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An Invisible Group. Asian American Women and the Invisible “Bamboo Glass Ceiling”

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I. Introduction

I write this in the wake of the news of yet another death, another murder, of an Asian American woman in America, Christina Yuna Lee.¹ I am saddened and numb as this again reminds me of the cruelty and brutality that has faced the Asian American community, especially during the pandemic. This attack comes not even a month after a man pushed Michelle Go, a 40-year-old Asian American woman off a subway platform to her death.² These attacks come following a record number of hate crimes against Asian Americans throughout the country.³ These attacks remind me and remind the Asian community that we are not the model minority and have never been the model minority.⁴

What further saddens me about the targeted hate is out of all the hate crimes against Asians across the United States, nearly two-thirds of them have been against women.⁵ Asian American women in the United States are particularly vulnerable and continue to be in the twenty-first century. This vulnerability stems from the perpetual stereotypes Asian women have faced from the very beginning since coming to the United States.⁶ We are seen but invisible. This is shown by the attacks on Asian American women as well as the discrimination in the workplace Asian

¹ Ashley Southall, Ali Watkins, & Jeffrey E. Singer, *Screams That 'Went Quiet': Prosecutors Account of Chinatown Killing*, N.Y. TIMES (Feb. 14, 2022), <https://www.nytimes.com/2022/02/14/nyregion/suspect-christina-yuna-lee-murder.html>.

² Tracy Tulley & Ashley Southall, *Woman Pushed Onto Subway Tracks 'Never Saw' Her Attacker*, N.Y. TIMES (Jan. 19, 2022), <https://www.nytimes.com/2022/01/16/nyregion/michelle-go-man-pushes-woman-subway.html>.

³ The Atlanta spa shootings which left 8 dead are a prime example of an increase of anti-Asian sentiment. *8 Dead in Atlanta Spa Shootings, With Fears of Anti-Asian Bias*, N.Y. TIMES (MAR. 26, 2021), <https://www.nytimes.com/live/2021/03/17/us/shooting-atlanta-acworth#the-suspect-in-the-spa-attacks-has-been-charged-with-eight-counts-of-murder>.

⁴ Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes* 36 WM. & MARY L. REV. 1, 71 (the premise of the model minority "is that minorities who work hard, have certain values, and are reasonably intelligent can be successful, the message to minorities and others who are successful is that they are lazy, their values are misplaced, or they do not have the inherent capabilities to succeed.")

⁵ Erin Donaghue, *Nearly two-thirds of anti-Asian hate incidents reported by women, new data shows*, CBS NEWS (May 7, 2021), <https://www.cbsnews.com/news/Asian-American-hate-incidents-women-disproportionately-impacted/> (Cynthia Cho, co founder Stop AAPI Hate, stated "A disproportionate number (64.8%) of incidents reported to Stop AAPI Hate were reported by women").

⁶ See *infra* Part IV: History of Asian Women in America

American women deal with due to historical stereotypes.⁷ This invisibility continues even to this day when even a big media outlet, ABC News, mistakenly identifies a New York City Assembly candidate and activist with Michelle Go, the same Asian American woman murdered on the subway platform.⁸

As an Asian American female growing up in a white community, I have become used to the questions “Where are you from? Where are you really from?” as well as the constant confusion between myself and another Asian student in my law school. I have gotten used to others assuming I am good at math and science by the way I look. I have gotten used to the “seemingly harmless” comments from people about how I am “much more outgoing and louder than I look” because I look “demure and quiet”. I am very used to being forgotten in discussions of minority and diversity.⁹

The term “Asian American” was originally coined by civil rights activist Yuji Ichioka in the late 1960s to unify the myriad of different Asian ethnic groups and create a unified front.¹⁰ Now the term is used to describe any person who is of Asian descent and has been used to lump groups from different Asian countries into one singular group despite their different immigration histories, socioeconomic status, cultural values and beliefs, and other differences.¹¹ This singular term has created a monolith that ignores the fact that Asian Americans come from a variety of

⁷ See *infra* Part V: Stereotypes of Asian American Women Throughout History and Media

⁸ Akemi Tamanaha, *ABC Apologizes for Mistakenly Identifying Activist as Michelle Go*, ASAM NEWS (Feb. 22, 2022), <https://asamnews.com/2022/02/22/abc-apologizes-for-mistakenly-identifying-activist-as-michelle-go/>.

⁹ Juan Perea, *The Black-White Binary Paradigm of Race*, in CRITICAL RACE THEORY: THE CUTTING EDGE 458-59 (Richard Delgado & Jean Stefancic, eds. 3rd ed. 2013) (defining the black-white binary paradigm as the conception of race in America consists in the context of two primary racial groups, the black and the white and dictates that all other racial identities that exist in America are best understood through this black-white binary paradigm).

¹⁰ Kristy Y. Shih et al., *Impacts of the Model Minority Myth on Asian American individuals and Families: Social Justice and Critical Feminist Perspectives*, 11 J. FAM. THEORY & REV., 412, 412 (2019).

¹¹ UNITED STATES CENSUS BUREAU, ABOUT THE TOPIC OF RACE, (2021), <https://www.census.gov/topics/population/race/about.html> (The U.S. Census Bureau defines Asian as “A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent”).

different ethnicities and socioeconomic backgrounds.¹² By merging all these groups together, “Asian Americans” are stereotypically viewed by the general public in America as the “model minority”.¹³ The term “model minority” ignores that despite having the highest educational attainment, there is very limited upward mobility for Asian Americans¹⁴ and the group has the lowest return on investment compared to other ethnic groups.¹⁵ More so than ignoring the differences between all the different groups, the term “model minority” ignores the different challenges and discrimination that Asian American women must face in society and the workplace. It ignores that even despite all this, in times of financial crisis anti-Asian sentiment, as well as hate crimes rise, and the most vulnerable are Asian American women.¹⁶

This paper will discuss a topic not properly discussed, otherwise invisible in discussions of minorities in the workplace, the topic of Asian American women, specifically East Asian American women¹⁷, in the workplace, and the discrimination they face.¹⁸ This paper argues that as a result of stereotypes placed on Asian American women, Asian American women face discrimination, not individually as an Asian or as a woman, but rather, as Asian women. Therefore, courts should analyze Title VII employment discrimination claims brought by Asian

¹² For example, Burmese and Mongolians experience significantly higher poverty rates and lower annual household income than the general population. See Abby Budiman & Nail G. Ruiz, *Key Facts about Asian Americans, a diverse and growing population*, PEW RESEARCH CENTER (Apr. 29, 2021), <https://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-asian-americans/>.

¹³ See *infra* Part II, Section A: Introducing the Model Minority

¹⁴ See *infra* Part III: The Glass and Bamboo Ceiling

¹⁵ Kelsey Nara Bigelow, *The Role of Stereotypes and Intergroup Bias in Promotion Evaluations of Asian Pacific American Associates in U.S. Law Firms* 3-4, 9-10, 25-27 (May 2012) (unpublished M.A. thesis, Humboldt State University).

¹⁶ See Donaghue, *supra* note 5.

¹⁷ East Asia includes China, Hong Kong, Japan, Macau, Mongolia, Korea, and Taiwan. *East Asia*, ASIA SOCIETY (2022), <https://asiasociety.org/countries-regions/east-asia>.

¹⁸ Although I would like to discuss South Asians as well and the social disparities between the two groups, this paper will be limited in scope. Future papers should look to differentiating the two as both groups face different discriminations and different realities even though they are usually categorized together under the umbrella term Asian American. Future papers should also look to the cultural backgrounds of Asian women and how such cultural differences also are a factor of why Asian women do not face upward mobility in the job industry.

American women through an intersectional lens¹⁹ that recognizes their unique, multiple, and inseparable identities.

This paper proceeds as follows. Part II will focus on what the term model minority is, how it is a myth, and the rising Anti-Asian sentiment and vulnerability of Asian American women in particular. Part III will introduce and discuss the commonly known term the Glass Ceiling²⁰ and the less commonly known term the Bamboo Ceiling.²¹ Part IV will focus on the history of Asian immigration as it pertains to Asian women. Part V will highlight the many tropes and stereotypes surrounding Asian women and the detriment of such stereotypes for Asian American women in the workplace. Part VI will discuss how the black-white paradigm negatively affects in particular Asian women and the underrepresentation of Asian American women in leadership positions. Part VII will discuss the concept of intersectionality, relevant employment discrimination claims brought by Asian American women, how courts have treated intersectional claims, and how when Asian American women bring Title VII employment discrimination claims, courts should take an intersectional approach and consider how being both Asian and a woman effect such a claim.

The historical stereotypes perpetuating certain standards on Asian women combined with the model minority myth have not allowed Asian American women to successfully bring many Title VII employment discrimination claims that fully represent the discrimination they face being both Asian and women. This paper argues that when courts analyze Title VII employment discrimination claims brought by Asian American women, courts should analyze the claims with

¹⁹ See *infra* Part VII, Section A: Concept of Intersectionality

²⁰ Neil M. Browne & Andrea Giampetro-Meyer, *Many Paths to Justice: The Glass Ceiling, The Looking Glass, and Strategies for Getting to the Other Side*, 21 HOFSTRA LAB. & EMP. L.J. 61, 63-64 (2003).

²¹ JANE HYUN, *BREAKING THE BAMBOO CEILING: CAREER STRATEGIES FOR ASIANS* (2005) (the term “bamboo ceiling” was originally coined by Jane Hyun referring to the invisible barriers that Asians face when achieving positions of leadership in the United States).

an intersectional lens, specifically using an “aggregate” or “totality” framework²² which fully encompasses the struggles Asian American women face in the workforce.

II. The Concept of “Asian American”

A. *Introducing the Model Minority*

Throughout history and very much prevalent in today’s society, Asian Americans have been consistently referred to as the “model minority”²³, a term used for minority groups who have achieved a high level of success in both education and finance in the United States.²⁴ The term “model minority stems from two articles published in 1966.²⁵ The first article was published in New York Times Magazine at the beginning of the year and was entitled, “Success Story, Japanese-American Style.”²⁶ That same year to close off the year, the U.S. News and World Report published an article entitled, “Success Story of One Minority in U.S.”²⁷ The focus of these two articles was to show that Japanese and Chinese Americans were “model minorities” because they had close family ties, were law-abiding, and focused on education.²⁸ Multiple articles subsequently appeared highlighting the “successes” of Asian American groups, explaining the successes as being due to cultural emphasis on hard work, strong family values, and genetic superiority.²⁹

²² See *infra* Part VII, Section E: Courts that Have Accepted Intersectional Claims

²³ Andrew Sullivan, *Why Do Democrats Feel Sorry for Hillary Clinton*, NYMAG (Apr. 14, 2017), <https://nymag.com/intelligencer/2017/04/why-do-democrats-feel-sorry-for-hillary-clinton.html> (An article in 2017 discussing how everything is not always racist due to the idea that despite the discrimination Asian Americans have faced they are “among the most prosperous, well-educated, and successful ethnic groups in America.”).

²⁴ SAPNA CHERYAN & GALEN BODENHAUSEN, ROUTLEDGE COMPANION TO RACE & ETHNICITY 173 (Stephen M Caliendo & Charlton D. McIlwain eds., 1st ed. 2011).

²⁵ Yuko Kawai, *The Dialectic of the Model Minority and the Yellow Peril*, 16 HOW. J. OF COMM’N 109, 113 (2005).

²⁶ William Peterson, *Success Story, Japanese-American Style*, N.Y. TIMES, Jan. 9, 1966, at 180.

²⁷ *Success Story of One Minority Group in U.S.*, U.S. NEWS & WORLD REP., Dec 26, 1966, at 6.

²⁸ Yuko Kawai, *Revisiting the 1966 Model Minority Myth: A Narrative Criticism of its Textual Origins*, 1 KALEIDOSCOPE: A GRADUATE J. OF QUALITATIVE COMM’N RSCH. 50, 50-69 (2003).

²⁹ See CHERYAN & BODENHAUSEN, *supra* note 24.

It was no accident or coincidence that the idea of the “model minority” was introduced during the Civil Rights Movement.³⁰ It was created to compare Asian Americans to other minority groups. It further legitimized the oppression other minority groups face and compared them to Asian Americans, further saying “all it takes is hard work, if the Asians can do it so can you, you are just being lazy”. As a result of this comparison, it pitted other minorities against Asian Americans.³¹

This concept of the model minority is a complete myth, negatively affecting Asian American women even more so, and continues to persist even in current society today. Asian Americans are forgotten in talks of minority discussions because there is a perception of wealth and professional success put on Asian Americans.³² And rightly so, compared to other minority groups, Asian Americans as a whole have the highest educational attainment³³, highest median income³⁴, and lowest unemployment rate.³⁵ Looking at such numbers and data alone suggests that Asians are doing extremely well in America, even more so than some whites. However, looking at such data exclusive of the context is extremely detrimental to the Asian community and feeds into the model minority stereotype. This data alone does not take into account multiple factors like how a great majority of Asian Americans live in areas like New York, California, and Hawaii which generally have a higher cost of living, higher than the national average, which

³⁰ Sumi K Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 185 (1997).

³¹ Claire Jean Kim, *The Racial Triangulation of Asian Americans*, POL. & SOC’Y, 27, 105–138 (1999).

³² See generally Okiyoshi Takeda, *A Forgotten Minority? A Content Analysis of Asian Pacific Americans in Introductory American Government Textbooks*, 48 POL. SCI. & POL. 430, 430-39 (2015).

³³ *U.S. Census Bureau Releases New Educational Attainment Data*, U.S. CENSUS BUREAU, CB20-TPS.09, (March 30, 2020), <https://www.census.gov/newsroom/press-releases/2020/educational-attainment.html>.

³⁴ *Income and Wealth in the United States: An Overview of Recent Data*, PETER G. PETERSON FOUNDATION, (Nov. 17, 2021), <https://www.pgpf.org/blog/2021/11/income-and-wealth-in-the-united-states-an-overview-of-data>.

³⁵ U.S. DEPARTMENT OF LABOR, WOMEN’S BUREAU, UNEMPLOYMENT RATES, (2020), <https://www.dol.gov/agencies/wb/data/latest-annual-data/employment-rates>.

constitutes higher incomes.³⁶ This data also does not take into account that in most Asian families, there are generally more people working compared to white families.³⁷ Despite Asian Americans having a higher median income, 10.1 percent of Asian Americans lived in poverty as compared to 8.1 percent of White, non-Hispanic Americans.³⁸ Further, although Asians have the highest educational attainment, they have a low return on investment as on average, Asian Americans only earn comparable incomes to whites.³⁹ This statistic also hides the fact that Asian Americans are more likely to have no high school diploma.⁴⁰ Looking at certain statistics that show Asian success financially and in education without context continues to perpetuate the model minority stereotype and ignores all the hardship and discrimination Asian Americans have gone through and continue to go through.

B. Rise of Female Asian American Hate Crimes

Since the pandemic has begun there have been an increased number of attacks against Asian Americans, especially against women. According to the Center for the Study of Hate & Extremism, anti-Asian hate crimes have risen 165 percent in the first quarter of 2021 as compared to 2020.⁴¹ The most recent National Report from Stop AAPI Hate highlighted that from March 19, 2020, to September 30, 2021, a total of 10,370 hate crimes against AAPI persons were reported to them, and of those hate crimes reported AAPI women made up 62 percent of

³⁶ RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS*, 475 (1st ed. 1987).

³⁷ *Id.*

³⁸ Dedrick Asante-Muhammad & Sally Sim, *Racial Wealth Snapshot: Asian Americans and the Racial Wealth Divide*, NATIONAL COMMUNITY REINVESTMENT COALITION (2020), <https://ncrc.org/racial-wealth-snapshot-asian-americans-and-the-racial-wealth-divide/>.

³⁹ See Takaki, *supra* note 36.

⁴⁰ *New American Economy Research Fund, Examining Educational, Workforce, and Earning Divides in the Asian American and Pacific Islander Community*, NEW AMERICAN ECONOMY RESEARCH FUND (May 13, 2021), <https://research.newamericaneconomy.org/report/aapi-examine-educational-workforce-earning-divides/> (12.2% of all AAPI having no high school diploma versus 11.4% for the U.S. Average).

⁴¹ BRIAN LEVIN, CTR. STUD. HATE & EXTREMISM, REPORT TO THE NATION: ANTI-ASIAN PREJUDICE & HATE CRIME, <https://www.csusb.edu/sites/default/files/Report.pdf>.

those reports.⁴² This rise in anti-Asian sentiment comes as no surprise as in times of financial crisis there is a long history of brutal bigotry against Asian Americans.⁴³ This can be stemmed not only from the stereotype that Asian people are the “model minority” but also because of the continuing stereotypes placed on Asians, specifically women, generally.

III. The Glass and Bamboo Ceiling

To clearly understand the challenges Asian American women face in the workplace, one must first understand the two distinct barriers Asian American women must continuously overcome in attempting to rise to leadership positions. Many in this day and age know or have heard about the “glass ceiling”.⁴⁴ It is a politically created term representing the invisible ceiling or barrier that society has created which prevents women from attaining higher-level positions in the job market.⁴⁵ In the news, one hears about how certain women are breaking the “glass ceiling.” More recently the media and general public discussed the end or shattering of the glass ceiling when Hillary Clinton became the first woman nominated by a major party for president.⁴⁶

In the same vein, where there has been extensive research and discussion about the glass ceiling, a similar yet less discussed concept is the “bamboo ceiling”.⁴⁷ Rather than a barrier or ceiling for women, the bamboo ceiling is the same type of societal barrier for Asian Americans which prevents them from attaining higher-level and leadership positions in the workplace.⁴⁸

⁴² AGGIE J. YELLOW HORSE, ET AL., STOP AAPI HATE, STOP AAPI HATE NATIONAL REPORT, (2021), <https://stopaapihate.org/national-report-through-september-2021/>.

⁴³ See Liz Mineo, *The scapegoating of Asian Americans*, THE HARVARD GAZETTE (Mar. 24, 2021), <https://news.harvard.edu/gazette/story/2021/03/a-long-history-of-bigotry-against-asian-americans/>.

⁴⁴ See Browne & Giampetro-Meyer, *supra* note 20.

⁴⁵ *Id.*

⁴⁶ *Breaking the ultimate glass ceiling*, CNN (Jul. 26, 2016), <https://www.cnn.com/2016/06/07/opinions/womens-voices-on-hillary-clinton-clinching-nomination-roundup/index.html>.

⁴⁷ See Hyun, *supra* note 21

⁴⁸ See Hyun, *supra* note 21, at 46-47.

Although Asian Americans make up about 7 percent of the U.S. population⁴⁹, from the 2018 U.S. Equal Employment Opportunity Comm'n (EEOC) data, Asians make up 13 percent of America's professionals.⁵⁰ Looking purely at this statistic, which shows an oversaturation of Asian Americans as professionals in the workplace, it perpetuates the idea that Asians are the "model minority" and the idea that Asian Americans do not suffer from poverty or discrimination. Despite the overrepresentation of Asians compared to other minorities in the workplace, this percentage continues to dramatically decrease the higher up in management one looks. Asians make up 7.7 percent of first/mid-level officials and managers and 6.1 percent of executive/senior-level officials and managers.⁵¹ Asian Americans in 2020 only made up 4.6 percent of corporate board director seats at Fortune 500 companies.⁵²

In the legal industry, this trend of limited upward mobility for Asian Americans persists. In 2012 while almost half of the minority firm associates were Asian American, they "ha[d] the lowest conversion rate from associate to partner of *any minority group*."⁵³ Although Asians are oversaturated in law firms in comparison to other minorities, they still have the lowest conversion rate.⁵⁴ Although Asians made up 12.12 percent of Associates in 2020, they only made up 4.08 percent of partners, an 8.04 percent difference.⁵⁵ In 2015, 34 percent of Asian American

⁴⁹ Abby Budiman & Neil G. Ruiz, *Key Facts about Asian Americans, a diverse and growing population*, PEW RESEARCH CENTER (Apr. 29, 2021), <https://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-Asian-Americans/>.

⁵⁰ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N (EEOC), 2018 JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY, (2018), <https://www.eeoc.gov/statistics/employment/jobpatterns/eeo1>.

⁵¹ *Id.*

⁵² ALLIANCE FOR BD. DIVERSITY & DELOITTE, MISSING PIECES REPORT: THE BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON FORTUNE 500 BOARDS, (2020), http://www.theabd.org/Missing_PiecesWomenandMinoritiesonFortune500Boards.pdf.

⁵³ Peggy Li, *Hitting the Ceiling: An Examination of Barriers to Success for Asian American Women*, 29 BERKELEY J. GENDER L. & JUST. 140, 143 (2014).

⁵⁴ NATIONAL ASSOCIATION FOR LAW PLACEMENT, INC., REPORT ON DIVERSITY IN U.S. LAW FIRMS, (2020), https://www.nalp.org/uploads/2020_NALP_Diversity_Report.pdf (Table 2: Partner and Associate Demographics at Law Firms 2009-2020).

⁵⁵ *Id.*

law students were enrolled in the top quintile of schools ranked by U.S. News & World Report as compared to only 21 percent of white students, 15 percent of African American students, and 14 percent of Hispanic students.⁵⁶ Although Asian Americans comprised 7.05 percent of all attorneys, the Vault MCCA survey of 2015 data showed that Asians only held 2.09 percent of all seats on executive management committees, 2.32 percent of seats on partner review committees, and 3.78 percent of seats on associate review committees.⁵⁷ In comparison, other minority groups and whites were better represented in such leadership roles relative to their respective numbers in the overall firm population.⁵⁸

These trends show a common pattern. All these reports, statistics, and trends suggest that “Asian Americans are not promoted at the same rate as other minority groups”⁵⁹ and receive “the lowest return on education of all ethnic groups.”⁶⁰ To understand the reason for the limited upward mobility of Asian Americans, specifically focusing on Asian women in this paper, despite statistics showing high educational attainment, this paper looks to the history of Asian Women in America in creating stereotypes that negatively affect Asian women in the workplace.

IV. History of Asian Women in America

To understand the stereotypes that negatively affect Asian American women in the job industry, this paper seeks to outline the history of the immigration of Asian women and how certain stereotypes were created and continue to be prevalent in today’s society. Throughout

⁵⁶ Eric Chung et. al., *A Portrait of Asian Americans in the Law*, YALE L. SCH. & NAT’L ASIAN PAC. AM. BAR ASS’N (2017).

⁵⁷ MINORITY CORP. COUNSEL ASS’N & VAULT, 2016 VAULT/MCCA LAW FIRM DIVERSITY SURVEY REPORT 11, 23 (2016), http://www/mcca.com/_data/global/downloads/research/reports/VaultMCCA_Survey-2016-v01.pdf (Table 1).

⁵⁸ *Id.*

⁵⁹ Kelsey Nara Bigelow, *The Role of Stereotypes and Intergroup Bias in Promotion Evaluations of Asian Pacific American Associates in U.S. Law Firms* 3-4, 9-10, 25-27 (May 2012) (unpublished M.A. thesis, Humboldt State University).

⁶⁰ *Id.*

history, Asian women have continuously had trouble immigrating into the United States. Typically, in thinking and discussing Asian immigration into the United States the first thing that pops into people's minds is the Chinese Exclusion Act.⁶¹ Many are not aware of the Page Act which was enacted in 1875 and predated the Chinese Exclusion Act.⁶² The Page Act essentially prohibited the recruitment of persons from "China, Japan, or any Oriental country" into the United States as unfree laborers and women brought for "immoral purposes".⁶³ In layman's terms, the act banned the immigration of women from "China, Japan, or any Oriental country" by creating a stereotype and image that all the women coming from such countries solely came for prostitution.⁶⁴ The law further targeted Chinese women because they were required to have a certificate proving their virtue before coming to America⁶⁵ and when arriving in the United States they had to prove to the port commissioner that they were not "imported for the purposes of prostitution."⁶⁶

This Act came as a result of an influx of Chinese laborers in the 1850s and the political climate which resulted at the time.⁶⁷ Chinese laborers worked in all different industries working in the gold mines, agriculture, factory, and building railroads.⁶⁸ Following the large influx of Chinese laborers, who made up 90 percent of the workforce and worked for longer and less than

⁶¹ Stewart Chang, *Feminism in Yellowface*, 38 HARV. J.L. & GENDER 235, 242 (2015).

⁶² 1875 Page Act, ch. 141. Sess. II, 477.

⁶³ *Id.*

⁶⁴ Page Law 2.

⁶⁵ Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 698 (2005).

⁶⁶ Page Law 5.

⁶⁷ Duchess Harris & Kate A Conley, *The Chinese Exclusion Act and Its Relevance Today* (Core Library, an imprint of Abdo Publishing) (2020), <https://web.s.ebscohost.com/ehost/detail/detail?vid=0&sid=18877d60-ce2a-424f-af01-6e3fb5b36b06%40redis&bdata=JkF1dGhUeXBIPXNoaWlmc2l0ZT1laG9zdC1saXZl#AN=2250750&db=e700xna>.

⁶⁸ Office of the Historian, *Chinese Immigration and the Chinese Exclusion Acts*, MILESTONES, 1866-1898 <https://history.state.gov/milestones/1866-1898/chinese-immigration> (last visited Feb. 24, 2022).

white workers, anti-Chinese sentiment dramatically increased leading to legislation that limited future immigration of Chinese workers, the first of which was the Page Act.⁶⁹

Although on its face the goal of the 1875 Page Act was to only prevent prostitutes from coming into the United States, in reality, it prevented all Chinese women from coming to the United States.⁷⁰ When enacted there was no specific standard to determine whether a woman was a prostitute or not.⁷¹ Immigration officials could deny women the necessary paperwork to enter the country merely if the prospective Chinese woman migrant had made a contract for “lewd or immoral purposes.”⁷² Under the Act, Chinese women coming into the United States were subjected to invasive and humiliating interrogations⁷³ and medical examinations.⁷⁴ The passage of this act in combination with humiliating and discriminatory exams resulted in a major decline in Chinese women immigrating into the United States so much so that between 1880 and 1882, although 50,000 Chinese men immigrated from China, only 550 Chinese women immigrated to America.⁷⁵ Specifically, between 1870 and 1880 the population of Chinese women dropped from 6.4 percent to 4.6 percent.⁷⁶

⁶⁹ ERIKA LEE, *AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES* 153 (1st ed. 2019).

⁷⁰ George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women under the Page Law, 1875-1882*, 6 J. OF AM. ETHNIC HIST. 28, 28-46 (Fall 1986).

⁷¹ Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 699 (2005) (citing George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women under the Page Law, 1875-1882*, 6 J. OF AM. ETHNIC HIST. 28, 47 (Fall 1986).

⁷² *Id.*

⁷³ EITHNE LUIBHÉID, *ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER* 41-43 (2002) (where Asian women had to answer inquiries multiple times such as: Do you intend to live a virtuous life in the United States? Do you go to the United States for the purposes of prostitution? Are you a virtuous woman? And provide details specifically related to her sexual “virtue”.)

⁷⁴ *Id.* at 45-46 (where data had to be accompanied by photographs or other techniques like Bertillonage, a system of taking nine measurement of different body parts and recording such measurements in file cards).

⁷⁵ NYHistory, *Page Act, 1875, WOMEN & THE AMERICAN STORY*, <https://wams.nyhistory.org/industry-and-empire/expansion-and-empire/page-act-1875/> (last visited Feb. 17, 2022).

⁷⁶ See Peffer, *supra* note 70, at 29.

Following the Page Act was the better-known Chinese Exclusion Act which effectively halted all Chinese immigration from 1882 till about 1994.⁷⁷ The federal Chinese Exclusion Act came from the heeded calls of Westerners, specifically Californians, to protect western workers from the so-called “Chinese invasion”.⁷⁸ The Chinese Exclusion Act stemmed from a statewide meeting in California about Chinese immigration where arguments against Chinese immigrants ranged from Chinese female prostitutes causing “moral and racial pollution” through their interracial liaisons to diseases Chinese people allegedly carried which were “infectious and horrible.”⁷⁹ The Chinese Exclusion Act was followed by a long history of continued systematic governmental exclusion of Asians from immigrating into the United States.⁸⁰

Put into perspective, although the Chinese Exclusion Act effectively limited Asian immigration into America, this Act in combination with the Page Act detrimentally affected Asian women even more. In 1870, merely 7.2% of the Chinese in America were women, which decreased to 3.6% in 1890.⁸¹ In 1900 Japanese women made up merely 4% of the Japanese population on the U.S. mainland and merely 12.6% in 1910.⁸² In 1920, of the Koreans in America, Korean women only made up 25% of the Korean population and 34% in 1930.⁸³ These varying stereotypes that promulgated America about the Asian population throughout history continue to carry on even in today’s society.

⁷⁷ See Chang, *supra* note 61.

⁷⁸ See Harris & Conley, *supra* note 67, at 17-22.

⁷⁹ California Senate, Committee on Chinese Immigration, *Chinese Immigration: The Social, moral, and Political Effect of Chinese Immigration. Report of the California State Senate of the Special Committee on Chinese Immigration*, 29, 32 (1878).

⁸⁰ Asian immigrants continued to be excluded with the enactment of the Immigration Act of 1917 which banned immigration from virtually all parts of Asia. Immigration Act, ch. 29, § 3, 39 Stat. 876 (1917)(repealed 1952); see also Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN’S L.J. 79, 88-89 (1998).

⁸¹ SUCHENG CHAN, ASIAN AMERICANS: AN INTERPRETIVE HISTORY 45, 104 (1991).

⁸² *Id.*

⁸³ *Id.*

V. Stereotypes of Asian American Women Throughout History and Media

Starting from the Page Act and throughout history, there have been many stereotypes about Asian American women that have persisted and continue to affect the workplace and how Asian American women are perceived. This section will focus on the three most common stereotypes about Asian women and about how those stereotypes proscribe certain qualities onto Asian women, qualities deemed unsuitable for leaders in the United States.

A. *Dragon Lady Stereotype*

This stereotype originates from the Asian female villain, the “Dragon Lady”, in the *Terry and the Pirates* comic strip who is considered beautiful, seductive, and evil.⁸⁴ The term is most commonly used to describe East Asian women who are considered “deceitful, domineering, cold, calculating, and mysterious.”⁸⁵ One such example was the 1924 film, *The Thief of Baghdad*, where a Chinese American actress played a handmaid who used treachery and deceit to help the villain win the hand of the princess.⁸⁶ A common theme of this popular trope is the fact that “dragon ladies” use their sexuality to seduce men to do their bidding or to further their goals.⁸⁷ A more modern example of this common trope is from the show *Ally McBeal* where Lucy Liu, a Chinese-American actress, played a cold and seductive lawyer.⁸⁸ This historically created stereotype negatively impacts the perception of Asian American women in the workplace as “dragon ladies” are considered demonically aggressive, conniving, and predatory.⁸⁹ According to this stereotype, Asian women are belligerent, cunning, and untrustworthy which translates

⁸⁴ Milton Caniff, TERRY AND THE PIRATES

⁸⁵ *Id.*

⁸⁶ THE THIEF OF BAGHDAD (United Artists, London Films 1940).

⁸⁷ See Caniff, *supra* note 84.

⁸⁸ *Ally Mcbeal* (FOX television broadcast Sept. 8, 1997).

⁸⁹ See Cho, *supra* note 3030, at 184-85.

directly to the lack of Asian American women in positions of power as these qualities are looked down upon in leadership positions.

B. Suzie Wong

The Suzie Wong trope stems from the 1960 film *The World of Suzie Wong*⁹⁰, where Suzie Wong, played by Asian actress Nancy Kwan, is an Asian sex worker who falls in love with a white man and leaves her life as a prostitute to pursue a relationship with the white man.⁹¹ This idea was created through the public perception of Asian women being mail-order brides.⁹² This trope falls in line with Asian women's immigration where Asian women were able to come into the United States by marrying American servicemen with the passage of the War Brides Act in 1945.⁹³ This idea that Asian women coming to America through marriage created this stereotype of Asian femininity in contrast to dominant males. Due to the history of American military involvement in Asia, many Asian brides were assumed to have been prostitutes further feeding into the stereotype.⁹⁴ This trope continues to sexualize Asian American women and continues to regard them as foreign which has detrimental effects on their perceptions by employers.

C. Lotus Flower and Madame Butterfly

The idea of the lotus flower is best portrayed in the Hollywood movie *Memoirs of a Geisha*⁹⁵, adapted from the historical fiction book of the same name by white male author Arthur

⁹⁰ THE WORLD OF SUZIE WONG (Paramount Pictures 1960).

⁹¹ *Id.*

⁹² See *Asian Mail Order Brides: Is This the Way to a Happy Marriage With an Asian Wife?*, SFWEEKLY (Aug. 4, 2021), <https://www.sfweekly.com/sponsored/asian-mail-order-brides-is-this-the-way-to-a-happy-marriage-win-an-asian-wife/>; *Asian Mail Order Brides – How to Find Asian Girl for Marriage*, THE WORLD FINANCIAL REVIEW (Dec. 4, 2021), <https://worldfinancialreview.com/asian-mail-order-brides-how-to-find-asian-girl-for-marriage/> (Examples of modern day articles which continue to perpetuate this stereotype).

⁹³ See War Brides Act, Pub. L. No. 79-271, 59 Stat. 659 (1945).

⁹⁴ See Chang, *supra* note 61, at 243.

⁹⁵ MEMOIRS OF A GEISHA (Columbia Pictures 2005).

Golden.⁹⁶ The movie depicts the geisha as the men’s vision of an ideal woman: beautiful, disciplined, demure, the pinnacle of femininity.⁹⁷ This again creates a negative stereotype of Asian American women in the workplace as “lotus blossoms” are perceived to be passive, domesticated, and feminine, qualities not fit for leadership positions.⁹⁸ The Madame Butterfly trope, from the three-act opera *Madama Butterfly*, depicts Asian women as being submissive and suffering.⁹⁹ This idea of Asian women being coquettish, flirtatious, and submissive however came during the mid-20th century, as American troops who were stationed in Eastern Asia treated the women as such sexual subtypes.¹⁰⁰

These depictions of Asian women in the media have created a stereotype that Asian women are either on one end of the spectrum, domineering, promiscuous, and cunning, or on the other end of the spectrum submissive, soft-spoken, and mild-mannered—qualities unsuitable for American leadership positions.¹⁰¹ Take, Dorothy Chin-Brandt, the first Asian American female judge of New York, who was continuously stereotyped by her political opponents due to these depictions, that she was too soft-spoken and submissive to control a New York City courtroom.¹⁰² As the first Asian American female judge of New York, she had to work to break the stereotype of being a submissive Madame Butterfly but also had to work to not be seen as the

⁹⁶ Penguin Random House, *Arthur Golden About the Author*, (last visited Feb. 24, 2022) <https://www.penguinrandomhouse.com/authors/10367/arthur-golden/>.

⁹⁷ MEMOIRS OF A GEISHA (Columbia Pictures 2005).

⁹⁸ See Cho, *supra* note 30, at 184-85; see also Kimberlé 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, 149-50 (1989).

⁹⁹ MADAMA BUTTERFLY, <https://www.metopera.org/discover/synopses/madama-butterfly/> (last visited Mar. 20, 2022).

¹⁰⁰ Ashleigh Shelby Rosette et al., *Intersectionality: Connecting experiences of gender with race at work*, 38 RSCH. IN ORG. BEHAV. 1, 5 (2018).

¹⁰¹ Thomas Sy et al., *Leadership Perceptions as a Function of Race-Occupation Fit: The Case of Asian Americans*, 95 J. APPLIED PSYCH. 902, 902-04 (2010) (In the United States, leaders are expected to be assertive, confident, and motivated, with conviction to speak up about concerns and ideas).

¹⁰² Dorothy Chin-Brandt, *Neither Madame Butterfly Nor the Dragon Lady: Rather, Ms. Justice*, 20 HARV. WOMEN'S L.J. 27, 28 (1997).

Dragon Lady.¹⁰³ This is a prime example of how all these stereotypes work hand in hand to depress Asian American women's ascent to executive-level or leadership positions and continues to follow them even when attaining such positions.

VI. Asian American Women Representation in the Workplace and Discrimination

The stereotypes and assumptions placed on Asian American women have led to devastating consequences. Asian American women are severely underrepresented in the workplace in leadership positions with little upward mobility as compared to Asian American men and other minority women. This section will discuss how the black-white paradigm leads to an inadvertent overlook of the discrimination other minorities group face as well as the underrepresentation of Asian American women in higher-level positions in the workplace and leadership positions.

A. The Black-White Paradigm

The black-white paradigm is the idea that when discussing race in the United States “the conception...[of] race...consists, either exclusively or primarily, of only two constituent racial groups, the black and the white.”¹⁰⁴ In discussing history and minorities in America the race that is primarily focused on is blacks.¹⁰⁵ This paradigm is dangerous as it leaves all other minorities out of the discussion, especially Asian American women.¹⁰⁶ Even in writing this, I have found little specifically about Asian American women in the legal profession with most studies, articles, and research being about Asian Americans in the workplace generally. A peruse of Google typing in “minority women in corporate jobs” of the 8 links on the first page of the search engine, 5 of them are specifically about black women in corporate America while the

¹⁰³ *Id.* at 30.

¹⁰⁴ Juan Perea, *The Black-White Binary Paradigm of Race*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 458 (Richard Delgado & Jean Stefancic, eds. 3rd ed. 2013)

¹⁰⁵ *Id.* at 458-59 (defining the black-white binary paradigm that the conception of race in America consists in the context of two primary racial groups, the black and the white and dictates that all other racial identities that exist in America are best understood through this black-white binary paradigm).

¹⁰⁶ *Id.*

other 3 are about women in corporate America generally. Although it is so important to discuss black women and their ascent into corporate America, the black-white paradigm ignores an invisible group, Asian American women, with devastating effects. Due to the focus on black Americans in discussions of race, other minority groups fall to the wayside, leading to the general public not acknowledging the discrimination other minorities face.

B. Asian American Women in the Workplace

Asian American women generally are overrepresented in the workplace but are severely underrepresented in leadership positions. Asian women represent about 3.9 percent of the U.S. population.¹⁰⁷ Asian American women are oversaturated in the professional workforce making up 4.6 percent of professionals.¹⁰⁸ Despite this oversaturation, in terms of leadership positions, a further breakdown shows that Asian American women make up only 2.8 percent of the first/mid-level officials and managers and only 1.7 percent of the executive/senior-level officials and managers.¹⁰⁹

Although in 2020 Asian Americans made up 4.6 percent of corporate board director seats at Fortune 500 companies, of that 4.6 percent, Asian American women made up a mere 1.6 percent.¹¹⁰ Analyzing 2018 data from the U.S. Equal Employment Opportunity Commission, the Ascend Foundation, a nonprofit organization for Asian professionals, found that Asian American men were 112 percent more likely to be executives than Asian American women and white women are 134 percent more likely to be executives than Asian American women.¹¹¹ In 2020,

¹⁰⁷ All figured are for each “race alone or in combination.” See *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States: April 1, 2010 to July 1, 2019*, U.S. Census Bureau, <https://www.census.gov/newsroom/press-kits/2020/population-estimates-detailed.html> (last visited Mar. 25, 2022).

¹⁰⁸ EEOC, *supra* note 50.

¹⁰⁹ *Id.*

¹¹⁰ Alliance for Bd. Diversity & Deloitte, *supra* note 52.

¹¹¹ Ludmilla Nunes, *Lessons from the Bamboo Ceiling*, ASS’N FOR PSYCH. SCI. (June 18, 2021), <https://www.psychologicalscience.org/observer/bamboo-ceiling>.

although 4.4 percent of all Fortune 1000 directors were Asian, only 1.47 percent of them were Asian women.¹¹²

Research shows that all Asian American women when compared to white women are disadvantaged in one of the following areas: unemployment, annual earnings, and the number of “people supervised in the workplace.”¹¹³ Further Asian American women are less likely than white women to attain positions that involve supervising other employees.¹¹⁴ The 2020 ASCEND study analyzed workforce data compiled by the Equal Employment Opportunity Commission, which showed Asian American women being the least likely of all groups to be Executives.¹¹⁵

In U.S. Leadership Positions Asian American women are underrepresented with only three Asian American female senators.¹¹⁶ As of October 2011, of the 17 women of color heading Fortune 500 legal departments, eleven were African American women, three were Hispanic American, and merely two were Asian American.¹¹⁷ This trend flows through academia as well as Asian female faculty members generally are in junior ranks, have one of the lowest tenure

¹¹² JANET S. WONG & SUSAN M. ANGELE, ASCEND, PINNACLE, THE PAN-ASIAN CORPORATE BOARD INITIATIVE, KPMG, ASIAN REPRESENTATION ON FORTUNE 1000 BOARDS (2020), <https://static1.squarespace.com/static/5e8bce29f730fc7358d4bc35/t/5f4e84c49fb7c07164836391/1598981324087/asian-representation-fortune-1000-boards.pdf>, (For the 4.4% figure [total number of Asian directors (n=332) as a percentage of the total number of directors serving on Fortune 1000 Boards (n=7477)]. For 1.47% [110/7477=1.47%]).

¹¹³ ChangHwan Kim et al., *Are Asian American Women Advantaged? Labor Market Performance of College Educated Female Workers*, 93 SOCIAL FORCES, 623, 631 (2014).

¹¹⁴ *Id.*

¹¹⁵ TINA KIM ET AL., ASCEND FOUNDATION, RACE, GENDER & THE DOUBLE GLASS CEILING: AN ANALYSIS OF EEOC NATIONAL WORKFORCE DATA, 1, 7 (2020), <https://static1.squarespace.com/static/5e8bce29f730fc7358d4bc35/t/5ff66a62cc85ca2d29e2d858/1609984611034/Race-Gender-And-The-Double-Glass-Ceiling.pdf>.

¹¹⁶ United States Senate, *Asian American Senators* (2022).

¹¹⁷ ABA COMMISSION ON WOMEN IN THE PROFESSION, VISIBLE INVISIBILITY ABA COMMISSION ON WOMEN IN THE PROFESSION WOMEN OF COLOR IN FORTUNE 500 LEGAL DEPARTMENTS (2013), https://www.americanbar.org/content/dam/aba/administrative/women/visible_invisibility_fortune500_reprint.pdf.

rates compared to all other racial and gender groups, and are the least likely among all race groups to hold professor positions.¹¹⁸

In the legal field, although Asian Americans are the fastest-growing minority group in the law, overrepresented in the country's top law schools and major law firms, compared to other racial groups, they lag in attaining leadership roles in the legal profession.¹¹⁹ Although 7.18 percent of law associates are made up of Asian American women, they only make up a mere 1.62 percent of partners.¹²⁰ Recently, Ketanji Brown Jackson, in a historic moment was confirmed to the Supreme Court of the United States making her the first Black woman to be on the Supreme Court.¹²¹ Although this is a historic moment and is one step closer to making the Supreme Court a reflection of the diversity in the United States, there has never been an Asian American seated or nominated to the U.S. Supreme Court never mind an Asian American female.¹²² In fact, there is not even a discussion about the lack of Asian representation on the Court as well as in the judiciary system generally. Of the 179 federal appellate court judges, only 12 of them are Asian Pacific Americans.¹²³ Of those 12, only 3 of them are female.¹²⁴ Of the 673 District Court judges and 9 Court of International Trade judges, there are only 33 active Asian Pacific American judges, and of those 21 are women.¹²⁵ Further, there are only three female Asian American women law school deans.¹²⁶ Despite the high educational attainment of Asian

¹¹⁸ Rosette et al., *supra* note 100100, at 9.

¹¹⁹ See NATIONAL ASSOCIATION FOR LAW PLACEMENT, INC., *supra* note 54.

¹²⁰ EEOC, *supra* note 50.

¹²¹ Eric McDaniel, *The Senate confirms Ketanji Brown Jackson to the Supreme Court*, NPR (Apr. 7, 2022), <https://www.npr.org/2022/04/07/1090973786/ketanji-brown-jackson-first-black-woman-supreme-court>

¹²² *Asian Pacific Americans and the Federal Judiciary*, NAPABA, (2022).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *L. Song Richardson Named UCI Law School Dean, Becomes Only Woman of Color Dean of a Top-30 Law School*, REAPPROPRIATE (Dec. 22, 2017), <http://reappropriate.co/2017/12/1-song-richardson-named-uci-law-school-dean-to-become-only-woman-of-color-dean-of-any-top-30-law-school/>; *CUNY Names Sudha Setty as Dean of School of Law, Nation's Leading Public Interest Law School*, CUNY THE CITY UNIVERSITY OF NEW YORK (Feb. 22, 2022), <https://www1.cuny.edu/mu/forum/2022/02/22/cuny-names-sudha-setty-as-dean-of-school-of-law-nations->

American women and the overrepresentation of Asian American women in the professional workplace, these statistics clearly show the low return on investment and underrepresentation of Asian women in leadership positions.

VII. Intersectionality of Asian American Women and the Law

A. Concept of Intersectionality

Kimberlé Crenshaw established the concept of intersectionality in her law review article in 1992, stating that the concept “denote[s] the various ways in which race and gender interact to shape the multiple dimensions of Black women’s . . . experiences. . . . [T]he intersection of racism and sexism factors into Black women’s lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.”¹²⁷ The basic idea introduced was that black women have a unique experience for their being both black and women, an experience that one cannot separate into two separate categories.¹²⁸

The idea of intersectionality has been discussed primarily in terms of Black women. This is not to say the intersectionality in terms of Black women is not important but rather, because of the focus primarily on Black women due to the black-white paradigm previously discussed when discussing minority women in the workplace, other minority women typically remain forgotten. What has become even starker as of late is the little amount of research and discussion of Asian American women and their intersectionality in society and the law.¹²⁹

leading-public-interest-law-school/; *Rose Cuison-Villazor Becomes First Filipina-American Dean of a U.S. Law School*, RUTGERS UNIVERSITY (Aug. 9, 2021) <https://law.rutgers.edu/news/rose-cuison-villazor-becomes-first-filipina-american-dean-us-law-school>.

¹²⁷ See generally Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL L. REV. 1467 (1992).

¹²⁸ *Id.*

¹²⁹ In attempting to find any information about the intersectionality about Asian American women in the legal profession through Vault/MCAA 2020 data there was none, the report only accounting as to how many Asian Americans were in the legal profession and separately woman of color in the legal profession.

There has been some literature and research done on intersectionality which has compared cases brought by black women to the struggles of Asian women.¹³⁰ I agree that this is a good start as many struggles black women face parallel the same struggles Asian women face, however, due to the stark difference in history and stereotypes in America, both groups have different experiences and therefore cannot be compared in discussing intersectionality.

B. Major Court Cases Brought by Asian American Women in Employment Discrimination Cases

In comparison to African American women, there are not many major high-profile cases brought by Asian American women when it comes to employment discrimination. New research from the IBM Institute for Business Value who surveyed Asian American executives from 2020 to 2021 found that nearly half of all respondents said they faced discrimination in the workplace.¹³¹ Despite facing discrimination in the workplace, of the FY 2013 the EEOC 32,260 total charges of employment discrimination on the basis of race, a mere 1,225—3 percent—of those charges filed were by individuals claiming discrimination based on their Asian heritage.¹³² There could be many reasons for this disparity. It could be due to the many stereotypes placed on Asian Americans which make them feel as if they do not deserve to have a claim¹³³, cultural differences¹³⁴, or due to the black-white paradigm.¹³⁵ Despite so few claims made, there is no doubt that Asian Americans generally face discrimination in the workplace. In this section, we

¹³⁰ See Li, *supra* note 53.

¹³¹ INHI CHO SUH ET AL., IBM INSTITUTE FOR BUSINESS VALUE, ASIAN AMERICAN INCLUSION IN THE WORKPLACE EXPLORING PERSISTENT BIASES AND EVOLVING CHALLENGES 2 (2021), <https://www.ibm.com/downloads/cas/9NGBDRLY>.

¹³² *What You Should Know About the EEOC and the Asian American and Pacific Islander Communities*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/wysk/what-you-should-know-about-eeoc-and-asian-american-and-pacific-islander-communities> (last visited Apr. 18, 2022).

¹³³ See generally *supra* Part II, Section A: The Concept of the Model Minority

¹³⁴ Asian culture works alongside stereotypes to depress the rise of Asian Americans to leadership positions as well as bringing claims of employment discrimination. Future essays should discuss the effects of Asian culture.

¹³⁵ *Supra* Part VI, Section A: The Black-White Paradigm.

will discuss three high-profile cases that outline the female Asian American experience in attempting to bring employment discrimination claims to court.

The first case is *Pao v. Kleiner Perkins Caufield & Byers LLC* where the employee, Ellen Pao, sued her employer, Kleiner Perkins Caufield & Byers LLC (KPCB), for gender discrimination.¹³⁶ KPCB is a venture capital firm in which its employees, known as investment partners, typically act as advisors to the Managing LLCs.¹³⁷ Pao, who held engineering, juris doctor, and masters of business administration degrees, had accepted a written offer of employment from KPCB which also stated that the employment was “at-will.”¹³⁸ Pao began working for John Doerr, one of the managing partners at LPCB.¹³⁹ Years after beginning her employment, Pao began to complain of sexual harassment and retaliation.¹⁴⁰ In 2012, Pao filed a lawsuit alleging that as a result of her gender and in retaliation for her complaints, she was denied promotions, salary increases and carried interest, board of director seats, and opportunities to contribute to fund management.¹⁴¹

The jury ultimately found for KPCB and rejected Pao’s claims of gender discrimination.¹⁴² The details that emerged during the trial however are extremely important to show how bringing an intersectional claim can help frame the claim. During the trial, Doerr told an investigator that Pao had a “female chip on her shoulder.”¹⁴³ A senior partner joked to a junior partner that Pao should be “flattered” that a colleague showed up at her hotel room door wearing only a

¹³⁶ *Pao v. Kleiner Perkins Caufield & Byers LLC*, No. A136090, 2013 WL 3224589, at *1 (Cal. Ct. App. June 26, 2013)

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at *2.

¹⁴¹ *Id.* at *3.

¹⁴² David Streitfeld, *Ellen Pao Loses Silicon Valley Bias Case Against Kleiner Perkins*, N.Y. TIMES (March 27, 2015), <https://www.nytimes.com/2015/03/28/technology/ellen-pao-kleiner-perkins-case-decision.html>.

¹⁴³ *Id.*

bathrobe.¹⁴⁴ Although, at first these comments can be found to be purely comments about gender warranting a claim for gender discrimination, if put into the perspective of the female Asian stereotypes¹⁴⁵ there may be a racial discrimination claim as well that intersects with the gender discrimination claim. Doerr may have thought Pao had a “female chip on her shoulder” because she is thought to be a “dragon lady”.¹⁴⁶ Pao should be “flattered” because of the stereotype that she is promiscuous and needs to be saved like the Suzie Wong stereotype.¹⁴⁷

The next case is *Huang v. Twitter, Inc.*, where former employee and plaintiff Tina Huang filed a putative class action against Twitter, Inc. (Twitter) alleging again gender discrimination.¹⁴⁸ Plaintiff began working at Twitter in October 2009 and throughout the years the company expanded and grew, increasing the number of employees.¹⁴⁹ In 2012, the company created a “Software Engineering Technical Ladder” (ladder) which later identified job title, job expectations, job levels, and necessary skills required for promotion.¹⁵⁰ Throughout the years the promotion process continued to evolve and in 2014 established two factors for managers to assess promotion eligibility: “Impact” and “How” which focused on the employee’s contribution to the company’s priorities and the quality of the employee’s work and whether it added value to the company.¹⁵¹ In 2013 Huang was supported by her manager for promotion to level 5 senior staff.¹⁵² Thereafter, the promotion committee met to discuss the 12 candidates for the level 5 promotions, and of those 12, 7 were promoted.¹⁵³ Of the candidates, the plaintiff was the only

¹⁴⁴ *Id.*

¹⁴⁵ *Supra* Part V: Stereotypes of Asian American Women Throughout History and Media.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Huang v. Twitter, Inc.*, No. A155155, 2019 WL 6726329, at *1 (Cal. Ct. App. Dec. 4, 2019)

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 2.

¹⁵³ *Id.*

woman and was denied a promotion “based on concerns about her personality and the quality of her coding.”¹⁵⁴

Plaintiff filed a complaint against the company on behalf of herself and a putative class of female employees for gender discrimination, alleging promotion decisions were “tainted with conscious or unconscious prejudices and gender-based stereotypes”.¹⁵⁵ The court held the commonality and typicality requirements for class action were not established and denied the plaintiff’s class certification motion.¹⁵⁶

Finally, we have *Hong v. Facebook* where the plaintiff, Chia Hong, brought forth claims of gender and racial discrimination.¹⁵⁷ In the complaint Plaintiff alleges she was discriminated against, harassed, and retaliated against during her employment, leading to her eventual termination.¹⁵⁸ The first claim brought was a sex discrimination claim claiming the company discriminated against the plaintiff based on her sex and discharged Plaintiff because of her sex.¹⁵⁹ The discrimination included, but was not limited to, “plaintiff being belittled at work...being ordered to organize parties and serve drinks to male colleagues, which was not part of her job description...and being replaced by a less qualified, less experienced male.”¹⁶⁰ Plaintiff also brought a claim of race/national origin discrimination.¹⁶¹ The discrimination included, but was not limited to, “plaintiff having her professional opinions belittled or ignored at group meetings in which she was one of the only employees of Chinese descent; plaintiff being told that she was not integrated into the team because she looks different and talks

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 8.

¹⁵⁷ Complaint for Damages & Demand for Jury Trial, at 1, *Hong v. Facebook, Inc.*, No. CIV 532943 (filed Mar. 16, 2015).

¹⁵⁸ *Id.* at 2.

¹⁵⁹ *Id.* at 3.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 6.

differently than other team members, and plaintiff being replaced by a less qualified, less experienced male.”¹⁶² The complaint was later dropped and an attorney for Hong said the matter was resolved.¹⁶³

But what is so wrong with all these cases? In each of these cases, there is both a gender element as well as an underlying race element. In *Pao*, where the manager told the investigator that the plaintiff had a “female chip on her shoulder”, it could be a completely gendered comment, but it can also derive from the stereotype of the domineering Dragon Lady.¹⁶⁴ In *Huang*, where the promotion committee did not promote the plaintiff “based on concerns about her personality,” it could have been a purely gendered comment.¹⁶⁵ But it could have also been a comment that her personality did not fit into the stereotype of a typical submissive Asian female or the opposite where they thought due to the stereotype she was either too conniving or too submissive, qualities unsuitable for higher-level executive positions.¹⁶⁶ And finally in *Hong*, where despite separate claims of sex and race being brought, all the times the plaintiff was belittled may have been due to the fact she was uniquely both an Asian and female.¹⁶⁷ These cases show how hard it is for Asian women to bring employment discrimination claims because sometimes the discrimination they face is not due to either being Asian or being a woman but because she is an Asian woman.

¹⁶² *Id.* at 7.

¹⁶³ Kurt Orzeck, *Ex-Facebook Employee Drops Suit Alleging Gender, Race Bias*, LAW360 (Oct. 8, 2015), <https://www.law360.com/articles/712826/ex-facebook-employee-drops-suit-alleging-gender-race-bias>.

¹⁶⁴ *Supra* Part V, Section A: Dragon Lady Stereotype

¹⁶⁵ *Supra* note 148.

¹⁶⁶ *Supra* Part V: Stereotypes of Asian American Women Throughout History and Media.

¹⁶⁷ *See supra* note 157.

C. How Employment Discrimination is Currently Being Analyzed Under Title VII

Title VII prohibits discrimination on the basis of race, color, national origin, religion, and gender at any stage of employment, including promotion.¹⁶⁸ To prove such unlawful discrimination, an employee plaintiff must generally show that the employer intended to discriminate; the employer took actions that adversely affected the employee's employment, and the adverse actions were causally linked to the employer's intent to discriminate.¹⁶⁹ Plaintiffs who bring forth a claim of unlawful discrimination in the employment context must pass a four-part test originally outlined in *McDonnell Douglas Corp. v. Green*.¹⁷⁰ The Supreme Court held that the plaintiff bringing a claim of discrimination must carry the initial burden of establishing a *prima facie* case.¹⁷¹ To establish the requisite claim the complainant must show (i) she belongs to the protected class; (ii) applied and qualified for the job the employer was seeking applicants; (iii) despite such qualifications was rejected; and (iv) after such rejection, the position remained open and the employer continued to seek applicants with the same qualifications.¹⁷² The plaintiff must establish a *prima facie* case of discriminatory action, giving rise to a presumption of discrimination.¹⁷³ Typically when bringing such a claim, to show evidence of discrimination, “most courts require the plaintiff to show evidence of a similarly situated ‘comparator’ outside of their protected class” who was not treated adversely.¹⁷⁴

The fault with the *McDonnell* test and Title VII generally for Asian American women, and for other plaintiffs who face discrimination based on a combination of protected classes under

¹⁶⁸ 42 U.S.C. § 2000e-2(a)

¹⁶⁹ MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 2* (7th ed. 2008).

¹⁷⁰ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 604 (2018) (“[F]or example a male employee for a sex claim and a white employee for a race claim.”).

Title VII, is the first prong, as when showing that a plaintiff employee is a protected class they have to fit into a box, either bringing a sex discrimination claim or a race discrimination claim. When attempting to bring forth a mixed claim “courts have had difficulty recognizing the interaction of more than one Title VII factor.”¹⁷⁵ Many courts have struggled with the idea of how exactly to integrate intersectional claims according to the Title VII doctrine because of how check the box the doctrine in reality is.¹⁷⁶ When bringing forth a Title VII claim, the claim is based on discrimination based on a person’s “race, color, religion, sex, **or** national origin.”¹⁷⁷ Because of how the statute is written some courts struggle with accepting the “or” in the statute as being inclusive to bring a claim based on a mix of protected classes.¹⁷⁸ For courts, it is easier for such claims to be brought separately for race or sex individually rather than an intersectional claim. Therefore, when bringing a claim, Asian American women have a more difficult time bringing forth a claim based on the fact she is discriminated against because she is an Asian woman rather than bringing one claim of discrimination based on her being Asian and a separate claim based on her being a woman.

The Equal Employment Opportunity Commission (EEOC) has identified intersectional discrimination as a potential claim¹⁷⁹, however, there has not been specific proper guidance to courts on how to interpret an intersectional claim under Title VII.¹⁸⁰ In discussing intersectional

¹⁷⁵ Virginia W. Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 B.C. L. REV. 771, 775 (1996).

¹⁷⁶ *Id.* at 772.

¹⁷⁷ 42 U.S.C. §2000e-2

¹⁷⁸ See *infra* Part VII, Section D: Courts that Have Not Recognized Intersectional Claims.

¹⁷⁹ EEOC, OFFICE OF LEGAL COUNSEL, DIRECTIVES TRANSMITTALS, EEOC COMPLIANCE MANUAL 3, 8-9 (2006), <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination> (EEOC Compliance Manual stating that “Title VII prohibits discrimination not just because of one protected trait (e.g., race), but also because of the intersection of two or more protected bases (e.g., race and sex).”).

¹⁸⁰ Yvette N.A. Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff*, 22 U. PA. J.L. & SOC. CHANGE 1, 18 (2019); Bradley Allan Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. CIV. RTS. L.J. 199, 232-34 (2006).

discrimination claims the EEOC has stated that Title VII also prohibits discrimination because of the intersection of two or more protected traits.¹⁸¹ Although the EEOC does say an intersectional claim can be made, in its guidance memo for such claims, it provides no guidance on how courts should fundamentally analyze such claims.¹⁸² Compared to claims based on a single protected category, plaintiffs who allege discrimination based on multiple protected categories are more likely to lose on summary judgment¹⁸³ and when making it beyond summary judgment are only half as likely to win their cases.¹⁸⁴ The subsequent sections of this paper will delineate between courts that have and have not accepted intersectional Title VII employment discrimination claims and will propose a framework that courts should use to analyze such claims.

D. Courts that Have Not Recognized Intersectional Claims

The Eighth Circuit is the primary example of a court refusing to read Title VII as accepting intersectional claims and has required black women workers to file separate claims of discrimination of either race or sex.¹⁸⁵ Many intersectional claims fail as Title VII claims are heavily dependent on the experiences of white women and Black men.¹⁸⁶

¹⁸¹ See EEOC Compliance Manual § 15(IV)(C) (Apr. 19, 2006), <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#IVC> (“Title VII prohibits discrimination not just because of one protected trait (e.g. race), but also because of the intersection of two or more protected bases (e.g. race and sex)...The law also prohibits individuals from being subjected to discrimination because of the intersection of their race and a trait covered by another EEO statute – e.g., race and disability, or race and age.”).

¹⁸² EEOC Compliance Manual § 15(VII)(A), ex. 19 (Apr. 19, 2006), <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#VIIA> (scroll down to Example 19).

¹⁸³ Minna Kotkin, *Diversity and Discrimination a Look at Complex Bias* 50 WM. & MARY L. REV. 1439, 1459 (2009) (noting that 96 percent of intersectional employment discrimination claims lose on summary judgment as compared to 73 percent of cases alleging discrimination based on one protected class).

¹⁸⁴ Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC’Y REV. 991, 1009 (2011) (Women of color win 15 percent of cases in comparison to 31 percent for white men, and 38 percent for white women).

¹⁸⁵ See *DeGraffenreid v. Gen. Motors Assembly Div.*, 413 F. Supp. 142, 143 (E.D. Mo. 1976), *aff’d in part, rev’d in part on other grounds*, 558 F. 2d 480 (8th Cir. 1977) (finding that an intersectional race and sex claim was beyond the intent of the Title VII statute and would in essence, create a new subgroup that would provide Black women a “super-remedy”).

¹⁸⁶ Kimberlé 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, 145-46 (1989).

DeGraffenreid v. General Motors Assembly Division is one such case and is the seminal case¹⁸⁷ in the judiciary's refusal to accept intersectional gender and race employment discrimination claims under Title VII.¹⁸⁸ *DeGraffenreid* was a case where five black women brought an action against their employer, General Motors (GM), claiming the employer's "last hired-first fired" layoff policy perpetuated race and sex discrimination, specifically against Black women, in violation of Title VII.¹⁸⁹ Before 1970, GM had only employed one black female.¹⁹⁰ Until May 1, 1970, GM excluded all women from assembly work except in areas where women could always be sent home after a nine-hour shift without disrupting production.¹⁹¹ Plaintiff Emma DeGraffenreid was hired on June 12, 1973, and due to a business recession, GM laid off the plaintiff and several other employees on January 15, 1974.¹⁹² Plaintiff Brenda Hines was hired on June 1, 1973, until she was placed on a layoff status in mid-January 1974.¹⁹³ Plaintiff Patricia Bell was hired on December 17, 1970, and was laid off on December 17, 1971.¹⁹⁴ All plaintiffs asserted that if not for GM's discriminatory employment practices they would have

¹⁸⁷ The holding in this case has following cases where employers may escape liability under Title VII. *See Moore v. Hughes Helicopter Inc.*, 708 F.2d 475, 480 (9th Cir. 1983) (where the court affirmed a decision declining to certify Tommie Moore, a Black woman, as the class action representative because Moore did not claim she was discriminated against as a female, but only as a black female, and thus could not represent all female employees); *Lee v. Walters*, 1988 WL 105887 *7 (E.D. Pa. Oct 11, 1988) (where the court held the plaintiff, an Asian female, who claimed she was denied a promotion to a higher salary level, had not met her burden of proof for race and sex discrimination because there were white females and Asian men in such positions); *Chaddah v. Harris Bank Glencoe-Northbrook, N.A.*, 1998 U.S. Dist. LEXIS 2693 *1 (N.D. Ill. Mar. 8, 1994), *aff'd*, 42 F.3d 1391 (7th Cir. 1994) (where the court refused to consider the plaintiff's intersectional claim of that she was denied an opportunity for promotion at her bank because of her age, race, and color); *cf. Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 564-66 (4th Cir. 1985) (upholding district court's refusal to redefine a certified class of African-American women to include African-American men, when the evidence demonstrated that the employer discriminated against African-American women to a greater degree than it discriminated against African-American men, and recognizing the class of African-American women as "special victims" of a more general racial animus).

¹⁸⁸ *DeGraffenreid v. Gen. Motors Assembly Div.*, 413 F. Supp. 142 (E.D. Mo. 1976), *aff'd in part, rev'd in part on other grounds*, 558 F. 2d 480 (8th Cir. 1977)

¹⁸⁹ *Id.* at 482.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 482-83.

¹⁹⁴ *Id.* at 483.

applied to work for GM years earlier.¹⁹⁵ The court affirmed the district court’s dismissal of appellants’ Title VII claims¹⁹⁶ in which the district court held that plaintiffs could not assert a combination of race and sex discrimination but rather would have to assert separate claims for race or sex discrimination.¹⁹⁷ In its explanation, the court said that allowing an intersectional claim would provide relief to the women “beyond what the drafters of [Title VII] intended.”¹⁹⁸

E. Courts that Have Recognized Intersectional Claims

Despite some courts not recognizing intersectional claims, other courts have recognized intersectional claims of Title VII race and sex discrimination.¹⁹⁹ The seminal case recognizing intersectionality comes from the Fifth Circuit in *Jefferies v. Harris County Community Action Association*.²⁰⁰ Plaintiff, a Black woman, filed a claim against her former employer for discriminating against her on the basis of both race and sex in failing to promote her and terminating her employment.²⁰¹ Plaintiff between 1970 and 1974 unsuccessfully applied multiple times for promotion to various positions within the agency.²⁰² In April 1974, Plaintiff applied for two vacancies within the agency which were later filled by a white female and a black male.²⁰³ On appeal, the appellant argued that the district court erred in dismissing her claim of race and sex discrimination.²⁰⁴ The court remanded the case because the district court did not consider the plaintiff’s claim of discrimination on the basis of both race and sex, thereby accepting an

¹⁹⁵ *Id.* at 482-83.

¹⁹⁶ *Id.* at 485.

¹⁹⁷ *DeGraffenreid v. Gen. Motors Assembly Div.*, 413 F. Supp. 142, 143 (E.D. Mo. 1976).

¹⁹⁸ *Id.*

¹⁹⁹ *See Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416-17 (10th Cir. 1987) (where the Tenth Circuit held that Title VII permits a court to aggregate evidence of racial and sexual harassment together to sustain a hostile work environment claim).

²⁰⁰ 615 F.2d 1025 (5th Cir. 1980).

²⁰¹ *Id.* at 1028.

²⁰² *Id.* at 1029.

²⁰³ *Id.*

²⁰⁴ *Id.*

intersectional claim.²⁰⁵ The court held that in a Title VII case where the “plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding that the employer did not discriminate against the black female plaintiff.”²⁰⁶ The court held that black females are in itself a protected class according to Title VII.²⁰⁷ The court in its reasoning looked to Congress’s intent in using the word “or” in Title VII to prohibit discrimination based on any or all of the listed characteristics and the fact that the House of Representatives refused to adopt an amendment which would have added the word “solely” to modify the word “sex.”²⁰⁸

The seminal case that laid down an “aggregate” or “totality” framework for intersectional claims was *Lam v. University of Hawaii*.²⁰⁹ *Lam* was a case where Plaintiff, a woman of Vietnamese descent, claimed that the University of Hawaii’s Richardson School of Law (“School”) discriminated against her on the basis of her race, sex, and national origin when she applied for the position of Director of the School’s Pacific Asian Legal Studies (“PALS”) program twice.²¹⁰ In the fall of 1987 when the school began searching for a full time for the PALS program, approximately 100 people applied for the position, including the plaintiff.²¹¹ The faculty canceled the search without hiring anyone.²¹² The School then went on another search from 1989 to 1990 where the Plaintiff again applied but the position was offered the position to another candidate.²¹³ The other candidate declined and the faculty again canceled the search.²¹⁴

²⁰⁵ *Id.* at 1035.

²⁰⁶ *Id.* at 1034.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1032. (citing 110 CONG. REC. 2728 (1964)).

²⁰⁹ 40 F.3d 1551 (9th Cir. 1994).

²¹⁰ *Id.* at 1554.

²¹¹ *Id.*

²¹² *Id.* at 1554.

²¹³ *Id.* at 1557-58.

²¹⁴ *Id.* at 1558.

The district court granted the School's motion for summary judgment regarding the first search in which the Plaintiff appealed.²¹⁵

The Circuit Court held that it was necessary for courts to consider a plaintiff's claim of discrimination based on a combination of protected categories rather than solely on whether an employer discriminates based on one category separate from another.²¹⁶ In its discussion, the court noted that the district court committed an error in its separate treatment of race and sex discrimination.²¹⁷ The court reasoned that Asian women are subject to a set of stereotypes and assumptions shared by neither Asian men nor white women "where two bases for discrimination exist, they cannot be neatly reduced to distinct components."²¹⁸ The reasoning and holding of *Lam* take into account the totality and aggregate of two or more protected categories which take into account the plaintiff's stereotypes and assumptions that create the discrimination.²¹⁹

*F. Why Intersectionality Will Help Asian American Women in Their Employment
Discrimination Claims*

When an Asian American woman brings a claim for employment discrimination, intersectional claims should be accepted because in some cases the basis of the discrimination is not separately because the plaintiff is Asian and not separately because the plaintiff is a woman, but purely because the plaintiff is an Asian American woman. As seen in the cases of *Pao*, *Huang*, and *Hong*, it has been difficult for Asian American women to bring a case of either gender or race discrimination because sometimes, it is the exact fact that these individuals are both Asian and women that they are being discriminated against. Stereotypes and assumptions

²¹⁵ *Id.*

²¹⁶ *Id.* at 1562.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

placed on Asian American women create a unique experience that cannot be fully encapsulated by each protected class in Title VII individually but rather is better encapsulated by an intersectional class. Being able to bring an intersectional claim will help Asian American women bring claims that fully express their experience being both Asian and female.

In assessing discrimination claims brought forth by Asian American women, the intersectionality of being Asian and being a woman should be considered in courts' analysis. Despite some courts adopting an intersectional approach when faced with claims alleging discrimination based on multiple protected classes, there has not been a clear analytical framework to analyze such cases.²²⁰ Some courts consider intersectional claims using a "sex-plus" or a "race plus" framework which considers sex plus another characteristic or race plus another characteristic in alleging employment discrimination.²²¹ However, this framework is not ideal because courts applying such a framework tend to overemphasize comparator analysis and may place one trait as superior to the other instead of recognizing both traits playing an equal role in the adverse employment action.²²² Other courts consider the specific intersectional class as a protected class in and of itself.²²³ This framework poses a problem as it would not be inclusive enough as each individual intersectional group would have to argue to be a protected class and may lead to varying contradictory court rulings.

²²⁰ Judith 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. REV. 775, 799 (1991).

²²¹ Marc Chase McAllister, *Proving Sex-Plus Discrimination Through Comparator Evidence*, 50 SETON HALL L. REV. 757, 760 (2020).

²²² See generally Jamillah Bowman Williams, *Beyond Sex-Plus: Acknowledging Black Women in Employment Law and Policy*, GEO. UNIV. L. CTR. 16-20 (2021) (Comparator analysis being plaintiffs showing evidence comparing treatment of an opposite class i.e. in a sex-plus race claim, Black male employees and in a race plus sex claim, white female employees).

²²³ See *supra* note 200, at 1034 ("[W]hen a Title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding that the employer did not discriminate against the black female plaintiff.").

Courts which use the “aggregate” or “totality” framework outlined in *Lam*²²⁴ would be able to fully consider the stereotypes and assumptions placed on Asian women in the workplace. Courts that have resisted intersectionality claims, do so because of the way Title VII is written.²²⁵ If there is proper guidance courts will be able to analyze intersectional claims. I propose that in resolving this circuit split²²⁶ the Supreme Court should use the “aggregate” or “totality” framework outlined in *Lam*²²⁷ to analyze intersectional claims that will clearly take into account the unique stereotypes and barriers that Asian women have faced and continue to face in the workplace.²²⁸ Further, by using this type of framework, this would be inclusive of all types of intersectional claims for all people, and plaintiffs with no recourse will be able to properly file employment discrimination claims that fully encompasses their intersectional identity.²²⁹

VIII. Conclusion

Asian American women face what I call the “Glass Bamboo Ceiling”. It is the intersection between the “glass ceiling” which prevents women from ascending to executive and leadership positions and the “bamboo ceiling” which prevents Asians from ascending to executive and leadership positions. These two work hand in hand to prevent Asian American women from climbing the corporate ladder to positions of power and leadership. Asian American women have a unique experience as they have been constantly stereotyped since Asian women first came to America and which lives on in employment decisions today. Because of the unique experience

²²⁴ See *supra* note 209.

²²⁵ *Supra* note 185.

²²⁶ See Williams, *supra* note 222 Table 1. Approaches to Analyzing the Intersectional Claims of Black Women: A Survey of the United States Courts of Appeals (outlining the various circuit courts’ approach to intersectional claims: Protected Traits Analyzed Separately – Fourth, Eighth; Recognizes Intersectional Claims Sex-Plus Race and/or Race-Plus Sex – Second, Third, Tenth; Recognized Intersectional Claims Black Woman = Protected Category – Fifth, Eleventh; Recognizes Intersectional Claims “Aggregate” or “Totality” Framework – Sixth, Ninth; Inconsistent/Undecided – First, D.C.).

²²⁷ See *supra* note 209.

²²⁸ *Supra* Part V: Stereotypes of Asian American Women Throughout History and Media.

²²⁹ E.g. Claims brought by Black women, gender and age claims, etc.

that Asian American women have, like black women, in bringing an employment discrimination claim, courts should look to an intersectional approach and look at how being both Asian and a woman shape employers' decisions in hiring and promotions.²³⁰ Future research papers should delineate the vast differences between the stereotypes of East Asian women and South Asian women as well as discuss the use of an intersectional framework in sexual harassment claims.

²³⁰ There are also other solutions which would push courts to accept intersectionality claims including the EEOC providing further guidance on interpreting Title VII in intersectional claims and Congress amending Title VII to include "or any combination thereof" in discussing the protected categories.