

ASIAN WOMEN AND EMPLOYMENT DISCRIMINATION: USING INTERSECTIONALITY THEORY TO ADDRESS TITLE VII CLAIMS BASED ON COMBINED FACTORS OF RACE, GENDER AND NATIONAL ORIGIN

*born into the
skin of yellow women
we are born
into the armor of warriors*

—Kitty Tsui, “Chinatown Talking Story”¹

I. INTRODUCTION

Women of color experience discrimination in multiple spheres that cannot be categorized as solely race-based or solely gender-based.² Their experiences are a result of both their race and gender.³ The identities of women of color must encompass the intersection of the two.⁴ When they encounter discrimination based upon race and gender, however, the discrimination tends to be characterized as purely one or the other.⁵ As a result, the experiences of women of color largely have been excluded from anti-racist or anti-sexist policies because both focus on characteristics that do not accurately reflect the unique intersectionality of race and gender.⁶ Existing frameworks of race and gender discussions are just beginning to reach out to include the intersectional experience, which is greater than the sum of racism and sexism.⁷

¹ Kitty Tsui, *Chinatown Talking Story*, in *MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN* 132, 135 (Asian Women United of California ed., 1989).

² Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Crenshaw, *supra* note 2, at 140; Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L.

Intersectional claims have become more visible in recent cases of employment discrimination.⁸ Currently, the broadest legislation against employment discrimination is Title VII of the Civil Rights Act of 1964 ("Title VII").⁹ Title VII prohibits discrimination on the basis of various factors, including race, sex and national origin.¹⁰ Over time, Title VII generally has been able to accommodate changing concepts of discrimination.¹¹ In interpreting and analyzing claims that involve intersectionality, however, courts have had some difficulty.¹² When courts initially examined race-based gender discrimination claims, they separated the race and gender claims.¹³ A few courts have accepted the notion that discrimination may be based on multiple factors, but many continue to have difficulty conceptualizing intersectional claims.¹⁴ In addition, others have trouble explaining adequately the multi-factored discrimination, hindering the integration of intersectional claims into the mainstream of Title VII doctrine.¹⁵

Discussion of dual claims of race and gender discrimination, as well as intersectionality theory, began largely with black women's experiences.¹⁶ Insofar as black women's claims have advanced the theory of intersectionality, Asian women¹⁷ are likely to benefit enormously.¹⁸ Still, although many aspects of black women's struggles parallel those of Asian women, the different social histories of Asian and black women in America have created distinctions in their experiences.¹⁹

REV. 775, 799 (1991); Rosalio Castro & Lucía Corral, Comment, *Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims*, 6 LA RAZA L.J. 159 (1993).

⁸ See, e.g., *Lam v. University of Haw.*, 40 F.3d 1551 (1994); *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025 (1980); *Fang-Hui Liao v. Dean*, 658 F. Supp. 1554 (N.D. Ala. 1987).

⁹ WILLIAM L. DIEDRICH, JR. & WILLIAM GAUS, DEFENSE OF EQUAL EMPLOYMENT CLAIMS 36 (1982).

¹⁰ 42 U.S.C. § 2000e-2(a)(1) (1988).

¹¹ Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2479 (1994).

¹² Crenshaw, *supra* note 2, at 141-48.

¹³ See, e.g., *DeGraffenreid v. General Motors*, 413 F. Supp. 142, 143 (E.D. Mo. 1976).

¹⁴ Abrams, *supra* note 11, at 2481.

¹⁵ *Id.*

¹⁶ See, e.g., Crenshaw, *supra* note 2; Winston, *supra* note 7; Cathy Scarborough, Note, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457 (1989).

¹⁷ For purposes of this Note, "Asian women" refers to immigrant Asian women, as well as Asian-American women. Both face common elements of employment discrimination in America, even though it may be possible to draw specific distinctions between them or among the different subpopulations that may all be classified as Asian.

¹⁸ *Lam*, 40 F.3d at 1562 (citing *Jefferies*, a case involving black woman's combined claim, to support Asian woman's combined claim).

¹⁹ Cf. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243, 1249 (1993).

Asian women experience the marginalization common to all women of color.²⁰ Additionally, they experience discrimination based on characteristics attributed to Asians as a whole, and most appropriately described as discrimination based on race and national origin.²¹ Distorted images and stereotypes often used to characterize Asians support beliefs that Asians do not experience discrimination.²² The distorted images then stigmatize Asians and penalize them with additional prejudice.²³ This, in turn, leads to a misunderstanding of Asians as a minority group and further discrimination based on the resultant stereotypes.²⁴

The myths and realities of Asian life in America affect the treatment of Asians in general and have added to the devaluation of Asian women in employment situations.²⁵ Asian women face an intersection of three forms of legally prohibited discrimination: race, gender and national origin.²⁶ The discrimination toward them is rooted in all of these factors simultaneously, but because their specific concerns have been underrepresented, the American mainstream has yet to recognize and understand the inseparability of their claims.²⁷

This Note examines the difficulties facing Asian women in the employment context and in bringing Title VII claims.²⁸ This Note argues that in order for Asian women to find adequate redress in employment discrimination cases, courts and practitioners must recognize and define precisely the unique circumstances of discrimination based on an inseparability of race, gender and national origin.²⁹ Section II describes Title VII and its purpose.³⁰ Section III examines judicial interpretations of Title VII using black women's and Asian

²⁰ Cf. *id.* at 1265.

²¹ U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990s 153 (1992); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 833 (1994).

²² Keith Osajima, *Asian Americans as the Model Minority: An Analysis of the Popular Press Image in the 1960s and 1980s*, in REFLECTIONS ON SHATTERED WINDOWS: PROMISES AND PROSPECTS FOR ASIAN AMERICAN STUDIES 165, 166-67 (Gary Y. Obihiro ed., 1988).

²³ Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 40-43 (1994).

²⁴ *Id.*

²⁵ U.S. COMM'N ON CIVIL RIGHTS, *supra* note 21, at 153; Renee E. Tajima, *Lotus Blossoms Don't Bleed: Images of Asian Women*, in MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN 308 (Asian Women United of California ed., 1989).

²⁶ See *infra* notes 365-80 and accompanying text.

²⁷ See *infra* notes 330-64 and accompanying text.

²⁸ See *infra* notes 110-70, 330-64 and accompanying text.

²⁹ See *infra* notes 365-420 and accompanying text.

³⁰ See *infra* notes 36-58 and accompanying text.

women's experiences.³¹ Section IV then highlights the historical discrimination against Asians in America and the resultant stereotypes that have harmful effects on Asians in the present.³² This Section also includes a discussion of stereotypes that affect Asian women's experiences in particular.³³ Section V discusses intersectionality theory and its potential as a tool for understanding the unique experiences of Asian women.³⁴ Section VI then advocates use of intersectionality theory by both judges and attorneys to frame Asian women's employment experiences in order to address adequately multi-factored claims based on race, gender and national origin.³⁵

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964— PURPOSE AND STANDARD

Prior to the enactment of Title VII of the Civil Rights Act of 1964, employees who faced discrimination in employment generally brought complaints to administrative civil rights agencies.³⁶ Agencies, however, were largely ineffective in redressing claims to enforce the legal rights of minorities and often did not enforce the antidiscriminatory policies in place prior to 1964.³⁷ The enactment of Title VII thus represented a milestone in employment discrimination law.³⁸ In its current state, Title VII prohibits unions and employers that have fifteen or more workers and are engaged in an industry affecting interstate commerce from committing discriminatory acts.³⁹ The Supreme Court has stated that the purpose of Title VII is to eliminate all artificial, arbitrary and unnecessary barriers to employment "that operate invidiously to discriminate on the basis of racial or other impermissible classifications."⁴⁰ Specifically, Title VII makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin"⁴¹

³¹ See *infra* notes 59–170 and accompanying text.

³² See *infra* notes 171–364 and accompanying text.

³³ See *infra* notes 330–64 and accompanying text.

³⁴ See *infra* notes 365–80 and accompanying text.

³⁵ See *infra* notes 381–420 and accompanying text.

³⁶ DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 831 (1992).

³⁷ *Id.*

³⁸ *Id.*

³⁹ 42 U.S.C. §§ 2000e-2(c), 2000e-2(a)(1), 2000e(b) (1988).

⁴⁰ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

⁴¹ 42 U.S.C. § 2000e-2(a)(1).

In order to succeed in a Title VII case, the plaintiff must proceed under a four-part test that was articulated in 1973, in *McDonnell Douglas v. Green*.⁴² In *McDonnell Douglas*, an employer discharged a black civil rights activist who engaged in disruptive and illegal activity to protest the firm's allegedly racially motivated hiring practices.⁴³ The Supreme Court held that a plaintiff must first demonstrate a prima facie case by showing that (1) he or she belongs to a protected class, (2) has applied for and was qualified for a job for which the employer was seeking applicants, (3) despite being qualified, was rejected, and (4) after the rejection, the position remained open and the employer continued to seek applicants from people of comparable qualifications.⁴⁴ After the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision.⁴⁵ The plaintiff then has an opportunity to demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory.⁴⁶

Although Title VII is the broadest of the antidiscrimination statutes, it has been criticized because its scheme compartmentalizes discrimination into neat, discrete categories.⁴⁷ Most Title VII litigation has accepted this scheme without objection, as the majority of cases involve plaintiffs who claim discrimination based on only one factor, such as race or sex.⁴⁸ In addition, the legal standards applied in Title VII cases were formulated in single-factor contexts, such as *McDonnell Douglas*.⁴⁹ Thus, when a claimant combines any of the categories under the statute, the situation becomes more complicated and courts have had difficulty recognizing the interaction of more than one Title VII factor.⁵⁰

There is much dispute about the intent of Title VII and, in particular, whether Congress wanted the legislation to apply to issues arising simultaneously under multiple categories.⁵¹ Some argue that the "or" in the present form of the statute should be considered an

⁴² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

⁴³ *Id.* at 794.

⁴⁴ *Id.* at 802.

⁴⁵ *Id.*

⁴⁶ *Id.* at 804.

⁴⁷ Castro & Corral, *supra* note 7, at 162.

⁴⁸ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *McDonnell Douglas*, 411 U.S. 792; *Mosely v. General Motors*, 497 F. Supp. 583 (E.D. Mo. 1980).

⁴⁹ *McDonnell Douglas*, 411 U.S. at 802.

⁵⁰ Crenshaw, *supra* note 2, at 141.

⁵¹ Castro & Corral, *supra* note 7, at 166; Scarborough, *supra* note 16, at 1466-67.

additive term rather than an exclusive one.⁵² If read as an additive term, the prohibited discrimination based on race, color, religion, sex *or* national origin would allow a claimant to bring a Title VII suit under more than one of the protected classes.⁵³ If, however, the "or" is read exclusively, a plaintiff could bring suit based on only one of the protected categories.⁵⁴ The legislative history of Title VII does not elucidate Congress's intention with regard to multiple claims.⁵⁵ One representative wanted to include the word "solely" into the bill to establish that "any discrimination proscribed in the bill must be based solely on race, color, religion, sex or national origin."⁵⁶ Some have argued that by rejecting this amendment, Congress expressed its desire to have the terms interpreted inclusively.⁵⁷ Thus, as written, the language of Title VII is ambiguous in guiding a potential plaintiff with multiple claims.⁵⁸

III. JUDICIAL INTERPRETATION OF TITLE VII—HISTORY OF CLAIMS BY BLACK AND ASIAN WOMEN

A. *Black Women's Experiences*

Black women brought some of the earliest Title VII cases based on combined race and sex discrimination.⁵⁹ In response, however, some courts determined that women of color were not entitled to bring claims based on sex and race combined.⁶⁰ For instance, in 1976, in *DeGraffenreid v. General Motors Assembly Division*, the United States District Court for the Eastern District of Missouri rejected a suit on behalf of black women who claimed discrimination by their employer.⁶¹ In *DeGraffenreid*, a group of black female employees of General Motors brought suit alleging that the company's seniority system perpetuated

⁵² Scarborough, *supra* note 16, at 1466-67 (citing James C. Oldham, *Questions of Exclusion and Exception Under Title VII—"Sex-Plus" and the BFOQ*, 23 HASTINGS L.J. 55, 61 (1971)).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1467.

⁵⁶ *Id.* at 1466 (citing 110 CONG. REC. 2728 (1964)).

⁵⁷ Scarborough, *supra* note 16, at 1466-67 (citing Oldham, *supra* note 52, at 61). In fact, at first, members of the House did not even consider including the category of "sex" as part of the bill. *Id.* at 1465 (citing 110 CONG. REC. 2577 (1964)). Representative Smith, who actually opposed the measure, proposed that "sex" be added to the bill. *Id.* In so doing, he sought to make it as controversial as possible so that neither the House nor the Senate would pass it. *Id.*

⁵⁸ *Id.* at 1467.

⁵⁹ See, e.g., *Moore v. Hughes Helicopter, Inc.*, 708 F.2d 475 (9th Cir. 1983); *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980); *DeGraffenreid v. General Motors Assembly Div.*, 413 F. Supp. 142 (E.D. Mo. 1976).

⁶⁰ *Moore*, 708 F.2d at 480; *DeGraffenreid*, 413 F. Supp. at 143.

⁶¹ 413 F. Supp. at 143.

discrimination against black women.⁶² The evidence indicated that before 1964, General Motors did not hire black women at all, and that after 1970, because of a recession, all of the black women were laid off due to a seniority-based system.⁶³ The court in *DeGraffenreid* determined that because General Motors did hire women prior to 1964, no sex discrimination occurred.⁶⁴ The court recommended that the women's separate race discrimination claim be consolidated with a race discrimination case brought by black male employees against General Motors.⁶⁵

Relying on the legislative history surrounding Title VII, the court reasoned that the statute did not include a goal of creating a new classification of "black women" who would have greater standing than a black male.⁶⁶ In rejecting the plaintiffs' claim, the court determined that the black women should not be allowed to combine statutory remedies to create a new "super-remedy."⁶⁷ The court stated that plaintiffs' claim must be examined to determine whether it states a cause of action for race discrimination or sex discrimination, but not a combination of both.⁶⁸ The court therefore concluded that Title VII protected black women only to the extent that their discrimination experiences coincided with either white women's or black men's experiences.⁶⁹ The court in *DeGraffenreid* thus refused to acknowledge that black women suffered a unique form of discrimination.⁷⁰

In 1980, in *Jefferies v. Harris County Community Action Ass'n*, however, the United States Court of Appeals for the Fifth Circuit did recognize that discrimination against a woman of color is distinct from other types of discrimination.⁷¹ In *Jefferies*, the Fifth Circuit held that black women constituted a protected subclass under Title VII.⁷² The plaintiff in *Jefferies* was denied promotions, including positions ultimately staffed by non-black females and black males.⁷³ The Fifth Circuit reasoned that the use of the word "or" in the proscriptive language of Title VII indicated Congress's intent to prohibit employment discrimi-

⁶² *Id.*

⁶³ Crenshaw, *supra* note 2, at 141.

⁶⁴ *DeGraffenreid*, 413 F. Supp. at 144.

⁶⁵ *Id.* at 144-45.

⁶⁶ *Id.* at 145.

⁶⁷ *Id.* at 143.

⁶⁸ *Id.*

⁶⁹ Crenshaw, *supra* note 2, at 143.

⁷⁰ 413 F. Supp. at 143.

⁷¹ 615 F.2d at 1032.

⁷² *Id.* at 1034.

⁷³ *Id.* at 1029.

nation based on any or all of the protected categories (race, color, religion, sex or national origin).⁷⁴ The court also considered the fact that the House of Representatives refused to adopt an amendment which would have added the word "solely" to modify the word "sex."⁷⁵ Thus, the Fifth Circuit allowed the plaintiff to sue on grounds of both race and sex discrimination and rejected the district court's approach of evaluating her race discrimination and sex discrimination claims separately.⁷⁶

In 1983, in *Moore v. Hughes Helicopter, Inc.*, the United States Court of Appeals for the Ninth Circuit held that a black female could not be certified as a class representative to sue for race and sex discrimination.⁷⁷ The plaintiff in *Moore* alleged that Hughes Helicopter discriminated against people on the bases of race and sex in promotions to upper level jobs.⁷⁸ The plaintiff introduced statistical evidence that established disparity between men and women and between black and white men in supervisory positions.⁷⁹ The Ninth Circuit, however, determined that, because Moore claimed discrimination specifically as a "black female," she would not be representing white females and thus was not qualified to be the class representative in the case.⁸⁰

Black women have faced similar hurdles in individual plaintiff suits.⁸¹ For example, in 1989, in *Brooms v. Regal Tube Co.*, the United States Court of Appeals for the Seventh Circuit affirmed a finding of a Title VII violation for sexual harassment but declined to hear the plaintiff's racial harassment claim.⁸² In *Brooms*, the plaintiff was a thirty-six year old black woman, employed by Regal Tube as an industrial nurse.⁸³ In the course of her employment, Brooms's male supervisor subjected her to repeated explicitly sexual and racial remarks.⁸⁴ The harassment culminated in a final incident during which the supervisor showed the plaintiff a picture of black women performing acts of bestiality, grabbed her by the arm and threatened to kill her.⁸⁵ Brooms

⁷⁴ *Id.* at 1032.

⁷⁵ *Id.* (citing 110 CONG. REC. 2728 (1964)).

⁷⁶ *Jefferies*, 615 F.2d at 1035.

⁷⁷ 708 F.2d 475, 480 (9th Cir. 1983).

⁷⁸ *Id.* at 478.

⁷⁹ *Id.* at 478-89.

⁸⁰ *Id.* at 480.

⁸¹ *Brooms v. Regal Tube Co.*, 881 F.2d 412, 424 (7th Cir. 1989).

⁸² *Id.* at 420, 424. Brooms brought her racial harassment claim under 42 U.S.C. § 1981. *Id.* at 424.

⁸³ *Id.* at 416.

⁸⁴ *Id.*

⁸⁵ *Id.* at 417.

managed to throw coffee on her supervisor and flee.⁸⁶ While escaping, however, she fell down a flight of stairs.⁸⁷ In addition, following the harassment, she suffered from severe depression.⁸⁸ The Seventh Circuit found that the supervisor's conduct was "grossly offensive" and had created a situation that would cause a reasonable employee in the same position to leave her job.⁸⁹ Although the Seventh Circuit held for the plaintiff on her sexual harassment claim, it did not address her claim of racial harassment.⁹⁰

Although a few courts have begun to recognize combined race and gender discrimination claims under Title VII, commentators observe that they have not yet achieved a fully-developed or adequate analytical construct for examining the dual race and gender considerations.⁹¹ In such cases, courts have viewed women of color first as women, and then as women who are doubly burdened by the characteristic of race.⁹² This analysis is referred to as the "sex-plus" rationale, which is still rooted primarily in the gender-related aspects of discrimination.⁹³ The sex-plus analysis is applied where an employer discriminates on the basis of a person's sex and an additional characteristic related to his or her sex.⁹⁴

The theory was developed in 1971 in a dissent to *Phillips v. Martin Marietta Corp.*, in which the Fifth Circuit held for the plaintiff in her sex discrimination claim.⁹⁵ In *Martin Marietta*, an employer hired fathers but not mothers of pre-school-aged children.⁹⁶ On review, the Supreme Court remanded the case for determination of whether the characteristic was a bona fide occupational characteristic.⁹⁷ The Court reasoned that the existence of family obligations, if more relevant to job performance for a woman than for a man, might be a basis for distinction.⁹⁸ Employers may not attempt to add a non-protected factor (parenthood of pre-school-aged children) to a protected characteristic

⁸⁶ *Brooms*, 881 F.2d at 417.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 423.

⁹⁰ *Id.* at 424.

⁹¹ *Abrams*, *supra* note 11, at 2481; *Winston*, *supra* note 7, at 799.

⁹² *Winston*, *supra* note 7, at 799.

⁹³ *Id.*

⁹⁴ *Id.* at 799 n.131.

⁹⁵ 416 F.2d 1257, 1260 (5th Cir. 1969) (Brown, J., dissenting).

⁹⁶ *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543 (1971).

⁹⁷ *Id.* at 544.

⁹⁸ *Id.*

(sex) to escape liability under Title VII.⁹⁹ Thus, the Court remanded the case for full consideration of the issue.¹⁰⁰

In 1987, the Tenth Circuit used a sex-plus analysis in *Hicks v. Gates Rubber Co.*, remanding a case for determination of the role of race discrimination in a sexually harassing environment.¹⁰¹ In *Hicks*, the black female plaintiff was subject to racial slurs.¹⁰² The Tenth Circuit reasoned that Title VII permits evidence of race discrimination to be considered as contributing to the hostile environment that gave rise to a sexual harassment claim.¹⁰³ When the Tenth Circuit remanded the case, however, it instructed the lower court to evaluate the existence of a sexually harassing hostile environment but did not provide it with guidance as to the relative weight the racial slurs should carry.¹⁰⁴ The Tenth Circuit chose to address the problem of racial slurs within the context of the sexually harassing environment.¹⁰⁵ Thus, the *Hicks* court deemed the racial slurs relevant, but only within the framework of a gender-based claim.¹⁰⁶

The cases involving black women's Title VII claims based on combined race and sex discrimination illustrate a variety of different approaches courts have taken.¹⁰⁷ Courts have either declined to follow the reasoning in *Jefferies* or have prioritized one factor over the other in combined claims.¹⁰⁸ Black women's claims, however, have provided substantial guidance and advanced the discussion of multi-factored claims for Asian women.¹⁰⁹

B. Asian Women's Experiences

As with black women's claims, Asian women have had similar difficulties with their Title VII claims based on combined factors of race and sex.¹¹⁰ For example, in 1976, in *Lim v. Citizens Savings & Loan Ass'n*, the United States District Court for the Northern District of California held for the defendant employer as to the plaintiff's Title

⁹⁹ *Id.*; see also *Martin Marietta Corp.*, 416 F.2d at 1260 (Brown, J., dissenting).

¹⁰⁰ *Martin Marietta Corp.*, 400 U.S. at 544.

¹⁰¹ 833 F.2d 1406, 1416, 1419 (10th Cir. 1987).

¹⁰² *Id.* at 1409.

¹⁰³ *Id.* at 1417.

¹⁰⁴ See *id.* at 1416-17.

¹⁰⁵ See *id.* at 1413-15.

¹⁰⁶ *Hicks*, 833 F.2d at 1417.

¹⁰⁷ See *supra* notes 59-106 and accompanying text.

¹⁰⁸ See *supra* notes 59-106 and accompanying text.

¹⁰⁹ See *infra* notes 110-67 and accompanying text.

¹¹⁰ See *infra* notes 111-67 and accompanying text.

VII claim based on race and sex.¹¹¹ In *Lim*, the plaintiff charged Citizens Savings and Loan ("Citizens") with discriminating against her by failing to promote her and then by discharging her.¹¹² Lim filed an individual discrimination suit and attempted to bring a class action suit as well, alleging that Citizens unlawfully concentrated female and Asian employees in lower-paying, lower-status jobs.¹¹³ Citing Citizen's statistics, which showed that the percentages of women and Asians in the various salaried and status jobs were entirely comparable in the relevant labor pools, the court denied Lim's motion to certify the class.¹¹⁴ On Lim's individual claims, the court, applying *McDonnell Douglas*, stated that she failed to prove a prima facie case for discrimination.¹¹⁵ The court, thus, granted defendant's motion for summary judgment.¹¹⁶

In 1987, however, in *Fang-Hui Liao v. Dean*, the United States District Court for the Northern District of Alabama held for an Asian female chemist in her combined race and gender claim.¹¹⁷ The employer dismissed Liao while retaining an equally qualified white male chemist with less seniority.¹¹⁸ The court found that Liao's employer, the Tennessee Valley Authority, violated its own affirmative action program.¹¹⁹ The court reasoned that once an employer adopts an affirmative action program, it will be required to adhere to its own program; otherwise the adoption of the program would be meaningless.¹²⁰ The court thus ordered Liao's reinstatement, with back pay, based on her racial and/or sexual discrimination claim under Title VII.¹²¹ The *Liao* court declined to decide whether the granting of the claim was based on race or sex, or a combination of the two.¹²²

In contrast, in 1988, in *Lee v. Walters*, the United States District Court for the Eastern District of Pennsylvania decided an Asian woman's combined claim based on only a single factor.¹²³ The plaintiff in *Lee* was a naturalized United States citizen originally from Taiwan.¹²⁴

¹¹¹ 430 F. Supp. 802, 804, 817 (N.D. Cal. 1976).

¹¹² *Id.* at 804.

¹¹³ *Id.* at 806.

¹¹⁴ *Id.* at 806 n.2, 809.

¹¹⁵ *Id.* at 817.

¹¹⁶ *Lim*, 430 F. Supp. at 817.

¹¹⁷ 658 F. Supp. 1554, 1561 (N.D. Ala. 1987).

¹¹⁸ *Id.* at 1555.

¹¹⁹ *Id.* at 1561.

¹²⁰ *Id.* at 1559.

¹²¹ *Id.* at 1561.

¹²² *Liao*, 658 F. Supp. at 1561.

¹²³ 1988 WL 105887, at *1, *7 (E.D. Pa. 1988).

¹²⁴ *Id.* at *1.

Lee brought an action for discrimination based on two experiences: 1) a failure to obtain a promotion, and 2) a reprimand that was not given to other doctors under similar circumstances.¹²⁵ After Lee was denied a promotion to chief grade physician several times, she filed an informal grievance alleging discrimination based on race and sex.¹²⁶ The plaintiff added national origin to her claim when she later brought a Title VII action.¹²⁷ The court, however, reasoning that Lee would have been promoted but for her national origin, held for the plaintiff on her first claim.¹²⁸ As for her reprimand claim, the court held that the reprimand was not a pretext for unlawful discrimination.¹²⁹ Although an Equal Employment Opportunity Commission investigator found discrimination against the plaintiff because of her sex and race and recommended that the reprimand be expunged, the district court set aside these findings and nonetheless held for the defendant.¹³⁰

Similarly, in 1994, in *Chaddah v. Harris Bank Glencoe-Northbrook, N.A.*, the United States District Court for the Northern District of Illinois granted summary judgment to the defendant on plaintiff's claims of multi-factored discrimination under Title VII.¹³¹ Chaddah, an Asian woman who worked at the bank, claimed the bank discriminated against her when she applied for, but did not receive, a loan administrator position.¹³² Chaddah also claimed that she was harassed on several occasions by other bank employees.¹³³ The plaintiff testified that on different occasions, bank employees ridiculed her English pronunciations, told her she did not deserve to work at the bank because of her poor English and suggested that she would "fit right in" with the women in China who worked barefoot in the fields.¹³⁴ Chaddah ultimately resigned from the bank.¹³⁵ The court stated that even if the plaintiff's testimony and other evidence were true, she failed to show that a reasonable person under the circumstances would have re-

¹²⁵ *Id.* at *5, *8.

¹²⁶ *Id.* at *1, *2.

¹²⁷ *Id.* at *1.

¹²⁸ *Lee*, 1988 WL 105887, at *7. In a footnote, the court rejected race and sex discrimination as bases for Lee's claim. *Id.* at *7 n.7. The court employed a single-factor analysis which pointed to the presence of "[non-Asian] females" and "[male] asians [sic]" in finding for the defendant. *Id.*

¹²⁹ *Id.* at *8.

¹³⁰ *Id.* at *4 & n.9.

¹³¹ 65 Empl. Prac. Dec. (CCH) ¶¶ 43,296, 81,313, 81,315 (N.D. Ill. 1994).

¹³² *Id.* ¶ 81,312.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

signed.¹³⁶ The court also stated that the plaintiff did not offer proof that younger, white women who were promoted ahead of her were less qualified than she was, or that there were few or no Asian or older bank officers.¹³⁷ Thus, the analysis of the court focused on each factor individually and not in combination.¹³⁸ The court then dismissed the plaintiff's cause of action with prejudice.¹³⁹

In contrast, in 1994, in *Lam v. University of Hawaii*, the United States Court of Appeals for the Ninth Circuit, following *Jefferies*, acknowledged that a claim brought by an Asian woman might be based upon multiple factors of discrimination.¹⁴⁰ In *Lam*, a woman of Vietnamese descent applied for the position of Director of the University of Hawaii Law School's Pacific Asian Legal Studies Program ("PALS").¹⁴¹ The law school conducted two separate searches for applicants, rejecting Lam's application each time.¹⁴²

In the first search, which lasted from the fall of 1987 to the spring of 1988, the majority of votes went to a white male candidate, but because the committee did not form a consensus around any of the candidates, it decided not to extend any offer of employment.¹⁴³ Two weeks later the faculty voted to cancel the first search.¹⁴⁴ In response to that cancellation, Lam filed a discrimination complaint with the university.¹⁴⁵ The university responded by rejecting her grievance, but issued a report detailing confidentiality breaches and procedural violations in the search for the PALS director.¹⁴⁶ The university required that the committee use stricter guidelines in the next search for the PALS directorship.¹⁴⁷

The second search for the PALS director began in 1989.¹⁴⁸ The announcement for the position was essentially identical to the one

¹³⁶ *Chaddah*, 65 Empl. Prac. Dec. (CCH) ¶ 81,314. The court stated that the employees' comments on which the plaintiff relied were isolated incidents that happened over a four-year period. *Id.*

¹³⁷ *Id.* ¶ 81,315.

¹³⁸ *See id.*

¹³⁹ *Id.*

¹⁴⁰ 40 F.3d 1551, 1562 (9th Cir. 1994).

¹⁴¹ *Id.* at 1554.

¹⁴² *Id.*

¹⁴³ *Id.* at 1554, 1557. In the first search, the law school had prepared a list of ten names from the applicant pool, including Lam's, for submission to the faculty. *Id.* at 1556. A fifteen-member committee made up of law school faculty considered the applicants. *Id.* at 1556-57. Various members expressed strong opinions for and against Lam's candidacy. *Id.* at 1557.

¹⁴⁴ *Id.*

¹⁴⁵ *Lam*, 40 F.3d at 1557.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

made during the first search, and Lam applied again.¹⁴⁹ Guidance to the search committee in the second search remained minimal, except for copies of the announcement for the position and a brief description of the program.¹⁵⁰ The committee employed none of the suggestions or recommendations produced by the extensive discussions and developments that had taken place regarding selection procedures as a result of the first search.¹⁵¹ The faculty eventually voted to offer the position to a white female Harvard Law graduate with a Ph.D. in Chinese History who had substantial law teaching experience and had published several scholarly works.¹⁵² The candidate declined the offer.¹⁵³ Without making an offer to any other applicants, the faculty again cancelled the search.¹⁵⁴

After this second cancellation, Lam filed an action under Title VII as well as other antidiscrimination statutes, alleging that the university discriminated against her on the basis of race, sex and national origin.¹⁵⁵ The United States District Court for the District of Hawaii granted partial summary judgment to the defendant on the count stemming from the first search.¹⁵⁶ The court reasoned that summary judgment was appropriate because any faculty prejudice that existed could not be attributed to the named defendants in the action, and in addition, the favorable consideration of an Asian man and a white woman precluded a claim.¹⁵⁷ Regarding the counts stemming from the second search, however, the court determined that there was a genuine issue of material fact as to whether the defendants intentionally discriminated against Lam or retaliated against her.¹⁵⁸ After a bench trial on the claims arising from the second search, however, the district court entered judgment for the university.¹⁵⁹ The district court rea-

¹⁴⁹ *Id.* None of the committee members from the first search served for the second search. *Id.* Each of the committee members independently selected fifteen to twenty of the total eighty-seven candidates, and the committee list was compiled based on those selections. *Id.* at 1558.

¹⁵⁰ *Lam*, 40 F.3d at 1558.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Lam*, 40 F.3d at 1554, 1557-58.

¹⁵⁶ *Id.* at 1558.

¹⁵⁷ *Id.* at 1558, 1560, 1561.

¹⁵⁸ *Id.* at 1558.

¹⁵⁹ *Id.* The outcome in the district court decision may be partially attributable to a deferential judicial attitude in academic positions cases. *See, e.g., id.* at 1564; *Siu v. Johnson*, 748 F.2d 238, 244 (4th Cir. 1984) ("The procedures prescribed for making the tenure decision . . . plainly contemplated a subjective, evaluative decisional process by academic professionals rather than an objective fact-finding process by tribunals adapted to that quite different purpose."); *Pyo v.*

soned that neither discrimination nor retaliation were motivating factors in the decision not to appoint Lam in the second search.¹⁶⁰

Lam appealed both rulings, and the Ninth Circuit held that as to the first search, evidence of bias on the part of members of the appointments committee precluded summary judgment, but the trial court did not clearly err in finding for the defendant as to the second search.¹⁶¹ The Ninth Circuit criticized the district court's view of racism and sexism as separate and distinct elements.¹⁶² It rejected an analysis that looks for racism "alone" or sexism "alone."¹⁶³ The Ninth Circuit reasoned that examining a person's identity in that manner would bisect it at the intersection of race and gender and would distort or ignore the particular nature of her experience.¹⁶⁴ The Ninth Circuit elaborated further, stating that Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women.¹⁶⁵ The Ninth Circuit thus reversed the district court's award of summary judgment for the defendants as to the university's first search and remanded it for trial.¹⁶⁶

Overall, like black women's claims, Asian women's Title VII claims based on combined factors have had limited success.¹⁶⁷ Unlike black women, however, Asian women face the additional difficulty of discrimination based on national origin.¹⁶⁸ Thus, while black women face discrimination on at least two fronts, Asian women face discrimination on at least three.¹⁶⁹ In order to understand this additional factor of national origin discrimination, it is essential to turn to the history of discrimination toward Asians in America.¹⁷⁰

Stockton State College, 603 F. Supp. 1278, 1281 (D.N.J. 1985) ("Courts have struggled . . . with the application of Title VII to the academic setting and, more often than not, have undertaken no more than a deferential review of tenure decisions. . . ."); GEORGE R. LANOUE & BARBARA A. LEE, *ACADEMICS IN COURT: THE CONSEQUENCES OF FACULTY DISCRIMINATION LITIGATION* 34 (1987). For a discussion about specific difficulties for women in academia, see Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 *TEMPLE L. REV.* 67 (1994).

¹⁶⁰ *Lam*, 40 F.3d at 1565.

¹⁶¹ *Id.* at 1566-67.

¹⁶² *Id.* at 1562.

¹⁶³ *Id.* at 1561. The Ninth Circuit relied on the reasoning of the Fifth Circuit in *Jefferies* and did not elaborate on its decision not to follow the Ninth Circuit case of *Moore*. See *supra* notes 77-80 and accompanying text.

¹⁶⁴ *Id.* at 1562.

¹⁶⁵ *Lam*, 40 F.3d at 1562.

¹⁶⁶ *Id.*

¹⁶⁷ See *supra* notes 60-166 and accompanying text.

¹⁶⁸ See *infra* notes 171-364 and accompanying text.

¹⁶⁹ See *infra* notes 171-364 and accompanying text.

¹⁷⁰ See *infra* notes 171-364 and accompanying text.

IV. RACE AND NATIONAL ORIGIN DISCRIMINATION: THE ASIAN EXPERIENCE

Although the Ninth Circuit, in *Lam*, recognized the unique discrimination Asian women face, this approach conflicts with the widespread belief that Asians do not face discrimination.¹⁷¹ Popular perceptions about Asians, including the "model minority myth," have contributed to this notion. Various authors, however, have noted the striking contradiction between this assumption and the long tradition of actual discrimination toward Asians in this country.¹⁷² Numerous areas of American history reflect discrimination against Asians, including slavery, employment, education, marriage, immigration and property rights.¹⁷³ Moreover, such discrimination and infringement upon the rights of Asians have been both judicially and publicly supported.¹⁷⁴ Sadly, many of these societal attitudes persist.¹⁷⁵ Certain forms of historical and ongoing discrimination have been leveled at all nonwhite minorities, but other forms of discrimination reflect unique feelings about Asians.¹⁷⁶

Although there is a relative dearth of discussion about discrimination toward Asians in general, even less attention is focused on the experiences of Asian women in America. Asian women face a unique combination of burdens which remains largely unrecognized. This is because various race and gender dialogues tend to marginalize Asian women.

In addition to confronting the difficulties faced by all Asians, Asian women have encountered numerous other characterizations of their identity by outsiders. Both historically and in the present, people without a sufficient understanding of Asian women have imposed upon them cultural perceptions. Ironically, these myths and stereotypes

¹⁷¹ Chew, *supra* note 23, at 6.

¹⁷² *Id.* The discussion in this Section is but a cursory view of the history of discrimination against Asians in America. For the purposes of this Note, Asians are referred to as a single group, though it would be more appropriate, but beyond the scope of the present discussion, to address specific experiences of individual Asian ethnicities. For more detailed analyses, see, e.g., *id.*; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 21; ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY (Hyung-chan Kim ed., 1992); ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850 (1988); CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA (1994); RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE (1987).

¹⁷³ Chew, *supra* note 23, at 10 & n.15, 17, 18.

¹⁷⁴ *Id.* at 10.

¹⁷⁵ See *id.*

¹⁷⁶ See *id.*

carry tremendous force, shaping American societal attitudes, and correspondingly affect the treatment of Asian women, extending into the employment context.

A. *Historical Discrimination Toward Asians*

American history texts often give only passing notice to the history of Asians in America or ignore it altogether. Frequently, historians equate "American" with being "white" or "European"¹⁷⁷:

[T]he mainstream, what we thought of as "America" and the conceptual norm of citizens and any potential readership, was going to be white, middle-class, and uninterested in us, our fractured histories, our emerging identities full of fissures and unjoined psychic seams. Whatever America was, it would be uninterested in its own margins and our job was rather to find our way into some kind of centrality either of economics or of culture in order to secure a presence, to earn and protect a standing in this country. America was, in the main and, ultimately, to this mindset, essentially *white*, inviolably white.¹⁷⁸

Initially, Asian immigrants came to America to meet labor demands and were employed as plantation workers, railroad crews, miners, factory operatives, cannery workers and farm laborers.¹⁷⁹ At the time, Asians were deemed members of "inferior races."¹⁸⁰ The Western world had long looked down upon Asians, and reflected upon its own superiority.¹⁸¹ At a primary level, much of the Asian image could be attributed to what whites perceived as an unusual appearance.¹⁸² Whereas it might have been possible for immigrants of European ancestry to shed their past and become physically indistinguishable from other whites in America, it was not as easy for Asians to blend into the society.¹⁸³ Qualities such as the shape of their eyes, the color of their hair, and the complexion of their skin subjected them to extreme racism and European ethnocentrism.¹⁸⁴

¹⁷⁷ TAKAKI, *supra* note 172, at 6-7.

¹⁷⁸ Garrett Hongo, *Introduction to THE OPEN BOAT: POEMS FROM ASIAN AMERICA* xxiii (Garrett Hongo ed., 1993).

¹⁷⁹ TAKAKI, *supra* note 172, at 13.

¹⁸⁰ SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 45 (1991).

¹⁸¹ See Chew, *supra* note 23, at 12-18.

¹⁸² TAKAKI, *supra* note 172, at 13.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 12-13.

Nevertheless, this did not stop whites from utilizing Asian labor in many ways. Asians were touted as "replacements" for black workers.¹⁸⁵ Asian laborers were extolled for their virtues and deliberately pitted against workers of other racial groups.¹⁸⁶ For instance, whites hoped to use Asian workers as an example to discipline black laborers.¹⁸⁷ Employers also developed a dual-wage system to pay Asian workers less than their white counterparts and induced antagonism between the groups to depress wages for both.¹⁸⁸ In turn, other laborers demanded the regulation of Asian workers already in America and the restriction of future Asian immigrants.¹⁸⁹

The rapidly growing Asian labor populations thus sparked a movement to close the borders and began many decades of institutionalized support of discrimination based on race and national origin.¹⁹⁰ The movement to exclude Chinese laborers resulted in federal immigration laws that demonstrated the official discriminatory policies toward Asians.¹⁹¹ In 1882, Congress passed the Chinese Exclusion Act, the first major immigration policy that restricted entry on the basis of race.¹⁹² Under the exclusion laws, private employers could disregard the rights of Chinese laborers under treaties and federal laws if Congress determined it was for the "public good, by any consideration of private interest."¹⁹³ Many state laws followed this exam-

¹⁸⁵ Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 230 (1995).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* For instance, one plantation owner wrote to a local newspaper that twenty-five Chinese laborers worked more efficiently than his black slaves had: "First, they work much more steady, without loss of half-Saturday; and second, they do not run over their work. What they do is done well." *Id.* at 230-31 (citing LUCY M. COHEN, *CHINESE IN THE POST CIVIL WAR SOUTH: A PEOPLE WITHOUT A HISTORY* (1984)). Another newspaper stated: "[Chinese] are more obedient and industrious than the negro, work as well without as with an overseer, and at the same time are more cleanly in their habits and persons than the freedmen." *Id.* at 231-32. Preferences for Asians over blacks continued into the next century. GARY Y. OKIHIRO, *MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE* 54 (1994). In 1925, a railway company hired Filipinos to work as attendants, cooks, and busboys, displacing blacks in these capacities. *Id.* Blacks were then relegated to porter positions and denied mobility to easier and better-paying jobs. *Id.*

¹⁸⁸ TAKAKI, *supra* note 172, at 13.

¹⁸⁹ *Id.*

¹⁹⁰ DANIELS, *supra* note 172, at 29; McCLAIN, *supra* note 172, at 147.

¹⁹¹ John Braeman, *Deportation and Expulsion, in ASIANS AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY* 77, 78-80 (Hyung-chan Kim ed., 1992).

¹⁹² Chew, *supra* note 23, at 13 & n.31 (citing Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (generally suspending the immigration of Chinese laborers for ten years, except for those who were already resident in the United States as of Nov. 17, 1880) (extended in 1892, 1902 and 1904, repealed 1943)). The Supreme Court upheld the constitutionality of the 1892 Exclusion Act in *Fong Yue Ting v. United States*, 149 U.S. 698, 713-14 (1893).

¹⁹³ Chew, *supra* note 23, at 13-14. The Chinese Exclusion Act most directly relates to employ-

ple.¹⁹⁴ The trend in anti-Asian sentiment in America continued with the National Origins Act of 1924, which totally prohibited Japanese immigration yet permitted the annual entry of 17,853 immigrants from Ireland, 5,802 from Italy and 6,524 from Poland.¹⁹⁵ The Tydings-McDuffie Act of 1934 also limited Filipino immigration to fifty persons per year.¹⁹⁶ Federal immigration laws prohibiting entrance for Asians were not completely repealed until 1952.¹⁹⁷

American laws likewise determined who could become citizens.¹⁹⁸ Even before Asians began to immigrate to the United States, naturalized citizenship was already reserved for "whites."¹⁹⁹ The Naturalization Law of 1790 specifying this condition also remained in effect until 1952.²⁰⁰ As citizenship was required for voting rights, Asian immigrants thus suffered a lack of voice through the ballot.²⁰¹ As Asians became ineligible for citizenship, many states also prohibited them from owning land.²⁰²

Throughout this time period, various cases and legislation in American legal history provided other examples of documented disdain for Asians.²⁰³ Some of the reported cases and official writings reflect a commonality between the experiences of Asians and other minorities, such as blacks. For example, in 1854, in *People v. Hall*, the California Supreme Court interpreted a state law that read, "No Black, or Mulatto person, or Indian, shall be allowed to give evidence in favor

ment discrimination, but in fact anti-foreign legislation began much earlier. Braeman, *supra* note 191, at 78. In 1798, the Alien Act was signed into law by the President and gave him power to deport aliens considered dangerous to the peace and safety of the country. *Id.* The same year, the President also signed the Alien Enemy Act, which allowed the President to remove all alien enemy males fourteen years and older. *Id.* For subsequent legislation that expressed similar sentiment, see *id.* at 79-105.

¹⁹⁴Chew, *supra* note 23, at 14. For example, California's 1879 Constitution made it illegal for California corporations and government entities to hire any Chinese employees. *Id.* Another California law required all foreign miners, who were ineligible for U.S. citizenship, to pay a large tax. *Id.* As intended, almost all of the \$1.5 million collected under the tax was paid by Chinese miners. *Id.*

¹⁹⁵TAKAKI, *supra* note 172, at 14.

¹⁹⁶*Id.*

¹⁹⁷Chew, *supra* note 23, at 17. This change in national policy stemmed from the increasingly apparent contradictions between the United States' foreign policy positions during and after World War II and its anti-Asian laws. *Id.* Congress replaced these broad prohibitions with restrictive quotas for Asian immigrants. *Id.* at 17-18.

¹⁹⁸*Id.*

¹⁹⁹*Id.* at 12.

²⁰⁰*Id.* at 17.

²⁰¹TAKAKI, *supra* note 172, at 14.

²⁰²*Id.*

²⁰³Chew, *supra* note 23, at 12-18.

of, or against a white man," and found that the words actually included all people of color, not just those enumerated.²⁰⁴ In *Hall*, a white man was convicted on the basis of testimony of Chinese witnesses.²⁰⁵ Because the court found that the word "Black" meant the "opposite of 'White,'" the statute excluded all persons of color from testifying.²⁰⁶ The court considered that the intent of the law was to shield white men from "testimony of the degraded and demoralized caste" and to protect the foundations of the state from the "actual and present danger" of "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point . . . between whom and ourselves nature has placed an impassable difference" ²⁰⁷ The testimony of the Chinese witnesses was thus inadmissible, and the case was remanded.²⁰⁸

Asians were similarly affected by discrimination in education, because Chinese children were considered nonwhite, or "Black," and were required to attend separate schools based on race.²⁰⁹ In 1927, in *Gong Lum et al. v. Rice et al.*, the United States Supreme Court affirmed that Chinese children could be excluded from attending schools for white children.²¹⁰ In *Gong Lum*, the plaintiff claimed that since his daughter was Chinese, and not Black, school authorities could not deny her the right to attend the school for white children.²¹¹ Relying on the "separate but equal" rationale of *Plessy v. Ferguson*, the Court reasoned that state legislatures were the proper forum for determining the matter.²¹² The Court, stating that it had ruled on the same question many times before, held, thus, that the State of Mississippi could prevent Chinese students from enrolling in white schools.²¹³

Not only did early case law demonstrate a general aversion to nonwhites, but individual justices explicitly targeted Asians with discriminatory remarks.²¹⁴ In a dissent to *Plessy*, Justice Harlan wrote, "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons be-

²⁰⁴ 4 Cal. 399, 403 (1854).

²⁰⁵ *Id.* at 399.

²⁰⁶ *Id.* at 403.

²⁰⁷ *Id.* at 402, 404, 405.

²⁰⁸ *Id.* at 405.

²⁰⁹ See *Gong Lum v. Rice*, 275 U.S. 78, 87 (1927).

²¹⁰ *Id.*

²¹¹ *Id.* at 81.

²¹² *Id.* at 86.

²¹³ *Id.* at 85-86.

²¹⁴ *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting); Chew, *supra* note 23, at n.34.

longing to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race."²¹⁵

Similarly, Justice Field wrote in personal correspondence:

[T]he manners, habits, mode of living, and everything connected with the Chinese prevent the possibility of their ever assimilating with our people. They are a different race, and, even if they could assimilate, assimilation would not be desirable. If they are permitted to come here, there will be at all times conflicts arising out of the antagonism of the races which would only tend to disturb public order and mar the progress of the country. . . . I belong to the class, [sic] who repudiate the doctrine that this country was made for the people of all races. On the contrary, I think it is for our race—the Caucasian race."²¹⁶

Thus, on both official and private levels, anti-Asian animus was evident.

Perhaps the most serious reflection of racial biases toward Asians was the Japanese internment situation during World War II.²¹⁷ After the bombing of Pearl Harbor, the American government took measures ordering the forced removal of resident enemy aliens or Japanese citizens.²¹⁸ The United States military, concerned with security, sought to exclude both Japanese resident enemy aliens and American citizens of Japanese descent.²¹⁹ The result was Executive Order 9066, which authorized the Secretary of War "to prescribe military areas in such places and of such extent as he . . . may determine, from which any or all persons may be excluded."²²⁰

A series of cases followed, challenging the constitutionality of the order, but to no avail.²²¹ In *Korematsu v. United States*, the United States

²¹⁵ 163 U.S. at 561. This passage is particularly ironic considering that Justice Harlan was dissenting to the holding in *Plessy*. See *id.*

²¹⁶ Chew, *supra* note 23, at 13–14 & n.34 (citing letter from Stephen J. Field to John Norton Pomeroy (Apr. 14, 1882)).

²¹⁷ Lorraine K. Bannai & Dale Minami, *Internment During World War II and Litigations*, in *ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY* 755, 779 (Hyung-chan Kim ed., 1992).

²¹⁸ Hyung-chan Kim, *An Overview*, in *ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY* 1, 47 (Hyung-chan Kim ed., 1992).

²¹⁹ *Id.*

²²⁰ *Id.* at 47–48 (citing Exec. Order 9066, *reprinted in* 22 Stat. 826, 826–27). Public Law 503 made it a misdemeanor, punishable by a fine and imprisonment, to violate the orders of a military commander in a designated zone. *Id.* Congress submitted Public Law 503 to the President and eventually passed the Act of March 21, 1942 to execute Executive Order 9066. *Id.*

²²¹ *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Mitsuye Endo*, 323 U.S. 283

Supreme Court ruled that the Act of March 21, 1942 was constitutional due to military necessity.²²² The plaintiff, Korematsu, had remained in a military area from which he had been prohibited by an exclusion order.²²³ After being convicted of violating the order, Korematsu challenged the constitutionality of the order and the assumptions the Court made in *Hirabayashi v. United States*.²²⁴ The majority reasoned that hardships are a circumstance of war and that the presence of disloyal members of the group mandated the exclusion of those of Japanese origin.²²⁵ Thus, the Court held that the 1942 Act was in fact constitutional because of the exigencies of the military situation.²²⁶ Relatively recently then, United States citizens of Japanese descent were interned alongside resident aliens.²²⁷ This willingness to apply the law equally to those born in the United States and those born elsewhere demonstrates the continued discrimination based on both race and national origin.²²⁸

Historically, then, as illustrated by the above examples, Asian immigrants were regarded with both disdain and curiosity by earlier immigrants. Although they may have shared experiences with both European immigrants and other oppressed peoples, Asians found themselves at a greater disadvantage based on cultural and physical differences. Legally sanctioned color prejudice—on racial and national origin grounds—severely limited the opportunities available to them, for their reception by American society was a cold one.²²⁹

B. *Asian Women's Presence in America*

Some second-generation Asian Americans were present in the early 1850s, but until the 1920s, they were very few in number because few Asian women came to America.²³⁰ At first, employers recruited mainly single male workers.²³¹ In some areas, managers later requested

(1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943). In all four cases, the Supreme Court ruled against the defendants and upheld the constitutionality of the Act of March 21, 1942. For a full discussion of these four cases, see Bannai & Minami, *supra* note 217, at 755.

²²² 323 U.S. at 219.

²²³ *Id.* at 215.

²²⁴ *Id.* at 218.

²²⁵ *Id.* at 219.

²²⁶ *Id.* at 223-24.

²²⁷ Kim, *supra* note 218, at 47.

²²⁸ *Id.*

²²⁹ CHAN, *supra* note 180, at 61.

²³⁰ *Id.* at 103.

²³¹ *Id.*

a small number of women for a positive effect on the men.²³² Asian laborers themselves found that it was more economical to sustain their families in Asia than in the United States.²³³ Furthermore, given the racial prejudice and hardship Asians encountered in America, many considered the conditions unsafe for women and children.²³⁴

Some Chinese and Japanese male emigrants were married but had left their wives and children in their homeland. Many sent for their families after finding employment.²³⁵ Still, the sex ratios in all Asian populations were severely skewed.²³⁶ In 1870, Chinese women constituted only 7.2% of the Chinese in America and a mere 3.6% in 1890.²³⁷ Japanese women comprised 4% of the Japanese population on the U.S. mainland in 1900 and 12.6% in 1910.²³⁸ Of the Filipinos admitted into California between 1920 and 1929, only 6.7% were women.²³⁹ In 1920, Korean women comprised 25% of the Koreans on the mainland and 34% in 1930.²⁴⁰ And, in this period, of 474 Asian Indians in America, none were women, the reasons for which have not yet been explored.²⁴¹

According to other statistics, throughout the latter half of the nineteenth century, no more than 5000 Chinese women were on the U.S. mainland at any one time.²⁴² Many of them were girls from poor families who had been sold into prostitution.²⁴³ As a result, beginning in 1875, federal laws restricted the entrance of Chinese women under suspicion of prostitution.²⁴⁴ This exclusion thus inhibited the natural development of Asian communities.²⁴⁵

Years later, Chinese American women still encountered great difficulty in entering the country.²⁴⁶ Chinese wives of U.S. citizens could not enter at all after the 1924 Immigration Act.²⁴⁷ Subsequently, after

²³² *Id.*

²³³ *Id.*

²³⁴ CHAN, *supra* note 180, at 104.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ CHAN, *supra* note 180, at 104.

²⁴⁰ *Id.*

²⁴¹ See *id.*; Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, in *ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943*, at 94 (Sucheng Chan ed., 1991).

²⁴² CHAN, *supra* note 180, at 104.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ CHAN, *supra* note 180, at 105.

protest, Congress passed an amendment to allow Chinese women who had married U.S. citizens before 1924 to come into the country.²⁴⁸ The amendment required females of Chinese ancestry born in America to show conclusive evidence of American citizenship, and daughters of Chinese American men had to prove their relationship beyond a reasonable doubt.²⁴⁹

The history of United States governmental policies on Chinese and Japanese family development differed. Unlike the sudden Chinese exclusion, the United States government restricted Japanese immigration in stages.²⁵⁰ Many Japanese women arrived as prostitutes; many others arrived as "picture brides."²⁵¹ Because many Japanese men were alone in America, they increasingly resorted to arranged marriages via the exchange of photographs, and thus began the picture bride phenomenon.²⁵² The picture brides went through wedding ceremonies in the absence of grooms, had their names entered into their spouses' family registers, applied for passports and arrived in America to meet their husbands for the first time.²⁵³ In 1920, anti-Japanese groups finally put a stop to incoming Japanese women, succeeding in their efforts to discontinue the issuance of passports to picture brides.

In general, Asian women who did arrive in America had to be strong both physically and emotionally. In Hawaii, they earned money by working the fields and by cooking and washing clothes for single males.²⁵⁴ They raised families and tended to household chores from the evening into the middle of the night while men relaxed.²⁵⁵ They were relegated to such tasks, even though many of them were well-educated and had high career aspirations.²⁵⁶

Despite their assiduousness, Asian women earned little respect.²⁵⁷ In addition, farms were scattered geographically, and the women found little female companionship and lived very isolated lives.²⁵⁸ They were often housebound, with no time to learn English or to participate

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 106.

²⁵⁰ See TAKAKI, *supra* note 172, at 200–12.

²⁵¹ *Id.* at 47–49, 51.

²⁵² *Id.* at 190.

²⁵³ See *id.* at 72.

²⁵⁴ *Id.* at 135.

²⁵⁵ TAKAKI, *supra* note 172, at 190–91.

²⁵⁶ Judy Yung, *Unbinding the Feet, Unbinding Their Lives: Chinese Immigrant Women in San Francisco, 1902–1931*, in *ASIAN AMERICANS: COMPARATIVE AND GLOBAL PERSPECTIVES* 70, 71–72 (Shirley Hune et al. eds., 1991).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

in social activities.²⁵⁹ Immigrant wives usually ruled the household, however, assuming the roles of disciplinarian and culture-bearer, and thus maintained the integrity of their families.²⁶⁰ In general, they were hardworking, frugal, tolerant and self-sacrificing toward their children while being faithful and respectful to their husbands.²⁶¹

Slowly, however, Asian women began to initiate social change for themselves by shedding social restrictions and becoming more publicly outspoken. For example, by the beginning of the twentieth century, Chinese women advocated unbound feet, equal rights, education and public participation.²⁶² One author explains that this was due largely to the continuous influence of nationalism and women's emancipation in China, the work of Protestant missionary women in Chinese communities, and the availability of socioeconomic opportunities outside the home.²⁶³ With help from the press and other organizations, immigrant women were less tolerant of abuse and more resourceful in upgrading their own status.²⁶⁴ For example, the Chung Sai Yat Po was a group particularly vociferous in support of women's emancipation.²⁶⁵ Many editorials and articles spoke out against polygamy, slavery, and arranged marriages.²⁶⁶ Mission homes helped to rescue prostitutes and abused women and offered classes for immigrant women in areas such as baby care, medical care, employment, immigration and domestic problems.²⁶⁷ In San Francisco, the Chinese YWCA was such a resource, and even provided personal interpretation services on medical visits and on trips to other public agencies.²⁶⁸ Most importantly, such associations offered public outlets for Asian women, as they sought self-improvement and social interaction.²⁶⁹

As the economy grew in the early twentieth century, the nature of Asian women's work changed.²⁷⁰ Many worked in industrial environments such as factories or canneries.²⁷¹ Many also found opportunities in garment shops, which were particularly attractive because they often

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Yung, *supra* note 256, at 70.

²⁶² *Id.* at 70.

²⁶³ *Id.*

²⁶⁴ *Id.* at 75.

²⁶⁵ *Id.*

²⁶⁶ Yung, *supra* note 256, at 75.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 76-77.

²⁷⁰ *Id.* at 78.

²⁷¹ Yung, *supra* note 256, at 78.

offered flexible work schedules, and mothers could bring their children.²⁷² In these various environments, however, Asian women could be easily exploited, as the majority of them still could not speak English and lacked union protection.²⁷³ It was common for them to work long hours for little pay under often unsanitary conditions.²⁷⁴

Although economic necessity brought Asian women outside the home, work gave them a new, relative sense of freedom, accomplishment and camaraderie. Despite often being exploited, Asian women made new acquaintances and gained exposure to new ideas.²⁷⁵ At the same time, however, Asian women were far from being fully emancipated, still trying to free themselves of past social restraints. Nonetheless, they had come a long way, beginning as indentured prostitutes and isolated wives but becoming involved, active and productive contributors to their communities.

C. *Ongoing Discrimination: Positive Perceptions, Harmful Effects*

After the war years, the pattern and composition of Asian immigration changed, affecting the Asian female presence in America. Under the amended 1945 War Brides Act, American servicemen brought a great number of Chinese, Japanese, Korean and Filipino women into the country.²⁷⁶ In the 1950s and 1960s, Asian immigrants came not as physical laborers but as highly-educated intellectuals, most of them from well-to-do families.²⁷⁷ In contrast to the earlier Asian immigrants, these men and women sought work in universities, research laboratories and private industries.²⁷⁸ The war changed the fortunes of Asians between 1941 and 1965.²⁷⁹ Although times still remained uncertain, Asian Americans worked hard without complaining.²⁸⁰ Asians continued to toil in this manner and managed to survive until renewed immigration after 1965 brought new energy and challenges to their communities.²⁸¹

The stereotypes of Asian immigrants, who were originally thought of as replacements for other "less industrious" minorities, set the stage

²⁷² *Id.* at 79.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ CHAN, *supra* note 180, at 140.

²⁷⁷ TAKAKI, *supra* note 172, at 420-21.

²⁷⁸ CHAN, *supra* note 180, at 141.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 142.

²⁸¹ *Id.*

for their present characterization as hard-working superachievers.²⁸² In more recent times, the diligence of well-educated Asians has contributed to today's celebration of them as the "model minority."²⁸³ The media have continually run special news segments on Asian Americans and their success.²⁸⁴ *NBC Nightly News*, *The McNeil/Lehrer Report* and *60 Minutes* have all presented stories on Asian Americans' achievements.²⁸⁵ *U.S. News & World Report*, *Time* and *Fortune* have also featured reports on Asian Americans' achievements; the *New Republic* named "The Triumph of Asian-Americans" as "America's greatest success story."²⁸⁶

The image, however, has been extensively discussed, debated and critiqued as myth.²⁸⁷ In a comparison of incomes between Asians and whites, at first glance, Asians might seem to fare better.²⁸⁸ Nonetheless, the higher incomes overall do not reflect the fact that Asian Americans are concentrated largely in states such as California, Hawaii and New York, which have higher incomes as well as higher costs of living than the national average.²⁸⁹ The single statistic also fails to account for the fact that Asian families usually have more persons working than do white families.²⁹⁰

Reported income levels alone, thus, fail to indicate that Asian Americans have not reached equality.²⁹¹ In fact, despite that they have acquired more education, on average, Asian Americans only earn comparable incomes to whites.²⁹² Moreover, there is a structural problem in the income inequality.²⁹³ Asians tend to be located in the labor market's secondary sector, where wages are low and promotional pros-

²⁸² See Chew, *supra* note 23, at 32; Wu, *supra* note 185, at 230.

²⁸³ See Wu, *supra* note 185, at 238.

²⁸⁴ TAKAKI, *supra* note 172, at 474.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ See, e.g., DANIELS, *supra* note 172, at 317-44; TAKAKI, *supra* note 172, at 474-84; Chew, *supra* note 23, at 32; Won Moo Hurh & Kwang Chung Kim, *The 'Success' Image of Asian Americans: Its Validity and Its Practical and Theoretical Implications*, 12 ETHNIC & RACIAL STUD. 512, 513-33 (1989); Osajima, *supra* note 22, at 165-73.

²⁸⁸ TAKAKI, *supra* note 172, at 475.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.* For instance, in 1980, the mean personal income for white men in California was \$23,400. *Id.* Although Japanese men earned a comparable income, they did so only by procuring 17.7 years of education to 16.8 years for white men twenty-four to twenty-five years old and by working more hours than white men (2160 compared to 2120 hours for white men in the same age category). *Id.* In reality then, Japanese men still lag behind Caucasian men. *Id.* Korean, Chinese, Filipino and Vietnamese men's incomes show even greater disparity. *Id.*

²⁹³ TAKAKI, *supra* note 172, at 476.

pects are minimal.²⁹⁴ Some are found in the primary sector but remain in low level positions, facing a "glass ceiling" when pursuing positions of executive leadership and decision-making.²⁹⁵ The same companies that pursue Asians for technical jobs might pass them up for managerial and executive positions.²⁹⁶ Nevertheless, Asians continue to be seen as a group that has achieved economic success, relative to other minority groups.²⁹⁷ This perception, in turn, leads many to believe that Asians do not face discrimination.²⁹⁸ The model minority myth persists and adds to the list of Asian stereotypes.

When a racial group is stereotyped, even though the stereotype may be considered by some to be positive or complimentary, there may nevertheless be harmful effects.²⁹⁹ For example, some point to the fact that the model minority image highlights the perceived economic success of Asians in American society, and this perpetuates race-based discrimination.³⁰⁰ Such a stereotype pits other minorities against Asian minorities, allowing a white majority to play the minorities off of each other.³⁰¹ The stereotype also fosters the belief that Asians are perhaps too successful and are therefore undeserving of protection on the basis of race.³⁰² Some believe that Asians have successfully assimilated into the mainstream of American society.³⁰³ This is appealing to many because they prefer to think that the American social system is a properly-functioning meritocracy and does not impede the progress of those who are capable and willing to work hard to do well.³⁰⁴ This often implies that all Asians are economically successful and socially accepted into the mainstream.³⁰⁵ The simplified characterization of Asians has actually obscured understanding of the group and has promoted racist

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 476; see also Ronald Chin, *Asian Americans in Corporate Organizations*, in *A LOOK BEYOND THE MODEL MINORITY IMAGE: CRITICAL ISSUES IN ASIAN AMERICA* 58, 58-60 (Grace Yun ed., 1989).

²⁹⁷ Hurh & Kim, *supra* note 287, at 528-31.

²⁹⁸ Chew, *supra* note 23, at 6; see also Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome,"* in *ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087, 1088* (Hyung-chan Kim ed., 1992) (describing the denial of the existence of racism against Asian Americans as the "Miss Saigon Syndrome").

²⁹⁹ Hurh & Kim, *supra* note 287, at 528-31.

³⁰⁰ *Id.* at 530.

³⁰¹ See Chew, *supra* note 23, at 70-75.

³⁰² Hurh & Kim, *supra* note 287, at 528.

³⁰³ Chew, *supra* note 23, at 6.

³⁰⁴ *Id.* at 24.

³⁰⁵ *Id.* at 24-25.

images centered on ill-founded beliefs that Asians are universally successful.³⁰⁶

The reality, however, is that Asians suffer from discrimination that may be quantitatively and qualitatively different from that suffered by other minority groups.³⁰⁷ Many non-Asians remain unaware of the current discrimination and its connection to the historical treatment of Asians since their arrival in America.³⁰⁸ Even those who are aware of the history often fail to see the association between the past treatment of Asians and the ongoing problems that continue to plague them.³⁰⁹

Various other stereotypical beliefs contribute to the misunderstanding of Asians. For example, some people assume that Asians have uniform experiences.³¹⁰ Others presume that all Asians are generally nonassertive and lack the aggressiveness required in administration.³¹¹ Non-Asians are not likely to witness the actual discriminatory experiences of Asians, and many acts of racism might even be considered unconscious.³¹² These stereotypes have caused more than just psychological or economic harm—they have contributed to the frequent occurrence of hate crimes against Asians.³¹³ Incidents of hate crimes demonstrate the reality that continued anti-Asian sentiment, induced by economic realities and deeply-rooted racism, persists in American society.³¹⁴

For example, in Jersey City, the home of 15,000 Asian Indians, a hate letter published in a local newspaper read:

We will go to any extreme to get Indians to move out of Jersey City. If I'm walking down the street and I see a Hindu and the setting is right, I will just hit him or her. We plan some of our more extreme attacks such as breaking windows, breaking car windows and crashing family parties. We use the phone

³⁰⁶ *Id.* at 25.

³⁰⁷ Chang, *supra* note 19, at 1247.

³⁰⁸ *Id.* at 1251.

³⁰⁹ *Id.*

³¹⁰ Chew, *supra* note 23, at 25.

³¹¹ David Sue et al., *Nonassertiveness of Asian Americans: An Inaccurate Assumption?*, 30 J. OF COUNSELING PSYCHOLOGY 581, 581 (1983); TAKAKI, *supra* note 172, at 476.

³¹² See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322, 340 (1987).

³¹³ Hurh & Kim, *supra* note 287, at 529–30; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 21, at 22–23.

³¹⁴ U.S. COMM'N ON CIVIL RIGHTS, *supra* note 21, at 25–48; Tomoji Ishi, *Contemporary Anti-Asian Activities: A Global Perspective*, in ASIAN AMERICANS: COMPARATIVE AND GLOBAL PERSPECTIVES 123, 123–24 (Shirley Hune et al. eds., 1991); Chang, *supra* note 19, at 1255.

book and look up the name Patel. Have you seen how many there are?³¹⁵

The letter was written by the "Dotbusters," an unkind reference to the *bindi* some Indian women wear as a symbol of sanctity; there have been some actual attacks, including verbal harassments, egg throwing and serious beatings.³¹⁶

One of the most serious offenses against the Asian community took place in 1982, in Detroit.³¹⁷ Vincent Chin, a young Chinese American, went with two friends to a bar to celebrate his upcoming wedding.³¹⁸ Two white autoworkers, referred to him as a "Jap" and shouted, "It's because of you motherfuckers that we're out of work."³¹⁹ The two men smashed Chin's skull, beating him to death with a baseball bat.³²⁰ The court accepted a guilty plea to manslaughter and sentenced each to three years' probation and fined each up to \$3,780.³²¹

Other examples of anti-Asian violence are too numerous to describe, and countless instances go unreported.³²² Beginning in the early 1980s, incidents of violence, including physical assault, harassment, vandalism and anti-Asian racial slurs, were reported to the U.S. Civil Rights Commission and to state and local civil rights bodies.³²³ The Commission concluded that "the issue of violence against Asian Americans is national in scope."³²⁴

Ultimately, the factor which may most influence the treatment of Asians in American society is the difference in physical features, which long ago invoked a sense of Asian inferiority among whites.³²⁵ The identity of Asians, including those born in America, encompasses distinctive skin tones, as well as other characteristics that many consider "foreign."³²⁶ Asians often field questions and comments on first encounters such as, "Where are you from?" or "You speak English without an accent."³²⁷ Stereotypical images of race then, also conjure up images

³¹⁵ TAKAKI, *supra* note 172, at 481.

³¹⁶ *Id.* at 482.

³¹⁷ *Id.* at 481-82.

³¹⁸ *Id.* at 481.

³¹⁹ *Id.*

³²⁰ TAKAKI, *supra* note 172, at 482.

³²¹ *Id.* at 482.

³²² CHAN, *supra* note 180, at 175; see Chew, *supra* note 23, at 18-24.

³²³ CHAN, *supra* note 180, at 175.

³²⁴ *Id.*; see also Yen Le Espiritu, ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES 134-60 (1992); Ishi, *supra* note 314, at 123-35.

³²⁵ Chew, *supra* note 23, at 19.

³²⁶ Gotanda, *supra* note 298, at 1095.

³²⁷ *Id.* at 1096.

of foreign identity, and Asians may be subject to bias based on both race and national origin.³²⁸

In popular culture, too, Asians conjure up distinct images:

Asians were bit players, extras with buck teeth and pigtailed on TV shows like *Bonanza* and *Kung Fu*. We were Charlie Chan, Mr. Moto, and Joe Jitsu. . . . We were *not* real, but cartoons and caricatures, sideshows and servants, jokes in a Jack Nicholson movie and ciphers of the mainstream culture contributing nothing generative and original on our own, but adding "spice" to the melting pot. If we emerged at all, we had before each of us a mask of the dehumanized and stereotyped image of Asians in our American culture. Slanted eyes, simian features, servile personalities.³²⁹

Specific and persistent characterizations by outsiders is even more complicated and invidious in the case of Asian women.

D. *Stereotypes and Perceptions of Asian Women*

Asian women face many of the same obstacles as Asian men, but they may face additional discrimination because of stereotypes and perceptions that are unique to Asian women.³³⁰ The roots of stereotypes of Asian women lie in the historical image of the Chinese prostitute and the slave girl of the nineteenth century, as well as in the more modern images of Asian women acting as sexual servants to soldiers in Asian wars.³³¹ Some continue to see Asian women in this light; they translate the images into the conclusion that Asian women are ideal for the domestic sphere and would thus make perfect wives.³³² As a result, Asian women are commonly characterized as passive and repressed.³³³

Popular culture contributes to and reinforces such images of Asian women.³³⁴ One author notes that images of Asian women in commercial media have remained consistently one-dimensional and are thus simplistic and inaccurate portrayals.³³⁵ Two common Asian female

³²⁸ Cf. Perea, *supra* note 21, at 833.

³²⁹ Hongo, *supra* note 178, at xxiv.

³³⁰ Esther Ngan-Ling Chow, *The Development of Feminist Consciousness Among Asian American Women*, 1 GENDER & SOCIETY 284, 288, 290-92 (1987).

³³¹ *Id.* at 288.

³³² *Id.*

³³³ *Id.* at 291.

³³⁴ *Id.*; Tajima, *supra* note 25, at 309.

³³⁵ Tajima, *supra* note 25, at 309.

stereotypes can be described as "Lotus Blossom Baby," a demure, diminutive type, and "Dragon Lady," a devious and more wicked character.³³⁶ These conceptions of Asian women make real Asian women seem interchangeable and definable solely by their appearances.³³⁷

Asian women in the media may have greater appeal to the American mainstream when they exhibit classic stereotypical characteristics. For example, *M. Butterfly*, which won the Tony Award for the best American play of 1988, told the story of a French diplomat who falls in love with a male Chinese opera singer impersonating a woman.³³⁸ Some have accused the playwright, David Henry Hwang, of catering to the taste for Oriental exotica on the part of white Americans.³³⁹ Others defend the work as Hwang's vehicle for making certain statements about imperialism, racism and sexism.³⁴⁰ In either case, however, the enormous success of the work still relied on burdensome Asian stereotypes and at least some level of passive acceptance of the images.

Aside from classic stereotypes, Asian women have been noticeably absent from the mainstream of American culture.³⁴¹ One commentator observes that Asian women rarely appear as "union organizers, divorced mothers fighting for the custody of their children, fading movie stars, spunky trial lawyers, or farm women fighting bank foreclosures."³⁴² The invisibility of Asian women makes it difficult for them to be accepted as everyday people in America.³⁴³

Only recently have Asian female characters, written about by Asian women themselves, begun to emerge as complex and fascinating.³⁴⁴ The female characters in Maxine Hong Kingston's *The Woman Warrior: Memoirs of a Childhood Among Ghosts*, while abused, are resourceful people who find ways to transcend the circumstances of their lives.³⁴⁵ In Velina Hasu Houston's 1985 trilogy, *Asa Ga Kimashita, American Dream* and *Tea*, Japanese war brides break traditional boundaries and conquer enormous difficulties to survive in strange, new environ-

³³⁶ *Id.*

³³⁷ *Id.* Tajima describes the Lotus Blossom Baby as a sexual-romantic object, an "Oriental flower" who is utterly feminine, delicate, and a welcome respite from the often independent American counterpart. *Id.*

³³⁸ CHAN, *supra* note 180, at 184.

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ Tajima, *supra* note 25, at 314.

³⁴² *Id.*

³⁴³ *See id.*

³⁴⁴ CHAN, *supra* note 180, at 184.

³⁴⁵ *Id.*; MAXINE HONG KINGSTON, *THE WOMAN WARRIOR: MEMOIR OF A GIRLHOOD AMONG GHOSTS* (1976).

ments.³⁴⁶ In *Clay Walls*, by Korean American novelist Kim Ronyoung, a wife and mother ruins her eyes doing embroidery to support her family after her husband's gambling debt wipes out the family's savings.³⁴⁷ Her character nevertheless retains her dignity and teaches her children to be proud of who they are.³⁴⁸ Amy Tan, in *The Joy Luck Club*, strips layers of the intertwined lives and complex personalities of four Chinese immigrant women and their daughters.³⁴⁹ The emergence of such literature is exciting but still quite limited.

Unfortunately, it is not these images, but rather the stereotypical ones that persist stubbornly, which seem to pervade the societal psyche and make it difficult for Asian women to progress in the workplace.³⁵⁰ Some note that minority women are referred to as "twofers" because they fulfill two equal opportunity employment categories.³⁵¹ The label then undermines their credibility on the job, and Asian women, as well as other women of color, end up being showpieces for compliance with equal opportunity regulations, rather than serious contenders for upper-level management positions.³⁵²

In addition, some commentators believe Asian women are less equipped to handle discrimination based on race and gender than women of other races.³⁵³ First, Asian women may find that the small number of other Asian women in a workplace impedes their joining informal networks of co-workers on the job; thus, they may suffer from isolation because they do not have ready access to support and advice from mentors or women experiencing similar difficulties.³⁵⁴ Second, Asian women, especially immigrants, may be less well-informed about their rights in the workplace or may be thought of as culturally condi-

³⁴⁶ CHAN, *supra* note 180, at 184-85; VELINE HASU HOUSTON, *AMERICAN DREAM* (1987); VELINE HASU HOUSTON, *ASA GA KIMASHITA* (1985); VELINE HASU HOUSTON, *TEA* (1988).

³⁴⁷ KIM RONYOUNG, *CLAY WALLS* (1990); *see* CHAN, *supra* note 180, at 184-85.

³⁴⁸ RONYOUNG, *supra* note 347; *see* CHAN, *supra* note 180, at 184-85.

³⁴⁹ AMY TAN, *THE JOY LUCK CLUB* (1989); *see* CHAN, *supra* note 180, at 184-85; *see also* Carolyn Ayon Lee, in *ASIAN AMERICAN EXPERIENCES IN THE UNITED STATES: ORAL HISTORIES OF FIRST TO FOURTH GENERATION AMERICANS FROM CHINA, THE PHILIPPINES, JAPAN, INDIA, THE PACIFIC ISLANDS, VIETNAM AND CAMBODIA* 132 (Joann Faung Jean Lee ed., 1991).

³⁵⁰ Deborah Woo, *The Gap Between Striving and Achieving: The Case of Asian American Women*, in *MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN* 185, 185, 192-93 (Asian Women United of California ed., 1989).

³⁵¹ Keith L. Alexander, *Management: Minority Women Feel Racism, Sexism Are Blocking the Path to Management*, WALL ST. J., July 25, 1990, at B1.

³⁵² *Id.* Alexander quotes one professor as saying "being a twofer doesn't give you legitimization, doesn't give you a voice or power and doesn't move you up." *Id.*

³⁵³ U.S. COMM'N ON CIVIL RIGHTS, *supra* note 21, at 153; Alexander, *supra* note 351.

³⁵⁴ Alexander, *supra* note 351, at B1; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 21, at 153.

tioned not to complain about mistreatment.³⁵⁵ These beliefs may lead others to discriminate more readily against Asian women.³⁵⁶

Many are quick to note that, as compared to other groups, Asian women have a low unemployment rate.³⁵⁷ However, like Asian men, their jobs are disproportionately distributed in low wage and low mobility occupations such as machine operators and fabricators.³⁵⁸ One study demonstrated that although Asian women have been relatively successful in obtaining jobs in professional positions, they have not been as successful in moving to managerial roles.³⁵⁹ The same study indicated that, although proportionately there are twice as many Asian women college graduates as white women, their income levels are nearly the same.³⁶⁰ In contrast, when Asian women and Asian men have the same levels of education, there is a great disparity in incomes between Asian women and Asian men.³⁶¹

Thus, the unique discrimination Asian women face translates into tangible economic and social effects.³⁶² Therefore, unless the underlying discrimination is first recognized and then eliminated, these inequalities will continue to persist.³⁶³ It is interesting that discriminatory images of Asian women have been perpetuated by people other than Asian women themselves. As they are now beginning to gain public voices, it is partially incumbent upon them to speak out in order to inform American society as to who they really are. At the same time, however, unless there is a willing listener, their voices will fall upon deaf ears. It is important, therefore, to recognize Asian women's ability to define themselves, to escape the constant stereotyped past and to establish their permanence in all aspects of American society, including the employment context. Intersectionality theory offers one method of accomplishing the necessary first step of recognizing the unique nature of discrimination toward Asian women.³⁶⁴

³⁵⁵ U.S. COMM'N ON CIVIL RIGHTS, *supra* note 21, at 153.

³⁵⁶ *Id.*

³⁵⁷ Judy Chu, *Social and Economic Profile of Asian Pacific American Women: Los Angeles County*, in REFLECTIONS ON SHATTERED WINDOWS: PROMISES AND PROSPECTS FOR ASIAN AMERICAN STUDIES 193, 200-01 (1988) (based on 1980 U.S. Census figures); Woo, *supra* note 350, at 192-93.

³⁵⁸ Chu, *supra* note 357, at 200-01; Woo, *supra* note 350, at 192-93.

³⁵⁹ Chu, *supra* note 357, at 202; *see also* Woo, *supra* note 350, at 192.

³⁶⁰ Chu, *supra* note 357, at 203. The median income for Asian females in Los Angeles County in 1980 was \$12,293 as compared to \$12,223 for white females. *Id.*

³⁶¹ *Id.* The median income for Asian men was \$17,896. *Id.*

³⁶² *Id.* at 204; Woo, *supra* note 350, at 186.

³⁶³ *See* Chow, *supra* note 330, at 286.

³⁶⁴ *Id.* at 290, 292.

V. THE THEORY OF INTERSECTIONALITY AND TITLE VII

For women of color, race and sex coexist in their identities, and various authors have noted that it makes sense to consider the impact of the two together, rather than as separate defining traits.³⁶⁵ The theory of intersectionality considers those situated at the crossroads of identity factors; thus far, scholars have most often discussed women of color at the intersection of at least race and gender factors.³⁶⁶

The intersectional experience is impossible to derive from previous gender dialogues and race dialogues.³⁶⁷ Because most feminist thought focuses on the experience of white women, and racial discussion largely ignores gender issues, women of color tend to be marginalized in both schools of thought.³⁶⁸ Although the proponents of intersectionality call for a re-centering of ideas and inquiries using the perspective of women of color, the concept of and dialogue regarding intersectionality is not meant to polarize the ongoing gender and racial debates. Rather, it is meant to broaden the discussion to include a wider perspective.³⁶⁹

Various authors note that Title VII fails to address issues pertinent to women of color because it has been interpreted in a manner that fails to recognize the intersectional experience in employment discrimination.³⁷⁰ For example, employers may act on racial stereotypes that make women of color more likely to be the targets of sexual harassment,³⁷¹ or they may use particular "racialized sexual hostility" or "sexualized racial hostility."³⁷² When conduct is overtly sexual in nature, courts have tended to characterize the discrimination as sexual harassment and have difficulty conceiving of an underlying racial motivation for the act.³⁷³ It has been difficult for courts to incorporate and account

³⁶⁵ Crenshaw, *supra* note 2, at 140; Castro & Corral, *supra* note 7, at 160.

³⁶⁶ Abrams, *supra* note 11, at 2481; Crenshaw, *supra* note 2, at 140; Winston, *supra* note 7, at 796-97.

³⁶⁷ Kimberle Williams Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 111, 112 (1993).

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ Abrams, *supra* note 11, at 2503; Judith A. Winston, *An Anti-discrimination Legal Construct That Disadvantages Working Women of Color*, 24 *CLEARINGHOUSE REV.* 403, 412 (1991).

³⁷¹ Winston, *supra* note 370, at 412. For example, with Asian women, this might be the perception that they are less likely to file complaints. See *supra* notes 285-88 and accompanying text.

³⁷² Abrams, *supra* note 11, at 2501 ("Terms like nigger bitch or Buffalo Butt are unlikely ever to be used against either black men or white women . . .").

³⁷³ Winston, *supra* note 7, at 797.

for the interaction of more than one factor, and they have frequently adopted requirements that force plaintiffs to choose between the racial discrimination claim or the gender discrimination claim at the pleading stage, which often results in findings that there was no discrimination.³⁷⁴ In addition, as some courts begin to acknowledge multi-factored claims, judicial opinions have failed to elaborate adequately on intersectional discrimination in a manner that clearly conveys the scope of protection that Title VII affords.³⁷⁵

Because commentators feel that Title VII in its present state is inadequate to deal with many aspects of discrimination that traditionally disempowered groups face, they have made various proposals to enable redress for different forms of discrimination.³⁷⁶ For example, one proposal would add the phrase "or any combination thereof" to the text of Title VII to make it more inclusive.³⁷⁷ This would explicitly allow the combination of factors.³⁷⁸ Another proposal suggests adding the terms "ancestry" and "ethnic traits" to the list of enumerated factors to address national origin discrimination more adequately.³⁷⁹ Finally, one professor conceives of a broader vision that requires the dominant perception of Title VII to be replaced with alternative understandings of discrimination to respond to intersectional claimants.³⁸⁰

VI. THE COMPLEX EXPERIENCE OF ASIAN WOMEN IN EMPLOYMENT DISCRIMINATION: RECOGNIZING THE INTERSECTION OF FACTORS TO PROVIDE ADEQUATE REDRESS FOR VIOLATIONS OF TITLE VII

In the years since the enactment of Title VII, Asian women have not had a great deal of success with their intersectional claims for two main reasons. First, courts have been slow to accept the theory of a

³⁷⁴ See *supra* notes 61–70, 82–90, 101–106, 111–16, 123–39 and accompanying text.

³⁷⁵ *Abrams*, *supra* note 11, at 2482; see also *supra* notes 91–106, 117–22 and accompanying text.

³⁷⁶ See *infra* notes 377–80 and accompanying text.

³⁷⁷ *Castro & Corral*, *supra* note 7, at 172. Under this proposal, 42 U.S.C. § 2000e-2(a)(1) would read: "It shall be an unlawful 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 any combination thereof*," (emphasis added). See *id.*

³⁷⁸ *Id.*

³⁷⁹ *Perea*, *supra* note 21, at 860–61. *Perea*'s version would end "[b]ecause of such individual's race, color, religion, sex, national origin, *ancestry, or ethnic traits*." *Id.* (emphasis added). He would also add a new section to define "ethnic traits": "The term 'ethnic traits' includes, but is not limited to, language, accent, surname, and ethnic appearance." *Id.* at 861.

³⁸⁰ *Abrams*, *supra* note 11, at 2538–39. *Abrams* discusses four assumptions underlying current

combined claim.³⁸¹ Even when courts seem to be seriously considering an intersectional claim, they demonstrate either an unwillingness to address the issue fully, or they display inherent biases that perpetuate the current inadequate understanding of Asian women.³⁸² Thus, future courts have little guidance and insufficient frameworks for evaluating intersectional claims.³⁸³ Until courts have established enough precedents to place intersectionality theory within the common understanding of Title VII, Asian women will have difficulty bringing claims based on the entirety of their experiences.

Second, courts are only partly responsible for the slow recognition of intersectional claims under Title VII. Plaintiffs' attorneys have continued to bring single-factor claims where an intersectional one might better suit their clients' experiences.³⁸⁴ One cannot expect judges to recognize and accept intersectional claims on their own; attorneys must guide the courts with properly pleaded and argued multi-factored claims.

A. *Reluctance to Accept the Intersectional Claim*

Because the purposes of Title VII are broadly defined, courts have the opportunity to incorporate intersectionality theory to recognize Asian women's combined claims of race, sex and national origin discrimination.³⁸⁵ The Supreme Court has stated that the purpose of Title VII is to eliminate all artificial, arbitrary and unnecessary barriers to employment "that operate invidiously to discriminate on the basis of

Title VII doctrine and two changes needed in order to modify the assumptions. *Id.* at 2526, 2527. The assumptions are that (1) that protected traits are biologically transmitted, (2) that judgments must be applicable to an entire group before they are considered discriminatory, (3) that discrimination cannot occur between members of the same group, and (4) that discrimination is specific to the workplace and distinct from broader social patterns. *Id.* at 2526. The two changes Abrams advocates relate to: 1) the nature and opinion of discriminatory judgments and 2) the characteristics that statutory categories are intended to protect. *Id.* at 2527.

³⁸¹ See *supra* notes 61-70, 82-90, 101-106, 111-16, 123-39 and accompanying text.

³⁸² See *Chaddah v. Harris Bank Glencoe-Northbrook, N.A.*, 65 Empl. Prac. Dec. (CCH) ¶ 43,296 (N.D. Ill. 1994); *Fang-Hui Liao v. Dean*, 658 F. Supp. 1554 (N.D. Ala. 1987).

³⁸³ See *Chaddah*, 65 Empl. Prac. Dec. ¶ 43,296 (intersectional claim decided on single-factor basis); *Lee v. Walters*, 1988 WL 105887 (E.D. Pa. 1988) (intersectional claim decided on basis of national origin); *Liao*, 658 F. Supp. at 1554 (intersectional claim decided on alternate grounds); *Lim v. Citizens Sav. & Loan*, 430 F. Supp. 802 (N.D. Cal. 1976) (intersectional claim denied based on presence of Asian men and white women in employer's workforce).

³⁸⁴ See *Hong v. Children's Memorial Hosp.*, 993 F.2d 1257, 1259 (7th Cir. 1993) (Korean American woman who experienced intersectional discrimination filed Title VII claim based only on national origin discrimination).

³⁸⁵ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Scarborough*, *supra* note 16, at 1473.

racial or other impermissible classifications.”³⁸⁶ Courts have also conceived of Title VII as a remedial statute to be liberally construed in favor of the victim of discrimination, and courts have great discretionary power to interpret and apply it.³⁸⁷ In order to address adequately the totality of Asian women’s employment experiences, recognition of intersectional claims is not only possible—it is essential.³⁸⁸

Courts have been slow to accept the theory of the combined claim because the statute does not explicitly state that a plaintiff may bring an action on the basis of simultaneous, multiple claims.³⁸⁹ Yet the legislative history excluding the word “solely” from the text of the statute bolsters the argument that Congress expressed its desire to have the terms interpreted inclusively.³⁹⁰ Indeed, the courts in *Jefferies* and *Lam* realized that interpreting the statute exclusively would leave minority women without a remedy.³⁹¹ Courts’ willingness to deny the claims of Asian women where Asian men and white women are represented in the workforce demonstrates this reality.

When the court in *Chaddah* stated that the plaintiff failed to prove that white women who were promoted ahead of her were less qualified than she, or that there were few or no Asian bank officers, it engaged in an overly simplistic analysis of multiple claims.³⁹² This division of claims is reminiscent of some of the early black women’s claims, such as in *DeGraffenreid*, where the court equated black women’s experiences with those of white women and black men.³⁹³ The *DeGraffenreid* court expressed concern that by recognizing black women’s claims as distinct they would open the door to the creation of special sub-categories under Title VII.³⁹⁴ In all likelihood, courts such as the one in *Chaddah* continue to consider a category of Asian women to be a “super-remedy.”³⁹⁵ Yet courts must come to realize that the combination of elements does not give Asian women any greater redress than it does

³⁸⁶ *Griggs*, 401 U.S. at 431.

³⁸⁷ Scarborough, *supra* note 16, at 1473 (citing cases).

³⁸⁸ See *Lam v. University of Haw.*, 40 F.3d 1551, 1554 (9th Cir. 1994); Chow, *supra* note 330, at 292.

³⁸⁹ See 42 U.S.C. § 2000e-2(a)(1) (1988); *DeGraffenreid v. General Motors Assembly Div.*, 413 F. Supp. 142, 143 (E.D. Mo. 1976).

³⁹⁰ See *supra* notes 56–57, 75–76 and accompanying text.

³⁹¹ See *Jefferies v. Harris County Community Action Ass’n*, 615 F.2d 1025, 1032 (5th Cir. 1980); *Lam*, 40 F.3d at 1562.

³⁹² *Chaddah*, 65 Empl. Prac. Dec. (CCH) ¶ 81,315.

³⁹³ *DeGraffenreid*, 413 F. Supp. at 144–45.

³⁹⁴ *Id.* at 143.

³⁹⁵ See *Chaddah*, 65 Empl. Prac. Dec. (CCH) ¶ 81,315; cf. *DeGraffenreid*, 413 F. Supp. at 143.

to Asian men or white women. Rather, it merely allows Asian women to define more clearly their unique experiences.³⁹⁶

Even in cases where plaintiffs bring multi-factored Title VII claims, courts may refuse to perform an analysis of the interaction of these factors.³⁹⁷ Notably, in *Lee*, where the Equal Employment Opportunity Commission performed such an analysis and found race and sex discrimination, the court decided to dispense with the agency's report and gave only a footnote justifying its action, stating that the weight to be given the report was within the trial judge's discretion.³⁹⁸ Thus, although the court found that Lee was discriminated against on the basis of national origin, it did not consider the interplay of the other factors. The court followed similar reasoning to the *DeGraffenreid* and *Chaddah* courts, remarking in a footnote that there was no evidence of anti-female or anti-Asian animus.³⁹⁹

In other situations, courts show a willingness to entertain a combined claim, but they may demonstrate a failure to fully address it.⁴⁰⁰ For example, although the court held for the Asian female chemist in *Liao*, it did so using language that did not directly address the intersectional claim.⁴⁰¹ The *Liao* court stated that the plaintiff claimed "sexual and/or racial discrimination."⁴⁰² The court never examined the particular discrimination that occurred to see whether it was actually sexual, racial or a combination of the two.⁴⁰³ Instead, the court held for the plaintiff based on an affirmative action program, which the defendant had violated.⁴⁰⁴ To center the discussion on the program instead of the nature of the discrimination appeared to be an easier method of finding for the plaintiff without delving into the actual combined claim.⁴⁰⁵

Courts' inadequate understanding of the intersection of factors affecting Asian women has sometimes led them to conclude that clear

³⁹⁶ Chow, *supra* note 330, at 292.

³⁹⁷ See *Lee*, 1988 WL 105887, at n.7.

³⁹⁸ *Id.* at *4 & n.9.

³⁹⁹ *Id.* at *7 n.7; see also *Chaddah*, 65 Empl. Prac. Dec. (CCH) ¶ 81,315; *DeGraffenreid*, 413 F. Supp. at 144-45.

⁴⁰⁰ See *Liao*, 658 F. Supp. at 1554.

⁴⁰¹ See *id.* at 1561.

⁴⁰² See *id.* at 1554.

⁴⁰³ See *id.* at 1561.

⁴⁰⁴ *Id.*

⁴⁰⁵ See *Liao*, 658 F. Supp. at 1561 ("[T]here is no need for this court to determine whether or not TVA's decision to terminate Dr. Liao was impermissibly or directly motivated by her race and/or sex.").

discriminatory conduct is beyond the scope of Title VII's protection.⁴⁰⁶ For example, in *Chaddah*, the court was willing to tolerate a certain degree of discrimination that, on its face, fell within Title VII's protected factors.⁴⁰⁷ In its analysis, the court remarked:

The harassment of plaintiff involves several comments regarding her pronunciation, three derogatory comments about foreigners or orientals [sic], and a comment that plaintiff would "fit right in with working women in China who worked in the fields with sleeves and pants rolled up."

Mocking of an employee's accent is not actionable racial harassment and is insufficient to sustain a claim of racial harassment. . . . Such comments would not affect a reasonable person's work performance nor would a reasonable person perceive such a work environment as being hostile.⁴⁰⁸

The justification of the remarks clearly devalues the Asian woman's experience. It is not clear from the court's analysis exactly how many discriminatory comments a plaintiff would have to endure in order to be "affected."⁴⁰⁹ If the court had used an intersectional framework, it might not have dismissed the incidents so lightly. Rather, the comments would have been essential in the examination of a multi-factored claim.⁴¹⁰

Looking at the varying outcomes of *Chaddah*, *Lee*, *Liao* and *Lim*, a future court has virtually no guidance in addressing discrimination facing Asian women.⁴¹¹ These decisions do not provide any insight into understanding the complex interaction of elements involved in an Asian woman's experience.⁴¹² Asian women experiencing various simultaneous forms of discrimination are thus left with inadequate remedies under these interpretations and applications of Title VII.⁴¹³

⁴⁰⁶ See *Chaddah*, 65 Empl. Prac. Dec. (CCH) ¶ 81,314.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ Cf. Crenshaw, *supra* note 2, at 140.

⁴¹¹ See *Chaddah*, 65 Empl. Prac. Dec. (CCH) ¶ 43,296; *Lee*, 1988 WL 105887; *Liao*, 658 F. Supp. 1554; *Lim*, 430 F. Supp. 802.

⁴¹² See *Chaddah*, 65 Empl. Prac. Dec. (CCH) ¶ 43,296; *Lee*, 1988 WL 105887; *Liao*, 658 F. Supp. 1554; *Lim*, 430 F. Supp. 802.

⁴¹³ See *Jefferies*, 615 F.2d 1025; *Lam*, 40 F.3d 1551.

B. *Pleading and Arguing the Intersectional Claim*

Clearly, intersectional claims will not succeed unless they are properly pleaded and well-argued. Plaintiffs' attorneys must be sure to recognize the intersectionality of factors and must not limit the description of their clients' reality by channeling discrimination into a single category when it most likely cannot be fully attributed to race, sex or national origin exclusively.⁴¹⁴ If attorneys present claims based on a single factor they will encourage courts to evaluate their clients under standards that oversimplify their experiences.

The *Lam* case is the best model for Asian women's intersectional claims thus far because it recognizes the existence of discrimination specifically based on race, sex and national origin in combination.⁴¹⁵ For Asian women, this is an important model to follow because discussions of intersectionality theory have focused primarily on the combination of race and sex.⁴¹⁶ National origin discrimination is an essential factor to consider in Asian women's cases because of the tendency to confuse or equate race and national origin.⁴¹⁷ The idea of "foreignness" that accompanies an Asian appearance may be overlooked if the national origin factor is excluded.

The Ninth Circuit in *Lam* and the Fifth Circuit in *Jefferies* have been forerunners in accepting the concept of intersectional claims and have carefully highlighted the unique experiences of women of color.⁴¹⁸ Attorneys should follow the *Jefferies* and *Lam* models when pleading and arguing in an effort to place intersectionality theory within the common understanding of Title VII. If other courts, such as the one in *DeGraffenreid*, choose to reject the concept of an intersectional claim, a Supreme Court ruling on intersectionality under Title VII would be necessary to protect the interests of multi-factored claimants. In the absence of a statutory amendment explicitly making the factors listed in Title VII inclusive, Asian women are left with no sure means of redress for intersectional violations of Title VII.

⁴¹⁴ See *Hong v. Children's Memorial Hosp.*, 993 F.2d 1257, 1259 (7th Cir. 1993) (Korean American woman who experienced intersectional discrimination filed Title VII claim based on national origin discrimination only).

⁴¹⁵ See *Lam*, 40 F.3d at 1554, 1562.

⁴¹⁶ See, e.g., *Crenshaw*, *supra* note 2, at 140; *Winston*, *supra* note 7, at 777; *Scarborough*, *supra* note 16, at 1457.

⁴¹⁷ See *Perea*, *supra* note 21, at 833.

⁴¹⁸ See *Lam*, 40 F.3d at 1562; *Jefferies*, 615 F.2d at 1032.

The *Lam* and *Jefferies* opinions have demonstrated that once judges come to understand intersectional claims in light of the purpose of Title VII, they become more amenable to the logical conclusion that it is impossible to separate the factors that comprise one's identity.⁴¹⁹ These cases incorporate intersectionality theory to aid understanding of the uniqueness of Asian women's employment experiences.⁴²⁰ Advocates can use these models to expand existing frameworks to account for the totality of Asian women's identities.

VII. CONCLUSION

The multiple factors that comprise an Asian woman's identity are impossible to separate—so too are elements of discrimination that occur precisely because one is an Asian woman. For Asian women, the intersection of race, gender and national origin often defines acts of discrimination in the workplace. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of various factors including race, sex and national origin. The difficulty that courts have had in interpreting combined claims may be due in part to historical prejudice, stereotypical misperceptions or the challenging nature of understanding and applying Title VII to a complex claim. In order to break down racial, ethnic and gender barriers, there is a great need to comprehend such claims and provide adequate redress for violations of the statute. Advocates for Asian women, as well as all women of color, must strive to expand traditional paradigms in applying Title VII to truly achieve the protection it was intended to provide.

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⁴¹⁹ See *Lam*, 40 F.3d at 1562; *Jefferies*, 615 F.2d at 1032.

⁴²⁰ See *Lam*, 40 F.3d at 1562; *Jefferies*, 615 F.2d at 1032.