Making Gains in a Discursive Legal Struggle:

Framing Strategies in Sexual Harassment Litigation in the 1970s

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The legal movement combatting workplace sexual harassment, beginning in the 1970s, reshaped U.S. law (Mink 2000). Zippel (2006:42) calls the effort a "feminist success story," because it expanded the Civil Rights Act's Title VII prohibitions on sex discrimination to include sexual harassment. While researchers provide accounts of the broader anti-sexual harassment movement and its key court decisions (Baker 2008; Marshall 2005), less frequently do scholars zero in on the legal movement and the lawyers litigating the cases, particularly their discursive efforts to convince judges to change judicial law. In written briefs to the courts, these legal actors provided arguments challenging beliefs that sexual harassment (SH) was merely "natural" sexual attraction and that it did not pose a barrier to women's equality in the workplace. While not all their arguments were successful, they did have a substantial influence on the change the law.

In this paper, I pursue a systematic examination of these early SH briefs, briefs combatting SH, and their case outcomes to trace which ideas were influential and which were ignored or outright rejected by the judges hearing the cases. Many lawyers writing the briefs were in a loose network of legal actors whose efforts aligned with the broader women's movement goals of expanding women's rights, including in the workplace (Baker 2008). Many of the attorneys were cause lawyers, that is, politicized attorneys associated with social-change politics, not only the women's movement, but the civil rights movement as well (Marshall 2001). Lawyers closely aligned with feminist politics attended women's law conferences, shared briefs, and commented on one another's work (Schlesinger Library 1973a). To study their discursive legal activism, I draw on social movement framing theory to identify key frames articulated in

the legal documents and to theorize which frames were more successful in persuading judges (Snow et al. 1986; Benford and Snow 1988).

In the judicial arena, judges, of course, play a powerful role in determining a case's outcome and concomitantly what becomes law. My analysis shows some themes articulated by the anti-SH plaintiff lawyers were successful in changing the judicial conversation. Other arguments, though, were repeatedly ignored by judges or explicitly rejected. Below I discuss racial-gender intersectional and harm-to-women arguments that fall into these latter categories of being ignored or rejected. Studying the early sexual harassment cases helps us understand how a social movement legal mobilization in the judiciary can at least in part succeed in its discursive struggle to change the law. As I highlight below, the themes that influenced or were adopted by the judges illustrate the impact of the anti-SH lawyers' brief writing. The ideational elements ignored or rejected by the judges, however, reveal important institutional limits on this discursive influence. And not surprisingly, overall, this research shows the fundamental impact judicial decision makers play in determining which legal movement discursive efforts bring about change in law.

A Framework for Studying Legal Discursive Strategy

Lawyers aligned with social movements often pursue movement goals through litigation (McCammon et al. 2020; Vanhala 2011), and for anti-SH activism, the court system has been an important institutional avenue for change.[1] Movement researchers theorize that institutional activism, that is, movement actors pursuing their goals within institutional structures can bring

[1] The #MeToo movement recently expanded public awareness of the scope of the problem of sexual harassment, including renewed assessment of whether the courts are effective in addressing workplace harassment (Alexander 2019).

important results but often with limitations on what can be achieved (Konet et al. 2024; Whittier 2016). Social movement scholars increasingly examine movement activism in the judicial arena (Espinoza-Kulick 2019; Ziegler 2020), and a sizable literature on movement litigation mobilization exists, sometimes with specific focus on the lawyers involved in the litigation ("cause lawyers") (Boutcher and McCammon 2018; Lehoucq and Taylor 2020; Sarat and Scheingold 2006). Yet, an aspect of judicial movement mobilization receiving more limited attention involves the discursive strategies movement lawyers develop and deploy as they present legal and other arguments to judicial decision makers across a series of cases (Epstein and Kobylka 1992; McCann et al. 2013). To examine lawyers' discursive approaches, that is, their meaning making, in a series of 1970s anti-SH cases, I am guided by social movement framing theory (Snow et al. 1986; Benford and Snow 2000), developed to aid researchers in identifying the problems and solutions movement actors articulate as they pursue social change. Socio-legal scholarship has long recognized the social construction of meaning as actors move from grievances to legal claims and beyond (McCann 1994; Taylor 2020). Yet, explicit and systematic study of the unfolding of discursive strategies in legal briefs across cases as litigation mobilization unfolds remains limited, although important studies exist (Haney-López 1997; Hollis-Brusky 2015). In recent work, both Frank (2017) and Kazyak et al. (2023) find that use of narrow framing in legal cases can be effective in persuading judges. Kazyak et al., for instance, find that lawyers working in opposition to LGBTQ rights who use frames specifically targeting same-sex marriage, rather than broad frames condemning LGBTQ relationships, are more likely to convince judges to rule conservatively.

My study examines the written legal briefs submitted in the 1970s anti-SH cases to discern the discursive legal strategies proffered by the cases' lawyers, as the attorneys presented

their rationales for deciding the case in their clients' favor.[2] I examine framing, both legal and other framing, in briefs submitted in these early SH cases by lawyers representing plaintiffs opposing workplace SH. I examine the briefs systematically across the cases, to pursue the question of whether judges in their opinions responded favorably or whether they ignored or rejected particular frames the lawyers put forward. These early SH cases provide an opportunity to develop a framework for understanding how lawyers aligned with broader movement activism articulated legal and other claims and legal solutions to the problem of SH, and, at least to some degree, brought about important change in law. My focus is on this nascent stage of the anti-SH legal movement, when lawyers first attempted to gain a legal response to the problem of what would in time be labeled quid-pro-quo SH.[3]

Because this research conceptualizes the lawyers acting against SH as a legal (and feminist) movement working to remedy the employment problem, I rely on social movement framing theory to examine the primary rationales offered by the lawyers. Framing theory allows us to see not only the legal framing of the anti-SH lawyers, that is, the ways in which the attorneys invoke law in their efforts to address the employment problem, but their framing that moves beyond the law as they define and characterize SH and its harms and origins. Social movement framing theory identifies diagnostic and prognostic framing as core forms of activist framing as movement actors define social problems (diagnostic) and their solutions (prognostic). As the examination of the case briefs shows, the anti-SH lawyers articulate the problem of SH

[2] Lawyers also present their cases orally during a trial or appellate hearing, but written accounts of these proceedings are not always available and judges often intervene to guide the flow of the proceedings.

[3] Following the quid-pro-quo cases, later SH cases would litigate hostile-environment sexual harassment. MacKinnon (1979) theorizes these forms of SH.

and its harms (diagnosis) and discern why and how the law can be an important remedy (prognosis).

Beyond articulating diagnostic and prognostic framing, framing theory is also delineates other movement framing strategies. These other strategies, referred to as "alignment processes," are discursive efforts attempting to persuade audiences by showing alignment or congruence between a movement frame and beliefs already held by the recipient (Snow et al. 1986). As the analysis below shows, anti-SH lawyers relied on two core alignment processes, frame transformation and bridging, along with their diagnostic and prognostic framing. Frame transformation involves rendering experiences or actions "already meaningful from the standpoint of some primary framework" "such that they are now 'seen by the participants to be something quite else'" (1986:474). Quite simply, frame transformation is an effort to transform the recipient's views, in this case the way they understand the behaviors underpinning SH. The present analysis focuses on the earlier cases to examine which frames used by the early lawyers succeeded in changing how judges viewed the behaviors in question; that is, which frames helped transform the meaning made of the workplace actions.

In the analysis below, I posit that the transformational framing engaged in by the anti-SH attorneys was also diagnostic framing. That is, the lawyers' briefs simultaneously identified for judges the SH problem (diagnosing it) and then also attempted to transform how judges made meaning of the sexualized workplace behavior, to change their thinking from understanding the behavior as something to be ignored or treated as acceptable workplace behavior, to behavior that was illegal under the law.[4]

[4] While the behaviors involved in SH invoke sexualized language and actions, as many scholars describe (Maass et al. 2006), the behaviors tend to be motivated by power and status.

Moreover, as the analysis below reveals, a particular form of diagnostic-transformational framing appears to have tipped the scales in persuading judges. Successful anti-SH attorneys put forward "incongruity" frames as a specific type of diagnostic-transformational framing in their efforts to persuade judges. Bostorff (1987) and Demo (2000), drawing on Burke's "perspectives by incongruity" (1964), describe sharply drawn contrasts, that is, framing in which alternative views are typically situated side by side to highlight their differences. According to Demo (2000:147-8, 152) incongruity framing can also "expose[] the hypocrisies" of an existing view and allow those seeking change to articulate an alternative view that "remoralizes a situation" by offering a new and more just understanding. McAdam (1996:25), too, speaks of "glaring contradictions between a highly salient cultural value and conventional social practices." Sexual harassment attorneys, particularly those succeeding in winning positive decisions for their clients, explicitly articulated, in side-by-side fashion, the contradiction of ignoring or accepting SH behaviors in light of law prohibiting sex discrimination. The analysis here will discuss incongruity transformational framing and show its efficacy in the early SH cases.

Frame bridging, another form of frame alignment, entails connecting previously unlinked ideational themes by articulating resonances between them. According to Snow and colleagues (1986:467), recipients of movement frame bridging hold "unmobilized sentiment pools" which movement actors tap into when they communicate how movement claims align with ideas already held by recipients of the movement's messaging. Not surprisingly, for judges, legal arguments, where movement lawyers draw on legal doctrine and concepts, often involving legal rights claims (Leachman 2013), can be such "sentiment pools." Simply, judges are primed to think in terms of law and legal concepts. While a judge ultimately may not accept the legal framing offered by a movement lawyer, proffered legal arguments linking SH behavior to a legal

right leverages a judge's predisposition to consider the issue in legal terms, and thus at a minimum taps into this legal resonance. The analysis below shows that the anti-SH lawyers utilized various ways of bridging to the law, putting various possible legal resonances in play in their discursive effort. The investigation explores these variations in legal frame bridging and helps us see which types of legal frame bridging in the SH cases had success with judicial decision makers.

Importantly, the connections to Title VII law made by the anti-SH attorneys offer a prognostic frame, that is, a legal solution to the problem of SH. The lawyers argued the sexualized workplace behaviors should be deemed a violation of Title VII to uphold women's right to be treated equally in the workplace. The legal remedy then, as outlined in the Civil Rights Act (CRA), entailed holding employers liable for the offending behavior. The analysis below illustrates how the anti-SH lawyers engaged in this *prognostic frame bridging* to the law.

Data and Methods

To examine discursive efforts utilized by plaintiff counsel in early quid-pro-quo SH litigation, I gathered all plaintiff attorney briefs for the relevant cases, the cases establishing quid-pro-quo SH, both federal district and circuit court cases. All of the cases occurred during the 1970s. Because the CRA and its 1972 amendments are federal law, sexual harassment litigation occurred during these early years in federal court.[5] The legal cases are listed in Table 1.

[5] Following passage of Title VII and this early SH litigation, most states enacted their own restrictions on workplace sexual harassment, leading to state-level litigation later, with a later sharp increase in new state laws following the #MeToo movement (Baker 2020; Simmons 2005). Early on, however, until the federal courts judged SH a clear violation of Title VII, few state level cases occurred. An early exception to the lack of state litigation in these earlier years is *Continental Can v. State* (1980). I limit my focus to workplace SH cases. Education SH cases

Nine are district court cases. Appeals in four of the nine cases bring the total number of disputes examined here to 13.[6] My analysis below begins with a brief discussion of the context giving rise to these cases.

I gathered legal briefs submitted by plaintiffs' counsel from archival sources, with most coming from the National Archives and a few from the papers of Catharine MacKinnon at the Schlesinger Library and the Women and Social Movements in the United States website (Baker 2005). Additionally, Professor Carrie Baker shared records from her earlier research, for which I am grateful. Below I refer to these documents as "briefs," but they include "complaints," "memoranda," "briefs," etc. I also gathered all the court opinions, most of which are available via Westlaw or NexiUni. All documents used in the research are listed in the appendix. In requesting records from the National Archives, I requested all briefs filed by the lawyers in the cases prior to the hearing, read each document multiple times, and then incorporated into the analysis those containing the legal and other arguments developed by counsel. I focus on the

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were fewer in number in these early years and drew on Title IX rather than Title VII, making their discourse different. A prominent early education case is *Alexander v. Yale* (1980).

[6] I exclude appeals in a) *Miller* because the circuit case narrowly concerns employer liability not establishing quid-pro-quo harassment and b) *Munford* where the decision is an unpublished affirmation of the district opinion. While there likely is some dependency across the district and circuit court briefs for the same case, there is important independence as well. In both *Goodyear* and *Barnes*, the appellate case involves different lawyers, resulting in entirely different briefs. Also, while some elements in the district briefs for the other two cases were carried over for the appeal (*Garber* and *Tomkins*), the briefs were heavily revised, with new arguments appearing and old ones removed. Additionally, the judges in the district and circuit cases are distinct. Three of the victorious cases for the plaintiffs are circuit court wins, making it important to consider these cases. Dropping these four district court cases does not change the conclusions drawn from the analysis.

anti-SH briefs and not their opponents briefs because I am interested in how legal actors representing the plaintiffs achieved a change in law deeming SH a violation of Title VII.[7]

To systematically analyze the briefs, I began with multiple close readings of the legal documents to familiarize myself with their discussions and how they made their case for the plaintiff. I then open coded the briefs and opinions, following both an inductive approach, to discern the primary frames utilized by the authors, and a deductive approach, to zero in on diagnostic, prognostic, transformational, and bridging frames (Benford and Snow 2000; Snow et al. 1986; Straus and Corbin 1998). I conducted multiple passes through the documents to refine my coding, locating key passages in the documents if and where the author articulates the frames. These multiple passes also allowed me to ensure I coded each document the same way, locating the presence of a frame or noting its absence if it did not appear in the document. The frames I discuss represent the core diagnostic, prognostic, transformational, and bridge frames appearing in these documents. Table 1 provides the overall results of my qualitative coding of the briefs.[8]

[7] A limitation of the current analysis is that I don't explicitly consider the opponents' briefs and how the anti-SH lawyers responded to their opponents' claims. Although such rebuttals are not an explicit focus of the analysis, many of the claims offered by the anti-SH lawyers considered below are, in fact, rebuttals of opponents' assertions (for example, see the opponents' "floodgate" argument mentioned in the analysis).

[8] Another frame (a race-gender analogy in which sex discrimination is compared to racial discrimination) appeared less frequently in the briefs, and it is not associated with the decisions in favor of the plaintiffs. Therefore, I don't pursue it further here.

Results

Launching the Legal Movement against Sexual Harassment

Emerging in the early 1970s, the legal movement combatting sexual harassment was a loosely coordinated effort among lawyers from varying backgrounds. Some had ties to feminist organizations, others aligned with the civil rights movement, and still others were practicing labor lawyers. They were drawn into the mobilization by plaintiffs seeking redress of their grievances, and claims were made under Title VII and the 1972 amendments extending Title VII's prohibitions on workplace sex discrimination to public sector employees. Before Title VII SH arguments gained traction, other litigants had experimented with alternative legal rationales. In *Monge v. Beebe* (1974), for example, Olga Monge's lawyer posited a breach-of-contact argument after Monge was fired for not giving in to her supervisor's sexual demands. The earliest litigated SH case invoking Title VII is likely *Goodyear v. Gates* (1973).[9] Esther Goodyear filed an employment discrimination suit in 1971 against Denver's Gates Rubber Company, asserting, in addition to being overlooked for promotion and underpaid compared to her male co-workers, she was sexually assaulted by her boss (1972[10]). The local National Organization for Women (NOW) chapter picketed in support of Goodyear, and NOW Legal Defense and Education Fund provided funding for the case (Jasin 1971; Schlesinger Library 1973b). District Court Judge Olin Chilson, illustrating early staunch judicial resistance to viewing sexualized workplace behavior directed at women as sex discrimination, ruled early in the proceedings that the sexual assault evidence was inadmissible as "immaterial to the issues at hand" (*Goodyear v. Gates* 1973a).

[9] *Heiman v. Scholl* was filed in 1972 but presumably was settled out of court (Charlton 1972).
[10] The earliest available *Goodyear* brief is the 1972 "Second Amended Complaint," but the case was originally filed in 1971 (Jasin 1971).

A variety of circumstances helped fuel the early anti-SH legal movement, including a broader effort to combat the problem led by activists such as Lin Farley, who collaborated with others to organize Working Women United in 1975, an organization focused on aiding women and raising public awareness (Baker 2008). But the earliest legal cases, *Goodyear*, *Barnes v. Train (rev'd sub nom. Barnes v. Costle)*, and *Williams v. Saxbe*, emerged before this broader anti-SH mobilization began. Paulette Barnes and Diane Williams, plaintiffs in *Barnes* and *Williams*, initially reached out to the Lawyers' Committee for Civil Rights under Law (LCCRL), a civil rights legal organization (Marshal 1998). Although the organization passed the cases on to other lawyers, likely due to limited resources, later cases, such as *Henson v. City of Dundee* and *Jones v. Flagship*, involved civil rights attorneys.[11]

The legal movement to combat SH, though, in time becoming closely aligned with broader anti-SH movement, was likely initially spurred by other factors. Increasing numbers of women in the labor force and a growing and highly visible second-wave feminist movement combined to invite anti-SH legal action. The problem had a long history well prior to the 1970s (Farley 1978). A 1972 letter-to-the-editor in the first issue of *Ms.* magazine, for instance, documents that women viewed it as a pressing issue. A flight attendant wrote, "I've seen instances when a crew member has gotten mad at a girl for not taking up his offer to sleep with him. He then writes a letter to his immediate supervisor saying she was insubordinate" (p. 43). Additionally, the rising number of women lawyers aligned with feminist politics in the 1970s (Green 2020; Strebeigh 2009) along with civil rights lawyers, many fighting against workplace racial discrimination, also helped foster the legal movement against SH. For these lawyers, Title

[11] Morris Milton, counsel in *Henson*, was a longtime civil right legal activist in Florida (Silva 2007), and John W. Walter, participating in early stages of *Jones*, was a well-known civil rights attorney in Arkansas (LDF 2019).

VII, the 1972 amendments, and successful court cases involving other forms of sex discrimination[12] and racial discrimination[13] provided a platform for beginning to formulate legal arguments that SH was workplace discrimination.

The most important credit for launching the legal effort, however, as other researchers (Baker 2008; Marshall 2005) recognize, goes to the plaintiffs, women who, early on, sought a legal remedy to the problem. Paulette Barnes and Diane Williams, both employed by the federal government (the Environmental Protection Agency and Department of Justice[14] respectively) and both part of the sizeable number of Black women working in the public sector (Higginbotham 1994), reached out to lawyers, starting with the LCCRL, ultimately with Barnes finding Warwick Furr and Williams, Michael Hausfeld, both lawyers white men allied with the civil rights movement (and likely LCCRL too) (Baker 2008; Marshall 1998). Moreover, given that both Barnes and Williams were federal employees, the 1972 amendments probably signaled to them that a legal solution to the workplace harassment they confronted might be possible.

Litigating Quid-Pro-Quo Sexual Harassment

Analysis of the SH briefs shows the plaintiffs' lawyers in the earliest SH cases combined two general discursive strategies: diagnostic-transformational framing and prognostic frame bridging. In deploying diagnostic-transformational framing, anti-SH attorneys named and described the disputed behavior, including in some cases its harms, and sought to transform

[12] *Rosenfeld v. Southern Pacific Company* (1968), *Sprogis v. United Air Lines* (1971), *Laffey v. Northwest Airlines* (1973).
[13] Particularly, *Griggs v. Duke* (1971).
[14] Williams notes the "irony" of filing a discrimination claim against the Department of Justice (Marshall 1998).

judges' thinking. In articulating prognostic frame bridging, the lawyers argued the behavior was a violation of Title VII and thus SH required a legal solution. The analysis also reveals that, while all the early SH cases utilized these two types of framing, lawyers succeeding in persuading judges used particular forms of diagnostic-transformational frames. Those who were not victorious did not utilize this specific frame type.

Also importantly, the analysis shows that a number of those losing their cases emphasized another particular type of diagnostic-transformational frame, a psychological-harm-to-women frame. Moreover, lawyers in two cases (*Miller v. Bank of America* and *Munford v. Barnes*) developed important race-gender intersectionality frames as a form of diagnostic-transformational framing. Judges in these cases, however, either completely ignore or outright reject these two additional frames.

These differences in framing by the winning and losing lawyers in early SH litigation provide insights into discursive strategies that can aid movement lawyers in their bid to change law. The frames ignored or rejected by the judges also illuminate frames for which judicial decision makers are not receptive. I begin by first discussing basic forms of the diagnostic-transformational framing employed by the SH attorneys, as they name and describe SH.

i. Diagnostic-Transformational Framing: Naming and Describing Sexual Harassment

As Felstiner et al. (1980) tell us, "naming" is a critical and necessary step in legal disputing. For the earliest SH cases, there was no agreed-upon term yet for SH. Not until 1975 did a broader anti-SH movement mobilize and begin publicly using the term "sexual harassment" (Baker 2008),[15] and the earliest legal cases began prior to this in 1971. Early legal statements

[15] In Ithaca, New York in May 1975, Working Women's United and the local NOW chapter organized a speak out, where the term "sexual harassment" was first utilized publicly (Baker 2008).

instead relied on a variety of phrases, such as "sexual advances" (*Goodyear* 1973b:11), "extract sexual favors" (*Barnes* 1973:3), and "illicit sexual relations" (*Garber v. Saxon* 1975:Appendix 6). Some of these nascent efforts sometimes in at least some passages in their briefs obscured the damage resulting from SH. One early legal complaint in a portion of the brief describes a supervisor's actions "to become personally acquainted with the plaintiff" and to "seek the social companionship of the plaintiff outside of office responsibilities," offering in at least these passages of the brief a benign description of the behavior as merely an attempt to socialize (*Williams* 1974:3). Williams, herself, however, in later testimony at a Congressional hearing speaks of her SH experience as "humiliating" and "degrading" and of being "frightened" of filing a complaint (U.S. House of Representatives 1979:76-77). Elsewhere in the 1974 *Williams* complaint, however, the document uses stronger language, referencing, for example, the "humiliation" Williams confronted (p. 5).[16]

A number of early judges viewed the behavior quite differently than did Diane Williams. While, unlike in *Goodyear*, other early judges permitted evidence of the sexual actions, their opinions often characterized it as simply "natural sexual attraction" (*Tomkins v. Public Service and Gas* 1976:557) or a personal relationship gone awry. District Judge John Smith, in his 1974 *Barnes* ruling, reports the problem as an "inharmonious personal relationship," stating this "plainly fall[s] wide of the mark set [for Title VII] by the court in *Sprogis*" as to what constitutes workplace sex discrimination (p. 1). In *Corne v. Bausch and Lomb*, District Court Judge William Frey refers to the harasser's behavior saying the "conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism" and simply the harasser "was satisfying a personal

[16] Although asserting harm to gain legal standing is necessary to civil law SH litigation, as the analysis indicates, centering harm to women in the case briefs is not an approach leading to legal success for the plaintiffs and their lawyers.

urge" (1975:163). When judges state that demanding sex in exchange for employment or promotion is simply a "natural sexual attraction" or an "inharmonious personal relationship," the underlying interpretive lens reflects a patriarchal belief system in which the male supervisors' sexual actions are rendered unproblematic and women's harsh experiences are unimportant. Additionally, the framing places the behaviors largely outside the scope of the workplace and thus beyond the reach of workplace law. It is precisely this SH framing, as a personal relationship outside the framework of workplace antidiscrimination law, that the anti-SH lawyers sought to transform.

In *Corne* (1975), lawyer Heather Sigworth's anti-SH brief recognizes the "unsolicited and unwelcome" nature of the actions experienced by plaintiffs, Jane Corne and Geneva DeVane (1974b:5). Sigworth also states "women are limited to the choice of putting up with being manhandled, or being out of work" (1974b:5-6). While suggesting this is a "choice" for women may be overly optimistic in that some (probably many) women cannot afford to quit or lose their jobs, the specific choices articulated reveal the narrow options women confront and, importantly, that this is an "employment condition…that tends to deprive the women of employment opportunities" (p. 5). Sigworth's early brief shifts interpretation of the behavior from the personal realm to the workplace, emphasizing women's experiences at work. She does not center the perpetrator's motives but emphasizes women's workplace response to the behavior, that the action was "unwelcome."

A brief filed in the *Barnes* appeal, after its district-level defeat, by Barnes' appellate attorney, Linda Singer, further reshapes the meaning, both in naming the behavior and diagnosing the problem. Singer states, Barnes' "male supervisor sought to coerce her to engage in sexual relations with him in order to secure her position as an employee at the [EPA]"

(1974c:13). This brief, too, situates the action in employment, and it also uses the phrase "sexual blackmail" to label the behavior (p. 14). The words "coerce" and "blackmail" reveal a progression in the legal documents, away from phrasing focused on the perpetrator's intent—and conceptualizing it benignly as someone engaged in "sexual advances" or "seek[ing] social companionship"—to instead labeling the behavior as abusive, specifically emphasizing the employment-based coercion and intimidation underlying SH, with threats of (or actual) job loss. This diagnostic-transformational framing, that is, situating the sexualized action specifically in the workplace and recognizing implications for women's employment, positioned the anti-SH attorneys to articulate their second discursive strategy: linking the behavior to Title VII.

ii. Prognostic Frame Bridging: Linking Sexual Harassment to Title VII

The anti-SH attorneys' second general framing strategy built on their diagnostic-transformational framing and asserted the offending behavior was a violation of law and thus necessitated a legal solution. By transforming the problem into a workplace matter, they could then bridge to workplace antidiscrimination law, at first in a basic way, simply by invoking the CRA's Title VII. Doing so appealed to the judges' willingness to consider (and even the judges' very expectation) of a legal argument. This prognostic bridge framing took two steps. First, it claimed the behavior was a violation of Title VII's prohibition on workplace sex discrimination, thus bridging to the law. Second, the framing provided a prognosis, that is, a legal solution to SH—specifically, holding employers accountable for SH, compelling them under Title VII's provisions to alleviate the problem and compensate victims for violation of their Title VII right not to be discriminated against. As lawyer Nadine Taub (1977c:26) argued in her *Tomkins* circuit brief, "the courts have consistently held that where a managerial or supervisory agent of an employer takes any action which violates [Title VII], the employer is liable for such action."

Apparent in the prognostic bridge framing among the SH briefs is variation in how the attorneys engaged in this form of framing. In *Goodyear*, likely the first case in which SH attorneys claimed a Title VII violation, counsel simply asserted the link with little elaboration (1972), and, as noted, the *Goodyear* case was not successful for the plaintiff. In later cases, however, the lawyers developed their explanations of how Title VII was relevant to the sexualized behaviors. In short, the lawyers began to offer more nuanced legal frame bridging. In a routinely used form of legal bridging (see Table 1), litigators put forward a "breadth of law" link between the law and the offending workplace behavior. In fact, *Goodyear* aside, nearly all these early cases offered the breadth frame. The breadth-of-law frame argued Congress intended that Title VII be applied to a wide array of workplace behaviors, and this wide array included SH. Often lawyers quoted an earlier (non-SH) sex discrimination case, *Sprogis* (1971:1198), to support the breadth claim, stating, Congress intended Title VII to be applied to "the entire spectrum of disparate treatment of men and women." Yet, as with simply invoking Title VII, the breadth frame appears in cases both won and lost, suggesting it does not play a pivotal role in persuading the judges.

While many of the attorneys used the breadth frame, some early anti-SH attorneys developed their bridge framing even further, drawing on specific language of Title VII in their briefs, particularly, the "conditions" and "terms" of employment language as they engaged in prognostic legal-frame bridging. They argued that when supervisors demanded sex in exchange for employment, promotion, or some other favorable treatment at work, such behavior then constituted a "condition" or "term" of employment, and these key terms were drawn specifically from Title VII's wording. Title VII states:

> It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin … (42 U.S.C. §2000e-2).

The law's specific language shows up in the earliest successful briefs, the *Williams* district and *Barnes* and *Garber* circuit court briefs (Table 1). Attorney Michael Hausfeld in *Williams* states (with paraphrasing from the CRA italicized in the following quotation):

> [t]he effect of the aforesaid acts and *practices* pursued by Defendants has been *to limit, segregate, classify* and invidiously *discriminate* against Plaintiff and other women and jeopardize their *opportunities* for *equal employment* in the Department of Justice and otherwise *affect their status* in regard to the *terms, conditions and provisions of their employment* with the department by *reason of their sex* (1974:6).

Similarly, Singer in the *Barnes* circuit court brief quotes both Title VII and the 1972 amendments, using key phrases such as "condition of" and "terms of employment" and "basis of sex" at critical junctures in the overall argument (1974c:4, 15). Yet, following these initial (and successful) early briefs, later briefs also use the same "condition" wording, and yet many of them were not successful (Table 1). This suggests, while this discursive strategy may have helped spell it out for judges especially earlier in this 1970s litigation, allowing them to see the link between

the behaviors and the law, judges later in the decade often needed further convincing and this is where incongruity framing (discussed next) appears to matter as well.

iii. Diagnostic-Transformational Framing: Incongruity Framing

Looking across the 13 quid-pro-quo cases, a discursive strategy used in all the victorious cases and in none of the losing cases is a framing strategy taking us back to diagnostic-transformational framing. In the *Williams* district and *Barnes*, *Garber*, and *Tomkins* circuit court briefs—the four decisions succeeding in defining quid-pro-quo SH as a violation of Title VII—the attorneys in each case constructs a sharp contrast between the two understandings of the workplace behavior, between viewing it as unproblematic and not a legal violation, on the one hand, and viewing it as a violation of Title VII sex discrimination law and highly problematic, on the other hand. This incongruity transformational framing—specifically, an explicit and sharply drawn contrast—I argue, paired with nuanced legal frame bridging, resulted in an effective discursive strategy for persuading judges to rule in favor of the plaintiffs. In short, the incongruity framing is a key form of diagnostic-transformational framing allowing the lawyers to successfully bridge to the law and win their case for their clients.

In *Barnes* and *Tomkins*, Singer and Taub (respectively) both place the two distinct interpretations of the male-supervisor treatment of female employees overtly side-by-side in their text and emphasize the contrast as they discuss two ways of interpretating the behavior. Singer, at a critical point in her brief where she first lays out her claim, states:

> In the instant case, the district court held that a male supervisor's retaliatory actions against a female employee for her refusal to engage in sexual relations with him—after she had been told explicitly that cooperation on her part would lead to promotion—did not, as a matter of law, constitute a violation of Title VII. Contrary to that determination,

> this case presents an example of the most egregious form of discrimination based on sex of the very type that Title VII was intended to eradicate. Ms. Barnes alleged in her complaint that her male supervisor sought to coerce her to engage in sexual relations with him in order to secure her position as an employee of the Environmental Protection Agency and that he repeatedly suggested that if Ms. Barnes 'cooperated with him in a sexual affair, her employment status would be enhanced'… It is hard to imagine a more explicit form of sex discrimination in employment (1974c:13-14).

"Contrary to that determination" marks the transition from one view to the other, from the behavior not viewed as a violation of law by the lower court to its opposite: the conduct understood as a legal violation, with Singer emphasizing it is "the most egregious form of discrimination." To further draw out the contrast, Singer discusses use of *coercion* to compel sexual relations. She then goes on immediately in a following statement to invoke the breadth frame to explain why the actions should be a legal violation, saying, this is because "Title VII was 'intended to strike at the entire spectrum of disparate treatment of men and women'" (p. 14), including this "most egregious form." In this early brief, we see Singer's skillful combining of incongruity transformational framing and legal-frame bridging.

Similarly, Taub, in her *Tomkins* circuit brief, states:

> [n]or will accepting plaintiff's theories lead to a federal lawsuit every time one employee invites another out to dinner … Plaintiff's claims concern only coercive sexual advances and assaults by a supervisor … the law … is accustomed to drawing the requisite lines between innocent and coercive behavior (1977c:32).

Here, Taub also engages in incongruity framing, rebutting a lower court that spoke of "floodgates" being opened to all types of lawsuits, including when one person simply invites

another to dinner. The juxtaposing in Taub's incongruity framing delineates non-coercive ("innocent") conduct, in which one person extends an invitation with no threat of job repercussions if the invitation is declined, from coercive actions that threaten the job status of the employee on the receiving end. Like Singer in the *Barnes* brief, Taub, too, then provides legal frame bridging to explain why the behavior in question is a violation of law, using both breadth and conditions framing, for the latter drawing on the language of Title VII. And like Singer, Taub deems the conduct in question a violation of Title VII because it is coercive, threatening the job status of the victim. Both *Barnes* and *Tomkins* briefs, by situating the differing meanings expressly side-by-side, highlight and simplify the difference between them, laying bare the element classifying the conduct as a legal violation: a coercive demand for sex from an employee so the employee can retain her employment. Incongruity framing distills down the distinction to its basic difference—coercion on the job—and situates the differing views of the behavior side by side to make this evident to the judges, all toward altering their legal consciousness.

The *Williams* district and *Garber* circuit briefs also deploy incongruity transformational framing but do so differently than *Barnes* and *Tomkins*. After discussing the supervisor's conduct requiring Williams to "accede[] to nonprofessional extracurricular sexual advances by her supervisor," Attorney Hausfeld's *Williams* brief states:

> [t]o permit [the supervisor's] conduct in this case, would require the government [as Williams' employer] in all future employment notices to include the following postscript: 'Note – To all applicants – In addition to job requirements cited above, you are informed that you may be required as a condition to any promotions or advancements, or to your continued employment, that you submit to all sexual advances made by your supervisor on his request and at his request' (1975:8).

In providing an incongruity frame, Hausfeld injects an absurd element into the brief, the absurdity of such an employment ad, to jar readers, compelling them to see what is being demanded of the employee to continue their employment. Bostorff (1987:44), in her study of political cartoons, states that such "collision of incompatible elements," common in humor (and some might read humor in Hausfeld's brief), can jolt the reader, to highlight a new way to make meaning of the circumstance and reveal the wrongness of the former understanding of the behavior. As Demo (2000) indicates, this form of incongruity can remoralize the behavior. One can reasonably conclude, this is precisely what Hausfeld intended: using the absurdity of the job ad and its inclusion of the sex requirement to persuade the judge of the wrongness of SH. Putting a requirement of compliance to sexual demands to retain a job in a job ad would shed public light on the behavior, and in a public forum many would deem a workplace requirement of sex as highly inappropriate.

In *Garber*, attorney Elaine Major uses a similar approach, writing:

> It is difficult to see why putting a male in a supervisory position over female employees, where the male supervisor persistently takes unsolicited and unwelcome sexual liberties with the female employees as a matter of course is not the creation of a sex discriminatory employment condition, and a limitation that tends to deprive the women of employment opportunities. They are limited to the choice of putting up with being manhandled, or being out of work. Presumably Defendant is not contending that it places women in supervisory positions over men, and permits the women to make sexual advances, all in order to avoid discriminating because of sex (1976:4).

Major, too, uses an absurd idea, that to equalize treatment of women and men in the workplace, one could promote women to supervisory roles and possibly even encourage them to sexually

harass their male subordinates, all toward achieving gender equality at work. Both lawyers, use absurd proposals to contrast the differing understandings of SH, on the one hand, as nonproblematic behavior that should be included in job ads or should be encouraged among female supervisors, and, on the other hand, as an absurd (an illegal) requirement of employees to hand over sex in exchange for a job. The incongruity framing in this form as well highlights for judges the collision of the two views: acceptance of workplace behaviors placing such demands on workers, on the one hand, and rejection of these practices instead as illegal sex discrimination, on the other.

In all four cases (*Corne*, *Garber*, *Tompkins*, *Williams*), the four brief writers also provide fully developed legal frame bridging, using both breadth and "conditions" language to connect the legal dots for the judges, to convince them of the legal violation being asserted. In all the other cases examined here, while they include at least some legal frame bridging, none engage in transformational incongruity framing, where the two ways of understanding the behavior in question are explicitly contrasted to reveal their incongruity. In the end, all four attorneys in *Corne*, *Garber*, *Tompkins*, and *Williams* were successful, winning their cases for the plaintiffs.

iv. Diagnostic-Transformational Framing: Intersectionality and Psychological-Harm-to-Women

The analysis also uncovers additional diagnostic-transformational frames put forward by the plaintiffs' attorneys and these additional frames are largely ignored and sometimes outright rejected by the judges. Two frames fall into this category, intersectionality and psychological-harm-to-women framing.

In *Williams*, the Organization of Black Activist Women filed an amicus (third-party, friend-of-the-court) brief (1976b), providing one of the first intersectional framing discussions

appearing in the SH cases. The group, recently organized in Washington, D.C., brought in attorneys, Maudine Rice Cooper of the National Urban League (Trescott 1983) and Benjamin Evans, to prepare the organization's filing. Their brief highlights women of color's high labor-force participation rates and states SH is "an issue which has plagued women, particularly Black and other minority women, throughout history" (1976b:2). Such framing provides a deeper diagnosis of the problem of SH—one Kimberlé Crenshaw (1992 see also Ellis 1981 for an early statement) would later develop even more fully—articulating that the harassment can be racialized sexual harassment, where racism and sexism combine to subjugate women of color.

Counsel's briefs in two other cases, *Miller* (1975, 1976b) and *Munford* (1976, 1977b), also develop race-gender intersectional framing as they diagnose and describe the SH problem. Both cases—like the *Barnes* and *Williams* cases—involve Black plaintiffs, Margaret Miller in San Francisco and Maxine Munford in Detroit. Munford would later participate in a successful citizen-led mobilization to change Michigan's law addressing sexual harassment (Harel and Cottledge 1982). While the lawyers representing the other Black plaintiffs in the cases studied here, *Barnes* and *Williams*, did not include intersectional framing in their briefs, Miller's lawyer, Stuart Wein, a white-male San Francisco employment lawyer, provided in his district court filings the first articulation of an intersectional frame in a brief filed by a SH plaintiff's attorney (1975, 1976b), and in the following year, Michigan attorney, Thomas Oehmke, another white-male employment lawyer, developed this intersectional discursive strategy further in *Munford* (1976, 1977b).

These legal formulations predate Crenshaw's (1989, 1991) groundbreaking intersectional theorizing. As others (Carastathis 2016) note, earlier thinkers, such as Frances Beal (1970), members of the Third World Women's Alliance (1970) including Beal, and Aileen Hernandez

(Lewis and Hernandez 1971), while not using the term "intersectionality," also put forward statements of Black women's subjugation due to combined racism and sexism.[17] While the *Miller* and *Munford* briefs do not cite these early intersectional statements, the briefs apply the reasoning to SH. The lawyers may have gained intersectional insights from early activist statements, such as that by Beal, or news media coverage of Black women's mobilizations during these years, including mobilizations in Detroit and San Francisco, the cities where *Munford* and *Miller* originated (Hunter 1970; Liddick 1973; Springer 2005; *Time* 1973).[18]

Wein, who in another case represented a transwoman experiencing employment discrimination (*Advance-Register* 1975), states in the *Miller* complaint that Miller was "discriminat[ed] against … because of her sex and race" (1975:1). His legal argument quotes the harasser who targeted Miller as a Black woman, saying, "I've never felt this way about a black chick before" (p. 3). The brief also details the employer's liability and recognizes a broader structural problem in this workplace beyond the individual claim in the specific case:

> Defendant had a policy or practice of permitting males in supervisory positions to put black female employees in subsidiary roles demeaning to their dignity a role which said black females had to play in order to remain employed with Defendant (p. 2).

Wein also adds that Miller, "[h]ad she not been a black female … would still be employed [at the bank]" (1976b:4). The brief's statements highlight that the treatment experienced by Miller resulted from her harasser targeting her because she was a Black woman. Studies (Hernández

[17] Beal additionally emphasized class oppression.
[18] Baker's (2004) close assessment of the broader SH movement's treatment of women of color's SH experiences—a broader movement that was primarily white-led—suggests these early briefs were formulated before the broader movement offered public statements on minority women's experiences, suggesting the broader SH movement was not the source of this early legal intersectional framing.

2001) show Black women experience higher levels of workplace sexual harassment compared to white women.

Briefs submitted in *Munford* by Oehmke, an attorney with ties to civil rights activism via his membership in the National Lawyers Guild (Marshall 2001), develop intersectional claims further. Oehmke's brief states:

> acquiescence to [the perpetrator's] sexual demands was made a condition of Plaintiff's continued employment … solely because she was black and female [and] would not have been made a condition … if Plaintiff had been a male, or a white female (1976:3).

The author's intersectional lens explicitly tells us Munford's treatment was different than that experienced by her male and white-female colleagues. The brief also points to the race of her harasser who was white, and to her employer, a Detroit mortgage company, that fostered a culture of "white male hegemony" condoning the behavior (1977b:14). Oehmke emphasizes the harsh treatment experienced by Maxine Munford, saying:

> The reasons given [for plaintiff's dismissal] were deliberate and calculated falsehoods, contrived by Defendants to cover-up their outrageous conduct in attempting to force a black woman to become the sexual toy of a white male supervisor (p. 22).

Oehmke's brief emphasizes that white men are elevated by the workplace culture, with Black women bearing the brunt of the disadvantage promoted by this racialized gender hierarchy.[19]

[19] The *Munford* briefs suggest a likely pattern among these SH cases, that Black women experienced substantially harsher treatment in their workplaces than did white women. Not only was Munford sexually harassed in both racist and sexist ways, her supervisor and others in her workplace also took steps to sully her overall reputation including sharing fabricated claims broadly with other employees (1976, 1977b). Because the *Williams* district and *Barnes* circuit briefs do not explore harm to the plaintiffs in any detail (which in and of itself is erasure of Black women's experience) (see Table 1), a full examination of the treatment of the Black plaintiffs is difficult to conduct.

While the Organization of Black Activist Women's amicus brief in *Williams* and *Miller* and *Munford* attorneys' briefs put intersectional diagnostic-transformational framing forward, the judges in the cases do not engage the intersectional discourse, not offering any assessment of how racial and gender discrimination can combine to produce a different experience for Black women. In *Williams*, the judge provides no comment, not even noting Diane Williams is Black (1976a). In both *Miller* and *Munford*, District Court Judges Spencer Williams and Ralph Freeman (respectively), while acknowledging the plaintiffs are Black women, deny the cases involve any racial discrimination (*Miller* 1976a; *Munford* 1977c). Denying race discrimination while allowing an evaluation of sex discrimination, with no acknowledgement that this step has been taken when the briefs themselves offer intersectional framing, reveals that the judges' apply a framework in which sex and race discrimination operate entirely separately, as distinct possible violations of law. They do not consider, as Mayeri (2015:729) states, race and sex discrimination can be "inextricably intertwined, mutually reinforcing, and manifest in particular stereotypes, epithets, and abuses directed toward female employees of color." The responses of these legal decision makers offer no indication they consider the attorneys' arguments that race and sex biases can be intersecting, interwoven discrimination that produces racialized sexual harassment of Black women. These cases show the lawyers' intersectional framing did not succeed in deepening and transforming judges' understanding of the problem of workplace treatment of Black women. The lack of discussion shows intersectional framing being ignored by the judges, and their denial of race discrimination suggests they likely even deny intersectional discrimination exists.

Another diagnostic-transformational frame for the most part ignored by the judges and in some cases explicitly rejected is the psychological-harm-to-women frame. In these early years

of quid-pro-quo harassment litigation, this frame attempts to persuade judges to rule in favor of plaintiffs by further describing SH by articulating the psychological and emotional harm experienced by those who are sexually harassed. A cause for action in a Title VII case necessitates a reasonable claim the plaintiff confronted workplace discrimination. As discussed, in these early quid-pro-quo SH cases, "conditions" of work legal framing was sometimes used to describe how some aspect of employment could be conditioned on complying with coercive sexual demands, which reveals possible and often very real economic harm of SH: simply, if one does not comply, one can lose a job or fail to receive a promotion or pay raise.

Here, though, I attend to framing around another important harm stemming from SH, psychological harm. The psychological-harm frame focuses on SH's psychological and emotional impact, which can sometimes, in turn, lead to physical-health problems (Willness et al. 2007). Such harm framing centers the victims of SH. As Table 1 shows, six of the 13 case briefs offer psychological-harm framing,[20] with the other seven not discussing or only very briefly mentioning psychological harm with just a few words. While articles in *Redbook* and *Harper's* magazines at the time provide evidence of the broad scope of the problem of SH, little is said in these early reports about the injuries and suffering of those experiencing workplace harassment (Bernstein 1976; Safran 1976).

But some legal briefs provide clear accounts of plaintiff harm. As Table 1 shows, six cases provide clear statements of psychological harm. For example, attorney Warwick Furr in an early *Barnes* brief in the district court case points not only to "economic hardship" but also to the "mental anguish, embarrassment" and "the constant fear of being subject to ridicule and

[20] *Barnes* district, *Garber* district, *Miller* district, *Munford* district, *Tomkins* circuit, *Neeley* district.

harassment" experienced by Paulette Barnes (1974b:1, 10). Wein in *Miller* writes of "suffering…irreparable injuries" that are "demeaning to [Black women's] dignity" (1975:2, 4), focusing attention on women's psychological experience with SH. Other briefs, though, do not offer psychological-harm framing, and some briefs, in fact, go in a very different direction. In *Garber's* circuit brief, for instance, instead of focusing on plaintiff Darla Jeanne Garber, attorney Elaine Major explains that SH has "adverse implications for marital and family relations" (1976:7), seeming to zero in on consequences for the husband rather than considering the woman involved.

In the end, however, the courts either ignore or outright reject psychological-harm framing. Judges' rulings in the six cases *with* psychological-harm framing in the briefs often do not comment on plaintiffs' psychological harm and rather, not surprisingly, focus on whether the law is intended to encompassment SH behavior under the definition of discrimination and, if so, what types of behavior qualify as discrimination. In short, judges tend to keep their discussions within Title VII's strictures that define and prohibit employment discrimination, and not discrimination's psychological impact.

However, some of the six court rulings where the briefs provide psychological-harm framing take discursive steps to *deny* psychological harm occurs for the plaintiff, even when the plaintiff briefs assert otherwise. In the *Barnes* district case (1974a:1), the judge's characterization of the disputed behavior renders it virtually *harmless*, calling it, as noted, simply "an inharmonious personal relationship." Similarly in *Miller* (1976:236), District Court Judge Spencer Williams refers to "the attraction of males to females and females to males [as] a natural sex phenomenon." In *Neeley v. American Fidelity Assurance* (1978:4), Judge Luther Bohanon offers that the psychological distress of plaintiff Nancy Neeley was caused by "many factors in

her life prior to her employment by defendant company," which sets aside attorney Sylvia Marks-Barnett's argument that the plaintiff, as a result of the SH, "has suffered and will suffer in the future, extreme mental and physical distress" along with experiencing substantial medical expenses and "irreparable damage and destruction to her self-esteem" (1977:4). The judge concludes SH did not harm the victim but rather many other "factors" in Neeley's life caused her harm.

In the end, the six cases in which case counsel provides psychological-harm framing are all plaintiff losses, with one exception. The *Tomkins* circuit court ruling is a win, and still the *Tomkins* judge says little about the harm Tomkins experienced, even though attorney Taub describes Tomkins' resulting "emotional distress" and "physical illness" (1977c:7). In fact, Judge Ruggero Aldisert notes in a footnote to the opinion that, while Taub argues that psychological harm from a work environment replete with sexual harassment should be prohibited, the court "need not pass [judgment] upon this" claim (1977b:1049). As SH litigation progresses in the 1980s, a hostile work environment, as the second form of SH theorized by Catharine MacKinnon (1979), in addition to quid-pro-quo harassment, will be ruled a violation of Title VII, including in the Supreme Court's first SH decision, *Meritor v. Vinson* (1986).

Additionally, in the other three plaintiff wins beyond the *Tomkins* circuit victory (*Williams*, *Barnes* circuit, and *Garber* circuit), the briefs do not develop psychological-harm frames, which also suggests the harm frame plays little role in these case outcomes. The judges in the SH cases when provided with a psychological-harm framing either ignore or reject it, and for the latter, they instead frame SH as harmless, denying suffering resulted from harassment. The psychological-harm frame, these patterns indicate, as with intersectional framing, is not a successful diagnostic-transformational frame in the SH discursive legal struggle.

Conclusion

[Preliminary draft] This paper provides an analysis of the discursive strategies used by lawyers in the 1970s quid-pro-quo SH cases, where lawyers articulated various frames in their briefs as they worked to change judges' understanding of workplace behaviors in which sex was required of employees in exchange for employment, promotions, and other job benefits. In the paper's analysis, I provide a systematic examination of the briefs' framing across all 13 federal quid-pro-quo cases to discern framing strategies where judges ruled in favor of plaintiffs compared to those where plaintiffs experienced legal losses. My analysis suggests a combination of a) diagnostic-transformational framing and b) prognostic legal-frame bridging persuaded judges to decide in favor of the plaintiffs. The rulings favoring plaintiffs, then, resulted in SH being included as a form of workplace sex discrimination in violation of Title VII of the Civil Rights Act.

More specifically, the analysis shows a particular type of diagnostic-transformational framing was pivotal in changing judges' understanding of the behavior. Transformational framing using an incongruity frame, where incongruity framing provided a sharply drawn contrast between viewing the workplace behavior as unproblematic and not a violation of law, on the one hand, and, on the other, seeing the workplace actions as coercive blackmail or even as highly inappropriate when put in the public limelight, was key. All four of the cases favoring plaintiffs entailed incongruity framing, and none of the rulings against them involved such a frame.

Other scholars (Burke 1964; Bostorff 1987; Demo 2000) also note the importance of juxtaposing meanings in an explicit fashion to draw an audience's attention to opposing

understandings. Some of the lawyers, indeed, set the two interpretations of the SH behaviors explicitly side by side at key junctures in their overall argument to clarify and simplify the contrasting understandings, to lay bare the opposing qualities in the two interpretations. Other lawyers drew out the absurdity of permitting workplace SH once the behaviors were understood as coercive workplace control of employees, coercive control imposed on workers as a requirement to maintain their employment or to gain opportunities or other benefits at work. In *Williams*, the lawyer's brief conveys this absurdity by asking judges to consider how a public job advertisement would be viewed if it contained a demand for sex to retain employment. As Demo's (2000) theorizing suggests, such a rhetorical move can remoralize the behavior, here making clear the wrongness of SH. McAdam (1996) points out that when movement advocates draw out such contradictions, this can produce social change, in this case, a change in law. When lawyers describe the behavior as coercion and blackmail, the contradiction of not outlawing the behavior, for many at least, becomes clearer.

Also, the findings here show that diagnostic-transformational framing needed to be accompanied by prognostic legal-frame bridging to provide judges with a convincing argument that Title VII applied to SH. In cases favoring the plaintiffs, both breadth-of-law arguments and the "conditions" language of Title VII were used to articulate the legal-frame bridging. Yet, the results indicate it was the combination of incongruity framing with legal-frame bridging that tipped the scales in the plaintiffs' favor. While the breadth and conditions arguments appear in all the cases in which plaintiffs won, these forms of legal-frame bridging also appears in a number of plaintiff losses. In the end, in all four successful qui-pro-quo SH decisions, the incongruity frame is present, and it is not present in the remaining nine cases not decided in the plaintiffs' favor.

Importantly, the analysis also reveals other diagnostic-transformational frames that were not successful and in fact were ignored or rejected by the judges. Both intersectionality and psychological-harm-to-women framing did not succeed in gaining legal victories for the plaintiffs.

One might argue that the legal context matters, perhaps even more than the lawyers' framing. Certainly, who the judges are, in terms of their political leanings, as a key form of legal context, is likely to play an important role in shaping judges' decision making. Among those ruling in favor of the plaintiff more were appointed by Democratic presidents (Johnson, in particular) than Republican presidents. Yet, there is an exception. Judge Charles Richey who decided *Williams* was a Nixon appointee. Moreover, among the cases lost by plaintiffs, there is a mixture of judges appointed by Democratic and Republican presidents.

While this legal context—the judges' political attitudes as indicated by the political party of the appointing president—likely matters, at the same time, to achieve decisions favoring plaintiffs, plaintiff attorneys must present arguments that succeed in persuading judges. The analysis here points to specific legal and other framing strategies, in the form of diagnostic-transformational framing involving incongruity framing along with prognostic legal-frame bridging, that provide judges with a compelling overall framework to support ruling for the plaintiff. I would argue as well that the incongruity frame and legal-frame bridging offer clarity for those judges willing to bring an open mind to the matter. The incongruity frame sets the contrasting modes of understanding the workplace treatment of women side by side and the language of Title VII and the breadth of law frame offers explicit rationales for viewing the behaviors as illegal discrimination under Title VII. The winning lawyers use framing strategies that make is easy for a judge to rule in their favor.

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Appendix

I. Cited Cases and Other Legal Documents need consistent format below; indent docs; where both dist and circ cases exist, these are underlined to highlight; I've added "a" and "b"s below and have not yet adjusted in text citations, need to check carefully

Alexander v. Yale, 631 F.2d 178 (2nd Cir. 1980).

Barnes v. Train, district court:

Barnes v. Train, 13 Fair Employment Practice Cases 123 (D.D.C. 1974a) rev'd sub nom.

Barnes v. Train, "Complaint for Declaratory Judgement, Injunctive and Other Affirmative Relief" (Sept. 1973).

Barnes v. Train, "Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment" (Mar. 1974b).

Barnes v. Train/Costle, circuit court:

Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

Barnes v. Train, "Brief for Appellant" (Dec. 1974c).

Corne v. Bausch and Lomb, district court:

Corne v. Bausch and Lomb, 390 F. Supp. 161 (D. Ariz. 1975).

Corne v. Bausch and Lomb, "Complaint Violation of Civil Rights Sex Discrimination" (Aug. 1974a).

Corne v. Bausch and Lomb, "Opposition to Defendant Bausch-Lomb's Motion to Dismiss" (Nov. 1974b).

Garber v. Saxon, district court:

Garber v. Saxon, 14 Employment Practices Decisions 7586 (E.D. Va. 1976).

Garber v. Saxon, "Complaint" (Oct. 1975).

Garber v. Saxon, circuit court:

Garber v. Saxon, 552 F.2d 1032 (4th Cir. 1977).

Garber v. Saxon, "Opening Brief of Appellant" (July 1976).

Goodyear v. Gates, district court:

Goodyear v. Gates, 6 FEP Cases 745 (D.Col. 1973a).

Goodyear v. Gates, "Second Amended Complaint" (Mar. 1972).

Goodyear v. Gates, circuit court:

Goodyear v. Gates, 8 FEP Cases 1007 (10th Cir. 1974)

Goodyear v. Gates, "Plaintiff-Appellant's Memorandum Pursuant to Rule 9" (1973b).

Griggs v. Duke Power., 401 U.S. 424 (1971).

Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

Jones v. Flagship, 793 F.2d 714 (5th Cir. 1986).

Laffey v. Northwest Airlines, 366 F. Supp. 763 (D.D.C. 1973).

Meritor v. Vinson, 477 US 57 (1986).

Miller v. Bank of America, district court:

Miller v. Bank of America, 418 F. Supp. 233 (N.D. Cal. 1976a).

Miller v. Bank of America, "Complaint for Damages, Injunctive Relief" (Dec. 1975).

Miller v. Bank of America, "Plaintiff's Response to Defendant's Motions to Dismiss and for Summary Judgment" (Feb. 1976b).

Continental Can v. State, 22 Fair Employment Practice Cases 1808 (Minn. 1980).
Monge v. Beebe Rubber, 316 A.2d 549 (N.H. 1974).

Munford v. Barnes, district court:

Munford v. Barnes, 441 F.Supp. 459 (E.D. Mich. 1977a).

Munford v. Barnes, "Complaint for Violation of Civil Rights, Slander & Libel and Demand for Jury Trial" (Oct. 1976).

Munford v. Barnes, "Trial Brief" (May 1977b).

Munford v. Barnes, "Memorandum Opinion" (Sept. 1977c). (Judge Freeman ruled on a motion. Later a jury decided against the plaintiff.)

Neeley v. American Fidelity Assurance Company, District Court:

Neeley v. American Fidelity Assurance, 17 Fair Employment Practice Cases 482 (W.D. Okla. 1978a).

Neeley v. American Fidelity Assurance, "Complaint" (Feb. 1977).

Neeley v. American Fidelity Assurance, "Trial Brief Regarding Scope of Relief in a Title VII Lawsuit" (Feb. 1978b).

Neeley v. American Fidelity Assurance, "Trial Brief in Regard to Liability" (Feb. 1978c).

Rosenfeld v. Southern Pacific, 293 F. Supp. 1219 (C.D. Cal. 1968)

Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971)

Tomkins v. Public Service and Gas, district court:

Tomkins v. Public Service Electric and Gas, 422 F. Supp. 553 (D.N.J. 1976) rev'd 568 F.2d 1044 (3rd Cir. 1977a).

Tomkins v. Public Service Electric and Gas, "Memorandum in Opposition to Defendant Company's Motion to Dismiss Plaintiff's Title VII Claim" (c. Nov. 1976a).

Tomkins v. Public Service and Gas, circuit court:

Tomkins v. Public Service Electric and Gas, 568 F.2d 1044 (3rd Cir. 1977b).

Tomkins v. Public Service Electric and Gas, "Plaintiff-Appellant's Appeal Brief" (Mar. 1977c).

Williams v. Saxbe, district court:

Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976a).

Williams v. Saxbe, "Complaint" (Jan. 1974).

Williams v. Saxbe, "Memorandum in Opposition to Defendants' Motion to Dismiss" (Apr. 1975).

Williams v. Saxbe, "Brief for the Organization of Black Activist Women as Amicus Curiae" (c. Feb. 1976b). (Brief was filed sometime after Jan. 29, 1976, given that Bralove's *Wall Street Journal* article published on this date is cited in the brief and Apr. 20, 1976, the date of the *Williams* decision.)

Case[a]	Lawyer	Frames[b]		Plaintiff and Plaintiff's Race	Brief's Word Count	Judge Appointed By	Case Outcome[c]
		Diagnostic-Transformational Framing	Prognostic Frame Bridging				
Goodyear dist. (Mar. 1972)	Michael Bender, labor lawyer; Lawrence Wright, labor lawyer	• SH[d]: "sexual assault," "sexual advances" • [no incongruity] • [very brief psy. harm]	• Title VII • [no breadth] • [no "condition" language]	Esther Goodyear, white	877	Eisenhower	loss
Goodyear circ. (1973a[e])	Mark Roye, unknown	• SH: "sexual advances," "sexual assault" • [no incongruity] • [no psy. harm]	• Title VII • [no breadth] • [no "condition" language]	Esther Goodyear, white	1,226	Truman	loss
Barnes dist. (Sept. 1973, Mar. 1974b)	Warwick Furr, links to civil rights legal efforts	• SH: "sexual advances," "extract sexual favors" • [no incongruity] • [no intersectionality][f] • psy. harm	• Title VII (and 1972 Amendments) • breadth of law • [very briefly draws on "condition" language]	Paulette Barnes, Black	1,333 (Sept. 1973), 6,144 (Mar. 1974b)	Johnson	loss
Williams dist. (Jan. 1974, Apr. 1975)[g]	Michael Hausfeld, links to civil rights legal efforts	• SH: "sexual advances," "sexual relations" • incongruity • [no intersectionality] • [no psy. harm]	• Title VII • breadth of law • Title VII "condition" language	Diane Williams, Black	5,103 [1,569 (Jan. 1974), 3,534 (Apr. 1975)]	Nixon	win

Corne dist. (Aug. 1974a, Nov. 1974b)	Heather Sigworth, women's rights law	• SH: "unsolicited," "unwelcome" • [no incongruity] • [no psy. harm]	• Title VII • breadth of law • [very briefly draws on "condition" language]	Jane Corne, white, and Geneva De Vane, white	3,041 [895 (Aug. 1974a), 2,146 (Nov. 1974b)]	Nixon	loss
Barnes circ. (Dec. 1974c)	Linda Singer, women's rights and civil rights law	• SH: "coercive," "blackmail" • incongruity • [no intersectionlity] • [no psy. harm]	• Title VII • breadth of law • Title VII "condition" language	Paulette Barnes, Black	7,330	Johnson	win
Garber dist. (Oct. 1975)	Elaine Major, unknown	• SH "illicit sexual relations" • [no incongruity] • psy. harm	• Title VII • [no breadth] • [no "condition" language]	Darla Jeanne Garber, white	972	Eisenhower	loss
Miller dist. (Dec. 1975, Feb. 1976b)	Stuart Wein, employ-ment law	• SH: "sexual advances," "amorous advances," "unsolicited and uninvited advances" • [no incongruity] • intersectionality • psy. harm	• Title VII • [no breadth] • Title VII "condition" language	Margaret Miller, Black	2,917 [1,065 (Dec. 1975), 1,852 (Feb. 1976b)]	Nixon	loss
Garber circ. (July 1976)	Elaine Major, unknown	• SH: "unsolicited and unwelcome sexual advances," "illicit sexual relations" • incongruity • [no psy. harm]	• Title VII • breadth of law • Title VII "condition" language	Darla Jeanne Garber, white	1,520	Kennedy	win

Munford dist. (Oct. 1976, May 1977b)	Thomas Oehmke, employ-ment law	• SH: "sexual demands," "require sexual relations"[h] • [no incongruity] • intersectionality • psy. harm	• Title VII • breadth of law • Title VII "condition" language	Maxine Munford, Black	8,500 [1,381 (Oct. 1976), 7,119 (May 1977)]	Eisenhower	loss
Tomkins dist. (c. Nov. 1976a)[i]	Nadine Taub, women's rights law	• SH: "sexual harassment" (first brief to use "SH") • [no incongruity] • [no psy. harm]	• Title VII • breadth of law • [no "condition" language]	Adrienne Tomkins, white	5,924	Nixon	loss
Tomkins circ. (Mar. 1977c)	Nadine Taub, women's rights law	• SH: "sexual harassment" • incongruity • psy. harm	• Title VII • breadth of law • Title VII "condition" language	Adrienne Tomkins, white	8,120	Johnson	win
Neeley dist. (Feb. 1977; Feb. 1978b, 1978c)	Sylvia Marks-Barnett, family, employ-ment, labor, and civil rights law	• SH: "sexual advances, harassment and intimidation," "sexual harassment" • [no incongruity] • psy. harm	• Title VII • [no breadth] • Title VII "condition" language	Nancy Kristine Neeley, white	6,776 [1,217 (Feb. 1977), 3,682 (Feb 1978b), 1,877 (Feb. 1978c)]	Kennedy	loss

Table 1: 1970s District and Circuit Court Quid-Pro-Quo Sexual Harassment Cases

a. The order of the cases reflects the chronology of when the case briefs were written. Dates after case names are when briefs were submitted to the courts. Cases (including the court's decision date) and briefs are cited in the paper's appendix. Both district ("dist.")

and circuit ("circ") court briefs are listed in Table 1 and appendix. For some cases, both district and circuit court hearings were held and are listed separately and treated as separate cases.

b. See the paper's text for a full discussion of the frames.

c. Case outcome for plaintiff.

d. The "SH" entries in the table tell us how the briefs refer to SH conduct.

e. Month for the *Goodyear* circuit court brief is unknown, although it occurred at end of the year because the district court decision was in Oct.

f. Intersectionality frame presence or absence is noted only for Black plaintiffs. The briefs for white plaintiffs do not include intersectional framing, with the exception of a brief in the district court *Tomkins* case. Nadine Taub, attorney for Adrienne Tomkins, a white plaintiff, included in the brief a short discussion of an EEOC case in which Black women were called "girl." The brief notes the use of the term "constituted both racial as well as gender discrimination" (1976a:13).

g. The Organization of Black Activist Women filed an amicus brief in *Williams* (1976b), which is not listed here because it is not a brief written by the plaintiff's counsel.

h. The *Munford* 1977 brief uses the term "sexual harassment," but this is after its use by Taub in her 1976 brief.

i. Month for the district court brief is unknown but document cites a Nov. 1976 *Redbook* article and case was decided in Nov. 1976. meaning this brief submitted in Nov. 1976.