

THE IMPACT OF GENDER ON VERDICT OUTCOMES IN  
WORKPLACE SEXUAL HARASSMENT CASES

by

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Workplace sexual harassment has become a widespread problem in American society. Verdicts in workplace sexual harassment cases are often determined by a jury's interpretation of the facts. One element that may bias the perception of jurors is gender. This literature review will examine empirical research regarding gender and sexual harassment within and outside of a legal context. Studies outside a legal context will present general conclusions on gender differences in sexual harassment perceptions. Mock juror studies on sexual harassment will examine whether these gender differences appear within a legal context. These studies will provide conclusions on how juror, plaintiff, and defendant gender may influence juror verdict outcomes in workplace sexual harassment cases. Explanations for these findings will be examined. Limitations of the current literature and directions for future research will also be discussed.

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## Introduction

Since the popularization of the #MeToo movement in 2017, public awareness of sexual harassment has significantly increased. This campaign, organized primarily through social media and the hashtag “Me Too,” encouraged survivors of sexual harassment and assault to speak publicly about their experiences. The sheer magnitude of tweets, posts, and articles resulting from the #MeToo movement became a harsh reminder to the American public of the current prevalence of sexual harassment.

Work conducted by Ilies et al., (2003) found that around one in every two American women have reported experiencing potentially harassing behaviors. They also found that 24% of women reported having experienced sexual harassment in the workplace. In 2019, over 7,000 sexual harassment charges were filed with the U.S. Equal Employment Opportunity Commission (*EEOC Sexual Harassment Charges by State & Gender FY 1997 - FY 2020*). In the federal workplace, 44% of women and 19% of men report experiencing some form of unwanted sexual attention during work (U.S. Merit Systems Protection Board, 1994). The publicization of sexual harassment from the #MeToo movement as well as the current data on sexual harassment make it clear that workplace sexual harassment has become a widespread problem.

Sexual harassment is a pressing issue in our modern society, and one intimately intertwined with social psychology and our legal system. Workplace sexual harassment cases are often determined by a jury’s interpretation of the facts. One element that may bias the perceptions of jurors is gender. If male and female jurors have differing perspectives on what behaviors constitute sexual harassment, these gender differences may control whether or not a defendant in a sexual harassment case is found liable.

Additionally, if jurors hold different opinions on harassing behaviors dependent on the gender of an alleged victim or perpetrator, these interpretations could dictate the final verdict in a case.

This literature review is concerned with investigating the impact gender may have on verdict outcomes in workplace sexual harassment cases. The review explores this issue by examining the current social science literature regarding gender and sexual harassment. This paper covers several topics related to gender, sexual harassment, and the law. First, the review covers general background information. This includes definitions of workplace sexual harassment, definitions of gender in the context of American sexual harassment law, and gender in the context of sexual harassment research. After this background information, the paper summarizes conclusions from research on gender and perceptions of sexual harassment outside a legal context. These psychological studies ask participants to evaluate vignettes of social-sexual conduct and determine whether sexual harassment has occurred.

Next, the paper includes conclusions from research on gender bias in sexual harassment studies within a legal context. These findings are derived from mock juror studies that require participants to function as jurors whilst reading or watching fictional workplace sexual harassment cases. Conclusions from these studies are divided into three sections: Mock Juror Studies with Male Perpetrator-Female Victim Sexual Harassment, Mock Juror Studies that varied Opposite-Gender Sexual Harassment, and Mock Juror Studies with Same-Gender Sexual Harassment. After reviewing these mock juror studies, the paper evaluates the limitations of these studies by examining concerns

related to their external validity. Lastly, the review notes future directions for later research on gender and workplace sexual harassment.

## General Background

### Workplace Sexual Harassment

Workplace sexual harassment is a form of federally prohibited sex discrimination under Title VII of the Civil Rights Act of 1964. In the United States, the Equal Employment Opportunity Commission (“E.E.O.C.”) is the government agency where individuals must file a charge of discrimination before they can file a sexual harassment lawsuit in court.<sup>1</sup> The E.E.O.C. defines sexual harassment as “Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” (E.E.O.C.’s Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)).

There are two kinds of workplace sexual harassment: *quid pro quo* harassment and hostile work environment harassment. *Quid pro quo* sexual harassment occurs when “submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting such individual” (29 C.F.R. § 1604.11(a)(2)). Hostile work environment harassment occurs when unwelcome sexual conduct “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment” (29 C.F.R. § 1604.11(a)(3)). In sum, sexual harassment in the workplace becomes actionable under the law when such harassing behaviors are “so frequent or severe that [they] create a hostile or offensive work environment or result in an adverse decision

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<sup>1</sup> Unless an individual is filing a claim regarding sex discrimination and equal pay/compensation based on the Equal Pay Act. An individual alleging a violation of the E.P.A. is not required to file an E.E.O.C. charge beforehand and may go directly to court.

(such as the victim being fired or demoted)” (*Sexual Harassment, U.S. Equal Employment Opportunity Commission.*, n.d.). The perpetrator of this harassment can be a victim’s supervisor, a co-worker, a supervisor in another area, or someone who is not an employee of the employer like a customer, client, or supplier (*Sexual Harassment*, n.d.).

After an individual files a charge of workplace sexual harassment with the E.E.O.C., it is up to the commission to investigate the claim. If the commission determines there is reasonable cause to believe that discrimination has occurred and the two parties are unable to resolve the matter, the E.E.O.C. will issue a Notice of Right to Sue. This Notice gives an alleged victim the permission to file a sexual harassment lawsuit in federal or state court.

When a sexual harassment lawsuit requires a bench trial, jurors are tasked with determining the final case verdict. In civil cases, jurors must provide findings of liability. The jury must determine whether the alleged victim, the plaintiff, was sexually harassed by the actions of the alleged perpetrator, the defendant. If the jurors believe that the plaintiff was a victim of workplace sexual harassment, they will find the defendant liable for sexual harassment. If a defendant is found liable, they may be ordered to pay damages to the victim. Damage awards can help the plaintiff cover the costs of lost wages, lost future wages, current and future medical expenses, pain and suffering, and legal fees. Damage awards can also be used to punish the defendant for their inappropriate behavior and to deter the defendant from committing similar behavior in the future.

## **Gender in the Context of American Sexual Harassment Law**

Gender has remained at the heart of sexual harassment law in the United States. After all, sexual harassment was first considered prohibited discrimination in 1980 by the Equal Employment Opportunity Commission which claimed that sexual harassment is a type of sex discrimination prohibited under the Civil Rights Act of 1964. In 1983, the E.E.O.C. established guidelines that formed our modern understanding of workplace sexual harassment. As stated previously, these guidelines define sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” in the workplace (E.E.O.C.’s Guidelines on Discrimination Because of Sex, 29 C.F.R, § 1604.11(a)). The E.E.O.C.’s definition does not specify when a work environment becomes hostile or offensive. Therefore, identifying sexual harassment is dependent on many factors including the qualities of the behavior, the characteristics of the situation, and features such as the gender of the individual evaluating the harassment.

In 1986, sexual harassment was first recognized as illegal workplace discrimination by the Supreme Court in *Meritor Savings Bank v. Vinson*. In this landmark case, the court affirmed the guidelines issued by the E.E.O.C. and established that “discrimination based on sex [that] has created a hostile or abusive work environment” is prohibited under federal law (477 U.S. 57, 66, 1986). The Court also concluded that for sexual harassment to be actionable under the law it must be “sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment” (477 U.S. 57, 67, 1986). After *Meritor*, Congress passed the Civil Rights Act (C.R.A.) of 1991 that granted victims of

workplace sexual harassment the right to a jury trial in federal court and the right to collect damages from their employers.

Following the passage of the C.R.A. of 1991, the Supreme Court began to address concerns regarding the gender bias of jurors. In *J.E.B. v. Alabama* (1994) the court concluded that gender-based peremptory challenges were unconstitutional. The court ruled that “litigants may not strike potential jurors solely on the basis of gender...[while] parties still may remove jurors who they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias” (511 U.S. 127, 143, 1994).

According to the ruling in *J.E.B.*, gender cannot be used as the basis for preventing a prospective juror from serving because gender alone does not create juror bias. Yet, in sexual harassment cases, the role of jurors has brought to light two legal issues concerning gender. The first issue is determining the appropriate legal standard that jurors should use when assessing the seriousness of the alleged offense. Over time, the courts have debated whose perspective—that of the particular victim, a reasonable person undifferentiated by sex, or a reasonable woman—jurors should employ to guide their decisions in these cases (Adler & Peirce, 1993).

Many courts utilize the reasonable person standard to determine whether sexual harassment has occurred (*Bennett v. New York City Dept of Corrections*, 705 F. Supp. 979, S.D.N.Y. 1989; *Hirschfeld v. New Mexico Corrections Dept*, 916 F.2d 572. 10th Cir. 1990; *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 1st Cir. 1990). In *Rabidue v. Osceola Refining Co.* (805 F.2d 611, 620, 6th Cir. 1986), the Sixth Circuit Court of Appeals stated that in harassment cases the “trier of fact, when judging the

totality of the circumstances with respect to the asserted abusive and hostile environment must adopt the perspective of a reasonable person's reaction to a similar environment under like circumstances" (805 F.2d 611, 620, 6th Cir. 1986). In addition to the precedents set in these courts, the E.E.O.C. has also recommended that individuals evaluate the severity of sexual harassment claims utilizing the reasonable person standard (Adler & Peirce, 1993).

Another prominent, yet controversial, legal standard utilized in sexual harassment cases is the reasonable woman standard. *Ellison v. Brady* (924 F.2d 871, 879, 9th Cir. 1991) was the first highly publicized case to support the reasonable woman standard. In *Ellison*, the Ninth Circuit ruled in favor of a female plaintiff in a hostile work environment case. The plaintiff claimed that the male defendant's conduct was sufficiently severe or pervasive enough to alter the conditions of her employment and create an abusive working environment. The district court first held that she did not state a prima facie case of sexual harassment due to a hostile working environment because the defendant's conduct was "isolated and genuinely trivial" in the eyes of a reasonable person (924 F.2d 871, 9th Cir. 1991). The Ninth Circuit court reversed the ruling of the district court on the basis of "the perspective of a reasonable woman...because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women" (*Ellison v. Brady*, 924 F.2d 871, 879, 9th Cir. 1991). The reasonable woman standard was intended to be a "gender-conscious examination of sexual harassment" (*Ellison v. Brady*, 924 F.2d 871, 879, 9th Cir. 1991). It assumed that men and women have different

perspectives on what comprises sexual harassment, with women more likely to interpret conduct of a sexual nature as harassment.

The second legal issue regarding gender and sexual harassment is whether interactions between or amongst the sexes are equally considered sexual harassment. In *Oncale v. Sundowner Offshore Services, Inc.* (523 U.S. 75, 1998) the Supreme Court affirmed that the prohibition of sex discrimination under the Civil Rights Act of 1964 extended to same-sex sexual harassment. In *Oncale*, the Court stated the Civil Rights Act of 1964 does not prohibit all physical or verbal harassment in the workplace but federal law does prohibit all forms of discrimination “because of sex” (523 U.S. 75, 78-82, 1998). The court concluded that workplace sexual harassment is not “automatically discrimination because of sex merely because the words used have sexual content or connotations” (523 U.S. 75, 80, 1998). Rather, workplace sexual harassment occurs whenever “members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed” (523 U.S. 75 1998). In *Oncale v. Sundowner Offshore Services, Inc.* (1998) we witness a significant gender-based distinction regarding workplace sexual harassment. Here, the court confirms that conduct of a sexual nature does not always qualify as sexual harassment; instead, this behavior must involve some form of discrimination based on a victim’s sex. Sex-based discrimination involves any situation that places the victim in an objectively disadvantageous work condition because of their gender.

American sexual harassment law leaves open several questions regarding gender and workplace sexual harassment. The most obvious of these is whether the court in *J.E.B. v. Alabama* (1994) was wrong to assert that gender alone does not bias the

verdict decisions of jurors. If male and female jurors regard sexual harassment differently, will this gender difference lead jurors to produce different verdicts? If juror gender has a significant influence on case verdicts, then should a gender-based legal standard, like the reasonable woman standard, be used in sexual harassment cases? Rulings in *Oncale v. Sundowner Offshore Services, Inc.* (1998) suggest that the gender of the plaintiff and defendant may also influence juror verdicts. If men and women differ in their harassment perceptions, is this difference influenced by the gender of the alleged victim or perpetrator? Similarly, will juror perceptions depend on whether these actions appear to be sexually motivated?

To find answers to these vital concerns, we turn to the guidance of social science research.

### **Gender in the Context of Sexual Harassment Research**

*Meritor Savings Bank v. Vinson* (1986) established the modern legal understanding of sexual harassment in the United States. During the 1980s, sexual harassment became a topic of interest not only for civil rights lawyers in the courtroom but for psychologists as well. These years marked the first decade of sexual harassment research in the field of psychology (Langley, 2007). It was believed that social science could contribute to understanding the origin of sexual harassment as well as anticipating reactions and responses to sexual harassment (Blumenthal, 1998).

As in sexual harassment law, issues related to gender and sexual harassment have remained at the forefront of psychological research. Researchers have examined how gender may contribute to an individual's recognition and interpretation of sexual harassment. These investigations have led researchers to formulate several theories

regarding how perceptions, biases, and stereotypes may shape outcomes in sexual harassment cases.

These findings have had a significant role in shaping American sexual harassment law. For example, the idea of the reasonable woman standard as defined in *Ellison v. Brady* (1991) was based on a decade of empirical research regarding how men and women differed in their perceptions of sexual harassment. The *Ellison* court cited several studies illustrating how men were less likely than women to be concerned with sexual behavior in the workplace (924 F.2d 871, 9th Cir. 1991).

In much of the current sexual harassment literature, gender is operationalized as participant sex. Many of the studies included in this review measured gender by providing participants with demographic questionnaires. These questionnaires asked participants to self-report their gender as “male” or “female.” These studies often do not measure and do not include subjects with gender identities that do not align with a response of “female” or “male” on a questionnaire, like transgender or non-binary individuals. Unfortunately, it is likely that the responses of these self-identified female subjects will not accurately represent the perspectives of all women and that the responses of self-identified male subjects will not accurately represent the perspectives of all men.

Because most of the literature in this area is limited to comparisons between males and females, the conclusions drawn in this literature review, for the most part, must be limited to cisgender classifications. However, as 97.7% of the U.S. population identifies as a cis-gender man or woman, a majority of sexual harassment cases involve cis-gender victims and perpetrators as well as cis-gender jurors (U.S. Census Bureau,

2021). Thus, studies on perceptions of sexual harassment resulting from cis-gender participants are highly relevant. In addition, these findings establish a foundation for understanding and anticipating the tendencies of jurors in workplace sexual harassment cases. It may be that the general findings from the current literature on cis-gender jurors, victims, and perpetrators will extend to other populations. The general psychological mechanisms that underlie these findings are likely to operate with non-cisgender individuals as well.

Although one can attempt to make reasonable extrapolations on how the behavior of cis-gender legal actors is applicable towards other sample populations, more research is required to confirm these conclusions. Analyzing the previous literature can inform decisions and hypotheses regarding gender in future harassment studies. Accordingly, this review later includes recommendations for future research on gender and sexual harassment that is more inclusive of those with non-cisgender identities.

## **Gender and Perceptions of Sexual Harassment outside a Legal Context**

Early sexual harassment research focused on individuals' perceptions of sexual harassment outside of a legal context (Kovera and Cass, 2002). Participants were often presented with short vignettes detailing a social-sexual interaction between two employees or brief descriptions of different social-sexual behaviors. Social-sexual behaviors can be defined as "interactions occurring between two or more organizational members...that are construed by the parties involved as having sexual connotations, but that are *not necessarily* perceived by one or more parties involved as having a threatening or harassing intent" (Aquino et al., 2014, p. 220). Such behaviors include flirting, gentle touching, complimenting another's physical appearance, making sexual innuendos, making sexually explicit jokes, and bantering on sexual topics (Aquino et al., 2014).

After allowing participants to read scenarios depicting social-sexual conduct, researchers provided subjects with various questionnaires. Often, participants had to rate whether an action was sexual harassment, assign attributions of blame, describe the character traits of the perpetrator and victim, and provide predictions of the victim's future well-being. Most of these scenarios only included a male perpetrator and female victim and each took place in a workplace or university setting.

The following studies were not designed to test how participants might function as jurors in a sexual harassment case. Participants were not provided with legal definitions of sexual harassment nor asked to give a verdict on liability and assign damage awards. But in these studies, participant gender, as well as the gender of the victim and perpetrator, emerged as significant variables in influencing determinations of

sexual harassment. Thus, this research offers valuable background for this review. From these studies, several conclusions about the effects of gender on perceptions of sexual harassment can be drawn.

### **Conclusion 1: Women Perceive More Incidents as Sexual Harassment**

The most common finding from existing literature on gender and sexual harassment is that women perceive a wider range of incidents as sexual harassment than do men (Gutek, 1995; Mazer and Percival, 1989; McKinney et al., 1992; Powell, 1986; Williams & Cyr, 1992). LaRocca and Kromrey (1999) provided college students with a vignette detailing an ambiguous episode of sexual harassment between a female student (the victim) and a male professor (the perpetrator). They reported that female college students were more likely to classify the interaction as sexual harassment than male students. The main effect for this effect was  $f = 0.25^2$  (LaRocca & Kromrey, 1999). Katz et al. (1996) also found that female participants rated more interactions as examples of sexual harassment. They provided participants with hypothetical interactions between a man and woman and found that participant gender accounted for 6.9% of the variance in whether a subject rated an act as sexual harassment.

The viewpoints of female and male participants tend to diverge greatest when the presented scenarios are ambiguous. Golden et al (2002) provided participants with scenarios depicting ambiguous incidents of sexual harassment between a female secretary and her male boss. These scenarios included incidents such as the boss making

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<sup>2</sup> Effect sizes measure the strength of a relationship between variables with larger effect sizes indicating a stronger relationship. For Cohen's  $f$  a value of 0.10 indicates a small effect, a value of 0.25 indicates a medium effect, and a value of 0.40 indicates a large effect. LaRocca and Kromrey (1999) reported a medium effect size for rater gender, with female raters more likely than male raters to find evidence of sexual harassment.

a sexually explicit joke, the boss repeatedly calling his secretary “Honey,” and the boss inviting his secretary over to his house to discuss a work-related project. Female participants found more of these examples to be sexual harassment than did their male counterparts (Golden et al., 2002). Gutek et al. (1983) utilized vignettes of ambiguous, but potentially sexual interactions, between men and women in the workplace including interactions like touching (“a pat on the fanny”) and verbal comments on physical appearance. Here, female participants rated these interactions more negatively than male participants (Gutek et al., 1983).

Fitzgerald and Ormerod (1991) found that overall women are more likely than men to view “less explicitly coercive situations” as harassing. For example, women are more likely to label offensive jokes and sexual remarks that occurred in the workplace as sexual harassment compared to men (Tata, 1993). Kenig and Ryan (1986) also found the greatest sex differences in definitions of sexual harassment for the “mildest forms of [social-sexual] behavior” like sex-stereotyped jokes compared to more severe forms of sexual harassment such as unwanted touching or unwanted pressure for sexual activity (Kenig & Ryan, 1986). Kenig and Ryan (1986) also reported greater gender differences in perception for sexual harassment behaviors occurring between peers rather than those perpetrated by an authority figure. All these findings suggest that when regarding more ambiguous situations, women may apply broader and more inclusive definitions of sexual harassment than men (Gutek, 1995).

## **Conclusion 2: Women are Less Tolerant of Sexual Harassment**

Another frequent finding from sexual harassment research is that women are generally less tolerant of sexual harassment behaviors than men (Ford & Donis, 1996;

Kenig & Ryan, 1986; McCabe and Hardman, 2005). McCabe and Hardman (2005) provided white-collar workers with the 18-item *Sexual Harassment Attitude Scale for Workers*. The scale had possible total scores ranging from 18-90, with higher scores indicating “more acceptance and tolerance of sexually harassing behaviors” (p. 725). McCabe and Hardman (2005) found that men ( $M = 45.18$ ) were significantly more tolerant of sexual harassment than women ( $M = 39.1$ ).

In general, female participants rate written scenarios detailing social-sexual behaviors as more inappropriate, harmful, and harassing than male participants (Baird et al., 1995; Bursik, 1992; Gutek et al., 1983; Loredo, 1995; Marks & Nelson, 1993; Powell, 1986). Gutek et al. (1983) gave participants 4 vignettes on social-sexual conduct occurring between 2 employees in a workplace. Participants provided responses to a variety of questions, with many items regarding the relationship between the initiator and the target, such as the extent the two were friends/liked each other, the extent the target respected the initiator, and whether they both worked well together. Gutek et al. (1983) found that women evaluated the relationship between the initiator and the target less favorably than did men did on a 5-item scale ( $M = 3.35$  and  $M = 3.49$ , respectively). Women ( $M = 3.14$ ) also evaluated the incidents in each vignette less favorably than men ( $M = 3.58$ ).

Loredo (1995) found that female high school students rated sexual harassment scenarios as more harassing ( $M = 5.02$ ) and more inappropriate ( $M = 5.76$ ) on a 7-point scale than male high school students ( $M = 4.33$  and  $M = 5.32$ , respectively). In a study by Powell (1986), undergraduate college students read ten behaviors that could be considered workplace sexual harassment. These included incidents like sexual remarks,

sexual looks and gestures, nonsexual touching, sexual touching, sexual propositions, and requiring dating or sexual activity as part of employment. Results showed that a higher percentage of women than men found each behavior to be harassing. This percentage difference ranged from only 2% for sexual remarks or sexual looks that are meant to be insulting, up to 25% for sexual looks and gestures meant to be complimentary (Powell, 1986). Following **Conclusion 1**, these findings are unsurprising as research demonstrates that individuals who define more incidents as sexual harassment have less tolerance for sexual harassment (Foulis & McCabe, 1997; Mazer & Percival, 1989).

In sum, women have more negative attitudes toward sexual harassment than men (Mazer & Percival, 1989). Compared to men, women are more likely to think sexual harassment is a problem and less likely to believe that claims of sexual harassment were exaggerated (Gutek, 1995). Research has also found that women are more likely to believe a sexual harassment victim will suffer from negative physical and psychological effects (Wiener & Hurt, 2000). In addition, women believe a victim's job performance will more likely be affected after experiencing sexual harassment (Popovich, 1992). These findings may be why women are more likely to punish sexual harassment than men (DeSouza et al., 1998). Summers and Myklebust (1992) found that female participants were more likely to support punishments for sexual harassment than male participants, who deemed certain types of punishment as too harsh and inappropriate for the offense.

### **Conclusion 3: Sexual Harassment is Often Perceived as Male Perpetrator-Female Victim**

Although sexual harassment is more frequently experienced by women, men are still victims of sexual harassment and the number of claims of sexual harassment toward men continues to increase over time (Studzinska & Hilton, 2016). Despite this reality, lay perceptions of sexual harassment often define the behavior as that initiated by a male perpetrator against a female victim. Survey results from Weinberg and Nielson (2017) found that both ordinary citizens and federal and state court judges identified more workplace disputes as sexual harassment when the perpetrator was male, and the victim was female. McCabe and Hardman (2005) reported that white and blue-collar workers both perceived more behaviors as sexual harassment when the presented scenario involved a female victim and a male perpetrator. Similar results were found amongst undergraduate college students as well as lawyers (Katz et al., 1996; Shechory-Bitton & Zvi, 2020). Another study utilizing college students found that participants perceived a male student harassing a female faculty member as sexual harassment more often than a female student harassing a male faculty member (McKinney, 1992).

The bias that most sexual harassers are male impacts how observers regard male perpetrators as well as male victims. Past research has found that men and women judge the behavior of male perpetrators more harshly and are more likely to punish male perpetrators than female perpetrators (LaRocca & Kromrey, 1999; Baird et al., 1995; Cummings & Armenta, 2002). When provided with ambiguous, but potentially sexual, interactions between men and women in a work setting, Gutek et al. (1983) found that

behaviors initiated by women were viewed as more favorable and more appropriate compared to men. In addition, male victims of opposite-gender sexual harassment are perceived to suffer less than female victims (Studzinka & Hilton, 2016). Because of this, female perpetrators of sexual harassment against men are evaluated less negatively than male perpetrators of sexual harassment against women (Studzinka & Hilton, 2016).

It must be noted that while these studies did investigate opposite-gender sexual harassment, most did not measure same-gender sexual harassment. Research on female-female or male-male sexual harassment is unfortunately limited. But recent research appears to show that same-gender sexual harassment is viewed more negatively than opposite-gender sexual harassment (Wayne et al., 2001; Carlucci & Golom, 2016). Stockdale et al. (2004) believe that one's attitude towards same-gender sexual harassment can be dictated by the perceived intentions of the harasser. This study identified two distinct kinds of sexual harassment: approach-based and rejection-based sexual harassment. Approach-based sexual harassment consists of unwanted sexual attention or advances and usually implies sexual attraction from the harasser. Rejection-based sexual harassment consists of behaviors that usually imply a harasser's desire to punish, humiliate, or drive away the target. This style of harassment is often employed by men to punish other men who do not conform to traditional gender roles or because the harasser wishes to "police hypermasculine gender norms" (Stockdale et al., 2004).

Stockdale et al. (2004) found that participants considered same-gender harassment to be more harassing than opposite-gender harassment when it was approach-based. The opposite was true for rejection-based sexual harassment. This

conclusion could explain findings from Weinberg and Nielson (2017) who included vignettes of male-male sexual harassment in their study. They found that federal and state court judges were less willing to regard an action as harassment when it was male-male sexual harassment than when there was a male victim and a female perpetrator (17.19% and 37.5% respectively). In this case, same-gender sexual harassment could have been viewed more leniently because judges regarded the provided scenarios as rejection-based forms of harassment, therefore, they were more acceptable.

Overall, these findings support the conclusion that sexual harassment is commonly viewed as actions by a male perpetrator toward a female victim. When acts of harassment fall outside traditional expectations, such as when a victim is male or both perpetrator and victim are of the same sex, participant response varies greatly. In general, male perpetrators and same-gender sexual harassment are viewed more harshly than harassment by a female perpetrator or harassment occurring in an opposite-gender interaction. However, perceptions of same-gender sexual harassment seem to vary depending on the implied intentions of exhibited behaviors. This wide variance in response could be because sexual harassment between “atypical” actors may be regarded as more ambiguous than “traditional” sexual harassment.

### **Strength of Relationship Between Observer Gender and Perceptions of Sexual Harassment**

Early research demonstrated that observer gender has some influence on perceptions of sexual harassment. But the question remained on the size of this difference. Meta-analyses conducted by Blumenthal (1998) and Rotundo et al. (2001) investigated whether women are more likely to interpret social-sexual behavior as

harassing as compared to men. After collecting data from 100 studies, Blumenthal (1998) reported a correlation of  $r = 0.171$ <sup>3</sup> between women interpreting more social-sexual behaviors as harassing compared to men. This positive correlation, while small, remained stable across other participant factors such as age, culture, and professional status. After analyzing the data of 62 studies, Rotundo et al. (2001) found a moderate correlation of  $r = 0.30$  for the likelihood of women to report more social-sexual behaviors as harassing compared to men. The size of this gender effect varied by harassment type. When isolating their findings by the type of harassment, Rotundo et al. (2001) reported a correlation between female participants and identifying more scenarios as harassment compared to male participants of  $r = 0.33$  for hostile work environment harassment and  $r = 0.18$  for *quid pro quo* harassment.

One explanation for this difference in gender effects could be that elements of *quid pro quo* harassment are easier to define than those of hostile work environment harassment. Individuals may find it easier to identify acts of *quid pro quo* harassment as these simply involve a perpetrator participating in unwelcome sexual conduct and using this conduct as a basis for employment decisions involving the victim. Hostile work environment harassment, on the other hand, can include a variety of unwelcome sexual behaviors that interfere with a victim's work performance and create an intimidating or offensive working environment. Compared to *quid pro quo* harassment, the elements of hostile work environment harassment can be more ambiguous. Defining what comments or behaviors create a work environment that is hostile, intimidating, or

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<sup>3</sup> Pearson's  $r$  represents the strength of the linear relationship between 2 standardized variables. Pearson's  $r$  always has a value between -1.0 and 1.0. Traditionally, an  $r$ -value between 0.10 to 0.30 (or between -0.10 to -0.30) represents a weak linear relationship, an  $r$ -value between 0.30 to 0.50 represents a moderate linear relationship, and an  $r$ -value between 0.50 to 1.0 represents a strong relationship.

offensive can be more subjective than determining whether a perpetrator caused a victim to experience adverse employment decisions as in a *quid pro quo* case. Thus, Rotundo et al. (2001) could support the idea that gender differences in perceptions of sexual harassment are the largest when a scenario or alleged behavior is more ambiguous.

Overall, Blumenthal (1998) and Rotundo et al. (2001) each found a small to moderate effect size for gender and perceptions of harassment. Their work provides evidence that women, compared to men, perceive a broader range of social-sexual behaviors as harassing.

## **Sexual Harassment Studies within a Legal Context**

### **Mock Juror Studies with Male Perpetrator-Female Victim Sexual Harassment**

Similar to early research on perception, mock juror studies that have used sexual harassment cases often use cases that feature a female plaintiff and a male defendant, or several male perpetrators represented by their work organization. From these studies, we witness several important case outcomes.

### **Verdict Outcomes**

*Female mock jurors favor female plaintiffs.* Several studies have reported that female mock jurors are more likely than male mock jurors to favor female plaintiffs and find male perpetrators liable. In a study by Wiener et al. (1995), undergraduate college students were provided with fact patterns from two sexual harassment cases and asked to make legally relevant decisions utilizing the reasonable person or reasonable woman legal standard. The presented cases were based on two hostile work environment cases: *Ellison v. Brady* (1991) and *Rabidue v. Osceola Refining Co.* (1986). In *Ellison* (1991), Ms. Ellison claimed that her male co-worker made sexual references to her and subjected her to unwelcome and persistent requests for dates. She refused the dates and filed a complaint; however, her co-worker maintained that he was expressing normal romantic interest. In *Rabidue* (1986), Ms. Rabidue claimed that a male co-worker made crude and vulgar comments about women and directed some of these comments toward her. In addition, she claimed that her other male co-workers openly displayed pictures of scantily clad and nude women. All names in the provided cases were altered from the real case.

Participants were asked to provide judgments on whether the sexual conduct was unwelcome, severe, and pervasive. Participants were also asked about the likelihood that the alleged sexual conduct negatively impacted the victim's psychological well-being and work performance. Lastly, participants were asked about the likelihood that the plaintiff was a victim of a hostile work environment and if the participant had been the plaintiff, whether they would have perceived themselves as a victim of a hostile work environment. Participants provided responses on a 9-point Likert scale with a higher rating indicating a higher likelihood of harassment.

Results showed that compared to men, women thought it more likely that the plaintiff was subjected to sexual conduct that was unwelcome, severe, and pervasive. On average, female jurors rated these categories a point higher than their male counterparts. Female jurors also found it more likely that the plaintiff's work performance and psychological well-being were affected in a negative manner. The greatest gender difference in juror response came from the ratings of the final two questions. The first was whether the plaintiff was subject to a hostile work environment. Here the ratings of female jurors ( $M = 6.81$ ) were almost 1.5 points higher than those of male jurors ( $M = 5.44$ ). The second question was whether, if treated as the plaintiff, the juror would have perceived themselves to have been a victim of harassment. Once again, female mock jurors ( $M = 6.73$ ), provided an average rating that was almost 1.5 points more than male jurors, ( $M = 5.37$ ). Overall, juror gender explained 10% of the variance in hostile work environment judgments. These gender effects remained independent of legal standards and fact patterns.

A later study by Wiener et al. (1997) found similar results. Utilizing the same case summaries and rating scale, they asked participants whether the presented sexual conduct in each case scenario was considered unwelcome by the plaintiff. Researchers found that female jurors were more likely to find that the defendant's social-sexual conduct was unwelcome. For these ratings, female participants provided an average rating of  $M = 7.15$  and male participants provided a rating of  $M = 6.34$  on the 9-point Likert scale. In addition, participants were asked whether the plaintiff was subjected to hostile work environment sexual harassment. For this measure, female participants ( $M = 6.72$ ) found the defendant's behaviors to be more likely to constitute hostile work environment harassment compared to male participants ( $M = 5.66$ ).

Wiener et al. (2004) again replicated these findings with a study utilizing two sexual harassment vignettes. One of the vignettes was again based on *Rabidue v. Osceola Refining Co.* (1986) and the other was modeled on *Faragher v. City of Boca Raton* (1998). In *Faragher*, the female plaintiff claimed that two of her supervisors created a sexually hostile atmosphere by repeatedly subjecting the plaintiff and her female colleagues to unwanted touching and offensive remarks about women. Wiener et al. (2004) asked undergraduate participants to evaluate the vignettes not as mock jurors but as observers of the depicted work behavior. Although instructed not to see themselves as jurors, participants were still read written instructions regarding the legal elements of sexual harassment and were asked to provide judgments on the same dependent measures as the previous studies. Once again, results indicated that women rated the likelihood of harassment greater than men.

These studies led by Richard Wiener and colleagues are not alone in their discovery of the tendency of female jurors to find male perpetrators liable for workplace sexual harassment (Cass et al., 2010; Kovera et al., 1999; O'Connor et al., 2004). In a study by Kovera et al. (1999), undergraduate college students viewed a trial simulation based on a hostile work environment case, *Robinson v. Jacksonville Shipyards* (1991). In this case, the female plaintiff claimed that her male coworkers targeted her with unwelcome sexual behavior and displayed sexually suggestive photos around her workplace. Participants viewed testimony from the plaintiff and a female co-worker who corroborated her claims and testimony from the defense that included comments from company supervisors and executives.

Before viewing the trial, each participant was given a voir dire questionnaire. At the conclusion of the trial, each subject completed a trial questionnaire where they rendered a dichotomous liability judgment and judged the probability that the plaintiff's workplace was hostile on a scale from 0% to 100%. Participants also rated the trustworthiness and credibility of each witness on a 7-point Likert scale with higher numbers representing more positive evaluations.<sup>4</sup>

Kovera et al. (1999) found that overall women were 3.43 times more likely than men to find the defendant liable. In addition, 78% of women as compared to 60% of men thought it was probable that the plaintiff's workplace was hostile. Likewise, female participants found the female plaintiff to be more trustworthy and more credible than

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<sup>4</sup> In Kovera et al. (1999) participants provided 7-point scale ratings on a series of four bipolar adjective pairs to judge the credibility of the plaintiff: "unconvincing-convincing" "uncertain-certain" "unbelievable-believable" "not credible-credible." Participants also provided 7-point scale ratings on a series of four bipolar adjective pairs to judge the trustworthiness of the plaintiff: "dishonest-honest" "insincere-sincere" "immoral-moral" "untrustworthy-trustworthy."

did male participants (Trustworthy: Female  $M = 5.24$ ; Male  $M = 4.58$ ; Credibility: Female  $M = 5.35$ ; Male  $M = 4.39$ , respectively).

As the participants of all these studies were undergraduate college students, the question remains whether this juror gender effect is apparent in other demographics. The answer appears to be yes. Cass et al. (2010) recruited jury-eligible community members to participate as mock jurors. Mock jurors were provided trial summaries loosely based on *Robinson v. Jacksonville Shipyards* (1991). Participants judged whether the plaintiff was the victim of a hostile work environment on a 7-point Likert scale, with higher scores indicating a greater likelihood of sexual harassment.

Although the gender effect was small, researchers still concluded that female mock jurors ( $M = 4.94$ ,  $SD = 0.16$ ) were more likely to believe that the workplace was hostile than male mock jurors ( $M = 4.42$ ,  $SD = 0.19$ ). Female mock jurors ( $M = 3.59$ ,  $SD = 0.18$ ) were also more likely to believe that the female plaintiff had suffered compared to male mock jurors ( $M = 2.98$ ,  $SD = 0.21$ ).

Participants recruited by O'Connor et al. (2004) included undergraduate college students as well as adults in the community who were part of the jury-selection pool. Subjects viewed a video trial, or a written scenario based on a fictional sexual harassment case that contained alleged claims of *quid pro quo* and hostile work environment harassment. The case involves a male-dominated manufacturing plant where the female plaintiff was a tool clerk. The defendant is her supervisor in the tool shop who the plaintiff claims frequently stared at her and followed her around. The plaintiff claims that one day the defendant tells her, "Ya know, if you were nicer to me, it would make your job a lot easier" (p.78). The plaintiff interpreted this as a sexual

advance and stated that after her non-responsiveness to these inquiries, her supervisor gave her a disciplinary warning. The defendant claims that he was trying to help the plaintiff be more sociable at work and that she received a warning because her work performance had been poor. The plaintiff stated that these events made her so stressed that her physician recommended she take a leave of absence from work. When the plaintiff returned to work, she claimed to experience retaliation from the defendant and her coworkers, so she requested to be transferred, but her request was denied. As a result, the plaintiff did not return to work, and she was fired.

Participants were also given the legal definitions of sexual harassment as defined by the E.E.O.C. Potential evidence for both forms of harassment were present in both stimulus vignettes. Each subject was asked whether the alleged conduct fit their personal definition of sexual harassment (*In your opinion was the plaintiff sexually harassed?*) and if the alleged conduct fit the legal definitions of *quid pro quo* and hostile work environment harassment. Subjects provided ratings for these questions on a 6-point Likert scale ranging from “definitely no” to “definitely yes.”

O’Connor et al. (2004) reported that female mock jurors rated the alleged conduct as more likely to be sexual harassment than men based on their personal definitions of sexual harassment and the legal definition of *quid pro quo* harassment. In the video trial condition, the effect of gender accounted for 2% of the variance in ratings of *quid pro quo* harassment and 5% of the variance in ratings based on one’s personal definition of sexual harassment. In the written scenario condition, gender accounted for 2% of the variance in ratings based on personal and legal definitions of *quid pro quo* sexual harassment. Also in this condition, female jurors provided higher harassment

ratings than male jurors based on the legal definition of hostile work environment harassment. Once again, the effect of gender accounted for 2% of the variance in these ratings.

### **Explanation of Findings**

*Self-Referencing.* One explanation for the tendency of female mock jurors to favor a female plaintiff and find a male perpetrator liable is *self-referencing*. In a sexual harassment case, self-referencing occurs when a juror imagines themselves in the position of the victim and determines how they would behave or interpret the alleged harasser's behaviors if they were in the same circumstance (Wiener et al., 2004; Wiener & Hurt, 2000). Social identity theory posits that a form of self-referencing can occur when individuals perceive their world as consisting of *ingroups*, social groups to which an individual belongs, and *outgroups*, social groups an individual is not a part of (Everett et al., 2015). Once individuals view themselves as members of a group, they begin to recognize the qualities and actions of the ingroup as representing a part of themselves (Everett et al., 2015). In sexual harassment cases, women may regard the female plaintiff as part of their ingroup because the plaintiff is a woman or because women are more likely to have personally experienced sexual harassment (Shechory-Bitton and Shaul, 2013). Therefore, it is easier for female jurors, compared to male jurors, to identify with the alleged female victim, leading them to perceive more behaviors as harassing.

Some mock juror studies have worked to isolate the variable of self-referencing to determine whether it influences a juror's belief that a plaintiff was a victim of sexual harassment. Schwartz and Hunt (2011) confirmed that self-referencing significantly

predicted the verdicts of mock jurors. They found that mock jurors who favored the female plaintiff showed greater self-referencing than jurors who favored the defendant (in this case her employer, not a male perpetrator).

Two of the mock juror studies mentioned above, O'Connor et al. (2004) and Wiener et al. (1997), actually tested for self-referencing along with measuring gender effects. O'Connor et al. (2004) found that self-referencing mediated the relationship between juror gender and sexual harassment judgments. They asked participants several questions on whether they believed they would have perceived themselves to have been sexually harassed if the events described in the scenario had happened to them. They found that female mock jurors were more likely than male mock jurors to believe they would have felt sexually harassed had they been in the plaintiff's situation. Thus, female mock jurors demonstrated higher levels of self-referencing than male jurors and this greater self-referencing predicted perceptions that the female plaintiff was a victim of sexual harassment.

O'Connor et al. (2004) hypothesized that heightened self-referencing led jurors to favor the plaintiff because of the connection between self-referencing and perceptions of complainant credibility. When a mock juror can put themselves in the plaintiff's position, they are more able to empathize with the plaintiff, resulting in a higher likelihood of finding the plaintiff credible. Therefore, because female mock jurors were more likely to believe the plaintiff's story, they were also more likely to produce a judgment of sexual harassment than male mock jurors (O'Connor et al., 2004).

Wiener et al. (1997) performed a multiple regression analysis to measure whether self-referencing could explain why they found that female jurors were more likely to favor the female plaintiff. Their analysis utilized 2 predictor variables: participant gender and the participant's ability to put themselves in the position of the plaintiff (self-referencing). To measure self-referencing they asked participants, "If you had been treated like [the plaintiff] how likely would you be to consider the treatment hostile work environment sexual harassment?" (p.78). Before their analysis, Wiener et al. (1997) reported that gender explained 6% and 7% of the variance in juror harassment judgments in the *Ellison* and *Rabidue* fact pattern, respectively. But after accounting for juror self-referencing, they found that gender explained less than 0.5% of the variance in harassment judgments in the *Ellison* fact pattern. For *Rabidue*, after accounting for self-referencing, gender explained only 1% of the variance in response.<sup>5</sup> These conclusions illustrate that in sexual harassment cases the act of self-referencing can be one explanation for why male and female jurors provide different judgments in these cases.

The role of self-referencing in judgments of sexual harassment is made even more apparent by looking at past research on gender and perception. Foulis and McCabe (1997) provided participants with 16 vignettes describing same gender or opposite gender sexual harassment incidents occurring to a male victim named Mike or a female victim named Jane. These behaviors ranged from sexually suggestive comments to unwanted touching and persistent requests for dates. For each behavior,

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<sup>5</sup> In Wiener et al. (1997), when entered last, self-referencing explained 61% of the variance in the *Ellison* case and 46% of the variance in the *Rabidue* case.

participants were asked to provide a dichotomous rating of whether the action constituted sexual harassment. But before participants recorded their sexual harassment rating, each had to answer a multiple-choice question related to self-referencing. This question was: “If you were Mike/Jane, would you be” with answer choices including 6 options: flattered, offended, upset, angry, annoyed, and not bothered (p. 792-797).

Foulis and McCabe (1997) found no significant gender differences in participant perceptions of sexual harassment across all vignettes. This finding could be a result of their stimulus questioning style that encouraged all participants to self-reference *before* they provided a harassment judgment. When male subjects had to place themselves in the position of the victim (who was also male in half of the presented scenarios), they were no less likely than female subjects to find the interaction to be harassing.

As previously explored in **Conclusion 1**, women perceive more incidents as sexual harassment, and this is especially true for forms of sexual harassment that are less severe and more ambiguous. When sexual conduct is severe, however, research indicates that there is no effect of gender on perceptions of harassment (Frazier, 1995; Gutek, 1995). The disappearance of this gender effect could be partially due to decreased self-referencing. When an occurrence of alleged sexual harassment is more severe, it may be difficult for a male or a female juror to imagine such hostile action directed at them. When jurors can no longer rely on self-referencing to provide clarity in their judgment making, male mock jurors are just as likely as female mock jurors to find a defendant liable for sexual harassment. These findings also support the idea that in cases where sexual harassment is easier to identify, it becomes less necessary for

jurors to place themselves in the position of the plaintiff to identify the situation as sexual harassment.

*Attribution Theory.* Another explanation for the tendency of female jurors to rule in favor of female plaintiffs is attribution theory. Attribution theory states that people frequently attribute their own behaviors to external factors, which are situationally determined, while they attribute the behaviors of others to internal factors, like personality (Rigor, 1991). Along these lines, Pryor (1985) asserts that people often interpret the behaviors of others based on their perceived causes. Therefore, in sexual harassment cases, mock jurors may interpret the interactions between the plaintiff and defendant based on what they perceive caused these interactions to occur. Jurors may consider the alleged conduct in light of whether they can attribute internal or external causes to the actions of the perpetrator and victim.

If women are more likely to view sexual harassment from the perspective of the female victim, they will be more likely to attribute her behavior to external rather than internal factors. Rather than thinking that the victim may have provoked the harassment or blaming the victim for allowing such harassment to occur, female jurors may be more likely to believe that harassment victims are simply acting in response to inappropriate behaviors of their male colleagues. This belief could contribute to female jurors having heightened sympathy for the plaintiff. In regard to the male perpetrator, female jurors may be more inclined to attribute their actions to internal causes, such as believing the perpetrator made a sexually explicit comment because he has a cruel disposition. The opposite could be true for male jurors who may be more likely to attribute the behaviors of the male perpetrator to environmental factors (i.e., the victim

was being flirtatious, the perpetrator misread the situation, his behavior is common in this workplace, etc.). Thus, how female, and male jurors attribute cause in cases of sexual harassment could largely influence liability verdicts.

***Stimulus Medium.*** O'Connor et al. (2004) found greater gender differences in sexual harassment judgments for participants who observed a video trial rather than read a written trial scenario. In the written scenario condition, gender accounted for 2% of the variance in participant response based on personal and legal definitions of sexual harassment. In the video trial condition, gender had a more significant effect on judgments, accounting for 2% of the variance in response based on definitions of *quid pro quo* harassment and 5% for responses based on personal definitions of harassment.

These findings could imply that the stimulus medium in sexual harassment studies may impact observed gender differences. More realistic trial simulations could produce greater gender effects than written sexual harassment scenarios or cases. Other studies utilizing videos of sexual harassment scenarios have concluded that women perceive significantly more of these incidents as harassment compared to men (Maeder et al., 2007; Marks and Nelson, 1993). Thus, although the gender effect on sexual harassment perceptions appears to be small across most studies previously mentioned, it is possible that this effect would be larger if a video trial simulation was used. If this is the case, such findings provide even more evidence for the presence of juror gender bias in actual sexual harassment cases as video trial simulations more closely emulate what a juror would experience in an actual trial.

## **Mock Juror Studies that Varied Opposite-Gender Sexual Harassment**

There have been several mock juror studies that have varied the gender of the alleged victim and perpetrator in a sexual harassment case. For the studies that investigated both male perpetrator-female victim sexual harassment and female perpetrator-male victim harassment we witness several effects on outcomes.

### **Verdict Outcomes**

*Female mock jurors favor the plaintiff.* In studies featuring opposite-gender sexual harassment, female mock jurors are more likely to find the defendant liable and believe that the plaintiff was a victim of harassment than male mock jurors. In a study conducted by Isbell et al. (2005), participants were given a fictional case summary in which a plaintiff accused two coworkers of the opposite sex of creating a hostile work environment. The plaintiff states that the coworkers made disturbing comments about the plaintiff's body and sex life and grabbed the plaintiff's bottom. In response, the defendants argued that their workplace is very relaxed and that these behaviors are common there. They also claimed that the plaintiff used to reciprocate this joking behavior and that the plaintiff was being too sensitive as these behaviors were intended as compliments.

After reading the case, participants were asked to rate the extent the defendant's behavior constituted sexual harassment by answering three questions based on the legal definition of sexual harassment: "(1) 'How unwelcome do you think the defendants' behavior was?"; (2) 'How severe do you think the defendants' behavior was?'; and (3) 'How pervasive do you think the defendants' behavior was?'" (Isbell et al., 2005, p. 759). Participants also rated the likelihood the conduct affected the plaintiff's work

performance, the extent the conduct impacted the plaintiff's psychological well-being in a negative manner, and the extent the plaintiff was subjected to a hostile work environment. All dependent measures were recorded on an 11-point scale ranging from 0, indicating "not at all likely," to 10, "extremely likely."

Isbell et al. (2005) found that female participants ( $M = 6.57$ ) were more likely than male participants ( $M = 5.94$ ) to believe that the defendants' behavior constituted the legal definition of sexual harassment. In addition, when jurors were asked to consider how they would regard the alleged conduct if they had experienced the same treatment, female mock jurors ( $M = 6.76$ ) were more likely than male mock jurors to consider the defendant's behavior to be sexual harassment ( $M = 4.31$ ). Female mock jurors also provided higher ratings than male jurors for the extent the behaviors affected the plaintiff's work performance (Female  $M = 7.17$ ; Male  $M = 6.48$ ) in a negative manner. Based on these results, it is unsurprising that female participants ( $M = 7.38$ ) were also more likely than male participants ( $M = 6.56$ ) to believe the plaintiff was a victim of hostile work environment sexual harassment.

Wayne et al. (2001) also explored gender effects in sexual harassment cases by varying the gender of the harasser and the target in their study. They gave over 400 mock jurors a fictional hostile work environment case based on *Ellison v Brady* (1991). In *Ellison*, the female plaintiff alleged that her male co-worker frequently asked her on dates and sent her love letters after she explicitly refused his advances. His advances became so frightening to her that she asked her supervisor to transfer her or the defendant to another office. Wayne et al. (2001) provided participants with fictional case summaries that featured opposite-gender sexual harassment or same-gender sexual

harassment.<sup>6</sup> Mock jurors received jury instructions that described the legal definition of sexual harassment (as defined by the E.E.O.C.), the definition of the reasonable person standard, the prior work records of the plaintiff and defendant, and the work organization's current sexual harassment policy. After reading the case, jurors were asked to provide a verdict of liability with scores ranging from -10 (extreme confidence in a verdict for the plaintiff) to 10 (extreme confidence in a verdict for the defendant). Participants also provided their opinions of the inappropriateness, seriousness, and offensiveness of the behavior on a 3-item scale ranging from 3-19 with higher scores representing a more negative view of the alleged conduct.

Wayne et al. (2001) reported that in the cases composed of opposite-gender sexual harassment, female mock jurors ( $M = -3.50$ ) were more likely than male jurors ( $M = -0.81$ ) to find the perpetrator guilty, regardless of whether the perpetrator was male or female. Furthermore, female jurors ( $M = 14.26$ ) perceived the behaviors in these cases to be significantly more inappropriate, serious, and offensive than male jurors ( $M = 12.93$ ).

*Gender of the victim and perpetrator has a mixed effect.* Although juror gender may have a consistent impact on verdict outcomes, research indicates that in opposite-gender sexual harassment cases, the gender of the victim and perpetrator influence mock jurors in different ways. Wayne et al. (2001) found evidence that both male and female mock jurors were more likely to find female perpetrators liable for sexual harassment than male perpetrators. The average rating of liability that male jurors assigned to a female perpetrator who harassed a male victim was  $M = -2.20$  while this

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<sup>6</sup> See page 51 for Wayne et al. (2001) results on same-gender sexual harassment.

value for a male perpetrator harassing a female victim was  $M = 0.36$ . As for female jurors, the average rating of liability in the female perpetrator-male victim condition was  $M = -4.62$ , while in the male perpetrator-female victim condition this value was  $M = -2.37$ .

Juror gender and perpetrator gender interacted in significant ways. In Wayne et al. (2001), on average female mock jurors determined that the male perpetrator was liable ( $M = -2.37$ ) while male mock jurors determined that the male perpetrator was not liable ( $M = 0.36$ ). Also, female jurors ( $M = -4.62$ ) were more confident in finding the female perpetrator liable than male jurors ( $M = -2.20$ ). Such findings explain why overall Wayne et al. (2001) reported that female jurors were more likely to find the defendant liable than male jurors even though both parties found the female perpetrator liable. Despite these distinctions, however, neither male nor female jurors reported any differences in their perceptions of the inappropriateness, offensiveness, or seriousness, of the behaviors depending on whether the behaviors were performed by a woman or by a man.

Similar findings were presented by Isbell et al. (2005), who reported that jurors believed a case involving a female perpetrator and a male victim was more likely to be sexual harassment than a case involving a male perpetrator and a female victim. In addition, the male victim was viewed as more likely to have suffered a negative impact from the sexual harassment than the female victim. Jurors reported that the male victim's psychological well-being ( $M = 7.09$ ) was more impacted in a negative manner than the female victim ( $M = 6.04$ ).

In contrast to the conclusions from studies by Wayne et al. (2001) and Isbell et al. (2005), Madera et al. (2007) found evidence that male perpetrators and male victims are viewed more negatively than their female counterparts. In work by Madera et al. (2007), participants were given a fictional case file that described an interaction between two employees in which an alleged perpetrator had inappropriately touched the complainant and asked him/her for a date. After the complainant refused the date, the complainant states that the alleged perpetrator asserted that dating him/her would be necessary for the advancement of the complainant's career. In the case file, the alleged perpetrator denied all the complainant's claims.

After reading the case file, the participants were given a questionnaire and asked to assess the likeability and believability of both the complainant and the alleged perpetrator. Participants also provided ratings for whether a punishment should be imposed on the alleged perpetrator with possible answers ranging from "no action," to "termination." Madera et al. (2007) found that male perpetrators tended to be liked less, believed less, and punished more severely than female perpetrators. In addition, male complainants ( $M = 4.63$  on a 7-point scale) were believed less than female complainants ( $M = 5.05$ ).

### **Explanation of Findings**

*Self-Referencing and the Minimization-Maximization Model.* Since female mock jurors are more likely to decide in favor of female and male plaintiffs compared to male jurors, it again appears that self-referencing plays a role in gender differences in perceptions of sexual harassment. Because women are more likely to have experienced sexual harassment, it may be that a female juror can more easily identify with any

harassment victim, regardless of the victim's gender (Schechory-Bitton and Shaul, 2013). Male jurors, on the other hand, are less likely to be victims of sexual harassment and may try to avoid thinking of themselves as victims as this experience could threaten their masculine identity (Schechory-Bitton and Shaul, 2013). O'Connor et al. (2004) suggests that female jurors experience greater self-referencing, whether they have personally experienced sexual harassment or not, because women are more familiar with the topic of sexual harassment than men. If men regard sexual harassment as a "women's issue," they may attempt to distance themselves from this topic and will have greater difficulty in seeing the perspective of the plaintiff in a sexual harassment case (O'Connor et al., 2004).

A similar explanation for these outcomes is the Minimization-Maximization model. This model proposes that because men are more likely than women to be accused of perpetrating sexual harassment, male jurors may act in self-interest and attempt to minimize the types of behaviors defined as harassment (Kenig & Ryan, 1986). In contrast, as women are often the victim in real-life sexual harassment cases, female jurors may find it advantageous to maximize the types of behaviors that fall under the harassment category (Kenig & Ryan, 1986). Along with self-referencing, the Minimization-Maximization model could help explain why male and female mock jurors tend to rule in different ways.

***Sexual Script Theory.*** Sexual scripts are yet another explanation for the tendency of female mock jurors to favor the plaintiff in sexual harassment cases. Social scripts are composed of the knowledge that helps individuals understand and anticipate the appropriate behaviors for various social contexts. Simon and Gagnon (1984) claim

that like social scripts, sexual scripts assist individuals in recognizing what could be a potentially sexual situation. According to script theory, feminine and masculine sexual behaviors are conditionally learned through modeling and receiving positive feedback from society (Gagnon, 1973). As a result, men and women may employ different sexual scripts based on these expected sex roles. Under these roles, men are expected to adopt the role of sexual initiator, a role that may include making sexual comments or making direct sexual overtures (Gutek et al., 1990). In addition, sexual scripts have historically neglected to see women as having an interest or commitment to sexual pleasure, while society deems these desires as common and acceptable for men (Simon and Gagon, 1984).

Thus, if a man recognizes a situation as potentially sexual, he may employ what he considers an appropriate sexual script such as making the first move and being assertive (Foulis & McCabe, 1997). Consequently, when male jurors regard incidents of social-sexual conduct, they may employ a masculine sexual script and be more inclined than female jurors to perceive potentially harassing behaviors to be actions expressing appropriate sexual attraction. In doing so, male jurors have a higher likelihood than female jurors of regarding these behaviors as nonthreatening or even complimentary or humorous. In contrast, female jurors may not perceive these situations as potentially sexual; hence, they will have a higher likelihood of perceiving the behaviors as unwelcome, frightening, and harassing. Therefore, the impact of sexual scripts on perceptions may partially explain why female jurors are more likely than male jurors to rule in favor of the plaintiff in sexual harassment cases.

***Gender Role Stereotypes.*** As the previous studies illustrate, in opposite-gender sexual harassment cases the gender of the victim and alleged perpetrator has a mixed effect on case outcomes. In Wayne et al. (2001) and Isbell et al. (2005), studies that both featured a fictional hostile work environment case, jurors were more likely to find the female perpetrator liable than the male perpetrator. Opposite findings were seen in Madera et al. (2007), a study that utilized a fictional *quid pro quo* harassment case. This discrepancy could be explained by gender role stereotypes. Gender role stereotypes refer to stereotypic attitudes about what are acceptable and appropriate behaviors and attributes of women and men (Foulis & McCabe, 1997). Under these societal expectations, women are assumed to be more gentle, passive, emotional, warm, sensitive, and nurturing than men (Collier & Williams, 1981; Eagly, 1987; Gutek & Cohen, 1987; Heilman, 1995). Likewise, women are supposed to behave in a communal manner and avoid appearing dominant (Koenig, 2018). In contrast, men are expected to be more dominant, aggressive, forceful, and sexual than women (Collier & Williams, 1981; Eagly, 1987; Gutek & Cohen, 1987; Heilman, 1995). According to these stereotypes, men are supposed to behave in an agentic manner and avoid appearing weak (Koenig, 2018).

Female perpetrators may be regarded more negatively in cases of hostile work environment harassment because these women are violating expected gender roles. A hostile work environment is one where unwelcome sexual conduct “has the purpose or effect of unreasonably interfering with an individual's work performance” or creates an “intimidating” or “offensive” work environment (29 C.F.R. § 1604.11(a)(3)). A woman perpetrating a disruptive work environment is acting in direct opposition to gender role

stereotypes that expect women to be communal and nurturing. In addition, accomplishing such disruption could imply that a woman is behaving in a dominant and aggressive manner, behaviors that are stereotypically attributed to men.

Eagly & Karau (2002) found that individuals are viewed more favorably when they conform to expected gender roles. Therefore, in hostile work environment cases, jurors may view female defendants less positively because these women are not conforming to expected gender roles. As male gender roles assume that men will behave in a manner that is dominant and sexual, jurors could be inclined to view harassing behaviors by a man as more appropriate than those exhibited by a woman. Future research could test this theory by comparing the ruling of sexual harassment cases to outcomes in simple hostile work environment cases with various combinations of female and male defendants and plaintiffs. Such investigations could help confirm whether in hostile work environment cases, female perpetrators are more likely to be found liable.

What must be noted, however, is that in general, jurors in both studies still viewed male perpetrators as liable for sexual harassment. The distinction in these findings is that although jurors viewed female and male perpetrators as liable, jurors were more confident in finding the female defendant liable for hostile work environment harassment than they were for male defendants accused of the same behavior. As the provided studies utilized mock jurors as opposed to mock juries, we do not know what effect jury deliberation would have on these findings. Perhaps during deliberations in an actual trial, the decreased confidence that mock jurors have in finding male defendants liable for hostile work environment harassment could result in

jurors being less likely to find male defendants liable overall. Thus, while gender role stereotypes do not necessarily excuse men from behaving in sexually harassing ways, they could provide a slight advantage for male defendants compared to female defendants in the courtroom.

On the contrary, in cases of *quid pro quo* harassment, jurors were more likely to find the male perpetrator liable than the female perpetrator. This finding can again be explained by gender role stereotypes. *Quid pro quo* sexual harassment occurs when “submission to or rejection of [unwelcome sexual] conduct by an individual” is then used as the “basis for employment decisions affecting such individual” (29 C.F.R. § 1604.11(a)(2)). Examples of *quid pro quo* sexual harassment could be frequent requests for dates or impositions for sex, in which the complainant experiences or is led to believe that rejections of these actions would negatively affect employment decisions like obtaining preferred assignments, getting promoted, or being fired.

Gender role stereotypes see men as acting dominant and sexual, with sex role stereotypes assuming men will always adopt the role of sexual initiator (Guttek et al., 1990). As men are regarded as sexual initiators, mock jurors may determine that a man wanting to express normal sexual desire would not need to use his status in the workplace to do so. Male perpetrators of *quid pro quo* harassment could be seen as violating expected gender roles by relying on their position in the workplace to attract a partner. This could explain why in a *quid pro quo* case, jurors may view the behavior of male defendants more negatively than female defendants who commit the same conduct.

Similarly, when *quid pro quo* harassment occurs, it is typically displayed by those who have control over organizational resources and have a higher status than the victim in the workplace. When men are in the roles of supervisor, manager or executive, gender role stereotypes that regard men as forceful, dominant, and more agentic than women may influence individuals to see leadership roles as roles held by men. If *quid pro quo* harassment is seen as behaviors carried out by those with higher status in the workplace and if men are seen as holding these positions, it is logical that jurors are more likely to see a male, as opposed to a female, defendant participating in these actions. We may witness these findings in sexual harassment cases because jurors who can more easily believe a certain type of defendant would carry out a certain type of behavior, are more likely to find that defendant liable for that behavior.

Regarding the gender of harassment victims, it appears in cases of *quid pro quo* harassment that male victims are perceived to suffer *less* than female victims (Madera et al., 2007). In cases of hostile work environment harassment, male victims are perceived to suffer *more* than female victims (Isbell et al., 2005; Wayne et al., 2001). Once again, gender role stereotypes could explain these findings. In incidents of *quid pro quo* harassment male victims may be perceived to suffer less than female victims because men are assumed to be more sexual. Gender role stereotypes posit that men should enjoy sexual attention from women. Jurors may believe that a man would welcome sexual propositions from a female colleague and would regard these acts as complimentary rather than harassing.

As a result, jurors could believe that male plaintiffs in *quid pro quo* harassment cases are lying about feeling harassed and are pursuing a fraudulent lawsuit. Even if a

juror does not believe a male plaintiff is being dishonest, they could still regard male victims negatively for behaving counter to accepted gender roles. This effect could be heightened by the belief that women are often not a physical threat to men, thus, jurors may believe that male victims should be more in control of situations of *quid pro quo* harassment than female victims.

In hostile work environment cases, male victims may be perceived to suffer more than female victims because these behaviors can be attributed less to sexual attraction and more to general harassment. Actions that create a hostile work environment, behaviors like unwanted touching or making vulgar comments about men in general, could appear as attempts to intimidate and emasculate a male colleague rather than flirt with him. As gender roles expect men to appear powerful and strong, mock jurors may believe that male victims will suffer more from harassment that undermines this appearance.

Once again, the distinction must be made that across all these cases, both male and female victims were perceived to suffer to some extent regardless of the type of sexual harassment they experienced. Victim gender, however, seems to influence the degree of suffering a mock juror perceives a harassment victim to have experienced. Future research is necessary to provide clarity on how jurors in sexual harassment cases initially perceive the intentions of the alleged perpetrator and victim and how these perceived intentions help determine final case judgments.

### **Mock Juror Studies with Same-Gender Sexual Harassment**

Although limited in number, there are some empirical studies on same-gender sexual harassment and juror case outcomes. Some of the following mock juror studies

echo the conclusions of past research and others report findings that are completely new. To add support for some of these findings, however, this section will include studies conducted outside a legal context that focus on same-gender sexual harassment.

### **Verdict Outcomes**

*In some ways, female jurors favor the plaintiff.* Like research on other forms of sexual harassment, mock juror studies on same-gender harassment show female jurors ruling in favor of the plaintiff more often than male mock jurors. Work by Carlucci and Golom (2016) investigated juror perceptions of female perpetrator-female victim sexual harassment. In the study, participants read a case vignette depicting female-female workplace sexual harassment. Participants were randomly assigned to one of three sexual harassment patterns: approach, reject, or generalized. The approach-based harassment was intended to communicate sexual interest. In this scenario “the harasser physically cornered the victim, put her arms around the victim’s waist, and said, ‘you look and smell great, baby’” (Carlucci & Golom, 2016, p.241). The reject-based harassment was intended to humiliate the victim. In this scenario “the harasser physically cornered the victim, but said, ‘you’d look much better with a bigger pair of t\*\*s, little boy’” (p.241). The generalized harassment was intended to demean women in general, not a particular victim. In this scenario, the harasser made degrading comments about women like “just telling the ladies about this really hot nurse I saw,” but did not direct the comments toward the victim herself (p.241). In addition, the sexual orientation of the harasser (heterosexual vs. lesbian) was varied in each vignette.

After reading the case vignette, participants were provided a series of questionnaires to assess their perceptions and their legal decisions in the case. Each

subject was given the legal definition of a hostile work environment as defined by the Equal Employment Opportunity Commission. Participants had to rate how severe, pervasive, and unwelcome the conduct was from the perspective of a reasonable person. Participants were also asked to rate how threatening and how discriminatory the behavior was. Each dependent measure was rated on a 9-point Likert scale with 1 indicating, “not very,” and 9 indicating, “very.” Subjects were also asked to determine defendant liability considering whether the victim was subjected to unwanted conduct that was severe, pervasive, or persistent. Participants provided dichotomous liability determinations (liable = -1, not liable = 1) that were multiplied by their rating on a 9-point confidence scale that ranged from 1, “not at all confident [in my decision],” to 9, “very confident [in my decision]” to obtain their liability verdicts.

Carlucci and Golom (2016) found that female participants ( $M = 5.88$ ) saw more evidence of discrimination in the alleged behaviors than male participants ( $M = 4.93$ ). Regarding sexual orientation, when the perpetrator was a lesbian, female participants ( $M = 6.25$ ) were more likely than male participants ( $M = 5.08$ ) to see her actions as a threat to the victim. For the other dependent measures, however, juror gender had no effect on outcomes. Thus, female jurors were not more likely than male jurors to find the perpetrator liable for creating a hostile work environment nor more likely to find evidence that the conduct was severe, pervasive, unwelcome, or threatening. In addition, whether the sexual harassment pattern in the vignette was generalized, approach, or rejection-based, had no influence on juror response.

Research on gender and perceptions of sexual harassment outside a legal context provides stronger evidence that female participants favor the victim in same-gender

sexual harassment scenarios. Like work by Carlucci and Golom (2016), DeSouza et al. (2007) investigated outcomes in female perpetrator-female victim sexual harassment within a university setting. They provided college students with one of four different scenarios depicting a hypothetical interaction between two female college students who lived in the same residence hall. One of the women frequently gave the victim unwanted sexual attention such as frequently asking her out on dates. The scenarios manipulated the sexual orientations of the victim and perpetrator so that each scenario featured either two heterosexual actors, two homosexual sexual actors, a heterosexual victim and homosexual perpetrator, or a homosexual victim and heterosexual perpetrator. Participants were asked whether the alleged victim was sexually harassed, whether a university-based investigation of the case was warranted, and what they would recommend as a punishment.

DeSouza et al. (2007) found that female participants were more likely than male participants to perceive that the alleged female perpetrator sexually harassed the female victim. They also found that women were more likely than men to perceive that the case warranted an investigation from the university and were more likely to punish the perpetrator.

DeSouza and Solberg (2004) found a similar pattern while investigating male perpetrator-male victim sexual harassment within a university setting. In the study researchers first provided participants with a list of behaviors perpetrated by men on other men at work or in educational settings (such as lewd comments, negative remarks about men, and unwanted sexual attention) and were asked to rate whether these actions constituted sexual harassment. Then participants were given one of two case scenarios

between two college roommates, one in which the alleged victim was heterosexual and the other where the victim was homosexual. The alleged victim accused his male roommate of verbal sexual harassment (stating, “he would constantly refer to me as ‘queer’ and ‘fag’ and urge me to ‘go back to San Francisco with the rest of the queers,’” p.637). Participants were asked about the extent the victim was sexually harassed by his roommate, the extent a university investigation was warranted, and what disciplinary actions would be appropriate for the perpetrator if the roommate’s version of events was true.

DeSouza and Solberg (2004) found that female participants rated the behaviors in the provided scenario as more sexually harassing, more deserving of an investigation, and warranting a more severe punishment than male participants. They also discovered that female participants perceived more of the listed behaviors perpetrated by men onto other men in a work or educational setting as sexual harassment compared to male participants.

*Perceptions of same-gender harassment, compared to opposite-gender harassment, are varied.* Another question regarding same-gender sexual harassment is whether the perceptions of mock jurors on same-gender sexual harassment differ from their perceptions of opposite-gender sexual harassment. Unfortunately, there is no consistent answer to this question.

In a study like Wayne et al. (2001), it seems that mock jurors perceive same-gender sexual harassment more negatively than opposite-gender sexual harassment. In Wayne et al. (2001), researchers included case summaries featuring female perpetrator-

female victim and male perpetrator-male victim sexual harassment.<sup>7</sup> For these conditions, they found that female and male jurors perceived harassing behaviors performed by a member of the same gender as more inappropriate, serious, and offensive than when performed by a member of the opposite gender.

In Wayne et al. (2001) male jurors perceived male perpetrator-male victim sexual harassment ( $M = 16.02$ ) and female perpetrator-female victim sexual harassment ( $M = 15.35$ ) more harshly than both opposite-gender cases (male perpetrator-female victim,  $M = 12.62$ ; female perpetrator-male victim,  $M = 13.27$ ). For male jurors, comparisons between each same-gender condition and each opposite-gender condition yielded small to moderate effect sizes. Likewise, female jurors perceived the same-gender cases (male perpetrator-male victim,  $M = 15.86$ ; female perpetrator-female victim,  $M = 16.02$ ) more harshly than cross-gender cases (male perpetrator-female victim,  $M = 14.41$ ; female perpetrator-male victim,  $M = 14.11$ ). For female jurors, comparisons between each same-gender condition and each opposite-gender condition yielded small effect sizes. Neither male nor female jurors differed significantly in their perceptions of female perpetrator-female victim sexual harassment compared to male perpetrator-male victim sexual harassment.

Interestingly, these perceptions were not entirely reflected by the jurors' verdicts in this study. As expected, male jurors not only perceived the same-gender cases more negatively than the opposite-gender cases, but they also more often found the defendant liable in all same-gender cases compared to all opposite-gender cases. For male jurors, perpetrators in both same-gender cases (male perpetrator-male victim,  $M = -6.25$ ; and

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<sup>7</sup> See page 36 for full description of Wayne et al. (2001).

female perpetrator-female victim,  $M = -6.04$ ) were more likely to be found liable than harassers in both cross-gender cases (male perpetrator-female victim,  $M = 0.36$ ; and female perpetrator-male victim,  $M = -2.20$ ). In addition, male mock jurors did not differ significantly in their verdicts in the male perpetrator-male victim condition compared to the female perpetrator-female victim condition.

But these findings were not consistent with the verdicts of female mock jurors. Female jurors did not assign higher ratings of liability for all same-gender cases compared to all opposite-gender cases. Rather, female jurors only found female perpetrator-female victim harassment ( $M = -6.83$ ) more liable relative to the male perpetrator-female victim harassment ( $M = -2.37$ ). For harassment cases featuring a male victim, female jurors did not differ significantly in their liability verdicts whether the harassment was perpetrated by a man (same-gender,  $M = -4.86$ ) or by a woman (opposite gender,  $M = -4.62$ ). Like male jurors, female jurors did not differ significantly in their verdicts in the male perpetrator-male victim condition compared to the female perpetrator-female victim condition.

Stockdale et al. (2004) also found inconsistent results about perceptions of same-gender harassment compared to opposite-gender harassment. This study provided participants with detailed scenarios of one of two forms of sexual harassment, approach-based or rejection-based. In every scenario the gender of the victim remained constant (male) while the gender of the perpetrator was manipulated. As discussed earlier in the review, approach-based sexual harassment consists of unwanted sexual attention or advances and usually implies sexual attraction. In contrast, rejection-based sexual harassment consists of behaviors that usually imply a desire to punish, humiliate,

or drive away the target. This style of harassment is often employed by men to punish other men who do not conform to traditional gender roles or because the harasser wishes to “police hypermasculine gender norms” (Stockdale et al., 2004).

In Stockdale et al. (2004), the approach-based scenario described the male victim, Bill Smith, accusing a company supervisor of making unwanted sexual advances toward him, including stalking and a physical confrontation. For the rejection-based scenario, Bill Smith is described as having a small frame and a speech impediment. The victim accuses a supervisor of taunting him as well as encouraging his coworkers to call him derogatory and vulgar names, mock his behavior, and make obscene remarks about his imagined sexual activities.

After reading the provided scenario, participants in this study were asked to fill out surveys that measured personal and legal definitions of sexual harassment. To measure a subject’s personal definition of sexual harassment each was asked, “In your opinion was Bill Smith sexually harassed?” (Stockdale et al., 2004, p.161). Each participant was provided with the legal definition of hostile work environment harassment and was asked two questions. The first was, “Would a reasonable person have perceived [this company] to be a hostile work environment?” The second was, “Do you think that a jury would decide that a hostile work environment existed [at this company]?” Participants were also asked a question related to self-referencing. This was, “If the things that happened to Bill Smith had happened to you, would you consider it to be sexual harassment?” All answers to the questions were rated on a 6-point scale ranging from 1 (“no, not at all”) to 6 (“yes, definitely”).

Stockdale et al. (2004) found that mock jurors considered same-gender sexual harassment to be more harassing than opposite-gender harassment when it was approach-based. For the approach-based scenario, participants were more likely to believe the situation constituted a hostile work environment when the perpetrator was male ( $M = 3.36$ ) than when the perpetrator was female ( $M = 3.01$ ). The opposite was true for rejection-based harassment; in these scenarios, participants were more likely to regard opposite-gender harassment as harassing compared to same-gender harassment. For the rejection-based scenario, participants were more likely to perceive the situation as a hostile work environment when the perpetrator was female ( $M = 3.73$ ) than when the perpetrator was male ( $M = 3.44$ ).

Along with these findings, Stockdale et al. (2004) reported that male and female participants did not differ in their perceptions of approach-based sexual harassment. But for rejection-based sexual harassment, female participants ( $M = 4.00$ ) provided higher ratings of sexual harassment under their personal definition of harassment compared to male participants ( $M = 3.40$ ).

### **Explanation of Findings**

*Sexual orientation significantly influences outcomes.* Studies on same-gender sexual harassment demonstrate that juror gender may have little impact on verdict outcomes. Although female mock jurors in Carlucci and Golom (2016) were more likely than male mock jurors to find the harassing behaviors between two female employees as discriminatory and threatening, female jurors were not more likely to find the plaintiff liable for creating a hostile work environment. This finding is unexpected as research on same-gender sexual harassment outside a legal context has found that

female participants are more likely than male participants to perceive social-sexual behaviors between two female or two male individuals as sexual harassment (DeSouza & Solberg, 2004; DeSouza et al., 2007).

Juror gender may have little impact on liability verdicts in same-gender harassment cases due to the increased influence of victim and perpetrator sexual orientation. It appears that homosexual perpetrators are often regarded more negatively than heterosexual perpetrators for the same conduct. For example, in Carlucci and Golom (2016) mock jurors found the perpetrator more liable when she was lesbian ( $M = -2.19$ ) than when she was heterosexual ( $M = -1.00$ ). The conduct of the lesbian perpetrator was also perceived as significantly more pervasive, severe, and unwelcome, than the conduct of the heterosexual perpetrator. Because of this finding, subjects saw more evidence of a hostile work environment when the perpetrator was lesbian ( $M = 6.83$ ) than when the perpetrator was heterosexual ( $M = 6.16$ ). Participants also found more evidence that the victim was threatened when the perpetrator was lesbian ( $M = 6.41$ ) than when they were heterosexual ( $M = 5.92$ ).

Once again, past research on same-gender sexual harassment outside a legal context helps to confirm conclusions from Carlucci and Golom (2016). In DeSouza et al. (2007)'s study on sexual harassment between university students, the scenario that featured both a heterosexual female student victim and heterosexual female student perpetrator was rated as the least sexually harassing compared to any scenario that included at least one homosexual actor. Because of this, participants rated the interaction between two heterosexual students as the least likely to warrant an investigation from the university and awarded this condition with the least severe

punishment. Similar results were found in DeSouza and Solberg (2004) where the scenario with a homosexual male student victim was rated as significantly more sexually harassing than the same scenario with a heterosexual male student victim. In addition, participants were significantly more likely to support the university further investigating the case when the victim was homosexual compared to when the victim was heterosexual.

These findings suggest that same-gender sexual harassment is viewed most negatively when it is perceived as motivated by sexual attraction. Sexual harassment research by Giuffre and Williams (1994) suggests that individuals view sexual interactions between members of the same-gender as atypical while the same interactions between members of the opposite-gender are often regarded as normal. This belief could be rooted in heterosexist intentions that render heterosexual sexuality as gender-appropriate and punish any deviations from this norm with acts of homophobia, anti-gay bias, or gender hostility (Epstein, 1997). Jurors often are swayed by the “norm bias,” that is the tendency to attribute causation and blame to behaviors that are considered abnormal or a deviation from a societal norm (Friedlander & Rudolph, n.d.). Thus, if both female and male jurors in a same-gender sexual harassment case believe the alleged conduct was perpetrated by a homosexual individual and if jurors tend to regard homosexuality as atypical, they will be more likely to blame the defendant and find them liable.

In addition, McKimmie et al. (2013) found that mock jurors considered the strength of evidence against defendants considered “stereotypical offenders” and disregarded the strength of evidence against counter-stereotypical defendants. As sexual

harassment is often perceived as harassment instigated by a male perpetrator onto a female victim, jurors may regard defendants in same-gender sexual harassment cases as counter-stereotypical defendants. In doing so, jurors could ignore the quantity or quality of evidence against these defendants, leading them to find these individuals liable at a higher frequency.

Sexual orientation and juror perceptions of sexual attraction also explain why in certain cases, same-gender sexual harassment is viewed more negatively than opposite-gender harassment. In Stockdale et al. (2004) mock jurors considered same-gender sexual harassment more harassing than opposite-gender harassment when it was approach-based. So, when the alleged harassment implied sexual attraction, jurors were more likely to regard the conduct as sexual harassment. In contrast, when the alleged harassment was rejection-based and used as a strategy to punish or humiliate the victim, jurors perceived opposite-gender sexual harassment as more severe. These conclusions demonstrate that same-gender sexual harassment is not always viewed more negatively than opposite-gender harassment, but it is viewed more negatively when it appears to be sexually motivated.

This hypothesis could explain why mock jurors in Wayne et al. (2001) perceived same-gender sexual harassment as more inappropriate, serious, and offensive than opposite-gender sexual harassment. Perhaps these mock jurors assumed the defendants in each same-gender harassment scenario were homosexual and consequently attributed higher blame to these individuals. This hypothesis also explains why male mock jurors in this study awarded higher liability ratings across both same-gender harassment cases compared to both opposite-gender cases.

Female mock jurors instead found the case with the female perpetrator-female victim the most harassing, followed by both cases with a male victim, and then the male perpetrator-female victim case. These findings suggest that gender may have more influence on female jurors in same-gender sexual harassment cases than male jurors. In Wayne et al. (2001) it appears that female jurors attribute the most blame to women who harass other women than to men who harass other men or even to men who harass other women. However, in general female mock jurors still regarded same-gender sexual harassment as equally harassing or more harassing than both cases of opposite-gender harassment (Wayne et al., 2001).

## **Study Limitations**

Research on gender and sexual harassment within a legal context offers many valuable conclusions. But whether these conclusions can be generalized beyond mock juror studies to actual verdicts in sexual harassment cases remains a point of contention. To evaluate the credibility of the findings in this literature review, several concerns regarding the external validity of mock juror research must be considered.

In mock juror studies, researchers ask participants to provide responses to fictional court cases while working independently. As participants do not collaborate with others before submitting their responses, these studies can only provide insight to the behaviors of singular mock jurors, not collective mock juries. One critique of mock juror studies generally is that they ignore the role that group dynamics may have on juror decision-making. In their critical review of mock juror research, Weiten and Diamond (1979) claim that one of six threats to the external validity of simulated jury research is its lack of jury deliberations.

This criticism could be ill-founded, however, as research indicates there may be little difference between a juror's pre- and post-deliberation response. In roughly 9 out of 10 criminal cases the jury decides in the direction of the initial majority (Hastie et al., 1983). This finding indicates that a majority of jurors do not change their initial opinions on a case. Thus, an effective predictor of a jury verdict is often the distribution of individual jurors' pre-deliberation responses.

Even if jury deliberations do affect final verdicts in some cases, mock juror studies on gender and sexual harassment still prove valuable. Understanding how male and female jurors initially perceive sexual harassment is informative as verdicts in

sexual harassment cases often depend on the jury's interpretation of the facts. These interpretations may depend on the social group to which a juror belongs. It is true that when aggregating juror decisions, the minority positions in the group usually yield to the majority. But even if male or female jurors are in the minority on a jury panel and hold minority opinions on the case, these minority views may still have the ability to sway jury deliberations. This review has discussed in-depth how female mock jurors are more likely than male mock jurors to favor the plaintiff in sexual harassment cases. Thus, the inclusion of even one female juror on a jury in a sexual harassment case could alter the group's perception of the alleged conduct.

Work by Golding et al. (2007) suggest that gender-related biases in individual mock jurors remain influential even after jury deliberation. In a simulated child sexual assault case, Golding et al. (2007) found that when women were in the majority, mock juries yielded more guilty verdicts than when men were in the majority. In addition, mock jurors in women majority juries were more likely to change their verdicts from not guilty to guilty while jurors in non-woman majority juries were more likely to change their verdicts from guilty to not guilty. This finding is most likely a result of the mock jurors' individual pre-deliberation judgments. In Golding et al. (2007), more female mock jurors provided guilty verdicts than male mock jurors (Female: 64%, Male: 42%). The conclusions in Golding et al. (2007) illustrate how the gender-related biases of individual jurors can greatly influence how a jury will deliberate and form a final case verdict.

Another prominent concern with mock juror research is its usage of undergraduate college students as participants. Sampling exclusively from a student

population is a concern as conclusions based on this population may not generalize to other jury-eligible community members. However, studies that have compared the responses of student and non-student mock jurors have discovered few differences between these populations.

MacCoun and Kerr (1988) set out to investigate the leniency bias, which is the tendency of jury deliberation to induce greater leniency in jury verdicts in simulated jury studies. They did so by comparing responses from undergraduate college students and adult jury-eligible volunteers on an armed robbery case. They found no evidence that student and non-student participants differed in their individual verdict preferences before deliberations and found no significant difference in the leniency bias of both groups.

Cutler et al., (1990) examined mock juror sensitivity to eyewitness identification evidence. They reported that there was a negligible difference between undergraduate students and jury-eligible community members in their sensitivity to eyewitness evidence. Likewise, Casper et al. (1989) looked at jury decision-making in simulated lawsuits against police officers accused of engaging in illegal searches. They reported that there were no significant differences in the incidence and size of punitive damage awards provided by jury-eligible adults or college students.

Similarly, in a simulated criminal trial, Hosch et al. (2011) found no difference in the verdict patterns of university students and jury-eligible volunteers from the same community. These findings are supported by work by Bornstein (1999) who examined 26 mock juror decision-making experiments, each involving participants who were college students or jury-eligible non-students. Bornstein (1999) found little evidence

that studies with student mock jurors reported different results than those using non-student samples.

Although it appears that participant type has little impact on outcomes in mock juror studies, there are simulated juror studies that have found significant differences between student and non-student samples. Fox et al. (2011) invited undergraduate students and jury-eligible community members to allocate damages in a simulated medical malpractice case. They discovered that student mock jurors assigned significantly lower punitive damages than the non-student mock jurors. Reichert et al. (2011) compared the judgments of student and community members in simulated medical malpractice cases where plaintiffs sued a physician who performed surgeries that ended badly. They reported that student mock jurors were more likely to find the doctors liable compared to non-student mock jurors.

In the realm of sexual harassment, there are fewer studies that have compared responses from student and non-student populations. In the studies that varied participant type, there has been evidence supporting similarities and differences between undergraduate student and non-student sample populations. Terpstra and Baker (1989) saw that reactions to sexual harassment did not differ between working women and female college students. This is perhaps because female college students and employed women report experiencing similar forms of sexual harassment (Fitzgerald et al., 1988). O'Connor et al. (2004)<sup>8</sup> found no difference in ratings of sexual harassment between their student and their non-student community samples who viewed a sexual

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<sup>8</sup> See page 27 for full description on O'Connor et al. (2004).

harassment trial on video. Likewise, Stockdale et al. (2004)<sup>9</sup> found student and non-student participants did not differ in their perceptions of sexual harassment. In both student and non-student samples, women were more likely than men to perceive sexual harassment scenarios as sexual harassment

Regarding differences between student and non-student populations, Baker et al. (1990), found that compared to female college students, a higher percentage of working women perceived the conduct in provided scenarios to be sexual harassment. In another sexual harassment study, Schwartz and Hunt (2011), observed that community mock jurors were more likely to favor the plaintiff rather than the defendant in prototypical sexual harassment cases. Undergraduate mock jurors showed no preference for the plaintiff or the defendant (Schwartz and Hunt, 2011).

The current literature remains divided on whether findings derived from samples of undergraduate mock jurors can also speak to the behaviors of other jury-eligible community members. This presents a clear limitation on the external validity of the studies covered in this review. The variations in outcomes amongst student and non-student mock jurors have led some researchers like Wiener et al. (2011) to support a two-stage process for future mock jury research. Implementation of this model will be further discussed under **Future Directions**.<sup>10</sup>

A final concern with respect to conclusions from mock juror studies investigating gender bias and sexual harassment is the potential for interaction effects. In addition to the variables of juror, victim, and perpetrator gender that are the focus of

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<sup>9</sup> See page 53 for full description on Stockdale et al. (2004).

<sup>10</sup> See page 67 for discussion of two-stage process model.

this review, there are other variables that could interact with gender to influence verdicts in sexual harassment cases. One such variable is physical attractiveness. Work by Golden et al. (2001) observed that the behaviors of attractive men were less likely to be seen as harassing than the behaviors of unattractive men. A study by Castellow et al. (1990) found that both male and female mock jurors awarded the highest percentage of liable verdicts in sexual harassment cases with an attractive plaintiff and unattractive defendant whereas cases with an unattractive plaintiff and an attractive defendant yielded the lowest percentage of liable verdicts.

As discussed, Madera et al. (2007)<sup>11</sup> noted that mock jurors tended to believe female complainants more than male complainants (Female  $M = 5.05$ , Male  $M = 4.63$  on a 7-point scale). They found that this tendency became stronger when the female complainant was physically attractive. LaRocca and Kromrey (1999) reported that physical attractiveness had a different impact on men's and women's perceptions of opposite-gender sexual harassment. They found that in regard to female perpetrators, female participants perceived an attractive female perpetrator as the most harassing while male participants viewed the unattractive female perpetrator as the most harassing. Regarding male perpetrators, male participants reported the attractive male perpetrator as the most harassing while female participants viewed the unattractive male perpetrator as the most harassing.

Physical attractiveness is just one example of the numerous factors that can interact with gender to influence verdicts in sexual harassment cases. Other variables such as race and age can also alter outcomes. In a study on race and sexual harassment,

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<sup>11</sup> See page 39 for full description of Madera et al. (2007).

Wuensch et al. (2002) concluded that Black and White mock jurors tended to favor litigants of their own race and gender. In addition, overt racial bias was the highest amongst White male mock jurors and lowest amongst White female mock jurors. In regard to age, Ford and Donis (1996) found that working women younger than 40 years old were significantly less tolerant of sexual harassment than working women older than 40 years old. They also found that male workers' tolerance for sexual harassment decreased with age until 50 years old and then this level of tolerance increased significantly.

Another factor that may influence the gender effects in sexual harassment cases are carryover effects. Mock juror studies that present participants with multiple case scenarios may be subject to the presence of certain carryover effects (Langley, 2007). Wiener et al. (2004) noticed that presenting participants with two sexual harassment vignettes impacted the views of male subjects on the subsequent vignette. In the first sexual harassment scenario, the female complainant was described as behaving in an aggressive, submissive, ambiguous, or neutral manner and in the second case the complainant was described in a neutral manner. Male participants who first read about an aggressive complainant were less likely to find that the second complainant was a victim of sexual harassment compared to men who first read about an ambiguous or neutral complainant. In contrast, the responses of female mock jurors in the second case were not influenced by the first case they read.

In sum, mock juror studies do present several concerns regarding the generalizability of their conclusions. These concerns stem from their absence of jury deliberations as well as from their usage of undergraduate students as mock jurors.

Additionally, the conclusions regarding gender and sexual harassment gathered from these studies could be impacted by the introduction of other variables such as physical attractiveness, race, and age. Despite the limitations in the current literature, these mock juror studies stand as valuable tools for building our understanding of juror behavior in workplace sexual harassment cases. There is good reason to believe that these studies offer accurate representations of how a randomly selected juror may behave in an actual sexual harassment case. In addition, findings like Golding et al. (2007) suggest that the conclusions reported in this review will remain relevant even after jury deliberation. Furthermore, conclusions from these studies can provide valuable background for formulating future hypotheses that can later be tested with broader samples of participants in more realistic jury simulations.

## **Future Directions**

Several findings concerning the impact of gender on verdicts in workplace sexual harassment cases were identified in this review. Based on these findings, there are four directions for future psychological research on sexual harassment and gender bias.

### **Direction #1: Conducting Realistic Jury Research**

As covered in **Study Limitations**, one concern with the credibility of mock juror studies is whether these studies accurately emulate the conditions present for jurors in actual sexual harassment cases. This review encourages future research to employ more ecologically valid simulation paradigms in their treatment of sexual harassment. To make future simulation paradigms more true to life, researchers can present these mock trials over video as opposed to written case summaries. In addition, these simulation paradigms could include more realistic trial procedures such as jury deliberations and the presence of testimony by expert witnesses. Future sexual harassment studies could also prioritize recruiting a higher number of participants in order to conduct mock jury, rather than mock juror, research. Moreover, as attitudes on what constitutes a proper interpersonal interaction are constantly shifting, these mock juror studies should continually be replicated to see whether they still present equivalent findings.

Another element of realism that should be incorporated into future research on sexual harassment is the diversity of participant type. Variations in outcomes amongst student and non-student mock jurors have led researchers like Wiener et al. (2011) to support a two-stage process for future mock juror research. In this process, initial

findings from studies using undergraduate mock jurors are tested against the responses of community samples in simulated jury studies. These simulated jury studies are designed to be more ecologically valid, incorporating many of the aspects discussed in this section, in addition to utilizing a diverse participant pool of jury-eligible community members. The two-stage process helps to illuminate the potential differences in outcomes produced from mock juries comprised exclusively of students and juries in actual trials. The two-stage process would be a vital addition to any future research regarding gender and sexual harassment.

### **Direction #2: Gender Bias and Damage Awards**

Two outcomes often determined by jurors in sexual harassment cases are verdict and damage awards. Though all mock juror studies on sexual harassment include verdict as a dependent measure, very few of these studies investigate the relationship between gender and the allocation of damage awards. The studies in this review that measured gender and damage awards report that juror and victim gender have a limited effect on award outcomes.

Two studies featuring a female plaintiff and a male perpetrator (O'Connor et al. (2004) and Cass et al. (2010)) found that juror gender rarely had an effect on awards. In O'Connor et al. (2004)'s study, participants were asked how much money they believed the plaintiff should receive if sexual harassment was present. Participants provided their answers on an ordinal scale ranging from 0 (indicating no dollar amount) to 9 (indicating 1 million dollars or more). Some participants received only written information about the sexual harassment case while others viewed a trial simulation. O'Connor et al. (2004) reported that gender only had an effect on awards for

participants who saw the video trial, not for participants who read the written case scenario. For these participants, female mock jurors ( $M = 3.59$ ) awarded slightly higher damages than male jurors ( $M = 3.00$ ).

Similarly, researchers in Cass et al. (2010) found mixed results for the influence of gender on juror damage allocations. Overall, the study did not find a main effect of gender on mock jurors' allocations of damage awards. However, they found that gender did interact with other variables. When the organization did not have a sexual harassment policy and the severity of the harassment was low, female jurors awarded higher amounts for damages than did male jurors. This was the only significant interaction involving juror gender and damage allocation.

Wayne et al. (2001) investigated damage award allocations in cases with opposite-gender and same-gender sexual harassment. Their study found mixed evidence for the effects of juror and victim gender on awards. In this study, participants who reached a verdict for the plaintiff were given several additional questions. Participants were first asked whether they would recommend "either (a) injunctive relief with no monetary award or (b) injunctive relief with monetary award" (p. 182). Instructions explained that injunctive relief was a court order that told the defendant to cease and desist their wrongful activities. Monetary awards were to help compensate the plaintiff for future and existing monetary losses and nonmonetary losses including mental anguish, suffering, emotional pain, and inconvenience. If participants chose to grant a monetary award along with injunctive relief, they indicated the amount for the award on a 6-point scale. The scale ranged from 1, indicating an award of \$1-50,000, to 6, an award of \$250,000-300,000. Participant responses were analyzed on a 7-point scale

ranging from 0 to 6 with a response of “0” representing injunctive relief with no award and all the other scale points remaining the same.

Wayne et al. (2001) hypothesized that female mock jurors would assign overall greater damage awards than male mock jurors. However, for opposite-gender sexual harassment, they found that juror gender had no effect on damage award allocations. In addition, they found there were no interactions between victim gender, perpetrator gender, and juror gender on damage outcomes. In fact, Wayne et al. (2001) reported that the mean award ratings for mock jurors were identical in conditions with a female victim and male perpetrator ( $M = 0.29$ ) and in conditions with a male victim and female perpetrator ( $M = 0.29$ ).

As for same-gender sexual harassment, researchers in Wayne et al. (2001) found varied results. They found in this condition that juror gender had no influence on damage awards. But in regard to perpetrator and victim gender, the mean monetary award for the male perpetrator-male victim condition ( $M = 0.75$ ) was significantly higher than the monetary award for both opposite-gender conditions (male perpetrator-female victim,  $M = 0.29$ ; and female perpetrator-male victim,  $M = 0.29$ ). But same-gender harassment did not always produce higher award outcomes compared to opposite-gender harassment. In the female perpetrator-female victim cases ( $M = 0.29$ ), the mean monetary award was not significantly higher than that for the cross-gender cases. In sum, the male perpetrator-male victim condition was awarded greater damages than all of the other conditions, which did not differ from each other.

Conclusions regarding gender and the allocation of damages in sexual harassment cases appear varied and unpredictable. One interpretation of these findings

is that unlike case verdict, there may be no significant relationship between juror gender and damage awards in sexual harassment cases. A second interpretation is that these inconclusive findings are a product of poor experimental design. The models of award measurement utilized in the studies above are not very informative. Both studies employed Likert-like scales to measure the monetary damages that mock jurors believed should be awarded in each case. Each of these scales included numbered values that corresponded to wide ranges of monetary awards. For example, researchers in O'Connor et al. (2004) used a value of 9 to represent a monetary award of \$1 million or more, while researchers in Wayne et al. (2001) used each number on the scale to represent a monetary range of \$50,000.

Thus, two mock jurors in Wayne et al. (2001)'s study could have both provided a damage award rating of 1 with one juror wanting to award \$2000 and the other juror wanting to award \$40,000. Likewise, in O'Connor et al. (2004)'s study, two jurors may select 9, the highest value on the scale, with one juror believing a package of \$1 million is appropriate while the other believes this amount should be \$5 million. Utilizing Likert scales to measure damage awards might be efficient; however, this model does not provide researchers with enough information to reasonably ascertain the intention of mock jurors. As the values on these scales include such broad ranges, these models do not offer researchers the ability to make clear conclusions on how jurors will award damages in actual sexual harassment cases.

Not only are these Likert-like scales less informative, but they are also less realistic. In the courtroom, assigning damage awards is a complex task for jurors. In actual sexual harassment cases it is common for the plaintiff or the court to hire expert

witnesses to testify on what constitutes an appropriate damage award. These experts help to educate jurors on what monetary damages a plaintiff has incurred and the amount of damages that have been allocated in similar cases. This background information is paramount for helping the average juror contextualize what an appropriate award package may be for a victim of workplace sexual harassment. Without providing mock jurors with this information, it is difficult to draw any conclusions from the results of these allocations.

Unlike studies conducted by O'Connor et al. (2004) and Wayne et al. (2001), researchers in Cass et al. (2010) did not use a Likert scale to measure damage awards. Instead, the researchers simply asked mock jurors to provide the damage award value they deemed appropriate. Once again, this measurement is flawed as jurors were not provided with any additional information such as the various injuries caused by sexual harassment or information on why certain award amounts may or may not be appropriate. Without any information upon which mock jurors could base their responses, it is difficult to know whether the average damage awarded in this study is an accurate representation of potential juror responses.

In addition, researchers in Cass et al. (2010) asked participants to assign punitive and compensatory damages collectively rather than individually. Combining these damages is detrimental to data collection as these forms of damages have distinct purposes. Punitive damages are intended to punish the defendant and deter them or others from committing similar behaviors in the future. Compensatory damages are intended to compensate plaintiffs for their pain and suffering as well as any financial losses they have experienced because of the harassment. To best measure what a juror

believes is an appropriate damage award in a sexual harassment case, future studies should measure punitive and compensatory damages separately.

Future mock juror research on sexual harassment should investigate the role that gender may have on allocations of damage awards. Though past studies have included damage awards as a dependent measure, these studies do not calculate the values of these awards in a method that is informative and realistic. Future work on sexual harassment and damages should combine Likert scales with asking mock jurors to report the specific monetary values they believe would be appropriate for punitive and compensatory damages measured separately. Studies should also provide jurors with information on the specific financial and emotional burdens the plaintiff has incurred and what may be reasonable damage awards given those burdens.

### **Direction #3: Femininity, Masculinity, and Gender Identity**

One drawback of the current collection of sexual harassment research is its rigid definition of gender. The majority of psychological research into sexual harassment has investigated gender as a binary variable, with female subjects representing the perspectives of women and male subjects representing the perspectives of men. Much of this research does not include subjects with gender identities that do not align with a response of “female” or “male” on a demographic questionnaire. Thus, little research exists that can speak to the sexual harassment perceptions of those who may not identify as “male” or “female” such as transgender or non-binary individuals.

In Hyde et al., (2018)’s guidance on gender-related research, they suggest that future studies should allow participants to report their gender identity in non-binary ways. They recommend measuring gender by providing participants with the options of

“female,” “male,” “transgender female,” “transgender male,” “genderqueer,” and “other (specify)” (p.185). Gender identity often occupies a broad and fluid spectrum, one that is difficult for empirical research to study in its absolute entirety while still achieving a statistically significant sample size. Nevertheless, it is both feasible and imperative for future research on gender and sexual harassment to identify participants with respect to cisgender, transgender, and non-binary identities.

Using gender/sex as an independent measure, even in a more inclusive way, still has its limitations. For example, even when studies consider participants with non-cisgender identities, it is generally difficult to obtain a sample size large enough to show moderate effects when they exist. Without a very large sample size, it would be impossible to have more than anecdotal evidence regarding the behaviors of non-cisgender participants.

To combat this, Hyde et al., (2018) suggest that in certain cases, gender-related research should replace gender with other dependent measures that correlate with gender/sex categories. Variables that correlate with gender and sex include factors like hormones, personality traits, muscle mass, and socioeconomic status (Hyde et al., 2018). Regarding sexual harassment research, it would be beneficial for future researchers to investigate how masculinity and femininity may relate to verdict outcomes. A benefit of measuring masculinity/femininity as opposed to gender/sex is that this variable is multidimensional and allows researchers to record one’s degree of masculinity or femininity while still assigning participant responses to one of two categories. Furthermore, measuring masculinity/femininity would provide reasonably sized samples and would allow analyses of this data.

This review has concluded that female mock jurors are more likely than male mock jurors to favor the plaintiff in most sexual harassment cases. Based on the responses of female participants in this review, more feminine individuals (whether they identify as female, male, non-binary, other) may be more likely to favor the plaintiff in a sexual harassment case.

Some current literature supports this extrapolation. Stockdale et al. (2004) found that men and individuals who endorsed hypermasculine beliefs were less likely to perceive a case summary as sexual harassment than were women and non-sexist individuals. This finding remained consistent across student and non-student populations. Powell (1986) reported that participants high in femininity perceived more behaviors as sexual harassment than those low in femininity. These findings support the idea that feminine individuals are more likely to perceive a situation as sexual harassment.

Yet, there is reason to believe that even femininity and masculinity may function differently in male and female jurors. Powell (1986) reported that men high in masculinity were less likely to regard sexual remarks as sexual harassment than men low in masculinity despite women high in masculinity being more likely to regard these comments as sexual harassment than women low in masculinity. Thus, it may still be fruitful to measure gender/sex alongside variables like femininity and masculinity in sexual harassment studies.

Additionally, most of the current literature on gender and sexual harassment has included fictional cases or vignettes of interactions between cis-gender individuals. Often, these studies feature interactions between a female victim and a male perpetrator,

although studies have started to include interactions between male victims and female perpetrators as well. Very few sexual harassment studies have included cases featuring same-gender harassment or harassment between non-cisgender victims and perpetrators. These topics remain significantly under-researched in the current literature, preventing comprehensive conclusions regarding gender bias and sexual harassment. Future research should present a wider variety of sexual harassment cases, some of which include non-cisgender plaintiffs and defendants, as well as make an extended effort to feature same-gender sexual harassment.

#### **Direction #4: Implementation of Social Framework Testimony**

Findings in this literature review suggest that gender does have an impact on verdict outcomes in workplace sexual harassment cases. In contrast to the precedent established in *J.E.B. v. Alabama* (1994), social science research suggests that juror gender may serve as a “proxy for bias” in sexual harassment cases (511 U.S. 127, 143, 1994). One application of these findings is the implementation of social framework testimony in future sexual harassment cases.

In social framework testimony, social science provides a framework of scientific data to help the court and jurors better evaluate the legal and factual issues of a case (Goodman-Delahunty & Croyle, 1989). These general conclusions from social science research are presented to the court by an expert witness (Goodman-Delahunty & Croyle, 1989). The purpose of social framework testimony is to provide the jury with information about the psychological and social context in which contested adjudicated facts occurred (Vidmar & Schuller, 1989).

One reason to support the use of social framework testimony in sexual harassment cases is that this testimony allows expert witnesses to educate jurors on the existing empirical evidence of how women and men generally differ in their evaluations of social-sexual conduct (Wiener et al., 1995). Expert witnesses could be vital in presenting to jurors many of the conclusions summarized in this review. For instance, social framework testimony could inform jurors that women are more likely to perceive incidents as sexual harassment and that women are less tolerant of these behaviors.

The disclosure of these findings could mitigate implicit bias in jurors. Recent research indicates that utilizing intentional strategies to overcome implicit bias is one of the most effective ways to reduce implicit bias over the short term (Fitzgerald et al., 2019). Studies utilizing this strategy explicitly instruct participants to temporarily override or suppress their biases over a certain period of time. This method could be incorporated into the social framework testimony in sexual harassment cases by explicitly asking jurors to be mindful of their gender-related biases throughout the trial. Most importantly, jurors should be aware of these biases when hearing testimony and forming perceptions concerning the impact of the behaviors of the plaintiff and defendant. Many sexual harassment cases that warrant a jury trial involve situations or conduct where it is not immediately clear whether the defendant is liable. Because gender differences in perceptions of sexual harassment are the most pronounced when the alleged behaviors are ambiguous, social framework testimony would be instrumental in helping reduce some gender-related biases during trial.

This testimony also allows experts to explain to jurors how a reasonable woman might view the offending behavior (Wiener et al., 1995). Utilizing the reasonable

woman standard in a sexual harassment case with a female plaintiff requires that male and female jurors be aware of how women regard sexual harassment. Social framework testimony can help male jurors be aware that they are probably less likely to perceive the alleged behaviors as sexual harassment than the female plaintiff in the case.

Therefore, this testimony can help male jurors better assess the harm such conduct caused the plaintiff. Conversely, social framework testimony can help female jurors better assess the intentions of a male defendant who may be less likely to perceive his actions as harassment and who may have intended to be amiable or express (what he assumed was) welcomed sexual attraction.

Fortunately, there is evidence that expert testimony can help mitigate gender stereotyping in workplace sexual harassment cases. In a mock sexual harassment case, Kovera et al. (1999) provided some participants with expert testimony on the working conditions that promote sexual harassment. They found that male jurors who heard expert testimony in a hostile work environment case were more likely to find the plaintiff's workplace as hostile than men who had not heard the testimony. Although male jurors in both conditions were still less likely to find the defendant liable than female jurors, the results found by Kovera et al. (1999) demonstrate that expert testimony can help reduce gender differences in verdict ratings.

Furthermore, Kovera et al. (1999) suggest that gender differences in sexual harassment judgments could be partially due to differences in sexual harassment knowledge between women and men. In their study (which utilized a female plaintiff, male defendant case), the liability judgments of female jurors were not impacted by the presence or absence of expert testimony. The verdicts of female jurors may not be

impacted by expert testimony because women have more knowledge of sexual harassment as women are more likely to be victims of sexual harassment than men. Women's greater understanding of sexual harassment could explain why in harassment cases women are better at distinguishing between legal standards and selecting the correct one (Wiener et al., 1997). It also could explain why the judgments of women are less influenced by conduct of complainants that is unrelated to the circumstances in the case (Wiener et al., 2004). Therefore, expert testimony on sexual harassment may not be as necessary for female jurors. Still more research must be conducted to confirm this finding and to investigate the effects of expert testimony on sexual harassment cases that do not feature a female plaintiff and a male defendant. But conclusions in Kovera et al. (1999) suggest that expert testimony could be an important mechanism in helping some jurors mitigate their gender-related biases.

All of these findings further support the introduction of social framework testimony in future workplace sexual harassment cases. Testimony of expert witnesses trained in research on gender bias and perceptions of sexual harassment should be allowed in sexual harassment cases as relevant evidence under the existing codes of evidence. Parties could challenge the introduction of this testimony, however, on the grounds that research regarding gender and sexual harassment remains too limited and fragmentary upon which to base any conclusion. This is certainly possible, if not probable.

Given this challenge, more empirical research is needed in the realm of gender and sexual harassment to ensure that social framework testimony is considered relevant and reliable evidence in a sexual harassment case. Moving forward, our legal system

must not ignore social science findings that gender can influence the behaviors of jurors in significant ways. To ensure that jurors provide liability verdicts that not only account for their individual perspectives of harassment but also for the perspectives of the plaintiff, social framework testimony is a vital addition to procedures in sexual harassment cases.

## Conclusion

Workplace sexual harassment is a prevalent issue in contemporary American society. This literature review presents evidence on how gender may impact verdict outcomes in workplace sexual harassment cases. From studies on gender and perceptions of sexual harassment, we witness several gender differences. Women perceive a more comprehensive range of behaviors as sexual harassment than men and women are less tolerant of these behaviors. Regarding the gender of victims and perpetrators, both men and women are more likely to view sexual harassment as interactions between a male perpetrator and a female victim.

Findings from mock juror research suggest that in most cases of sexual harassment, especially in cases with female plaintiffs and male defendants, female jurors are more likely than male jurors to favor the plaintiff and find the defendant liable. There are several explanations for these findings. The tendency of female jurors to favor the plaintiff could be due to heightened self-referencing or to how women attribute the cause of a defendant's actions. In addition, the minimization-maximization model and sexual script theory serve as other reasonable explanations for why female and male jurors may rule differently in sexual harassment cases.

Despite these conclusions, gender does not always produce clear effects in workplace sexual harassment. The gender of the alleged perpetrator and victim appears to have mixed effects on juror verdict outcomes. Regarding cases of opposite-gender harassment, gender role stereotypes and whether the case is an example of *quid pro quo* or hostile work environment harassment provide partial explanations for these inconsistent findings. Regarding cases of same-gender sexual harassment, the sexual

orientation of victims and perpetrators and whether the harassment was motivated by sexual attraction also provide insight on these mixed gender effects.

Overall, the conclusions in this review allow for reasonable predictions about how gender may influence verdicts in sexual harassment cases. It may be reasonable to expect that a female-dominated jury will be more likely to find a defendant liable than a male-dominated jury. Additionally, it may be reasonable to expect verdicts in same-gender harassment cases to hinge on whether a juror perceives the conduct to be sexually motivated.

While the strength of the relationship between observer gender and perceptions of sexual harassment remains small to moderate, gender-related biases of individual jurors could greatly influence how a jury will deliberate and produce a verdict. Even if male or female jurors are of the minority on a jury panel and hold minority opinions on a case, these minority views may still have the ability to alter the perceptions of other jurors and sway jury deliberations.

Social framework testimony should be allowed in future sexual harassment cases to educate jurors on how men and women may differ in their evaluations of social-sexual conduct in the workplace. The introduction of this evidence into courtroom could help jurors better evaluate the potential harms caused to the plaintiff by the defendant. This expert testimony can also serve to mitigate juror gender bias.

More research is necessary to confirm the findings present in this review. Future psychological research on gender and workplace sexual harassment should employ more realistic jury simulations and investigate how gender may influence damage awards. Additionally, future sexual harassment studies should strive to be more

inclusive with their definition of gender. This can be accomplished by including non-cisgender mock jurors and case scenarios featuring non-cisgender individuals as well as by investigating other variables that correlate with gender/sex categories like femininity and masculinity. These future studies should also further investigate same-gender sexual harassment.

Moving forward, our legal system must not ignore that gender can influence the behaviors of jurors in significant ways. Social science research serves as a valuable tool in helping us understand and anticipate juror behavior. We must continue to investigate how gender-related biases may impact outcomes in workplace sexual harassment cases.

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