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## The Missing Minority Judges

Pat K. Chew

*University of Pittsburgh School of Law, patchew@pitt.edu*

Luke T. Kelley-Chew

*Economics & Mechanical Engineering Graduate, Stanford University, 2010*

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# The Missing Minority Judges

*Pat K. Chew*  
*Luke T. Kelley-Chew\**

*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.*

—Supreme Court Justice John Paul Stevens<sup>1</sup>

## I. INTRODUCTION

Currently, 15.4% of the judges on the federal bench are judges of color,<sup>2</sup> although thirty percent of the general population is minority.<sup>3</sup> Along with women and racial minorities, President Barack Obama has nominated a record number of Asian-Americans to the federal judiciary.<sup>4</sup> These historical events make inquiries into the implications of a more diverse bench in the American justice system timely. While other articles have focused on minority judges in general, or on African-American or Hispanic judges in particular,<sup>5</sup> little has been written about Asian-American judges.<sup>6</sup> This

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\* Pat Chew is a Distinguished Faculty Scholar and Professor at the University of Pittsburgh School of Law. Luke Kelley-Chew is an economics and mechanical engineering graduate, Stanford University, class of 2010. The authors thank Patty Houck for her statistical consultation.

1. Adam Liptak, *At 89, Stevens Contemplates Law, and How to Leave It*, N.Y. TIMES, Apr. 3, 2010, at A1 (summarizing an interview with Justice Stevens).

2. See *infra* Table 2, indicating that 15.4% of all sitting judges are African-American, Asian-American, Hispanic, or Native American. Data on the federal judiciary are available through the Federal Judiciary Center. *Biographical Directory of Judges*, FED. JUDICIARY CENTER, <http://www.fjc.gov/history/home.nsf/page/judges.html> [hereinafter *Directory of Judges*] (last visited Aug. 31, 2010).

3. See U.S. CENSUS BUREAU, STAT. ABSTRACT OF THE U.S.: 2009, at 11 tbl.8 (2009), available at <http://www.census.gov/prod/2008pubs/09statab/pop.pdf>.

4. See, e.g., Press Release, Asian Am. Bar Ass'n of the Greater Bay Area, President Obama Nominates Professor Goodwin Liu to the U.S. Court of Appeals for the Ninth Circuit (Feb. 24, 2010). See also Joan Biskupic, *Push for Court Diversity Hits Snag*, USA TODAY, June 16, 2010, at A1.

5. See, e.g., Kenneth L. Manning, *¿Cómo Decide?: Decision-Making by Latino Judges in the Federal Courts* (Apr. 14–17, 2004) (paper presented at the Midwest Political Science Association), available at [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/0/8/3/3/9/p83393\\_index.html](http://www.allacademic.com/meta/p_mla_apa_research_citation/0/8/3/3/9/p83393_index.html); Pat K. Chew & Robert E. Kelley, *The Conundrum of Color in Racial Harassment Cases* (work-in-progress) (on file with Pat Chew) (summarizing research on judges' race and case outcomes) [hereinafter *Conundrum*].

Article considers the current lack of Asian-Americans in the judiciary and the implications of increasing the number of Asian-American judges.

This Article discusses these topics through the lens of federal workplace racial harassment cases, examining how the lack of Asian-American judges may have affected the poor success rate of Asian-American plaintiffs.<sup>7</sup> This discussion is exploratory, given the historically small numbers of Asian-American federal jurists and the relatively small number of racial harassment cases involving Asian-American plaintiffs. Nonetheless, the available statistical data and the substantial interdisciplinary research on Asian-Americans in American society provide fertile bases for this discussion.

This Article begins with an overview of Asian-Americans in the federal judiciary.<sup>8</sup> It substantiates their underrepresentation while explaining that a “pipeline problem” does not fully explain their absence. As an illustration of the experiences of Asian-Americans in the U.S. judicial system, this Article will then summarize how they fared in an empirical study of federal workplace racial harassment cases.<sup>9</sup> Asian-American plaintiffs were often unsuccessful, losing over eighty percent of their disputes reported in published opinions. This Article further explores whether the paucity of Asian-American judges is related to the woeful success rate of Asian-American plaintiffs in these cases.<sup>10</sup> While one explanation is that Asian-Americans have weak cases on the merits, a consideration of the dispute resolution processes for these types of disputes does not support this simple explanation. Instead, the explanation is likely more complicated, relating the applicable legal inquiries, judicial interpretations, social science research on racial differences in perceptions of discrimination, and societal stereotyping of Asian-Americans. Once again, the model minority myth is a plausible culprit. Finally, this Article asks what practical differences appointing more Asian-Americans judges can make,<sup>11</sup> concluding that the true beneficiary may be the overall justice system rather than Asian-Americans specifically.

## II. UNDERREPRESENTATION OF ASIAN-AMERICAN JUDGES

Asian-Americans are missing on the federal bench. To provide some context, Asian-Americans represent 4.9% of the general population,

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6. *But see* Josh Hsu, *Asian-American Judges: Identity, Their Narratives, & Diversity on the Bench*, 11 *UCLA ASIAN PAC. AM. L.J.* 92 (2006) (providing a qualitative study of select Asian-American judges).

7. *See infra* Parts II–III.

8. *See infra* Part II.

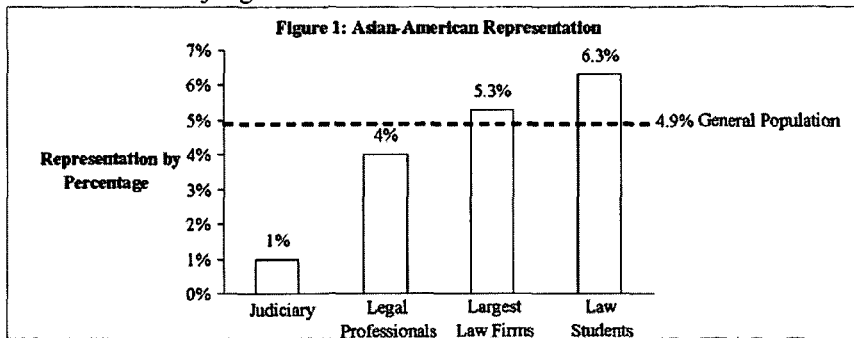
9. *See infra* Part II.

10. *See infra* Part III.

11. *See infra* Part V.

numbering 14.5 million in 2005.<sup>12</sup> Asian-Americans likewise represent approximately 4% of legal professionals overall.<sup>13</sup> Among the largest law firms, 5.3% are Asian-American; among law students, 6.3% are Asian-American. However, when it comes to Asian-American judges, the numbers paint a very different picture, revealing a dramatic underrepresentation.

There are currently 1289 “sitting” federal judges, which include both active judges and judges of senior status.<sup>14</sup> Of these, only twelve are Asian-American, constituting less than 1% of the total. Four of these twelve are women and eight are men. In other words, and as illustrated in Figure 1, there are proportionately four to five times more Asian-Americans in the general population and in professional groups from which judges are drawn than in the federal judiciary. Among the 771 active federal judges, there are only ten Asian-Americans, constituting 1.3%. There is currently no active Asian-American federal appellate court judge<sup>15</sup> and no Supreme Court justice. Only nineteen Asian-Americans have ever served as federal judges in the entire history of the federal courts.<sup>16</sup> The Appendix lists all Asian-American federal judges.



While Democratic presidents historically have appointed a higher percentage of minority judges,<sup>17</sup> this has not been true for Asian-American judges. As shown below in Table 1, both Democratic and Republican presidents have appointed about the same small number of Asian-American judges.<sup>18</sup> President Nixon appointed the first Asian-American to the

12. See *Asian Pacific Americans in the Judiciary Fact Sheet*, NAT’L ASIAN PAC. AM. BAR ASS’N, <http://www.napaba.org/uploads/napaba/APAs%20in%20the%20Judiciary%20Fact%20Sheet.pdf> (last visited Aug. 31, 2010).

13. *Id.*

14. *Directory of Judges*, *supra* note 2.

15. *Id.*

16. See *id.* (showing seven Asian-American judges besides those currently sitting).

17. ELIZABETH CHAMBLISS, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 30, 51, 58 (2004).

18. See *Directory of Judges*, *supra* note 2 (providing the data from which the authors compiled Table 1).

appellate court in 1971;<sup>19</sup> President Ford appointed the first Asian-American to the district court in 1973;<sup>20</sup> and President Clinton appointed the first Asian-American woman to the bench in 1998.<sup>21</sup>

Table 1:  
Appointments of Asian-American Judges by Nominating President

	<u>District Courts</u>	<u>Appellate Courts</u>
Nixon (R) ('69-74)	0	2
Ford (R) ('74-77)	2	0
Carter (D) ('77-81)	1	1
Reagan (R) ('81-89)	2	0
G. H. Bush (R) ('89-93)	0	0
Clinton (D) ('93-01)	4	0
G. W. Bush (R) ('01-09)	4	0
Obama (D) ('09-)	2	0

There are also striking geographic limitations to where Asian-American judges serve. Of the current sitting judges, all serve in California except for one in Hawaii, one in Kentucky, and two in New York.<sup>22</sup> While California and Hawaii have a substantial Asian-American population, there are many parts of the country with substantial Asian-American populations that do not have any Asian-American federal judges.

Also, while the federal judiciary is not exemplary in its inclusion of judges of other races and ethnicities, there is a particular paucity of Asian-American and Native American judges among active and sitting judges.<sup>23</sup> As

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19. *Herbert Young Cho Choy*, JUST THE BEGINNING FOUND., <http://www.jtbf.org> (follow "Historical Profile: Integration of the Federal Judiciary" hyperlink; then follow "Asian American Firsts" hyperlink; then follow "Herbert Young Cho Choy") (last visited Oct. 12, 2010).

20. *Dick Yin Wong*, JUST THE BEGINNING FOUND., <http://www.jtbf.org> (follow "Historical Profile: Integration of the Federal Judiciary" hyperlink; then follow "Asian American Firsts" hyperlink; then follow "Dick Yin Wong") (last visited Oct. 12, 2010).

21. *Susan Oki Mollway*, JUST THE BEGINNING FOUND., <http://www.jtbf.org> (follow "Historical Profile: Integration of the Federal Judiciary" hyperlink; then follow "Asian American Firsts" hyperlink; then follow "Susan Oki Mollway") (last visited Oct. 12, 2010).

22. See *Directory of Judges*, *supra* note 2 (providing geographical data on sitting judges).

23. See *id.* (providing data indicating that among sitting judges, 112 were African-American,

Table 2 shows, Native American judges are almost invisible in the federal judiciary. Asian-Americans are dramatically underrepresented relative to their percentages in the general population and in the legal profession. Hispanics also are underrepresented relative to the general population but are better represented in the judiciary than in the legal profession. Finally, African-American judges, particularly active judges, best approximate their representation in the population and exceed their representation among lawyers.<sup>24</sup>

Table 2:  
Racial Representation on Federal Judiciary, in Population, and Among Lawyers

	<u>Sitting Judges</u> <sup>25</sup>	<u>Active Judges</u>	<u>Population</u> <sup>26</sup>	<u>Lawyers</u> <sup>27</sup>
African-American	8.8%	11.3%	12.3%	4.7%
Asian-American	.9	1.3	4.9	4.1
Hispanic	5.6	7.7	12.5	2.8
Native American	.1	0	1.0	
White	84.5	79.7		

While this Article’s purpose is not to explore fully the reasons for the paucity of Asian-American judges, it does note that the federal judiciary lacks Asian-Americans at all levels, that presidents of both political parties have appointed very few Asian-American judges, and that in most of the country’s federal circuits Asian-American judges are simply nonexistent.

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12 were Asian-American, 71 were Hispanic, 1 was Native American, and 1072 were White, for a total of 1268 judges; among active judges, 86 were African-American, 10 were Asian-American, 59 were Hispanic, 0 were Native American, and 608 were White).

24. See Table 2.

25. See *Directory of Judges*, *supra* note 2 (providing data from which the authors compiled this table).

26. U.S. CENSUS BUREAU, *supra* note 3.

27. U.S. BUREAU OF LABOR & STATISTICS, 2009 HOUSEHOLD DATA ANNUAL AVERAGES 205–11 (2009), available at <http://www.bls.gov/cps/cpsaat11.pdf>.

Moreover, attributing the lack of Asian-American judges to a lack of qualified Asian-American candidates currently and in the pipeline for judgeships is not totally satisfactory. Given that the average age of judges is approximately sixty years old<sup>28</sup> and that Asian-Americans have been entering the legal profession in large numbers only in recent decades, one could reasonably argue that there has been inadequate time for very many Asian-Americans to enter the judicial pool. While the racial composition of the judiciary is still evolving and has therefore likely not reached a steady state, its current status is nonetheless revealing. Indeed, Hispanics have similar entry dates into the legal profession yet still have higher representative numbers in the judiciary than Asian-Americans.<sup>29</sup> Future research, for instance, may also reveal that Asian-Americans as a group are either not as interested or qualified for the judiciary. At this time, however, there is not particular evidence of these circumstances. In fact, there are 270 Asian-American law school faculty, which is one pool of legal experts that may be appropriate as judicial candidates.<sup>30</sup>

### III. ASIAN-AMERICANS AS UNSUCCESSFUL LITIGANTS

This Article now shifts from discussing Asian-American judges to discussing Asian-American litigants. As one illustration of Asian-Americans' experience in the justice system, this Article considers their experience in federal workplace racial harassment cases. In particular, it draws from the research of one of the authors and her colleagues, who studied various characteristics of federal racial harassment cases extensively.<sup>31</sup> Their work suggests that Asian-American plaintiffs in these cases are more likely to lose than White or Hispanic plaintiffs and about as likely to lose as African-American plaintiffs.<sup>32</sup> In other words, race differences in who is successful in these cases exist, and Asian-Americans appear to be on the losing end of the stick.

Table 3 below summarizes results from a study of all federal workplace

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28. See Conundrum, *supra* note 5, at 6.

29. See *supra* Table 2 (showing comparative representation among Asian-Americans and Hispanics in the judiciary). Beginning in Fall 2000, Hispanic/Latinos represented 3.6% of matriculating law students, growing to 5.3% in Fall 2009. *Matriculants by Ethnicity*, L. SCH. ADMISSION COUNCIL, <http://www.lsac.org/> (follow "LSAC Resources" hyperlink; then follow "Matriculants by Ethnicity" hyperlink) (last visited Oct. 11, 2010). Showing a similar historical pattern, beginning in Fall 2000, Asian/Pacific Islanders represented 7% of matriculating students, rising to 8.1% in Fall 2009. *Id.* However, today Hispanics constitute 5.6% of federal judges, while Asian-Americans constitute only 0.9%. *Supra* Table 2.

30. 2008–2009 AALS Statistical Report on Law Faculty, ASS'N AM. L. SCHOOLS, <http://www.aals.org/statistics/2009dlt/race.html> (last visited Aug. 31, 2010).

31. See Conundrum, *supra* note 5, at 8 tbl.1.

32. *Id.* Asian-American plaintiffs included individuals of Chinese, Indian, Vietnamese, Korean, Filipino/a, and Japanese ancestry. *Id.* at 11.

racial harassment claims under the Civil Rights Act that appear in published judicial opinions between 2002–2008 from district court cases in six federal circuits.<sup>33</sup> Most cases in this study deal with employers' motions for summary judgment.<sup>34</sup> These proceedings require judges to make basic assessments of the plaintiffs' claim to determine if their racial harassment case is viable—namely, whether there are any material facts in dispute and whether, as a matter of law, the employer–defendant should be victorious. If the judge determines the plaintiffs' claim is not viable, she or he will grant the employers' motion, and the plaintiffs can no longer pursue their claim through the courts. Plaintiffs, therefore, need to persuade judges that their cases are viable. As discussed further in Part III, judges have considerable discretion in answering this difficult legal question.

The outcome for Asian-American plaintiffs in these cases was striking. Asian-American plaintiffs were successful in only 19.4% of their cases, losing over 80% of the time.<sup>35</sup> Judges granted employers' motions for summary judgment in approximately four out of every five cases.<sup>36</sup> Excluding the very small number of cases with Native American plaintiffs, Asian-Americans and African-Americans had the most dismal litigation prospects, followed by White plaintiffs.<sup>37</sup> In contrast, Hispanic and Middle-Eastern American plaintiffs had substantially better success rates. They were successful in 40% and 47% of their cases, respectively.<sup>38</sup> A chi-square test indicated that plaintiffs' race made a significant difference in how these cases turned out.<sup>39</sup> An earlier empirical study also found similar patterns among plaintiffs' groups by race.<sup>40</sup> Nonetheless, given the small number of cases for some of these plaintiff groups, we should generalize from these results with caution.

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33. Federal circuits were selected to be representative of parts of the country and included the First, Second, Fifth, Seventh, Ninth, and Eleventh Circuits. These are also the same circuits Pat Chew and Robert Kelley examined in an earlier study. *See, e.g.*, Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 *BERKELEY J. EMP. & LAB. L.* 49, 76, 90 (2006).

34. JUDITH RESNIK, *PROCESSES OF THE LAW: UNDERSTANDING COURTS AND THEIR ALTERNATIVES* 1–11 (2004).

35. Conundrum, *supra* note 5, at 8 tbl.1.

36. *Id.*

37. *Id.*

38. *Id.*

39.  $P = .011$ . The analysis also included a plaintiff group of mixed racial backgrounds ( $n=25$ ), resulting in a total sample of 604 cases.

40. *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, 1143 (2009) (although this study did not indicate that these differences were statistically significant).



Table 3:  
Plaintiffs' Success Rates by Plaintiffs' Race in Racial Harassment Cases

<u>Race</u>	<u>Plaintiffs Successful</u>		<u>Plaintiffs Unsuccessful</u>		<u>Total Cases</u>
	N	%	N	%	N
Asian-American	6	19.4	25	80.6	31
African-American	89	21.3	328	78.9	417
Hispanic	24	40.0	36	60.0	60
Middle-Eastern American	8	47.1	9	52.9	17
Native American	0	0	4	100.0	4
White	12	24.0	38	76.0	50

(df) = 16.62 (6)

P = .011

#### IV. WHY ASIAN-AMERICAN PLAINTIFFS LOSE

##### *A. The Simple Explanation*

While this Article could productively explore case outcomes for any of the plaintiff groups, given the focus of this Article, it will now intentionally examine the outcomes for Asian-American plaintiffs. In particular, the authors ask: What explains the poor success rate of Asian-American plaintiffs in racial harassment cases? An initial simple answer might be that Asian-American plaintiffs have weak cases on the merits. They might bring cases with fact patterns that on their face do not support findings of discriminatory racial harassment. For instance, Asian-Americans may be more inclined to complain than other employees and so bring a broader range of meritorious to non-meritorious claims. While this line of thinking provides a possible explanation, it is not a particularly convincing one.

Complicated and numerous legal and administrative procedures precede motions for summary judgment or other pre-trial proceedings.<sup>41</sup> These procedures would discourage all but the most-committed plaintiffs. Plaintiffs' attorneys would also correctly predict low rates of success for their clients generally in these cases and would likely discourage all but the strongest cases from moving ahead with litigation. Finally, to the extent that Asian-Americans adhere to their cultural stereotype, they would avoid the

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41. See Chew & Kelley, *supra* note 33, at 61–63.

kinds of confrontational processes inherent in litigation.<sup>42</sup> In summary, it is more reasonable to assume that Asian-American employees would engage in litigation only if they experienced egregious race-based harassment. Thus, given all these considerations, it seems more logical that Asian-American plaintiffs' cases that reach this stage of litigation would be strong rather than weak on the merits.

### *B. The Alternative Interrelated Explanation*

Instead, the authors suggest that the explanation for Asian-Americans' poor success rate is complicated. As this Article discusses below, legal complexities in this area of the law and social science research on perceptual differences of discrimination are part of the answer. Societal stereotyping of Asian-Americans offers further insights into the explanation of racially-related success rates.

#### 1. Legal Complexities

The Supreme Court laid out the general legal principles of the racial harassment (hostile environment) doctrine under Title VII of the Civil Rights Act.<sup>43</sup> This doctrine is designed to protect employees from racially hostile environments that employers create (via the employees' supervisors' and workers' ridicule, intimidation, social or professional isolation, and disparate treatment of them). The Court, however, has left much discretion to federal judges on exactly how to interpret those principles.<sup>44</sup> Furthermore, racial harassment law requires difficult inquiries into the racial dynamics at the workplace, including determining (i) whether the perpetrator harassed the employee because of her or his race, as opposed to some non-race-based reason; and (ii) whether the perpetrator's harassment was severe or pervasive enough to alter the employee's work environment and render it racially hostile.<sup>45</sup>

Most judges have opted for clear guidelines on answering these questions, while at the same time imposing burdensome standards on the plaintiffs to show race-based harassment and sufficiently severe or pervasive harassment.<sup>46</sup> Judges often consider only explicit and egregious racist incidents as evidence of racial harassment, and even then they may impose

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42. See, e.g., RICHARD E. NISBETT, *THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY* 73–77 (2003) (explaining Asian cultural tendency to avoid adversarial confrontation).

43. See Pat K. Chew, *Seeing Subtle Racism*, 6 *STAN. J. C.R. & C.L.* (forthcoming 2010) [hereinafter *Subtle Racism*].

44. *Id.*

45. *Id.*

46. *Id.*

strict requirements for the frequency and circumstances under which those racist incidents occur.<sup>47</sup> While some judges do acknowledge more contextual and subtle racism, they are more in the vanguard than in the mainstream.<sup>48</sup> In other words, given the legal principles and judges' interpretations, it is simply very difficult for plaintiffs to meet the legal standards set by the courts. Given this legal situation, it is understandable that all plaintiffs, including Asian-American plaintiffs, are more likely to be unsuccessful than successful.

In addition to the complex and nuanced legal jurisprudence in racial harassment law, social science research also confirms that individuals of different racial backgrounds tend to perceive discrimination differently. In study after study, Whites are less likely than racial minorities, including Asian-Americans, to perceive discrimination in the workplace and elsewhere.<sup>49</sup>

Given the current paucity of Asian-American judges, it is virtually certain that a non-Asian-American judge—most likely a White judge—would hear an Asian-American plaintiff's case. Hence, consistent with the social science research, White judges, like White Americans in general, might well perceive discrimination differently than the Asian-American plaintiffs before them, thus making it that much more difficult for the Asian-American plaintiffs' claims to appear credible and persuasive. White judges assess through their own cultural lenses Asian-American plaintiffs' claims that their harassment is race-based and sufficiently severe or pervasive.

## 2. Unique Societal Stereotypes

As described above, Asian-Americans, like all other plaintiffs, are subject to the very high legal hurdles all plaintiffs face in racial harassment cases. Like other minority plaintiffs, they also often argue their cases to White judges who perceive discrimination differently than they do. Asian-Americans, however, may also be subject to unique societal stereotypes that effectively make it more difficult than non-Asian-American plaintiffs to prove their case. While Asian-American judges would likely be familiar with these stereotypes (as well as their inaccuracies, limitations, and harms), non-Asian-American judges are less likely to be aware of them or sensitive

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47. *Id.* In *Narasirisinlapa v. SBC Communications, Inc.*, plaintiff Griengsak Narasirisinlapa (of Thai origin) was a Network Center technician in a communications company. *Narasirisinlapa v. SBC Commc'ns, Inc.*, No. Civ.A. 305CV001M, 2006 WL 832509, at \*1 (N.D. Tex. Mar. 29, 2006). He claimed that his supervisor falsified and misrepresented work reports, made personal attacks, and tried to instigate conflict between minorities. *Id.* at \*3–5. The court, however, holding that the harassment must be of a “racial character or purpose,” found that Narasirisinlapa did not present sufficient evidence of such racist misconduct. *Id.* at \*1–5, nn.6–7.

48. *Subtle Racism*, *supra* note 43.

49. See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1106–12 (2008) (summarizing research on differing perceptions by race).

to their possible applications in racial harassment cases.

The stereotype of Asian-Americans as “model minorities” particularly disadvantages Asian-American plaintiffs.<sup>50</sup> As model minorities, many Americans believe Asian-Americans to be very successful in American society, including in the workplace.<sup>51</sup> The image of Asian-Americans as smart, hard-working, and good at math, for instance, is consistent with and reinforces this model minority image.<sup>52</sup> Judges, buying into this model minority stereotype, may find it difficult to reconcile this image of the successful, assimilated Asian-American employee with the Asian-American plaintiff’s contrary depiction of her or himself as the victim of harmful racism, suffering from a racially hostile work environment that supervisors and coworkers have created. Thus, the authors posit that judges are likely to be naturally predisposed, perhaps subconsciously,<sup>53</sup> to find Asian-American plaintiffs’ complaints of racial harassment generally less believable.

Judges may not be familiar with the considerable social science evidence that Asian-Americans continue to suffer from discrimination—some of it egregious.<sup>54</sup> Furthermore, judges may not yet recognize that the image of the successfully assimilated Asian-American is an inaccurate overgeneralization for many Asian-American subgroups.<sup>55</sup>

At the same time, negative stereotypes of Asian-Americans (that are ironically somewhat contradictory to the model minority image) work against Asian-American plaintiffs. Racial harassment law requires that supervisors’ and coworkers’ harassment of the plaintiff be “because of race,” rather than a non-race-based explanation for their conduct. While non-race-based ridicule and harassment may be wrongful under other professional, social, or legal standards, it is not illegal under racial harassment law. Judges, meanwhile, have considerable discretion in determining if the harassment is race-based or non-race-based.

Negative stereotypes of Asian-Americans—such as those depicting them as undesirable “foreigners,” inept communicators, non-assertive and ineffective managers, untrustworthy and deceitful workers, cartoon-like

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50. FRANK WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 39–78 (2002) (including extensive list of research on topics in chapter notes). See also Pat K. Chew, *Asian-Americans as the Reticent Minority*, 36 WM. & MARY L. REV. 1 (1994).

51. See sources cited *supra* note 50.

52. *Id.*

53. For two classic pieces on unconscious discrimination in the legal system, see Peggy C. Davis, *Popular Legal Culture: Law as Microaggressions*, 98 YALE L.J. 1559 (1989); and Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 13 STAN. L. REV. 317 (1987). See also generally EDUARDO BONILLA SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2d ed. 2006).

54. Wu, *supra* note 50, at 69–73 (describing examples of discrimination).

55. *Id.* at 54 (noting the poverty of some Asian-American subgroups).

kung-fu aficionados, dog-eaters, and as violent terrorists or warmongers<sup>56</sup>—provide judges with ample alternative non-race-based explanations for why supervisors and coworkers may be harassing Asian-American employees. Recent judicial opinions illustrate the unfortunate continuing presence of these stereotypes in the workplace. In *Ting v. Chicago Mercantile Exchange*,<sup>57</sup> the bosses of the Asian-American head of human resources made denigrating remarks about his ability to speak and write and criticized his management style, even though there was no evidence that Mr. Ting had any difficulties with either his communication or management skills.<sup>58</sup> In *Jindal v. University Transplant Associates*,<sup>59</sup> the plaintiff was an Indian-born, Asian-American physician who had post-medical-school training at Oxford University, University of Boston, and Mt. Sinai Medical Center in New York. Nonetheless, his university-affiliated hospital work colleagues told him that Indians were liars, thieves, cheats,<sup>60</sup> should be shopkeepers rather than doctors, and should go back to India.<sup>61</sup>

In *Lambert v. Louisiana Housing Development Corporation*,<sup>62</sup> the supervisor and coworkers of a biracial Asian-American clerk (whose mother was Japanese and had no Hispanic ancestry) repeatedly called her a number of insulting racial slurs such as “chink” and “spic.”<sup>63</sup> In one instance, a co-worker insulted her in front of her mother.<sup>64</sup> In *Sung v. Knauf Fiber Glass*,<sup>65</sup> a Korean-American was employed at a manufacturing company. He claimed that his former supervisors called him a number of insulting and derogatory names based on the way he looked, a stereotyped eating habit of Asians, and

56. See generally *id.*

57. *Ting v. Chi. Mercantile Exch.*, No. 03 C 3927, 2005 WL 2335584 (N.D. Ill. Sept. 21, 2005).

58. *Id.* at \*1, \*6.

59. *Jindal v. Univ. Transplant Assoc.*, No. IP 00-678-C-M/F, 2002 WL 1461705 (S.D. Ind. Mar. 7, 2002).

60. *Id.* at \*12.

61. *Id.* at \*6. Similarly, in *Khan v. Federal Reserve Bank of New York*, a programmer analyst was told when joining a workplace conversation about current events, “If you don’t like it, you can leave the country” and “go back to [her] country.” *Khan v. Fed. Reserve Bank of N.Y.*, No. 02 Civ.8893(JCF), 2005 WL 273027, at \*1, \*8 (S.D.N.Y. Feb. 2, 2005) (brackets in the original). These comments illustrate the stereotype of Asian-Americans as perpetual foreigners. Some judges, perhaps unconsciously, might then consider Asian-American plaintiffs as not “real” Americans deserving of the protections of U.S. employment laws.

62. *Lambert v. La. Hous. Dev. Corp.*, No. Civ. A. 04-2481KDESS, 2005 WL 3543790 (E.D. La. Oct. 20, 2005).

63. *Id.* at \*5. When the plaintiff reminded her supervisor of her racial identity, he discounted the distinction, apparently viewing Asian-Americans and other minority groups as indistinguishable, at least for purposes of his ridicule. *Id.*

64. *Id.*

65. *Sung v. Knauf Fiber Glass*, No. 1:102CV1566SEB, 2004 WL 2272153 (S.D. Ind. Sept. 30, 2004).

U.S. military history with Asian countries,<sup>66</sup> despite the lack of evidence that the employee engaged in the eating habit or was ever involved in military service. In all of these cases, the Asian-American plaintiffs were unsuccessful in convincing the judges that their employers violated Title VII. Finally, in *EEOC v. Monterey Collision Frame & Body*,<sup>67</sup> coworkers referred to an Asian-American worker as “Bruce Lee” and mimicked martial arts movements in a stereotypical fashion in front of him, even though he was not a martial arts practitioner.<sup>68</sup> In this exceptional case, however, the plaintiff persuaded the judge to not grant the employer’s motion to dismiss.<sup>69</sup>

#### V. THE DIFFERENCE THAT MORE ASIAN-AMERICAN JUDGES WOULD MAKE

Given the particularly poor success rate of Asian-American plaintiffs, would the increased representation of Asian-Americans in the judiciary make a meaningful difference to Asian-American plaintiffs or to the justice system more broadly? Would Asian-American judges significantly add to the multiplicity of views and ideologies in the judiciary based on their particular social and cultural experiences, or will their perspective essentially mirror existing judicial norms and philosophies? In the context of racial harassment cases, a critical question would be whether their interpretations of legal principles and their assessment of racism towards Asian-Americans and other plaintiffs are distinguishable from, for instance, White judges.

There have been empirical findings contrasting the decision-making patterns of White and African-American judges.<sup>70</sup> The research suggests that African-American plaintiffs might benefit from an “empathy factor” from African-American judges—or be disadvantaged by the lack of empathy of White judges—in cases where race is salient in the legal analysis.<sup>71</sup> In studies on race-related cases in the federal courts, researchers have found that African-American judges are more likely than White judges to hold for the party claiming discrimination (the majority of whom are African-American).<sup>72</sup> For example, in one study of racial harassment cases, plaintiffs

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66. *Id.* at \*4, nn.21–22 (names included “slant eyed monkey,” “slant-eyed mother fucker,” “slant-eyed nigger,” “jap,” “dog eater,” “Fuji,” and “gook”).

67. *EEOC v. Monterey Collision Frame & Body*, No. C 06-6032 JF (PVT), 2007 WL 1201767 (N.D. Cal. Apr. 23, 2007).

68. *Id.* at \*5.

69. *Id.*

70. *See* Conundrum, *supra* note 5, at 8 tbl.1.

71. *See* Chew & Kelley, *supra* note 40, at 1157–58.

72. *Id.*; Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 29–30 (2008); Nancy E. Crowe, *The Effects of Judges’ Sex and Race on Judicial Decision Making on the U.S. Courts of Appeals, 1981–1996*, at 153–59 (June 1999) (unpublished Ph.D.

were successful only twenty-one percent of the time when they appeared before non-African-American judges but forty-six percent of the time when they appeared before African-American judges.<sup>73</sup> The theory is that judges, while still adhering to legal principles, bring their personal experiences and socialization to bear when assessing disputes with which they identify. Supreme Court Justice John Paul Stevens, for instance, recently acknowledged the impact of personal experience in judicial decision making.<sup>74</sup>

The current paucity of Asian-American judges makes it very difficult to empirically study their decision-making patterns.<sup>75</sup> However, social science studies of Asian-Americans generally indicate that they perceive discrimination distinctively from other racial groups,<sup>76</sup> so it is reasonable to predict that Asian-American judges might similarly contribute a distinctive racial perspective. Some studies illustrate these racial differences in perception, as illustrated in a study by Katherine Naff of federal employees.<sup>77</sup> Asian-American employees were less likely than African-American employees, but much more likely than White employees, to agree that “nonminorities receive preferential treatment compared to minorities” in their organizations.<sup>78</sup> Other studies help identify how characteristics of Asian-American subgroups can make a difference in their perceptions. For instance, in a study of Asian-American and Asian college students,<sup>79</sup> researchers Vaunne Ma Weathers and Donald Truxillo found that perceptions of discrimination varied depending on whether the students were born in the United States or had non-American accents, with non-United States-born students and students with accents perceiving more

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dissertation, University of Chicago) (on file with the authors).

73. Chew & Kelley, *supra* note 40, at 1143 tbl.3.

74. See quote accompanying *supra* note 1.

75. Interestingly, however, the small sample of Asian-American judges tentatively suggests that Asian-American judges' decision-making pattern in racial harassment cases in general is more like White judges than African-American judges. See Conundrum, *supra* note 5, at 8 tbl.1. Hopefully, as the number of Asian-American judges increases, an empirical analysis will be possible to study this topic with more certainty.

76. See *infra* notes 77–80.

77. KATHERINE C. NAFF, TO LOOK LIKE AMERICA: DISMANTLING BARRIERS FOR WOMEN AND MINORITIES IN GOVERNMENT 147 tbl.6.3 (2001). See also Vaunne M. Weathers & Donald M. Truxillo, *Whites' and Asian-Americans' Perceptions of Asian-Americans as Targets of Affirmative Action*, 38 J. APPLIED SOC. PSYCHOL. 2837 (2008) (finding Asian-Americans were more likely than Whites to perceive that Asian-Americans suffer from discrimination and underrepresentation).

78. See NAFF, *supra* note 77 (showing that 34.6% of Asian-Pacific American, 58% of African-American and 8.2% of Euro-American federal employees “strongly agree/agree” with the statement).

79. Vaunne M. Weathers & Donald M. Truxillo, *Perceptions of Discrimination and Need for Affirmative Action Among Asian Americans: Is it Need or Self-Interest?*, CAHIERS DE L'URMIS (Dec. 2006), <http://urmis.revues.org/index234.html>.

discrimination.<sup>80</sup>

However, ironically, even if Asian-American judges do have a distinctive perspective on racial harassment cases in general and in racial harassment cases of Asian-American plaintiffs in particular (as these studies would suggest), it is disputable whether Asian-American plaintiffs would directly benefit. The reality is that that an Asian-American plaintiff has low odds of actually having an Asian-American judge hear his or her case. Given the very small number of Asian-American federal judges,<sup>81</sup> the probability of an Asian-American plaintiff having an Asian-American judge is very slight. If an Asian-American plaintiff brings a case in any circuit other than those in California, New York, or Kentucky, there is currently no chance at all.<sup>82</sup> The best odds of an Asian-American plaintiff having an Asian-American judge would be in one of the federal district courts in California, where most of the few Asian-American federal judges serve.<sup>83</sup> Even if the number of Asian-American judges doubled, Asian-American judges would still only be approximately two percent of the federal judiciary.<sup>84</sup> There would be only two dozen Asian-American judges out of a total of 1268 federal judges<sup>85</sup>—still making it highly unlikely that an Asian-American plaintiff's case would be heard by an Asian-American judge.

Hence, the real practical value, at least in the foreseeable future, of increasing Asian-American judges is not in helping Asian-American plaintiffs specifically, but rather in improving the resolution of racial harassment disputes more broadly. While there are no definitive answers on the particular contributions of Asian-Americans to the judicial decision-making process, substantial evidence of the benefits of increasing the diversity among judges in general is relevant. Continuing research from a number of disciplines indicates that increasing the diversity of decision makers helps produce better and more creative solutions in a range of settings.<sup>86</sup> Furthermore, studies by psychologists John Dovidio, Tamur Saguy, and others are helping us better understand how ongoing workplace interactions between individuals of different races can be most productive

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80. *Id.* Weathers and Truxillo also measured Asian and Asian-Americans' perception of discrimination of other groups. They found, for example, that Asian and Asian-American students thought that Hispanics experience more discrimination than Asian-Americans in scientific and management occupations but nonetheless thought both Asian-Americans and Hispanics should benefit from affirmative action policies. *Id.* at §§ 3.2 and 3.6, respectively.

81. *See generally supra* Part I.

82. *See supra* text accompanying note 22.

83. *Id.*

84. *See* text accompanying *supra* notes 14–15 (indicating only twelve Asian-American judges, representing 1% of the federal bench).

85. *See supra* note 23.

86. *See generally* SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS AND SOCIETIES* (2008).



and facilitate cross-racial understanding.<sup>87</sup>

Even more directly relevant is the provocative emerging research on how increasing the racial diversity of judges—for instance on appellate panels—influences decision-making patterns. These studies find that mixed-race judicial panels (typically defined as panels with at least one African-American judge) in race discrimination cases have different decision-making patterns than all-White panels. In a study of federal appellate court cases by Adam Cox and of voting rights cases by Thomas Miles, the researchers found that mixed-race panels with at least one African-American judge were more likely to rule for the plaintiffs than all-White panels.<sup>88</sup> Nancy Crowe similarly found that mixed-race panels had different outcomes in race-discrimination cases; once again, the mixed-race panels were more likely to hold for plaintiffs in race discrimination and sex discrimination cases.<sup>89</sup> In summary, it appears that judges of different races can share and influence each other on their perceptions of racism.

By having judges with diverse backgrounds and experiences, including those who may mirror some aspects of the plaintiff's own background and experiences, the judiciary can more fully understand the circumstances under which racial harassment occurs. Grossly inadequate representation of any one group deprives the judicial system, including the litigants, of that group's insights and perspectives. Given the particular underrepresentation of Asian-Americans on the bench, their missing minority perspective is of only theoretical benefit to Asian-American plaintiffs in the foreseeable future, but is of immediate practical value to the resolution of racial harassment disputes more generally.

## VI. CONCLUSION

There is a paucity of Asian-Americans in the federal judiciary, resulting in a stark underrepresentation of this racial group in the justice system.<sup>90</sup> At the same time, Asian-American plaintiffs are likely to fare poorly in the justice system, at least as indicated by an empirical study of workplace racial harassment cases.<sup>91</sup>

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87. See NEITHER ENEMIES NOR FRIENDS: LATINOS, BLACKS, AFRO-LATINOS (Anani Dzidzienyo & Suzanne Oboler eds., 2005); John F. Dovidio, Samuel L. Gaertner & Tamar Saguy, *Commonality and the Complexity of "We": Social Attitudes and Social Change*, 13 PERSONALITY & SOC. PSYCHOL. REV. 3 (2009); John F. Dovidio, Tamar Saguy & Nurit Shnabel, *Cooperation and Conflict Within Groups: Bridging Intragroup and Intergroup Processes*, 65 J. SOC. ISSUES 429 (2009); John F. Dovidio et al., *Majority and Minority Perspectives in Intergroup Relations: The Role of Contact, Group Representations, Threat, and Trust in Intergroup Conflict and Reconciliation*, in THE SOCIAL PSYCHOLOGY OF INTERGROUP RECONCILIATION 227 (Arie Nadler et al. eds., 2008).

88. Cox & Miles, *supra* note 72, at 33–34.

89. Crowe, *supra* note 72, at 153–59.

90. See *supra* Part I.

91. See *supra* Part II.

This Article explored whether the lack of Asian-American judges is related to the poor success rate of these Asian-American litigants. A simple explanation for Asian-American plaintiffs' poor success rate is that their cases are weak, but the dispute resolution process for these cases would suggest that is not the likely answer.<sup>92</sup> This Article instead offers an alternative and more complicated answer that interrelates the applicable legal principles and judicial discretion in interpreting those legal principles, the tendency for individuals of different races to perceive discrimination differently, and the particular stereotypes about Asian-Americans that put them at a disadvantage in racial harassment cases.<sup>93</sup> Furthermore, this Article posits that Asian-American judges are more likely than other judges (who are typically White)<sup>94</sup> to understand how these differing perceptions and stereotypes relate to and disadvantage Asian-Americans' racial harassment claims.

Assuming that Asian-American judges are more insightful about Asian-American plaintiffs' racial harassment claims, would an increase in the number of Asian-American judges, perhaps a doubling of the current number, make a significant difference in Asian-American plaintiffs' cases?<sup>95</sup> The answer is probably not. Even if you double the number of Asian-American judges, the odds of an Asian-American plaintiff appearing before an Asian-American judge are in fact very low. Therefore, this Article concludes that the real value of increasing the number of Asian-American judges is to enhance the diverse thinking of the judiciary more broadly, rather than to benefit Asian-American plaintiffs directly.<sup>96</sup>

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92. See *supra* Part III.A.

93. See *supra* Part III.B.

94. See *supra* Part I.

95. There are currently twelve Asian-American federal judges. See *supra* Part I. Doubling that number would yield twenty-four judges, which would constitute less than 2% of all sitting judges. *Supra* note 23.

96. See *supra* Part V.

Appendix: Asian-American Federal Judges<sup>97</sup>

Name (gender)	Court	Commission date (President)	Birth	College/Law School
Chin, Denny (m)	S.D.N.Y. 2 <sup>nd</sup> Cir.	1994 (Clinton) 2010 (Obama)	1954 Hong Kong	Princeton/Fordham
Gee, Dolly Maizie (f)	C.D. CA	2010 (Obama)	1959 CA	UCLA/UCLA
Ishii, Anthony W. (m)	E.D. CA	1997 (Clinton)	1946 CA	U. Pacific/UC Berkeley
King, George H. (m)	C.D. CA	1995 (Clinton)	1951 China	UCLA/USC
Lew, Ronald S.W. (m)	C.D. CA	1987 (Reagan)	1941 CA	Loyola L.A./Southwestern
Matsumoto, Kiyo A. (f)	E.D.N.Y.	2008 (G.W. Bush)	1955 NC	UC Berkeley/Georgetown
Mollway, Susan Oki. (f)	D.C. HI	1998 (Clinton)	1950 HI	HI/Harvard
Nguyen, Jacqueline Hong-Ngoc (f)	C.D. CA	2009 (Obama)	1963 Vietnam	Occidental/UCLA
Sabraw, Dana Makoto (m)	S.D. CA	2003 (G.W. Bush)	1958 CA	San Diego State/U. Pacific
Tashima, Atsushi Wallace* (m)	C.D. CA 9 <sup>th</sup> Cir.	1980 (Carter) 1996 (Clinton)	1934 CA	UCLA/Harvard
Thapar, Anul Roger (m)	E.D. KY	2008 (G.W. Bush)	1969 MI	Boston College/ UC Berkeley
Wu, George H. (m)	C.D. CA	2007 (G.W. Bush)	1950 NY	Pomona/Chicago

\*Senior Status

97. The author compiled this table by using data from the Federal Judiciary Center. *Directory of Judges*, *supra* note 2. The author followed the "Select research categories" hyperlink; checked the box next to "Race or Ethnicity" and followed the "Continue" hyperlink; selected "Asian American" from the dropdown box and followed the "Search" hyperlink; and followed the hyperlink for each judge. By selecting the appropriate categories, the author was also able to distinguish between sitting judges, active judges, and judges who have served at any time.

Former Asian-American Federal Judges

Name (gender)	Court	Commission term (President)	Birth/ Death	College/ Law School
Choy, Herbert Young Cho (m)	9 <sup>th</sup> Cir.	1971 (Nixon)	1916 HI/2004	HI/Harvard
Fong, Harold Michael (m)	D.C. HI	1982 (Reagan) (Carter)	1938 HI/1995	USC/MI
Heen, Walter Meheula* (m)	D.C. HI		1928 HI	HI/Georgetown
Kashiwa, Shiro (m)	Ct of Claims**	1972 (Nixon)	1912 HI/1998	MI/MI
Takasugi, Robert Mitsuhiro (m)	C.D. CA	1976 (Ford)	1930 WA/2009	UCLA/USC
Tang, Thomas (m)	9 <sup>th</sup> Cir.	1977 (Carter)	1922 AZ/1995	Santa Clara/AZ
Wong, Dick Yin (m)	D.C. HI	1975 (Ford)	1920 HI/1978	HI/Northwestern

\*recess appointment by Carter, but nomination not confirmed by Senate

\*\*reassigned to U.S. Ct. of App. For Federal Circuit

