and calling substantive value "participation and perspective" among other descriptions); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 301–02 (2004) (calling symbolic value "descriptive representation").
 12. Mike Green, *Report: Race Matters in Judicial Decision-Making*, THE HUFFINGTON POST (Feb. 13, 2010, 5:40 PM), http://www.huffingtonpost.com/mike-green/report-race-matters-in-ju_b_461526.html.
 13. Two examples illustrate. The first is the controversy over now-Justice Sonia Sotomayor's comments about the "wise Latina," *supra* note 9. See *Race & Gender of Judges Make Enormous Differences in Rulings, Studies Find*, A.B.A. J. L. NEWS NOW, Feb. 6, 2010, http://www.abajournal.com/news/article/race_gender_of_judges_make_enormous_differences_in_rulings_studies_find_aba/ (news article on the study). The second is the considerable interest in the legal community over an empirical study finding that judges' race made a significant difference in outcomes in racial harassment cases. See Molly McDonough, *10 Most Popular Posts: Race & Gender of Judges; Why Lawyers Should Work Less; & Lawyers in Trouble*, A.B.A. J. L. NEWS

Nonetheless, does a more racially diverse judiciary actually have “substantive value,” thus altering jurisprudential content and judicial decision-making? Would case outcomes change, and if so, would they change for judges and plaintiffs of particular races?

Emerging empirical research has produced some answers. For instance, a half-dozen studies indicate that White judges and African American judges have different decision-making patterns in employment discrimination cases.¹⁴ In criminal law cases, however, the results are mixed, with some showing racial differences between White and African American judges and others finding no differences.¹⁵ This research on judges’ race focuses almost exclusively on White judges and African American judges, with very little exploration of judges of other races and ethnicities. Furthermore, while studies of criminal law cases have also considered how the defendants’ race relates to case outcomes,¹⁶ very little research exists on how the plaintiffs’ race in civil cases, including discrimination, affects case outcomes.¹⁷

Now, Dec. 28, 2010, http://www.abajournal.com/news/article/most_read_in_2010 (noting that the “Race and Gender . . . ” article was the most viewed ABA online article for that year.)

14. The majority of studies of judges’ race in civil rights cases (including employment discrimination cases) found differences in the decision-making patterns of federal judges of different races. See Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008); Sarah Westergren, Note: *Gender Effects in the Courts of Appeals Revisited: The Data Since 1994*, 92 GEO. L.J. 689 (2004); Kenneth L. Manning, *¿Como Decide?: Decision-Making by Latino Judges in the Federal Courts* (Apr. 14, 2004) (unpublished manuscript, on file with authors); Charles M. Cameron & Craig P. Cummings, *Diversity and Judicial Decision-Making: Evidence from Affirmative Action Cases in the Federal Courts of Appeals, 1971–1999* (Mar. 30, 2003) (unpublished manuscript, on file with authors); 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).

In contrast, a minority of studies did not find race differences. See Farhang & Wawro, *supra* note 11; Carol T. Kulik, Elissa L. Perry, & Molly B. Pepper, *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes*, 27 LAW & HUM. BEHAV. 69 (2003); Tajuana Massie et al., *The Impact of Gender and Race in the Decisions of Judges on the United States Courts of Appeals* (Apr. 25, 2002) (unpublished manuscript, on file with authors); Jennifer A. Segal, *Representative Decision-Making on the Federal Bench: Clinton’s District Court Appointees*, 53 POL. RES. Q. 137 (2000).

Some studies have also considered other judicial characteristics, such as judges’ political ideology, and gender to see how these characteristics interact with the judges’ race in predicting case outcomes. See, e.g., Chew & Kelley, *supra*; Kulik, *supra*; Cameron & Cummings, *supra*.

15. CASSIA L. SPOHN, *HOW DO JUDGES DECIDE?* 102 (2002). See, e.g., Todd Collins & Laura Moyer, *Gender, Race, and Intersectionality on the Federal Appellate Bench*, 61 POL. RES. Q. 219 (2008); Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District Level Judicial Demographics*, 34 J. LEGAL STUD. 57 (2005) (finding differences in case outcomes).
16. See SPOHN, *supra* note 15, at 101–17.
17. An exception is Crowe, *supra* note 14, which considered both the race of the judges and plaintiffs in discrimination cases.

This empirical study furthers our understanding in specific ways. To begin, this is the first study that explores whether the plaintiffs' race makes a difference in racial harassment case outcomes.¹⁸ Second, while most research focuses on White versus African American judges, this study also includes both Hispanic judges and plaintiffs. Hispanics are a fast growing ethnicity in the federal judiciary, as well as a fast growing ethnic population in the country.¹⁹ Finally, in addition to considering the plaintiffs' race and the judges' race independently of each other, this study considers the effects of the two variables simultaneously, looking for the interactions between them and case outcomes. Namely, it explores whether a judge of one race appears to favor or disfavor plaintiffs of various races.

As subsequently explained, the study's overall empirical conclusions are consistent and clear. When considered independently, the plaintiffs' race matters, and the judges' race affects whether plaintiffs are successful or not. Furthermore, there are significant interactive effects, so that the particular combination of judge's race and plaintiff's race makes a difference — signaling a general tendency for a judge of one race to find more persuasive the claims of a plaintiff of the same race. In the concluding discussion, this Article explores the implications of these findings, arguing that a more racially integrated judiciary serves important democratic purposes and ultimately results in more societally responsive and informed decisions.

II. DESCRIPTION OF STUDY

Plaintiff-employees in workplace racial harassment cases allege they were harassed because of their race, resulting in a "racially hostile" work environment.²⁰ The authors have discussed at length in earlier works the legal requirements, jurisprudence, and exhaustive litigation process for racial harassment claims.²¹ These racial harassment cases are an important area of law and particularly appropriate for studying the effects of race in judicial decision making. Thousands of racial harassment complaints are filed with the Equal Employment Opportunity Commission

18. Crowe, *supra* note 14, studied discrimination cases, which may have included some racial harassment cases. The current study focuses exclusively on racial harassment cases.

19. Federal Judicial Center, *supra* note 1 (searching "commission date" by Jan. 1, 2000 and Jan. 1, 2012, the number of commissioned Hispanic judges increased from 50 to 104 in that time period, in comparison to African American judges at 129 to 176); Conor Dougherty, *U.S. Moves Closer to Minority Majority*, WALL ST. J. (Apr. 31, 2011, 5:00 AM), <http://blogs.wsj.com/economics/2011/08/31/u-s-moves-closer-to-minority-majority/> (describing results of Brookings Institute report on changing racial demographics, including growth of Hispanic population).

20. Federal racial harassment claims, as a form of workplace race discrimination, are based on the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (2006).

21. See Pat K. Chew, *Seeing Subtle Racism*, 6 STAN. J. C.R. & C. L. 183, 187–98 (2010) (describing traditional and emerging racial harassment jurisprudence) [hereinafter Chew, *Seeing*]; Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 55–63 (2006) (explaining racial harassment law and dispute resolution process) [hereinafter Chew & Kelley, *Unwrapping*].

each year, and the number is on the rise.²² These cases present an intriguing racial triad: the complaining employees are almost always minority and most typically African American, while the judges presiding over these cases and the alleged harassers are most often White.²³ Thus, most commonly in these cases, White judges must assess the credibility of African American employees' perceptions of racial harassment by their White supervisors or co-workers. The legal inquiries focus specifically on race in the workplace. Courts require that plaintiffs show their supervisors or co-workers (1) harassed them so "severely or pervasively" that it altered their work environment; and (2) that the harassment occurred because of the plaintiff's race, and not for some non-race-related reason.²⁴ Thus, the judge must assess the parties' depiction of racial dynamics in the workplace to see if these requirements are met. While the Supreme Court has laid out these fundamental legal principles, it has left much discretion to federal judges in interpreting them.²⁵

The database in this study consists of all reported racial harassment cases brought under Title VII of the Civil Rights Act in the federal district courts of six representative circuits between 2002 and 2008.²⁶ In particular, this study analyzes the effects of judges' race and plaintiffs' race on case outcomes. As with all empirical research based on reported judicial opinions, inherent limitations exist.²⁷ Reported judicial opinions do not capture all disputes. Some disputes are settled and are never part of the litigation process. Even if they are part of the litigation process, judges do not write opinions on all cases and not all written judicial opinions are included in the reporter systems. On the other hand, judicial opinions provide valuable insights and are the traditional source for judges' legal reasoning and decision-making patterns.

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22. Stephanie Armour, *Racial Harassment Lawsuits at Work Go Up*, USA TODAY, Oct. 26, 2007, at 1B, available at http://www.usatoday.com/money/workplace/2007-10-25-noose-harassment-eeoc_N.htm (noting over 7,000 complaints in one year); EEOC, Enforcement & Litigation Statistics, <http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm> (last visited Feb. 1, 2012). See also Chew & Kelley, *Unwrapping*, *supra* note 21, at 51 n.4 (citing research documenting racial harassment in the workplace).
 23. Chew & Kelley, *supra* note 14, at 1143.
 24. See the trilogy of Supreme Court cases laying out key legal principles for discriminatory harassment claim, including racial harassment: *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Sys.*, 510 U.S. 17 (1993); *Oncale v. Sundowner Offshore Serv.*, 523 U.S. 75 (1998). See also Chew, *Seeing*, *supra* note 21, at 187–91 (explaining these cases). In addition, employers can argue affirmative defenses. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 72 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
 25. See Chew, *Seeing*, *supra* note 21, at 187–91.
 26. Searching both LEXIS and WESTLAW, all racial harassment cases in the First, Second, Fifth, Seventh, Ninth, and Eleventh circuits were identified. These circuits were selected because they represented circuits from all regions of the United States and included large, racially diverse populations. Cases that had multiple plaintiffs and uncertain procedural outcomes (*i.e.*, not clearly a plaintiff win or loss) were not included in the statistical analysis.
 27. See Chew & Kelley, *supra* note 14, at 62–63 (further explaining that only a very small percentage of original complaints result in a published judicial opinion).

Also keep in mind that the vast majority of cases (89%) in this study dealt with the defendant-employers' motions for summary judgment.²⁸ While the courts' rulings on motions for summary judgment are not technically the final resolution of the disputes, the courts' granting of the employers' motions are a significant rebuff of plaintiffs' cases. It prevents them from proceeding to a trial, unless plaintiffs are able to obtain appellate reversals of the district courts' decisions. Plaintiffs' successes at the appellate level, however, are unlikely.²⁹ Thus, this study considered the courts' granting of the employer-defendants' motions for summary judgment a "plaintiff loss."

The effective meaning of the courts' denials of the employers' motions, on the other hand, is less certain.³⁰ The plaintiff-employees can technically proceed to trial, where they may ultimately succeed or fail on the cases' merits. In practice, the denial of the employers' motions likely prompts employers to actively engage plaintiffs in settlement negotiations. Plaintiff-employees view both possibilities positively, and, therefore, this study considered the court's denial of the employer-defendants' motions a "plaintiff success."

As discussed below, standard statistical analyses were used to study the database, including descriptive statistics, chi-square analyses, and logistic regression analyses.³¹ While a range of established research methods for this type of research are available to scholars, these methods are widely accepted.³²

Since statistical terms and concepts are less common in the legal literature than in social science literature, a brief primer here assists the reader. More detailed technical explanations are provided in the footnotes.³³ In addition to basic descriptive statistics (e.g., the number and percentage of the cases where plaintiffs were successful), other statistical methods are

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28. See 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, 839 (2004) (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.*
29. See Chew & Kelley, *Unwrapping*, *supra* note 21, at 90 tbl.15 (indicating only 24.5% of employee-plaintiffs were successful at the appellate level).
30. See *supra* note 28.
31. See, e.g., ROBERT M. LAWLESS, JENNIFER K. ROBBENNOLT & THOMAS. S. ULEN, *EMPIRICAL METHODS IN LAW* 248–64, 300–09, 345–50, 405, 418, 421, 425 (2010) (describing chi-square and logistic regression modeling and their use in these kinds of studies); PAUL BREST & LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS* 115–210 (2010) (discussing generally the use of statistics in legal and policy problem-solving).
32. LAWLESS ET. AL., *supra* note 31.
33. See *infra* note 35 (discussing logistic regressions) and note 55 (discussing multiple logistic regression modeling).

commonly used to further interpret the meaning and consequences of these numbers and percentages. Chi-square tests and logistic regression modeling, in particular, are statistical methods used to determine the probability of some occurrence. For instance, the descriptive statistics may show a difference between the decision-making patterns of African American judges versus all other judges. The results of chi square testing and logistic regression modeling reveals whether something meaningful is occurring (often referred to as statistical significance) or if this difference between African American judges and all other judges is merely happening by chance.³⁴

The usual marker of statistical significance is a probability (“p”) value of less than .05 (typically written as $p < .05$), meaning the difference would occur less than five times out of one hundred times. In other words, it is not very likely to happen; or stated another way, the difference is not occurring by chance and therefore is considered statistically significant. If the p value is even less, then the difference is even more significant. For example, p less than .01 ($p < .01$) means that this difference would occur only one time out of one hundred instances. The p less than .05 cutoff is not sacrosanct. In some cases, it may be reasonable to relax the standard due to various factors, such as small sample size. In other cases, one may want it to be more stringent. However, most researchers use the .05 cutoff. Thus, if the p value is greater than .05, the occurrence (i.e., the difference between judges’ decision-making patterns) is considered to be happening by chance — the difference is *not* meaningfully significant.

In addition to providing another check of p values, logistic regression modeling yields odds ratios (“OR”). OR gives an idea of how dramatically one’s “odds” increase or decrease in given situations, for instance, the probability of a plaintiff-employee being successful before a White judge. To illustrate, an OR of 2.0 would indicate that it is twice as likely as normal for that event to occur. As we move through the study’s findings on the relationship between plaintiffs’ race, judges’ race, and case outcomes, the relevant p values indicating statistical significance and OR indicating odds of an event occurring are provided and discussed.

III. FINDINGS AND DISCUSSION

Overall, plaintiff-employees find it very difficult to succeed in their racial harassment claims, while employer-defendants are much more likely to be successful. Out of 473 judicial opinions on racial harassment claims, plaintiffs were successful only 22.2% of the time, while defendants were successful in over three out of four cases. This 22.2% is the baseline against which cases with certain characteristics (e.g., cases brought by plaintiffs of a particular race or cases heard by judges of a particular race) are compared.

The following discussion begins with the findings on the effect of the plaintiffs’ race on case outcomes, is followed by the findings on the effect

34. BREST & KRIEGER, *supra* note 31, at 141–46 (further explaining the concept of statistical significance).

of the judges' race, and concludes with the interactive effects of the judges' race and plaintiffs' race.

A. Plaintiffs' Race Matters

This empirical study is the first to consider the relationship between the plaintiffs' race and case outcomes in racial harassment cases. While members of any racial group can bring racial harassment claims, African American employees brought 74% of these claims under federal employment discrimination laws. Hispanics, Whites, and Asian Americans were plaintiffs in the remaining 26% of the cases in this study.

As shown in Table 1, the first finding is that success rates vary among plaintiffs of different racial groups. While all groups are less likely to win than to lose, Hispanic (37.3%) plaintiffs have the highest success rates. In contrast, Asian American (4.3%) and African American (20.7%) plaintiffs have substantially lower success rates. These differences among plaintiff groups are statistically significant ($p=.009$), indicating that these differences are not occurring by chance. The comparatively high Hispanic win rate and the comparatively low Asian American win rate primarily drives this significance. In contrast to plaintiffs' race, the gender of plaintiffs was not significant to case outcomes with males and females succeeding at the same 22.2% rate.

TABLE 1: PLAINTIFFS’ AND JUDGES’ CHARACTERISTICS BY CASE OUTCOMES

<i>Comparisons</i>	<i>Plaintiffs Successful</i>		<i>Plaintiffs Unsuccessful</i>		<i>Significance Levels (p)</i>
	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>	
All Cases	105	22.2	368	77.8	
Plaintiffs’ Characteristics					
(Test on plaintiffs’ race is 3 degrees of freedom)					
African American plaintiffs vs. all others					0.009**
African American (n = 352)	73	20.7	279	79.3	0.19
Others (n = 121)	32	26.4	89	73.6	
Hispanic plaintiffs vs. all others					0.006**
Hispanic (n = 51)	19	37.3	32	62.7	
Others (n = 422)	86	20.4	336	79.6	
Asian American plaintiffs vs. all others					0.035*
Asian American (n = 23)	1	4.3	22	95.7	
Others (n = 450)	104	23.1	346	76.9	
White plaintiffs vs. all others					0.56
White (n = 47)	12	25.5	35	74.5	
Others (n = 426)	93	21.8	333	78.2	
Sex of plaintiffs (Female vs. male)					
Female (n = 185)	41	22.2	144	77.8	0.99
Male (n = 288)	64	22.2	224	77.8	
Judges’ Characteristics					
(Test on judges’ race is 3 degrees of freedom)					
African American judges vs. all others					0.01*
African American judge (n = 45)	19	42.2	26	57.8	0.001**
Others (n = 428)	86	20.1	342	79.9	
Hispanic judges vs. all others					0.35
Hispanic judge (n = 32)	5	15.6	27	84.4	
Others (n = 441)	100	22.7	341	77.3	
Asian American judges vs. all others					1.00
Asian American judge (n = 3)	0	0.0	3	100.0	
Others (n = 470)	105	22.3	365	77.7	
White judges vs. all others					0.07
White judge (n = 393)	81	20.6	312	79.4	
Others (n = 80)	24	30.0	56	70.0	
Age at time of Case (Mean ± SD)	60.2 ± 8.8		60.7 ± 9.5		0.60
Experience at time of Case (Mean ± SD)	12.9 ± 8.4		12.4 ± 9.1		0.60
Sex of judges (female vs. male)					
Female judges (n = 105)	24	22.9	81	77.1	0.85
Male judges (n = 368)	81	22.0	287	78.0	
Political Affiliation of judges					
Republican judge (n = 239)	53	22.2	186	77.8	0.99
Democratic judge (n = 234)	52	22.2	182	77.8	

**<0.01

* <0.05

Logistic regression analyses on plaintiffs’ race provide further details on how the plaintiffs’ race matters.³⁵ While the chi-square analyses shown in Table 1 compare plaintiffs of each race with all other plaintiffs,

35. Logistic regressions allow 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 case characteristic to the odds of success without that characteristic. 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

the logistic regression analyses shown in Table 2 compare the outcomes for plaintiffs of each race in this general way and also in head-to-head comparisons of plaintiffs' races. Asian American plaintiffs were dropped from this analysis because of their comparatively small sample size. The analyses indicate that the success rate of Hispanic plaintiffs as compared to other plaintiffs is very significant ($p=.007$). The logistic regression analyses predict that Hispanics plaintiffs are 2.32 times more likely to succeed than others, or in the inverse, that others are .43 times less likely to succeed.³⁶ More particularly, the relationship between Hispanic and African American plaintiffs helps most explain this Hispanic plaintiff advantage ($p=.01$).

plaintiffs will be successful and an odds ratio less than 1.0 indicates an increased likelihood that plaintiffs will be unsuccessful.

The inverse of the odds ratios can also be calculated, by dividing the odds ratio (OR) number into 1. Thus, while an OR of 2.0 indicates the outcome is twice as likely to occur, an OR of 0.50 means it is one-half as likely to occur (or mathematically, twice as likely to *not* occur). Likewise, you can determine the inverse of any OR less than 1.0 into an OR greater than 1.0 by dividing 1 by the number. However, when you determine the inverse OR's, you must also reverse the terms in the logistic regression model. So an OR of 0.57 for White judges versus all other judges means that White judges are .57 times less likely (or 43% less likely) to rule favorably than other judges. By transposing the OR, you can say that other judges are 1.75 times more likely than White Judges to hold for plaintiffs.

Since some judges heard multiple cases, a statistical concern is whether these overlapping cases affect the outcomes. In other words, does the judge's ruling in one case affect the rulings in subsequent cases? To handle this possibility, we utilized both logistic regressions and Generalized Estimation Equation (GEE) models. A GEE model is used to fit a Generalized Linear Model (GLM) when we know that there may be some unknown correlation present in the model. They are similar to logistic regressions and are used often for nested models where the correlation may exist in the natural grouping of data (in this study, one judge with multiple cases). The results of both the logistic regressions and the GEE were almost identical. We can assume that, since we saw very similar results in the logistic regressions and the GEEs that the grouping of plaintiff within judge did not influence the outcome of the analyses. In other words, the potential dependencies among the judge's decisions did not surface. Since the GEE results take into account the potential dependencies, we reported them in the tables rather than the logistic regression results. However, we use the term "logistic regression" in the text because it is a more familiar term and because the results in this study are so close as to be interchangeable.

We also performed a measure of the overall explanatory power of each model. We calculated Nagelkerke's generalized R² as a measure of the overall explanatory power of each fitted model. R² 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).

36. For the reader's convenience, the OR and inverse OR are provided in Table 2. Keep in mind that when using the inverse, the reader must also reverse the order of the groups being compared, as explained in *supra* note 35.

TABLE 2. PLAINTIFFS' RACE AND JUDGES' RACE: ODDS RATIOS AND SIGNIFICANCE LEVELS

	<i>Odds Ratios</i>	<i>Inverse Odds Ratios</i>	<i>Significance Levels</i>
Plaintiffs' Race			
African American plaintiffs vs. all others	0.73	(1.37)	0.19
Hispanic plaintiffs vs. all others	2.32	(.43)	0.007**
White plaintiffs vs. all others	1.23	(.81)	0.56
Hispanic plaintiffs vs. White plaintiffs	1.72	(.58)	0.22
White plaintiffs vs. African American plaintiffs	1.30	(.77)	0.47
Hispanic plaintiffs vs. African American plaintiffs	2.25	(.44)	.01*
Judges' Race			
African American judges vs. all others	2.90	(.34)	001**
Hispanic judges vs. all others	0.63	(1.6)	0.35
White judges vs. all others	0.57	(1.8)	0.04*
White judges vs. Hispanic judges	1.30	(.77)	.60
African American judges vs. White judges	2.91	(.34)	0.001**
African American judges vs. Hispanic judges	3.80	(.26)	.02*

** <0.01

* <0.05

Discussion of Plaintiffs' Race. The most apparent question from these findings on plaintiffs' race is: Why do Hispanic plaintiffs, and to a lesser extent White plaintiffs, fare so much better than African American and Asian American plaintiffs? Alternative explanations are possible, although some are more plausible than others.³⁷

One simple explanation might be that different racial groups bring different quality of cases to the court. Following this reasoning, Hispanic plaintiffs, for some reason, may bring stronger cases, while African Americans and Asian Americans may bring weaker cases. Given the large number of cases brought by African American plaintiffs, it is possible that they bring a broader range of cases than other groups, including some percent of weaker cases that bring down the overall quality of their cases in the aggregate. Or perhaps African American and Asian American plaintiffs are more sensitive to what they perceive as racial slights, thus misinterpreting workplace behavior and seeing racial animus when it does not exist. Perhaps Hispanic plaintiffs, recognizing they have an uphill battle with these kinds of legal claims, proceed with lawsuits only when their harassment is blatantly egregious and racist. Or perhaps they

37. Another possible albeit unlikely explanation involves statistics. The results could be a function of the number of cases for each group. Since 74% of the plaintiffs are African American, they heavily influence the average. Since all other groups bring only 6% to 14% as many cases as African Americans, a statistical anomaly may be occurring. However, this study used stringent, conservative, statistical testing that accommodates for smaller numbers and large discrepancies between the numbers in each group, so there is only a very small chance that the results are a statistical aberration. In future studies where the number of cases for all the racial groups would be larger, this possible explanation can be tested.

have more skilled lawyers who more successfully maneuver through the justice system.

The problem with attributing these disparate racial outcomes to the quality of the cases is that, as far as the authors know, no evidence exists that plaintiffs of a particular race bring weaker or stronger cases or that lawyers for particular racial groups are more legally sophisticated or knowledgeable about the law. Instead, all plaintiffs, regardless of color, have to satisfy the substantial administrative steps that precede bringing a lawsuit,³⁸ and their lawyers are presumably comparably aware of the difficulties in these types of claims.

Another possible explanation for these findings is that judges are less sympathetic to some groups. Given the long history of African Americans' claims of discrimination, perhaps judges are weary of their complaints, or judges believe African American plaintiffs exaggerate or improperly attribute supervisors' conduct to racial bias. Judges may find it difficult to reconcile Asian Americans' image as the model minority with their claims of being victimized in the workplace, thereby viewing their complaints as less credible.³⁹ Asian American and African American plaintiffs are also the most physically different than the White judges, accentuating insider-outside distinctions.⁴⁰ And perhaps Hispanic plaintiffs look more like White judges, prompting an unconscious sense of common identification.

B. Judges' Race Matters

Given the numerical dominance of White federal judges, not surprisingly, White judges heard over 80% of the 473 total cases. African American and Hispanic judges heard a smaller number of cases, but the numbers were large enough to study statistically. Asian American judges heard too few cases to study statistically and so were dropped from further analysis.⁴¹

The statistical analyses indicate that judges of different racial and ethnic groups have different decision-making patterns. Simply put, the race of the judge matters in predicting how these racial harassment cases turn out. As shown in Table 1, descriptive and chi-square analyses found that African American judges were the most likely to hold for the plaintiffs; plaintiffs were successful in 42.2% of their cases before African American judges compared to the plaintiffs' baseline success rate of 22.2%. In con-

38. See Chew & Kelley, *Unwrapping*, *supra* note 21, at 55–63.

39. See, e.g., Pat K. Chew & Luke T. Kelley-Chew, *The Missing Minority Judges*, 14 J. GENDER, RACE & JUST. 179, 189–91 (2010) (further discussing this possibility).

40. For further discussion of in-group preferences, see *infra* text accompanying note 59. Also, as mentioned when interpreting the effect of plaintiffs' race, *supra* note 36, this interaction between judges and plaintiffs might result from statistical anomalies. Thus, it is possible albeit unlikely that if every combination of judges and plaintiffs had hundreds of cases, then this race-matching effect could disappear. Once again, though, the stringent statistical testing used here would suggest that this statistical anomaly is not occurring.

41. See Chew & Kelley-Chew, *supra* note 39 (discussing the possible relationship between the absence of Asian American judges and the low success rates of Asian American plaintiffs in racial harassment cases).

trast, plaintiffs had comparatively worse outcomes before White judges with a 20.6% success rate, and before Hispanic judges with a 15.6% success rate. These differences among case outcomes on the basis of judges' race are statistically significant ($p=.01$), meaning that these differences would occur by chance only 1 in 100 times. The difference between African American judges and all other judges ($p<.001$) primarily drives the overall result.

To test the robustness of the findings from the chi-square analyses described above, logistic regression analyses on judges' race also were conducted.⁴² As shown in Table 2, results of the logistic regression analyses confirm the significance of judges' race. These statistical results are primarily attributable to significantly different decision making patterns between African American judges and other judges (namely Hispanic and White judges) ($p=.001$). The odds ratio (OR) predicts that plaintiffs coming before African American judges are 2.9 times more likely to be successful than before other judges. Logistic regressions also indicate the inverse: other judges are .3 times less likely to hold for plaintiffs than African American judges.⁴³ Similarly, but slightly less statistically significant, White judges are .6 times less likely to rule for the plaintiffs than all other judges, or stated in the inverse, other judges are 1.8 times more likely to rule for the plaintiffs than White judges ($p=.04$).

The race-to-race analysis in Table 2 indicates that African American judges are 2.9 times more likely to rule in favor of plaintiffs than White judges ($p=.0001$), or inversely, that White judges are .3 times less likely to rule for plaintiffs than African American judges ($p=.0001$). Consistent with some earlier research on race-related discrimination cases,⁴⁴ the findings here show that African American and White judges have contrasting decision making patterns, with African American judges more likely to hold for the plaintiffs.

Note, furthermore, that contrary to what a "monolithic minority judge" model would suggest, African American judges and Hispanic judges had significantly different decision making patterns ($p=.02$), with African American judges 3.8 times more likely to hold for the plaintiffs, or in the inverse, that Hispanic judges are .3 times less likely to hold for the plaintiffs. Also striking, the analysis shows that White and Hispanic judges do not have significantly different decision making patterns ($p=.60$). Thus, whether plaintiffs have a White judge or a Hispanic judge appears not to have significant consequences in the outcomes of racial harassment cases.

While the focus in this study is on the judges' race in relation to case outcomes, the judges' age, experience, political affiliation, and gender also were briefly examined. As shown in Table 1, neither the judges' age nor their years of judicial experience appear to affect case outcomes. Judges who held for or against plaintiffs had similar ages (mean of 60.2 years versus 60.7 years) and experience levels (12.9 years versus 12.4 years).

42. See *supra* text accompanying note 35 (explaining logistic regressions).

43. See *supra* text accompanying note 35 (explaining inverse ratios).

44. See *supra* note 14.

Judges who were appointed by a Democratic president (“Democratic”) and those appointed by a Republican president (“Republican”) have almost identical decision making patterns.⁴⁵ Finally, the gender of judges also does not appear to make a meaningful difference in case outcomes (with female judges holding for plaintiffs 22.9% of the time versus 22.0% of the time for male judges).⁴⁶

Discussion of Judges’ Race. A plaintiff-employee typically sues on the basis of several events that have occurred in the workplace. The judge must decide if these events are isolated and unrelated or, instead, form a pattern constituting racial harassment and creating a hostile work environment. Some judges connect the dots between the events, while others do not.

It could be that White judges as a whole are less likely to connect the dots. Or, they discount some of the dots, explaining them away as typical workplace behavior or an insensitive form of humor that is not race-related or serious. In contrast, African American judges may be more inclined to connect the dots. They see these numerous events as contributing to the same end, namely, creating a hostile work environment based on race. In their view, these events are not isolated; rather they are pieces of an overall picture of discriminatory conduct. They are also more likely to give credence to subtle stereotyping of minority groups, such as “coded” statements linked to stereotyping of racial minorities.⁴⁷

While not clear why White and African American judges might have these different inclinations, one possible explanation is that White judges are less likely to have personally experienced or even observed racial harassment in their own lives. In this sense, they are naïve about the entire phenomena. In the same way that a judge’s military experience, family business, or Ivy League education may provide some context in relevant cases, so would a judge’s experience as a racial minority.⁴⁸ Thus, in American society, African American judges have more probably been targets of

45. Since judges’ party affiliation did influence outcomes in our previous research, logistical regressions were conducted to substantiate the insignificance of judges’ party in this study ($p > .05$). Our earlier study covered a twenty-six year period from 1976 to 2002. See Chew & Kelley, *supra* note 14, at 1158–59. This current study included more recent cases between 2002 and 2008. It could be that more recently appointed judges are more politically neutral than in earlier years. The federal judicial process, beginning with the Senate Judiciary Committee and continuing in the full Senate, has become filled with political landmines in the last ten to fifteen years. Both Democrats and Republicans are on the lookout for anyone who is too far left or too far right. This process might weed out judges who will vote predictably conservative or liberal. These middle-of-the-road judges may be neutralizing a political affiliation effect.

46. See Pat K. Chew, *Judges’ Gender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions*, 14 J. GENDER, RACE & JUST. 359 (2011) (summarizing research on effect of judges’ gender in employment discrimination cases).

47. See Chew, *Seeing*, *supra* note 21, at 198–206 (describing social science research on more subtle, coded forms of racism).

48. As described by former Justice John Paul Stevens: “I’ve confessed to many people that I think my personal experience has had an impact on what I’ve done. Time and time again, not only for myself but for other people on the court, during discussions of cases you bring up experiences that you are familiar with.” Adam Liptak, *At 89*,

race-related behavior during their lives (whether it be taxi drivers refusing to pick them up, strangers insulting them with racial slurs, or supervisors crediting their achievements to affirmative action rather than their merits). Simply stated, African American judges could be much further up the learning curve of what constitutes racial harassment than their White counterparts.

These experiential-based differences are consistent with a study of federal appellate court cases dealing with race-related voting rights disputes.⁴⁹ This study found that all-White judicial panels rule less favorably for plaintiffs in these cases than panels with at least one African American judge. One explanation is that the African American judge facilitates at least one of her or his White colleagues' understanding of how to see the dots and the resulting racial discrimination pattern.⁵⁰ In other words, the White judge with the assistance of an African American colleague moves up the racial harassment learning curve in her or his efforts to more accurately interpret the law.

The current study also reveals that African American judges and Hispanic judges have distinct decision-making patterns, confirming that there is no monolithic minority judge decision-making pattern in these cases. It could be that Hispanic judges are more socially and politically conservative than African American judges, and hence more inclined to find for employers than for employee-plaintiffs or to interpret employment discrimination laws narrowly.⁵¹ Consider, for example, that Republican President George W. Bush appointed more Hispanic judges than judges from other minority groups put together.⁵² It could be that these conservative tendencies are more salient for Hispanic judges than the tendency to identify with other minorities' racial discrimination. It could also be that the life experiences of Hispanic judges on the federal bench are more like those of White judges than those of African American judges. Thus, some Hispanic judges' combination of political conserva-

Stevens Contemplates Law, and How to Leave It, N.Y. TIMES, Apr. 3, 2010, at A1 (summarizing an interview with Justice Stevens).

49. Cox & Miles, *supra* note 14, at 34–37 (discussing a study of judicial decision making in racial disenfranchisement cases).
50. Another factor may be that when an African American judge is present, White judges become more “politically correct” so as to not be seen as biased, or worse, as racist.
51. The political views of Hispanics in the United States of course are diverse, dependent in part on their original countries of origin. Those from Cuba, for instance, have been characterized as more anti-Black in their political activities, while those from Puerto Rico have more in common with Blacks. Mark Sawyer, *Racial Politics in Multiethnic America: Black and Latina/o Identities and Coalitions*, in NEITHER ENEMIES NOR FRIENDS: LATINOS, BLACKS, AFRO-LATINOS 265, 265 (Anaani Dzidzienyo & Suzanne Obler eds., 2005). See also Eduardo Bonilla-Silva, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 189 (2d ed. 2006) (finding same patterns among those of Cuban and Puerto Rican backgrounds); Mireya Navarro, *For Many Latinos, Racial Identity is More Culture Than Color*, N.Y. TIMES (Jan. 13, 2012), <http://www.nytimes.com/2012/01/14/us/for-many-latinos-race-is-more-culture-than-color.html> (describing Latinos/as' varied cultural backgrounds).
52. See *supra* note 8. See also Manning, *supra* note 14 (finding that Hispanic judges are more likely to make decisions associated with politically conservative ideologies).

tism and social backgrounds might help explain a disinclination to connect the dots in African American employees' complaints of racial harassment.

This finding that there is no monolithic minority judge is a reminder to be careful about over-generalizing about an individual judge's decision-making. In the same way that there is no monolithic minority judge, there is no monolithic African American or White judge. The study's findings describe the tendencies of the aggregate group of judges of a certain race, but they are not determinative of what a particular individual judge will do.

C. *Judges' Race and Plaintiffs' Race Interact*

Parts III.A and III.B consider judges' race and plaintiffs' race separately. This section takes the analysis one logical step further by concurrently exploring the relationship between judges' race, plaintiffs' race, and case outcomes.

The analysis begins with a simple description of the rulings of judges of each race by plaintiffs of each race⁵³:

White Judges

Success By Plaintiff Groups (Total N)

African American	18.9%	(296)
Asian American	6%	(18)
Hispanic	32.5%	(40)
White	28.2%	(38)

African-American Judges

Success By Plaintiff Groups (Total N)

African American	46.9%	(32)
Asian American	0%	(2)
Hispanic	60%	(5)
White	16.7%	(6)

Hispanic Judges

Success By Plaintiff Groups (Total N)

African American	9.5%	(21)
Asian American	0%	(3)
Hispanic	50%	(6)
White	0%	(2)

This description, on its face, suggests that outcomes for plaintiffs of a particular race vary depending on the race of their judges. For example, African American plaintiffs had a success rate of 47% before African American judges, but notably lower success rates before Hispanic judges (9.5%) and White judges (19%). In another example, plaintiffs' success rate before White judges varies depending on the plaintiffs' race: the suc-

53. This summary includes only cases where information on *both* the judges' race and the plaintiffs' race was available, while Table 2, *infra*, includes cases where judges' race and plaintiffs' race was available but not necessarily both.

cess rate ranged from Asian Americans with the lowest success rate (6%) to Hispanics with the highest success rate (32.5%). Given the small total number of Asian American (N=23) plaintiff cases and their extremely low number of successes (N=1 or 4.3%), they are excluded from subsequent analyses.⁵⁴

Another way to look at these results is to compare cases with judges and plaintiffs of the same race ("same-race" pairings such as White judges and White plaintiffs or African American judges and African American plaintiffs) with cases that have judges and plaintiffs of different races ("different-race" pairings such as White judges and African American plaintiffs or African American judges and Hispanic plaintiffs). This comparison allows us to gauge the general tendency of judges of one racial group to hold for the plaintiffs of their own racial group. Given that the baseline success rate for all plaintiffs is 22.2%, the comparisons between same-race paired cases and different-race paired cases indicate numerous deviations from that baseline.

First and most notably, Hispanic plaintiffs succeed at the highest rates in front of every judge group (African American judges 60%; Hispanic judges 50%; White judges 32.5%), which helps account for their overall success rate of 37% discussed earlier. Second, White and African American judges rule much more favorably for plaintiffs of their own race (same-race pairings) than of another race, with White judges and White plaintiffs at 28%; and African American judges and African American plaintiffs at 47%. Third, different-race pairings (excluding Hispanic plaintiffs who are treated most favorably by all judges) have success rates lower than the baseline (White judges and African American plaintiffs at 19%; African American judges and White plaintiffs at 17%; Hispanic judges and White plaintiffs at 0% or African American plaintiffs at 9.5%).

Logistic regressions once again determined if these differences were significant or instead explainable as chance occurrences. The results in Table 3 confirm the importance of same-race versus different-race pairings. Comparing the outcomes of same-race pairings with all other cases (Model 1), the odds of success are 2.38 times higher ($p=.001$). In other words, if plaintiffs go in front of a judge of the same race, then they are notably more likely to win; conversely, in different-race pairings, plaintiffs are more likely to lose.

54. While the number of cases is also not high for some of the remaining plaintiff and judge groups (African American and Hispanic judges, Hispanic and White plaintiffs), it is large enough to perform statistical analyses and to observe some tentative general patterns.

TABLE 3. LOGISTIC REGRESSION MODELING OF JUDGES' RACE AND PLAINTIFFS' RACE COMBINATIONS

<i>Combinations of Variables</i>	<i>Odds Ratios</i>	<i>Sig. Level</i>
Model 1: Same-race pairings vs. all others	2.38	0.001**
Model 2: <u>Judges' Race</u> •African American judge vs. White judge •Hispanic judge vs. White judge •African American judge vs. Hispanic judge <u>Plaintiffs' Race</u> •White plaintiff vs. African-American plaintiff •Hispanic plaintiff vs. African American plaintiff •White plaintiff vs. Hispanic plaintiff	2.93 0.70 4.19 1.24 2.32 0.53	0.004** 0.002** 0.46 0.01* 0.03* 0.57 0.009** 0.17
Model 3: <u>Judges' Race</u> •African American judge vs. White judge •Hispanic judge vs. White judge •African American judge vs. Hispanic judge <u>Plaintiffs' Race</u> •White plaintiff vs. African American plaintiff •Hispanic plaintiff vs. African American plaintiff •White Plaintiff vs. Hispanic Plaintiff Same-race pairings vs. all others	1.55 0.53 2.96 0.62 2.38 0.26 2.68	0.22 0.34 0.23 0.08 0.01* 0.34 0.007** 0.02* 0.03*

** <0.01

* <0.05

Finally, a statistical method called multiple logistical regression modeling allows the concurrent consideration of multiple variables (judges' race, plaintiffs' race, and matched-race pairings) combined in various ways to see if and how they interact to affect case outcomes.⁵⁵ Thus, as shown Table 3 (Model 2), when judges' and plaintiffs' race are considered concurrently (the model analyzes the interactive effects of both variables simultaneously), both factors significantly affect outcomes with judges' race significance at $p = .004$ and plaintiffs' race significant at $p = .03$.⁵⁶

When considering all three variables (judges' race, plaintiffs' race, and same-race pairings) concurrently, as shown in Table 3 (Model 3), the importance of plaintiffs' race ($p = .01$) and same-race pairings ($p = .03$) is

55. 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 other variables. 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. Further information on the models is available from the authors.

56. Within judges' race, the primary driver is how African American judges rule differently from the other two groups. African American judges are 2.9 times more likely to rule for the plaintiffs than White judges ($p = .002$) and 4.2 times more likely than Hispanic judges ($p = .03$). Meanwhile, Hispanic plaintiffs are 2.32 times more likely to receive a favorable ruling than African American ones ($p = .009$).

highlighted and the importance of the judges' race as a single variable lessens ($p=.22$). Further analysis of each same-race and different race pairing (e.g., White judges and White plaintiffs, White judges and African American plaintiffs, White judges and Hispanic plaintiffs, etc.) further reveals what is occurring.⁵⁷ Judges of all racial groups favor Hispanic plaintiffs over all other racial groups. This preference is particularly significant for African American judges.⁵⁸ After that, however, judges favor their own racial group over the remaining racial groups.⁵⁹

Discussion of Judges' Race and Plaintiffs' Race. When examining the impact of judges' race and plaintiffs' race on case outcomes, two important questions arise: What explains why race-matching makes such a difference? Why do Hispanics get favorable treatment from all judicial groups?

First, recall that race-matching of judges and plaintiffs had a strong effect on outcomes. That is, all racial groups have better outcomes when they appear in front of a judge of the same race than when compared to all the cases as a whole. In addition, White judges are less likely to hold for African American plaintiffs than White plaintiffs; African American judges are less likely to hold for White plaintiffs than African American plaintiffs; and Hispanic judges treat both Whites and African Americans less favorably than Hispanics.

In-group versus out-group dynamics might explain much of this finding.⁶⁰ Simply put, judges of each racial group can more readily identify with injustices that happen to their racial group. They draw upon similar life experiences; they know how they would react to being treated in certain ways; and they understand all the subtle "coded" words that carry racial offenses but that others tend to dismiss with "that's not what I was saying — you're reading into it." Likewise, their race antennae are up for signals that affect their group, while they miss or discount what happens to out-groups. A White judge might interpret the expression "White men can't jump" as a racist remark, while other judges would see it as a movie reference. Similarly, an African American judge might hear the expression "lazy Tom" as reminiscent of the history of slavery, while a non-African American judge might consider the phrase a colloquial expres-

57. The complete results of this three-factor logistical regression analysis are not provided here, but are available through the authors

58. African American judges are 2.3 times more likely to rule in favor of Hispanic plaintiffs than African American ones ($p=.009$). See *supra* note 57.

59. Hispanic judges are 2.3 times more likely to rule in favor of Hispanic plaintiffs than African American ones ($p=.0009$), and African American judges are likely to rule in favor of Hispanic plaintiffs, see *id.* While the data indicates that White judges are more likely to rule in favor of White plaintiffs than African American ones, and African American judges are more likely to rule in favor of African American plaintiffs than White ones, these results were not statistically significant.

60. See HENRY GLEITMAN, ALAN J. FRIDLUND & DANIEL REISBEG, *PSYCHOLOGY* 382–84 (Jon Durbin ed., 6th ed. 2004) (discussing group stereotypes and in-group favoritism); see generally Mina Cikara et al., *Us and Them: Intergroup Failures of Empathy*, 20(3) *CURRENT DIRECTIONS PSYCHOL. SCI.* 149 (2011) (finding that the suffering of members in out-groups elicits less empathic responses, as compared to the suffering of members in in-groups); Anthony Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 *CALIF. L. REV.* 945, 951 (2006) (discussing relationship between in-group bias and implicit stereotypes).

sion that just happened to be used to describe an African American employee. As discussed above, group membership provides a “lens” through which judges see the dots (or not) and connect them (or not).

In addition, the effects of different-race pairings more negatively impact African American plaintiffs as a group. White judges hear 84% of the cases and African American plaintiffs bring 74% of the cases. Their intersecting cases represent 63% of all cases and 85% of all African American plaintiff cases. Although African American judges produce more favorable outcomes for African American plaintiffs than any other judge group, it is not enough to offset the effect of White judges’ rulings on African American plaintiffs. Similarly, White judges hear 83% of all White plaintiff cases, so Whites benefit disproportionately from the matched-race effect.

Second, the findings indicate that all judicial groups treat Hispanic plaintiffs favorably relative to other groups. Ironically, this pattern might also be a function of a variation of in-group versus out-group dynamics. White judges might view many Hispanics as having European Spanish or Portuguese origins and looking more typically White or Mediterranean. Since White judges might not see them as racially distinct, they include them in their “group.” At the same time, African American judges might see Hispanics as fellow minorities who suffer similar discriminations as African-Americans. These judges are conscious of the ill treatment all minorities receive in American society. Meanwhile, Hispanic judges see Hispanics as separate from both Whites and African Americans. Where White and African American judges respond to Hispanics’ racial ambiguity by including them in their groups, Hispanic judges see Hispanics as a distinct group of their own.

Since Hispanics are in the news so frequently regarding both immigration and shifting U.S. demographics, all judges also may be more sensitized to the issues facing them and their need for legal protection. Judges might see the clamor over illegal immigration as a “coded” assault on Hispanics. Although illegal aliens come from countries all over the world, it may appear to judges that much of the animus is unnecessarily directed at Hispanics.⁶¹ Likewise, some judges might see Hispanics as the current wave in an American history full of similar immigration waves. Rather than be alarmed, judges might recall their own family origins and note ancestors who entered the country (legally or illegally). They might identify with Hispanics as fellow seekers trying to improve their life circumstances. Their judicial rulings, then, might flow from an unspoken desire to protect the American Dream.

IV. CONCLUSIONS

A. *Summary of Study and Findings*

This is the first study to analyze whether the plaintiff-employees’ race and the interaction between judges’ race and plaintiffs’ race make a differ-

61. For example, if a third-generation U.S. citizen of Hispanic origin is constantly singled out at work to produce valid identification to support her employability, judges of all races might view that employer conduct as harassment.

ence in racial harassment cases. The results indicate that outcomes do vary depending on the plaintiffs' race, the judges' race, and the interactions between them. The authors' earlier empirical study of older cases indicated that judges of different races have different decision-making patterns in federal, racial harassment in the workplace cases.⁶² This current study confirms these differing decision-making patterns in more recent district court cases (2002-2008). Furthermore, while existing empirical research on the judges' race and case outcomes tends to focus only on White and African American judges, this study additionally considers Hispanic judges.

Moreover, the current study goes a step further than independently considering the plaintiffs' race and judges' race. It also analyzes the interactive effects of plaintiffs' race and judges' race on case outcomes. Particularly, it found that judges of one race treat differently plaintiffs of their race versus plaintiffs of other races. Why judges of any race are consciously or unconsciously disposed toward litigants of any race is unclear, but the data suggests that it does occur.

In summary, the findings confirm that both judges' race and plaintiffs' race can make a significant difference in racial harassment cases in the federal courts, but not necessarily in ways one might predict:

- (1) *Plaintiffs' Race.* African American plaintiffs bring 74% of all cases, so their success rate of 20.9% has a large impact on the 22% overall plaintiff success rate. African American plaintiffs (along with Asian American ones) are more likely than other groups to lose; correspondingly, Hispanic and White plaintiffs are more likely to win. In practical terms, the analysis predicts that Hispanics are 2.3 times more likely and Whites are 1.3 times more likely to be successful than African Americans. Even with these more positive odds, keep in mind that Hispanic plaintiffs are successful in only 37% of their cases.
- (2) *Judges' Race.* White judges hear 84% of all cases, so their decision-making pattern (20.9% plaintiffs' success rate) heavily influences the overall plaintiffs' success rate of 22%. Hispanic judges are less likely to hold for plaintiffs (15.6%). African American judges resolve these cases differently than either White judges or Hispanic judges with a 42.2% plaintiffs' success rate. In practical terms, plaintiffs who come before African American judges are 2.8 times more likely to be successful than if they come before White judges and 4.0 times more likely to be successful than if they come before a Hispanic judge. Even with African American judges, however, plaintiffs succeed only about 4 times in 10.
- (3) *Interactive Effects of Plaintiffs' Race and Judges' Race.* The findings suggest that judges of different races perceive the complaints of plaintiffs of different races distinctively. Interestingly, Hispanic plaintiffs get more favorable outcomes from all judge groups. Meanwhile, race-matching (when the

62. See Chew & Kelley, *supra* note 14, at 1143 tbl.3, 1156-58.

judge and the plaintiff are of the same race) is a strong indicator of outcomes, improving the plaintiffs' odds of success by 2.5 times.

B. Implications

These findings raise a host of issues and implications about judges' race, plaintiffs' race, and their relationship to each other. First and foremost, race is related to outcomes in federal racial harassment in the workplace cases. The explanations for this are no doubt complex and not fully understood. However, the study results do not appear to support the formalism model of judicial decision-making, where judges' legal analyses are considered largely a mechanical and value-neutral exercise.⁶³ Under this model, one would expect all judge groups to rule somewhat similarly and all plaintiff groups to have similar outcomes. One would not expect the results from this study, including the strong effect of race-matching (where judges and plaintiffs are of the same race).

Instead, as the realism model suggests,⁶⁴ judicial decision-making appears to be a more complicated, and human activity where judges' backgrounds, including their race and their conscious or unconscious worldview of other races, affect case outcomes. An interpretation of the realism model by James Gibson and Gregory Caldeira is particularly apt.⁶⁵ Judicial "decisionmaking involves far more than 'applying' the law to the facts in a mechanical or syllogistic fashion," and "inevitably involves and implicates judges' personal values."⁶⁶ At the same time, they observe:

[T]his is a matter of degree — to reject mechanical jurisprudence is not necessarily to assume unfettered discretion but only to recognize that, within the context of the rule of law, judges have choices in their decisions and that their choices often if not typically reflect their own ideological predispositions.⁶⁷

In practice, judges typically exercise discretion in a principled fashion, not in a strategic self-interested way, thereby protecting judicial legitimacy. They are not "merely politicians in robes."⁶⁸

These study findings also highlight the importance of further integrating the judiciary. Philosopher Elizabeth Anderson posits that a true and

63. See James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 *LAW & SOC'Y REV.* 195, 201–14 (2011) (examining public perceptions about the process of judging and studying the subsequent impacts on institutional support); Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 *N.Y.U. L. REV.* 419, 420 (1992) (describing legal realist judges as outcome-oriented judges who believe that the law is often indeterminate, whereas formalist judges believe that most legal questions have 'determinate, objectively discoverable right answers'); Brian Leiter, *Positivism, Formalism, Realism*, 99 *COLUM. L. REV.* 1138, 1145–48 (1999) (reviewing ANTHONY SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* (1998)).

64. See generally LAURA KALMAN, *LEGAL REALISM AT YALE 1927–60* (G. Edward White ed., 1986); Neuborne, *supra* note 63, at 420; Leiter, *supra* note 63, at 1145–48.

65. Gibson & Caldeira, *supra* note 63, at 201–14.

66. *Id.* at 201.

67. *Id.* at 214.

68. *Id.*

well-functioning democracy requires that key decision-makers in society, such as judges, be as integrated as possible.⁶⁹ Thus, a racially diverse judiciary, is more inclined to be “responsive and accountable to the just claims of citizens from all walks of life” because “[t]hey can draw on a more diverse pool of information about the asymmetrical effects of public policies on different citizens, and are more likely to modify decisions in lights of information, than homogeneous elites.”⁷⁰

Referring to experiments with mock juries, Anderson cites evidence of the benefits of decision-making groups with racial diversity versus those who are all White.⁷¹ Racially integrated juries are more conscientious and have higher quality deliberations. They consider more facts and issues, are less likely to make inaccurate statements, and are more likely to correct errors. Moreover, these initiatives are spurred by both White and African American members of the group.

Research on integrated versus all-white judicial appellate panels also reveals differing decision-making processes. Namely, appellate panels with at least one African American judge are more likely than all-White panels to agree with the plaintiff’s claim of race discrimination.⁷² These findings suggest two phenomena. First, African American judges, like African American jurors, are influencing their White colleagues, presumably by sharing their insights on what race discrimination is and how to detect it in modern American society. Second, they suggest that White judges, like White jurors, are open to learning from their African American colleagues. Presumably, such peer influence and openness to learning can also occur when the roles are reversed. Thus, White judges can help judges of other races better understand discriminatory conduct against Whites;⁷³ Hispanic judges can help judges of other races better understand discriminatory conduct against Hispanics, and so on. If judges of all races help each other see race-related cases through their group’s “lenses,” then plaintiffs of all colors would get the fairest hearing of their complaints. Moreover, a more racially diverse judiciary might prompt judges to be more self-conscious and learn more about their own biases and stereotypes that affect their judicial decisions.⁷⁴ In particular, they could examine their in-group leanings and out-group skepticism.

69. ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 127–34 (2010).

70. *Id.* at 128.

71. *Id.* at 130–31.

72. See COX & MILES, *supra* note 14, at 4 (“When a white judge sits on a panel with at least one African American judge, she becomes roughly 20 percentage points more likely to find a section 2 violation [of the Voting Rights Act].”). Social science research also suggests that more contact among members of different racial groups increases empathy and trust between races. See, e.g., Gordon Hodson, *Do Ideologically Intolerant People Benefit From Intergroup Contact?*, 20(3) *CURRENT DIRECTIONS PSYCHOL. SCI.* 154 (2011) (reviewing research indicating that intergroup contact and friendships work well among intolerant and cognitively rigid person, by reducing threat and anxiety and increasing empathy, trust, and out-group closeness).

73. See, e.g., Michael I. Norton & Samuel R. Sommers, *Whites See Racism as Zero-Sum Game That They Are Now Losing*, 6(3) *PERSP. PSYCH. SCI.* 215 (2011) (studying Whites’ increasing concern about anti-White bias).

74. See BREST & KRIEGER, *supra* note 31, at 334–38 (discussing how correcting an individual’s impressions, including unconscious racial stereotypes, requires three condi-

In conclusion, our study results indicate that judges of different races have different decision-making patterns; that plaintiffs of different races have differing outcomes; and that judges are more likely to be persuaded by plaintiffs of their same race. Consistent with a “principled discretion” version of a realism model of judicial decision-making, it appears that the life experiences of judges of different races result in different relevant “pools of information” that have real-world consequences for plaintiffs of different races in racial harassment cases. Given the dominant number of White judges, their “pools of information” and resulting perspectives are most likely to set the norms. The Obama administration’s pattern of appointing more minority judges has both symbolic and substantive value. A more integrated judiciary that is representative of American society would expand judicial perspectives, prompt a more deliberative process, and help assure more accountable and responsive decision-making for “citizens of all walks of life,” thus facilitating a more fully-functioning democracy.

tions: the individual’s motivation, cognitive resources (time, spare processing capacity), and “information from which a reasoned corrective judgment might be made”).

