

Culture Matters: Cultural Differences in the Reporting of Employment Discrimination Claims

Andrew Tae-Hyun Kim

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CULTURE MATTERS: CULTURAL DIFFERENCES IN THE REPORTING OF EMPLOYMENT DISCRIMINATION CLAIMS

Andrew Tae-Hyun Kim*

ABSTRACT

Why don't reasonable people complain about discrimination? Behavioral science evidence points to structural barriers, like the fear of retaliation and the lack of sociocultural power in the workplace, that discourage employees from reporting. By not reporting perceived discriminatory or harassing conduct, the employee not only underutilizes Title VII's administrative scheme—which was created precisely to remedy and deter such conduct—but also incurs a heavy litigative cost in employer liability suits. This Article claims that for certain minority groups, namely Asian Americans, certain cultural differences significantly heighten those structural barriers and consequently leave them underprotected in the legal system. The Article locates the cultural differences in two dimensions of cultural diversity—collectivism and particularism—and a Confucian philosophical norm. Ultimately, it asks and addresses whether the law should accommodate these differences or whether the ethnic minority should accommodate, and thereby assimilate to, the legal norm. It concludes that courts should, as with certain gender differences, consider cultural differences when assessing the reasonableness of the employee's actions in employer liability suits.

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* Law Teaching Fellow, Louisiana State University Law Center. J.D., Harvard Law School; B.A., Duke University. I thank Bill Corbett, Mary Ann Glendon, Christine Jolls, Lee Ann Lockridge, Missy Lonegrass, April Stockfleet, Heidi Thompson, Justine Tinkler, and the participants at the 2011 Fellows Works-In-Progress Workshop at Louisiana State University Law Center for helpful comments and suggestions. I thank Amy Goode for excellent research assistance. I dedicate this Article to my parents Chi Hoon Kim and Soon Rye Kim for their grace and courage.

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INTRODUCTION

This Article examines the role that cultural differences play in the reporting of employment discrimination claims and exposes the disproportionate impact that reporting requirements have on certain ethnic minorities. When employees experience discrimination, the law assumes that they report it. Indeed, the law has fashioned a complex and expensive web of administrative and judicial mechanisms on that assumption via the Civil Rights Act of 1964,¹ which was created to address discrimination.² The Equal Employment Opportunity Commission (EEOC),³ a federal agency with an annual budget of \$367 million, was established to oversee the implementation of Title VII of the Civil Rights Act.⁴ The majority of that budget goes towards the EEOC's "most important and resource-intensive activity"⁵ of processing complaints and charges of discrimination, which triggers Title VII's redress mechanism.⁶ This

¹ Civil Rights Act of 1964, Pub. L. No. 88-352, § 705, 78 Stat. 241, 258 (1964) (codified as amended at 42 U.S.C. § 2000e-4 (2006)).

² See Roy L. Brooks, *A Roadmap Through Title VII's Procedural and Remedial Labyrinth*, 24 Sw. U. L. REV. 511, 521 (1995).

³ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, 104 (codified as amended at 42 U.S.C. § 2000e-5 (2000)).

⁴ See EEOC, FISCAL YEAR 2010 CONGRESSIONAL BUDGET JUSTIFICATION 12 (2009) [hereinafter 2010 BUDGET JUSTIFICATION], available at <http://www.eeoc.gov/eeoc/plan/upload/2010budget.pdf>.

⁵ See EEOC, FISCAL YEAR 2008 PERFORMANCE AND ACCOUNTABILITY REPORT 42 (2008), available at <http://archive.eeoc.gov/abouteeoc/plan/par/2008/par2008.pdf>.

⁶ See 2010 BUDGET JUSTIFICATION, *supra* note 4, at 12 (stating that approximately \$162 million was spent on the administrative processing of claims in 2008).

mechanism presumes—indeed requires as a prerequisite to suit—that the putative complainant will bring a claim when he or she believes to have experienced unlawful discrimination. However, what happens when a significant segment of the United States population, for whom Title VII was created to protect, is reluctant to report their perception of discrimination?

In 2007, the EEOC formed the Asian American and Pacific Islander Work Group (EEOC Work Group) to examine that and other problems of discrimination against Asian Americans in the federal government.⁷ The EEOC Work Group found that “31% of the Asian[] [Americans]⁸ surveyed reported incidents of [race] discrimination, the largest percentage . . . [reported by] any ethnic group, with African Americans constituting the second largest group at 26%.”⁹ Yet, the vast majority of Asian Americans chose not to report that discrimination.¹⁰ This is especially surprising because government employees may be better shielded from retaliation than private sector employees due to the various civil service protections available to them. Such underreporting is not limited to civil discrimination suits. For example, in the reporting of hate crimes, almost one-third of Asians in one study stated that they had experienced hate crimes.¹¹ But an overwhelming 82% of those respondents stated that they did not report the crime to the police.¹²

Employees must file charges with the EEOC to preserve their right to sue.¹³ If employees want to prevail in such suits, they must also have reported their grievances to their employer.¹⁴ Moreover, employees must report quickly, as courts have construed the statute of limitations strictly and have punished employees for not reporting

⁷ EQUAL EMP. OPPORTUNITY COMM’N, ASIAN AMERICAN AND PACIFIC ISLANDER WORK GROUP REPORT TO THE CHAIR OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 1 (2008) [hereinafter EEOC WORK GROUP REPORT], available at <http://www.eeoc.gov/federal/reports/aapi.html>.

⁸ Although the EEOC Work Group’s study included broader categories of Asian Americans, this Article focuses primarily on Asian Americans from East Asia (e.g., Chinese and Taiwanese Americans, Japanese Americans, and Korean Americans) and from countries influenced by Confucianism (e.g., Vietnamese Americans). See Min Zhou & Yang Sao Xiong, *The Multifaceted American Experiences of the Children of Asian Immigrants: Lessons for Segmented Assimilation*, 28 ETHNIC & RACIAL STUD. 1119, 1125 (2005) (stating that Chinese and Filipinos are the largest group, followed by Indians, Koreans, Vietnamese, and Japanese). Together, these populations form the majority of the Asian immigrant population in the United States. *Id.*

⁹ EEOC WORK GROUP REPORT, *supra* note 7, at 3.

¹⁰ *Id.*

¹¹ Zenobia Lai & Andrew Leong, *From the Community Lawyers’ Lens: The Case of the “Quincy 4” and Challenges to Securing Civil Rights for Asian Americans*, 15 ASIAN AM. L.J. 73, 82 (2008) (stating that the respondents of the survey reported incidents of smashed car windows, rocks thrown through house windows, and spray-painted racial slurs).

¹² *Id.*

¹³ See *infra* Part II.A.

¹⁴ *Id.*

the first incident of harassment in employer liability suits.¹⁵ This Article argues that such strict reporting requirements¹⁶ contradict behavioral science research, which shows that the less assertive response to discriminatory conduct is the norm, not the exception.¹⁷ Moreover, the requirements have a disproportionate impact on certain minority groups who for reasons of cultural differences are more vulnerable to the reporting requirements.

Part I of this Article examines the findings of the EEOC Work Group and contests its assessment that a lack of English fluency may be the primary explanation for Asian Americans' reluctance to report discrimination. Part II analyzes the legal consequences of underreporting discrimination: the loss of the right to sue and the improbability of prevailing in employer liability suits. It contends that the Supreme Court's strict interpretation of the statute of limitations for bringing charges to the EEOC and its requirement that employees immediately report harassment to their employer disproportionately harm certain minority groups, namely Asian Americans. Part III analyzes the structural barriers—the desire to maintain social relationships, the lack of sociocultural power, and fear of retaliation—that cause certain minority groups to underreport discrimination and concludes that for women, gender differences intensify these structural barriers. Part III provides a comparator for Parts IV and V of this Article, and applies the behavioral science research concerning women's reluctance to report sexual harassment claims to argue that cultural differences for Asian Americans, like gender differences for women, magnify the structural barriers to reporting discrimination. Parts IV and V apply the work of cross-cultural theorists who have mapped out multiple dimensions of cultural diversity. These Parts contend that two of those dimensions—collectivism and particularism—help explain Asian Americans' reluctance to report discrimination and that these dimensions are moored in the Confucian philosophical norm. Part VI addresses whether the law should accommodate cultural differences or whether the ethnic minority instead should adapt to the law. It frames this problem as a tension between assimilation—reporting discrimination—and multicultural accommodation. This Article asserts that the cultural costs to the individual do not outweigh the benefits of assimilation and urges courts to follow what they have already done in the gender context—to consider cultural differences when they assess the reasonability of an employee's delay in reporting in employer liability suits.

¹⁵ *Id.*

¹⁶ For purposes of this Article, “reporting requirements” means both the requirement to file with the EEOC before filing a lawsuit and the requirement to report (quickly) to the employer in employer liability suits. The Article focuses mostly on the latter requirement because the former requirement is mostly ancillary to filing a lawsuit and, in current practice, does not have a significant effect on outcome.

¹⁷ James E. Gruber & Michael D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, 17 BASIC & APPLIED SOC. PSYCHOL. 543, 545, 557 (1995).

I. THE PROBLEM: AN ASSESSMENT OF THE FINDINGS OF THE EEOC WORK GROUP

A. The “Model Minority”?: The Asian American-Demographic in the United States

Asian Americans have been referred to as the “model minority” since the beginning of the 1960s.¹⁸ The conventional view is that, due to their visible successes as compared to other minority or immigrant groups, Asian Americans do not face external barriers to full integration or other social challenges.¹⁹ But recent studies have contested the “model minority myth.”²⁰ A recent sociological study showed that Asian-American men have not achieved labor market parity with white men.²¹ The research revealed that most Asian-American men are at an earnings disadvantage and lag behind white men in terms of full equality in the labor market.²² Similarly, in a recent study, researchers found a significant underrepresentation of Asian-American lawyers at the highest levels of law practice—as partners and practice group heads of law firms in New York City.²³

Moreover, the “model minority myth” applies only to a small subset of the Asian-American population and detracts attention away from those who are not “mythically” successful.²⁴ Even those who are successful face structural challenges particular to being Asian. Unlike some other minority populations in the United States, Asian Americans are often perceived to be foreign,²⁵ socially deficient,²⁶ and lacking

¹⁸ See, e.g., William Petersen, *Success Story, Japanese-American Style*, N.Y. TIMES, Jan. 9, 1966 (Magazine), at 20–21, 33, 36, 38, 40, 43.

¹⁹ *Id.* at 43.

²⁰ Chang Hwan Kim & Arthur Sakamoto, *Have Asian American Men Achieved Labor Market Parity with White Men?*, 75 AM. SOC. REV. 930, 935 (2010).

²¹ *Id.* at 935–36, 952–54.

²² *Id.* at 952–54. Asian-American men who were schooled entirely overseas are at a substantial earnings disadvantage, whereas Asian-American men who obtained their highest degree in the United States but completed high school in their home countries are at an intermediate earnings disadvantage. *Id.* at 943–46. However, 1.5-generation Asian-American men appear to have reached full parity with white men. *Id.* at 954.

²³ Vivia Chen, *Asian American Lawyers Still Underdogs*, CAREERIST (Feb. 3, 2011, 3:10 PM), <http://thecareerist.typepad.com/thecareerist/2011/02/asian-american-lawyers.html>.

²⁴ See Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80, 80–83 (1999). The perpetuation of the myth prevents much-needed assistance for skill deficiencies, lack of mentoring availabilities, and lack of networking associations.

²⁵ MIA TUAN, *FOREVER FOREIGNERS OR HONORARY WHITES?: THE ASIAN EXPERIENCE TODAY* 87–88 (1998).

²⁶ Monica H. Lin et al., *Stereotype Content Model Explains Prejudice for an Envied Outgroup: Scale of Anti-Asian American Prejudice Stereotypes*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 34, 35, 44 (2005) (developing a scale of anti-Asian American stereotypes and finding that perception of low sociability can lead to exclusion from social networks).

in leadership ability.²⁷ For Asian Americans with a foreign accent, the accent can be a source of subordination.²⁸ Asian accents are perceived to be “low status” accents on the speech-status scale.²⁹

Although the “model” status of Asian Americans may be debatable, what is clear is that the Asian presence in the United States is growing, and the latest census data shows that it will continue to grow.³⁰ According to the census figures, the Asian population is one of the fastest growing populations in the United States.³¹ “Between 1990 and 2000 this population grew 48%, from 6.9 million to 10.2 million persons.”³² The United States Census Bureau projects that the Asian population will increase to almost 40 million, which is about 10% of the United States population, by the year 2050.³³ Currently, over 4% of the United States population—almost 11 million Americans—are Asian.³⁴

When comparing the growth of the Asian working-age population to that of the general working-age population, the results are even more staggering. From 1980 to 2005, “the [Asian] working-age population grew by nearly 300%,” whereas the growth for the general working-age population was only 29%.³⁵ From 2005 to 2030, it is projected that the Asian working-age population will grow another 62%, whereas the estimated growth projection for the total working-age population is 14%.³⁶

The Asian workforce is quite diverse in levels of human capital, class, and ethnicity.³⁷ With regard to educational levels, it is overrepresented at both the top end—with significant overrepresentation among those with advanced degrees—and the bottom end—with significant overrepresentation among those without high school diplomas.³⁸ The Chinese, Indians, and Filipinos are overrepresented among the well educated and highly skilled professionals, whereas Vietnamese and other Southeast

²⁷ Katherine R. Xin, *Asian American Managers: An Impression Gap?*, 40 J. APPLIED BEHAV. SCI. 160, 161 (2004).

²⁸ ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 124–25 (2006).

²⁹ Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1352 (1991) (“In a society with a speech hierarchy . . . it is quite common that speakers of the low-status speech variety, by necessity, are able to understand speakers of the high-status variety. . . . Speakers of the high-status variety, on the other hand, frequently report that they cannot understand speakers below them on the speech-status scale.”).

³⁰ EEOC WORK GROUP REPORT, *supra* note 7, at 4.

³¹ *Id.*

³² *Id.* at 2.

³³ *Id.* at 4.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 3.

³⁸ *Id.* at 4.

Asians are overrepresented among the poorly educated.³⁹ But “[a] higher proportion of non-Pacific Islander [Asians] work in professional specialty occupations” as compared to white Americans.⁴⁰ Many of them have scientific and technical jobs.⁴¹ They comprise 10% of the scientists in this country, even though they make up only 4% of the total population.⁴² With the exception of the Japanese, most Asians in the United States are first-generation immigrants at 64%; 27% are second-generation.⁴³

On April 29, 2010, President Obama recognized the growing presence of Asian Americans in American society and issued a Presidential Proclamation creating Asian American and Pacific Islander History Month.⁴⁴ This designation was bittersweet for many, as it coincided with the 100th anniversary of the U.S. Immigration Station at Angel Island, where, for three decades, Asian immigrants arrived and endured harsh interrogation and exams and unsanitary confinement.⁴⁵ Those “who were not turned back by racially prejudiced immigration laws endured hardship, injustice, and deplorable conditions as miners, railroad builders, and farm workers.”⁴⁶ In creating Asian American and Pacific Islander History Month, President Obama stated that “we must acknowledge the challenges [that Asian Americans] still face” and urged that such challenges be properly addressed so that “all Americans can reach their full potential.”⁴⁷

B. Findings of the EEOC Work Group

On October 11, 2007, the EEOC Commission Chair Naomi C. Earp formed the EEOC Work Group to address issues of concern for both Asian-American and Pacific Islander employees in the federal government and the Asian American and Pacific Islander community at large.⁴⁸ This was the first time in history that such a group had been formed.⁴⁹ The EEOC Work Group is comprised of employees from various federal agencies, professions, grade levels, and management levels and was diverse in race, ethnicity, and gender.⁵⁰

³⁹ Zhou & Xiong, *supra* note 8, at 1127.

⁴⁰ EEOC WORK GROUP REPORT, *supra* note 7, at 4.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Zhou & Xiong, *supra* note 8, at 1125.

⁴⁴ Proclamation No. 8508, 75 Fed. Reg. 24,363 (Apr. 29, 2010).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ EEOC WORK GROUP REPORT, *supra* note 7, at 4.

⁴⁹ *Id.*

⁵⁰ *Id.* The group members and supporting staffers are:
Gazal Modhera, U.S. Equal Employment Opportunity Commission;
Suzan Aramaki, U.S. Department of Commerce; Linda Bradford-
Washington, U.S. Department of Housing and Urban Development;
Sherrie Davis, National Institutes of Health; Anna Hui, Department of

The EEOC Work Group examined several concerns about federal sector employment, including ways to improve employment opportunities for Asian Americans, to develop and prepare them for leadership within the federal government, and to eliminate barriers to senior level opportunities.⁵¹ A major concern for the EEOC Work Group was the “apparent reluctance” of Asian-American federal employees “to air their grievances” through “the federal sector EEO complaint process.”⁵²

In a survey that sampled employees’ perception of discrimination at work and the effect those perceptions had on performance and retention, 15% of all workers perceived that they had been subject to some discriminatory treatment.⁵³ When examined by subgroups, 31% of Asian Americans and Pacific Islanders said that they perceived they had been subject to some discriminatory treatment.⁵⁴ Surprisingly, this was “the largest percentage of any ethnic group, with African Americans constituting the second largest group at 26%.”⁵⁵ Even more surprising was that despite the relatively high percentage of those surveyed who claimed discriminatory treatment, a vast majority of them stated that they did not report the discrimination to their employer.⁵⁶ Indeed, “only about 2 percent of all [discrimination] charges in the private sector and 3.26 percent in the federal sector are filed by” Asian American or Pacific Islanders.⁵⁷ Furthermore, in the context of race discrimination cases, “82.5% of charges were brought by African Americans” whereas only 3% were filed by Asian American and Pacific Islanders.⁵⁸

In its report, the EEOC Work Group identified several challenges facing this strong and growing group of minority employees, including the low representation

Labor; Robert Jew, The National Archives and Records Administration; Farook Sait, U.S. Department of Agriculture; James Su, Federal Asian Pacific American Council; Piyachat Terrell, U.S. Environmental Protection Agency; Sharon Wong, Asian American Government Executives; Frankie Cox, U.S. Department of Housing and Urban Development; Jerry Holloway, U.S. Department of Housing and Urban Development; Tonya Watson, U.S. Department of Housing and Urban Development; Chau Le Williams, U.S. Department of Housing and Urban Development; John I. Cofer V, U.S. Equal Employment Opportunity Commission; Marc Plotkin, U.S. Equal Employment Opportunity Commission; and Mildred Rivera, U.S. Equal Employment Opportunity Commission.

Id. at 43.

⁵¹ *Id.* at 1.

⁵² *Id.*

⁵³ *Id.* at 3.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Press Release, Equal Emp. Opportunity Comm’n, *New Gallup Poll on Employment Discrimination Shows Progress, Problems 40 Years After Founding of EEOC* (Dec. 8, 2005), <http://www.eeoc.gov/eeoc/newsroom/release/12-8-05.cfm>.

of Asian employees, particularly in higher management positions.⁵⁹ To help fulfill one of the goals of the EEOC—the prevention of unlawful discrimination—the EEOC Work Group recommended assisting various federal agencies in developing and implementing EEO model programs.⁶⁰ The Work Group proposed six elements: “(A) demonstrated commitment from agency leadership, (B) integration of EEO into agency’s strategic mission, (C) management and program accountability, (D) proactive prevention of unlawful discrimination, (E) efficiency in the federal EEO process, and (F) responsiveness and legal compliance.”⁶¹

In addition, the EEOC Work Group recommended the identification of barriers that exclude any EEO group.⁶² It defined barriers as “policies, procedures, practices, or conditions that limit employment opportunities” and stated that “[w]hile some barriers are readily discernable, most are hidden in an agency’s day-to-day activities, . . . [such as] recruitment, hiring, career development, competitive and noncompetitive promotions, . . . disciplinary actions, and separations.”⁶³ The EEOC Work Group listed the following as examples of barriers which could limit employment opportunities for a certain group: (1) single-source or limited-source recruiting, (2) hiring laterally at higher grades, as opposed to hiring through federal pools from one’s own agency, (3) the use of overly narrow selection criteria and (4) biased or hostile attitude of management toward a particular ethnic group, gender, or persons with disabilities.⁶⁴

The EEOC Work Group recommended that each agency conduct a “barrier analysis” and outlined six steps for doing so.⁶⁵ The first step is to conduct a review of an agency’s policies, practices, and procedures.⁶⁶ A subject of review would be those “in the natural employment progression,” such as “recruitment, hiring, training, and career development” policies.⁶⁷ The second step is to analyze source materials, such as the “EEO complaints, EEO and Human Resources office interviews or data,” exit interviews, employment surveys, and the like.⁶⁸ In the third step, such source materials would be analyzed for “triggers” or any anomalies in the data, such as recurring EEO complaints on a particular issue or against a particular manager.⁶⁹ The fourth step calls for the determination of the “root causes of the triggers.”⁷⁰ An example of a root cause of low participation rates of Asians in an agency’s total workforce is the

⁵⁹ EEOC WORK GROUP REPORT, *supra* note 7, at 17.

⁶⁰ *Id.* at 26–27.

⁶¹ *Id.*

⁶² *Id.* at 27.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 33.

⁶⁹ *Id.*

⁷⁰ *Id.*

recruitment policies and processes that recruit from colleges without many Asians.⁷¹ The fifth step calls for an “action plan” to eliminate the barrier.⁷² For the root cause identified in the previous example, such a plan would recruit at a more diverse set of colleges, including those with a higher concentration of Asians.⁷³ The final step is a follow-up to assess if the action plan successfully eliminated the barrier and to implement “a continuous assessment and monitoring process.”⁷⁴

C. An Assessment of the EEOC Work Group’s Recommendations

Though such recommendations for the elimination of barriers seem reasonable, it is striking that most of the barriers targeted, such as recruitment strategies or hiring criteria, are couched in structural or external terms. This is a common assumption in access to justice scholarship, which often characterizes barriers to justice as external—be they from unlawful discrimination by others or due to structural societal inequalities.⁷⁵ While not discounting the existence or gravity that such barriers pose to the equal opportunity for some, these externally focused efforts underinvestigate and under-identify the internal barriers that immigrants impose on themselves, either unknowingly or by choice, which may prevent the full integration or access to opportunities.⁷⁶ As this Article shows in Parts IV and V, the internal or cultural barriers often interplay with the structural barriers, and the distinction between the two often blurs.

The one internal barrier that the EEOC Work Group identified concerned the scarcity of formal EEO complaint activities among Asian Americans and Pacific Islanders.⁷⁷ Only 3.26% of all discrimination charges in the federal sector are filed by Asian Americans.⁷⁸ Yet, a large percentage of Asian Americans voiced concerns about discrimination—31% of Asians surveyed stated that they had perceived incidents of discrimination.⁷⁹

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ For example, the American Bar Association has the Standing Committee on Legal Aid and Indigent Defendants, which provides resources for language access in courts. See Standing Comm. on Legal Aid & Indigent Defendants, ABA, *Laying the Path: Creating National Standards for Language Access to State Courts*, http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/atjresourcecenter/downloads/2010_LanguageAccess.audcheckdam.pdf (last visited Dec. 10, 2011) [hereinafter *Language Access*].

⁷⁶ See, e.g., Lauren Gilbert, *Citizenship, Civic Virtue, and Immigrant Integration: The Enduring Power of Community-Based Norms*, 27 *YALE L. & POL’Y REV.*, 335, 369–82 (2009) (analyzing barriers to integration which Somalis impose on themselves).

⁷⁷ EEOC WORK GROUP REPORT, *supra* note 7, at 41–42.

⁷⁸ *Id.* at 3.

⁷⁹ *Id.*

The EEOC Work Group identified this as a “significant barrier [] in the federal workplace,” but attributed the problem primarily to language, which it described as “the most prominent barrier to the EEO complaint process.”⁸⁰ As a proposed solution, the EEOC Work Group recommended that “federal agencies . . . improve educational opportunities to overcome language barriers by improving bilingual programs and promoting increased cultural diversity.”⁸¹ It also stated that agencies should provide extra training and information concerning the EEO complaint process to Asian-American employees.⁸² It recommended helping Asian Americans identify the benefits of the complaint process by highlighting historical cases that pertain to the Asian community and assisting them in “overcoming their fear of the EEO Process [sic] and retaliation by breaking the myths of the EEO Complaint process.”⁸³

The EEOC Work Group’s characterization of language as the “most prominent barrier to the EEO complaint process” is surprising.⁸⁴ It is true that for many, if not most, members of the Asian-American community in the United States, language is a barrier to employment and other civic opportunities.⁸⁵ To address this barrier, many Asian-American interest organizations devote much of their resources to providing language assistance and translation services to Asian Americans.⁸⁶ But for most positions in the federal government, English language proficiency is a prerequisite. If most Asian Americans in the federal government are proficient in the English language, then the EEOC Work Group’s recommendation of providing language assistance would have little to no impact on Asian-American employees’ reluctance to report perceived discrimination; shifting resources to provide language assistance programs would detract from the true source of the problem.

⁸⁰ *Id.* at 41 (“Language is perhaps the most prominent barrier to the EEO complaint process. Therefore, the AAPI community and federal agencies must improve educational opportunities to overcome language barriers by improving bilingual programs and promoting increased cultural diversity.”).

⁸¹ *Id.*

⁸² *Id.* at 39.

⁸³ *Id.*

⁸⁴ *Id.* at 41.

⁸⁵ See *Language Access*, *supra* note 75.

⁸⁶ The following organizations have language assistance programs to assist Asian Americans: Asian Pacific American Legal Resource Center, which through its Asian Language Legal Hotlines, helps “nearly 10,000 . . . limited or non-English speaking individuals a year,” *A Lasting Impact 2008 Annual Report*, ASIAN PAC. AM. LEGAL RES. CTR., <http://www.apalc.org/annualreports/2008.pdf> (last visited Dec. 10, 2011); Asian American Justice Center, which has as one of its programs “Language Access” to monitor compliance with Title VII of the Civil Rights Act of 1964 and Executive Order 13166, *The Asian American Justice Center*, ASIAN AM. JUST. CENTER, <http://www.advancingequality.org/language-access> (last visited Dec. 10, 2011); Asian Pacific American Legal Resource Center, through its Asian American Language Access Project which provides language assistance to Asian Americans to be able to fully access D.C. government programs and services, ASIAN PAC. AM. LEGAL RES. CTR., http://www.apalrc.org/prog_asian.html (last visited Dec. 10, 2011).

The EEOC Work Group's recommendation for providing training concerning the EEO complaint process is a better approach for addressing the reporting problem. One reasonable hypothesis for why Asian Americans do not report perceived discrimination is that they are unaware of the reporting requirements. Thus, it is not for the lack of a desire to report, but simply that they do not know how to report. But, if the lack of knowledge of the reporting procedures is the real reason, one would expect that other minority groups would exhibit the same reluctance to report perceived discrimination. Yet, according to the Work Group Report, such reluctance to report was mostly seen among Asian-American federal employees. For example, African-American employees did not show the same reluctance to report.⁸⁷

Likewise, the EEOC Work Group's recommended approach of educating people about the legal protections against retaliation may also make sense. As Part III of this Article shows, fear of retaliation and adverse consequences is a barrier to reporting discrimination not only among Asian Americans, but also among other minority groups.⁸⁸ Those fears may be more intense among Asian Americans, not due to their lack of knowledge of retaliation protections in place relative to other minority groups, but due to cultural differences which may intensify their fear of retaliation.⁸⁹

II. THE LEGAL CONSEQUENCES OF UNDERREPORTING DISCRIMINATION

A. Disuse of the Redress Mechanism and the Potential Loss of the Right to Sue

Title VII of the Civil Rights Act of 1964⁹⁰ created a complex administrative and judicial scheme to address and enforce its antidiscrimination mandate.⁹¹ Before its enactment, Title VII faced considerable opposition in Congress.⁹² Economic theorists attacked the bill and the new administrative regime it would soon implement as being too costly to maintain and ultimately inefficient.⁹³ Libertarians criticized the bill because, as Judge Bork once wrote, preventing free association was coercive and even

⁸⁷ See EEOC WORK GROUP REPORT, *supra* note 7, at 3.

⁸⁸ See *infra* Parts IV–V.

⁸⁹ *Id.*

⁹⁰ 42 U.S.C. §§ 2000e–2000e-17 (2006).

⁹¹ See Brooks, *supra* note 2, at 511.

⁹² *Pre 1965: Events Leading to the Creation of the EEOC*, EEOC, <http://www.eeoc.gov/eeoc/history/35th/pre1965/index.html> (last visited Dec. 10, 2011).

⁹³ John J. Donahue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1591, 1597 (1992) (recounting the Chicago School's opposition to the passage of Title VII). Donahue notes that Milton Friedman stated that antidiscrimination laws were unnecessary because the "general rules of private property and of capitalism have [sic] been a major source of opportunity for Negroes and have [sic] permitted them to make greater progress than they otherwise could have made." *Id.* at 1591. According to Friedman, whose views became orthodoxy for many in the Chicago School, antidiscrimination laws were unnecessary and ultimately unsuccessful at providing economic benefit for blacks. *Id.* at 1592.

worse than “the ugliness of racial discrimination.”⁹⁴ Some of those same critics remain opposed to this day to what they perceive as Title VII’s overexpansive reach. Others say that it is outdated and doubt its utility to address new forms of discrimination.⁹⁵ Though Title VII lawsuits were effective in driving out overt and intentional forms of racial discrimination in the past, such overt forms of discrimination are rarer today.⁹⁶ Instead, discrimination now tends to come in the forms of unconscious racism,⁹⁷ implicit bias,⁹⁸ and structural discrimination.⁹⁹ Still others say that Title VII is too costly a system to maintain.¹⁰⁰

As imperfect as it may be to some, Title VII and the related antidiscrimination statutes represent the primary legal mechanism through which we address the problems of employment discrimination.¹⁰¹ Before a complainant can file suit for an alleged act of employment discrimination, he or she must first exhaust the EEOC’s procedural requirements.¹⁰² For complainants employed by the federal government, that process involves going through the federal complaint process.¹⁰³ Each federal agency has a

⁹⁴ Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 21–22; see also RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 75 (1992) (“The [law’s] standard prohibition against force and fraud does not depend on a simple assertion that killing or murder is just illegitimate. Rather, it rests on the powerful, albeit empirical, judgment that all people value their right to be free from coercion far more than they value their right to coerce others in a Hobbesian war of all against all.”).

⁹⁵ See Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1237–50 (2010) (contending that the EEOC has failed in its mission and proposing a complete restructuring of the EEOC).

⁹⁶ Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315, 1320 (2008).

⁹⁷ Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995).

⁹⁸ See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1072–73 (2006); Christine Jolls, *Antidiscrimination Law’s Effects on Implicit Bias* 2–3 (Yale Law Sch., Pub. Law Working Paper No. 148, 2005), available at http://papers.ssrn.com/sol3/papers/cfm?abstract_id=959228.

⁹⁹ See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 2 (2006).

¹⁰⁰ Epstein, *supra* note 94, at 73–75 (pointing out the heavy costs and inefficiencies in making discrimination illegal).

¹⁰¹ See J. Hoult Verkerke, *Free to Search*, 105 HARV. L. REV. 2080, 2085 (1992) (defending antidiscrimination laws even under a libertarian perspective as necessary to “remedy an unjust distribution of resources”).

¹⁰² The EEOC provides a nice overview of the federal complaint process. *Overview of Federal Sector EEO Complaint Process*, EEOC, http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm (last visited Dec. 10, 2011) [hereinafter *Federal Sector Complaint Process*]. A charge must also be filed with any existing state antidiscrimination agency. See *FEPAs and Dual Filing*, EEOC, <http://www.eeoc.gov/employees/fepa.cfm> (last visited Dec. 10, 2011).

¹⁰³ *Federal Sector Complaint Process*, *supra* note 102.

designated EEO counselor and must post “information about how to contact the agency’s EEO Office.”¹⁰⁴ Generally, the complainant has forty-five days from the date the alleged discrimination occurred to contact an EEO counselor.¹⁰⁵ Once the complainant contacts the EEO counselor, the precomplaint process begins, which lasts up to thirty days.¹⁰⁶ A part of that process includes the choice of participating in EEO counseling or alternative dispute resolution (ADR) programs, such as mediation, before filing a formal complaint.¹⁰⁷

All agencies are required to have an ADR program, and in 2000, the EEOC required all federal agencies to make ADR programs available during the precomplaint and formal complaint process.¹⁰⁸ Agencies must make “reasonable efforts” to voluntarily settle the complaint as early as possible.¹⁰⁹ If the complainant chooses the ADR program, the EEO counseling activities come to an end. Choosing the ADR program increases the precomplaint process from thirty to ninety days.¹¹⁰ If the matter does not conclude using the ADR program, the agency conducts a final review and issues a notice of right to file a formal complaint.¹¹¹

Once a formal complaint is filed, the agency reviews the complaint for any procedural deficiencies.¹¹² At various points during the process, a complainant may quit the process and opt to file a lawsuit in court.¹¹³ But, as a precondition to filing suit, the employee must file a charge with the EEOC¹¹⁴ within the statute of

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Federal EEO Complaint Processing Procedures*, EEOC, <http://www.eeoc.gov/eeoc/publications/fedprocess.cfm> (last visited Dec. 10, 2011).

¹⁰⁷ *Federal Sector Complaint Process*, *supra* note 102.

¹⁰⁸ *Federal Sector Alternative Dispute Resolution Fact Sheet*, EEOC, <http://www.eeoc.gov/federal/adr/facts.cfm> (last visited Dec. 10, 2011).

¹⁰⁹ 29 C.F.R. § 1614.603 (2010).

¹¹⁰ *Federal Sector Alternative Dispute Resolution Fact Sheet*, *supra* note 108.

¹¹¹ *Id.*

¹¹² If the agency does not dismiss the complaint, the agency conducts an investigation and has 180 days to do so. Upon the conclusion of the agency investigation, the complainant has two choices: either request a hearing from the EEOC Administrative Judge or ask the agency to issue a decision as to whether discrimination occurred. If the complainant requests the latter and the agency finds that no discrimination occurred, the complainant has the option of appealing that decision to the EEOC, when EEOC appellate attorneys conduct review of the agency’s findings, or challenging it in federal district court. *Federal Sector Complaint Process*, *supra* note 102. If the complainant chooses the former, an Administrative Judge will hear the matter and issue a decision and order relief if discrimination is found. *Id.* The complainant also has the ability to appeal the Administrative Law Judge’s decision to the EEOC as well as to a federal district court. *Id.* The complainant may still choose the ADR option during the formal complaint process. *Federal Sector Alternative Dispute Resolution Fact Sheet*, *supra* note 108.

¹¹³ *Federal Sector Complaint Process*, *supra* note 102.

¹¹⁴ *Id.*; 42 U.S.C. § 2000e-5(b) (2006). A charge must comply with the EEOC regulation, which specifies that “a charge is sufficient when the Commission receives from the person

limitations,¹¹⁵ which has been strictly interpreted.¹¹⁶ The Supreme Court recently stated that the “time for filing a charge of employment discrimination . . . begins when the discriminatory act occurs.”¹¹⁷ The Court had previously interpreted the limitations period as beginning to run when the employee receives notice of a discriminatory employment act, not when the act occurs.¹¹⁸ This change considerably shortens an already short limitations period and puts greater pressure on employees to report in a timely fashion.

B. The Loss of the Affirmative Defense in Employer Liability Suits: The U.S. Supreme Court’s Decisions in Ellerth and Faragher

In addition to the strict interpretation of the statute of limitations for filing a charge with the EEOC, the Supreme Court has imposed another reporting requirement on the employee by considerably narrowing the time period available for an employee to report any alleged misconduct if the employee wishes to pursue a private suit against the employer. To prevail in hostile work environment claims under Title VII, an employee has a duty to timely report the alleged misconduct.¹¹⁹ In *Burlington Industries, Inc. v. Ellerth*¹²⁰ and *Faragher v. City of Boca Raton*,¹²¹ two cases decided on the same day, the United States Supreme Court established a framework that governs employer liability for sexual harassment by supervisors. Employers are vicariously liable for actions of supervisors in the employee’s chain of command when tangible employment action is taken.¹²² Although these cases were decided within

making the charge a written statement sufficiently precise to identify the parties and to describe generally the action or practice complained of.” 29 C.F.R. § 1601.12(b).

¹¹⁵ A complainant has several options to file: after 180 days have passed from the date he filed the complaint if the agency has not issued a decision and no appeal has been filed; within ninety days from the date the complainant received the agency’s decision on his complaint so long as no appeal has been filed; after 180 days from the date he filed the appeal if the EEOC has not issued a decision; or within ninety days from the date the EEOC’s decision on the appeal is received. *See Federal Sector Complaint Process, supra* note 102.

¹¹⁶ Title VII provides two applicable periods of limitation. The general rule is that the charge must be filed within 180 days “after the alleged unlawful employment practice occurred.” 42 U.S.C. § 2000e-5(e). The exception to the rule is when there is a state or local antidiscrimination agency, in which case the charge must be filed with such agency in addition to the EEOC, within 300 days of the alleged violation or within thirty days after notice that the state proceedings are terminated, whichever date is later. *Id.*

¹¹⁷ *Ledbetter v. Goodyear Tire & Rubber Co. Inc.*, 550 U.S. 618, 619 (2007), *superseded on other grounds*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 and 42 U.S.C. (2009)).

¹¹⁸ *Del. State Coll. v. Ricks*, 449 U.S. 250, 259 (1980).

¹¹⁹ *See Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 765 (1998).

¹²⁰ 524 U.S. 742 (1998).

¹²¹ 524 U.S. 775 (1998).

¹²² *Ellerth*, 524 U.S. at 760–61. “A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with

the sexual harassment context, their holdings have been extended and applied in race harassment cases.¹²³

While establishing a cause of action for employer liability, the Court articulated a strong affirmative defense that an employer may raise. To establish that defense, the employer must show that: (1) it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and (2) that the employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided or to avoid harm otherwise.”¹²⁴ The employer bears the burden of proof on both elements.¹²⁵ Concerning the two required elements, the Court stated:

While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, *a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defense.*¹²⁶

In articulating such a holding, the Court was trying to alter the behavior of both employers and employees. It placed on the employer the burden of showing that it took corrective action when the employee reported the harassment. Although failing to establish an antiharassment policy and accompanying complaint procedures does not technically preclude an employer from establishing the first element of the affirmative defense,¹²⁷ it is all but required if an employer wishes to reduce its

significantly different responsibilities, or a decision causing a significant change in benefits.” *Id.* at 761.

¹²³ See *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 186 n.9 (4th Cir. 2001); *Jackson v. Ark. Dep’t of Educ.*, 272 F.3d 1020, 1024 (8th Cir. 2001); *Hill v. Am. Gen. Fin., Inc.*, 218 F.3d 639, 641 (7th Cir. 2000); *Allen v. Mich. Dep’t of Corr.*, 165 F.3d 405, 411 (6th Cir. 1999); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294–95 (2nd Cir. 1999); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998). This affirmative defense has been extended beyond Title VII harassment cases. For example, the Fifth Circuit held that the *Ellerth-Faragher* standard governs hostile work environment claims alleged under the Energy Reorganization Act’s whistle-blower provision. *Williams v. Admin. Review Bd.*, 376 F.3d 471, 478–79 (5th Cir. 2004).

¹²⁴ *Ellerth*, 524 U.S. at 765.

¹²⁵ *Olson v. Lowe’s Home Ctrs. Inc.*, 130 Fed. App’x 380, 389 (11th Cir. 2005).

¹²⁶ *Ellerth*, 524 U.S. at 765 (emphasis added); see also *Faragher*, 524 U.S. at 807–08.

¹²⁷ The Court explained that the absence of such conciliatory tools “may appropriately be addressed in any case when litigating the first element of the defense,” which suggests that

exposure to liability.¹²⁸ Moreover, under *Faragher*, the employer must, at a minimum, disseminate that policy among its employees and allow them to bypass the harassing supervisor in the complaint process.¹²⁹

Though the employer has the burden to prove the second element as well, it can meet that burden by showing evidence of an employee “unreasonably fail[ing] to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.”¹³⁰ Under this formulation, the Court seems to have left open the option for an employee to act reasonably by taking steps to avoid harm, without taking advantage of the preventative or corrective opportunities provided by the employer. In its next breath, however, the Court seems to disabuse itself of that notion by stating that the employee’s failure to use her employer’s complaint procedures “will normally suffice to satisfy the employer’s burden under the second element of the defense.”¹³¹

Indeed, the lower courts have treated the employee’s reporting requirement as a duty. In *Matvia v. Bald Head Island Management, Inc.*, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court’s grant of summary judgment for the employer on the employee’s claims of sexual harassment.¹³² There, the employee argued that her reluctance to report the harassing behavior of her supervisor was not unreasonable.¹³³ In response, the court repeatedly characterized the reporting of harassment as a duty.¹³⁴ It stated that *Faragher* and *Ellerth* “command that a victim of sexual harassment report the misconduct, [rather than] investigate, gather evidence, and then approach company officials.”¹³⁵

Not only did the court in *Matvia* require the reporting of harassment, but it also seems to have imposed a time requirement for doing so.¹³⁶ The employee waited until

such conciliatory procedures are not necessary to establish the first element of the affirmative defense. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 778.

¹²⁸ See Edward A. Marshall, *Excluding Participation in Internal Complaint Mechanisms from Absolute Retaliation Protection: Why Everyone, Including the Employer, Loses*, 5 EMP. RTS. & EMP. POL’Y J. 549, 571 (2001).

¹²⁹ *Faragher*, 524 U.S. at 808.

¹³⁰ *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

¹³¹ *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

¹³² 259 F.3d 261, 265 (4th Cir. 2001).

¹³³ *Id.* at 269.

¹³⁴ *Id.* at 269–70 (citing *Faragher*’s observation that “a victim [of sexual harassment] has a duty to use such means as are reasonable under the circumstances to avoid or minimize the damages that result from violations of the statute” and that the unpleasantness of reporting “cannot override the duty to report sexual harassment”).

¹³⁵ *Id.* at 269.

¹³⁶ *Id.* In addition to the requirement to report timely under *Ellerth* and *Faragher*, some employers’ internal policies require reporting harassment “immediately.” For example, in *Baldwin v. Blue Cross/Blue Shield of Alabama*, Blue Cross policy required the employee to “report the [harassing] incident or conduct immediately.” 480 F.3d 1287, 1295 (11th Cir. 2007). The court concluded that the “employee must comply with the reporting rules and procedures her employer has established.” *Id.* at 1306. The Supreme Court in *National Railroad*

the final incident to complain to her employer and argued that it was reasonable for her to refrain from reporting so that she could wait to see “whether he was a ‘predator’ or merely an ‘interested man’ who could be politely rebuffed.”¹³⁷ The court rejected such actions as unreasonable and concluded that victims of sexual harassment act prudently only by immediately reporting the misconduct, rather than “investigat[ing]” or “gather[ing] evidence.”¹³⁸

Matvia’s holding is not an outlier.¹³⁹ Many district courts have deemed even relatively short delays between incidents of sexual harassment and the date the employee reported them to be unreasonable for purposes of assessing employer liability.¹⁴⁰ For example, an employee in *Phillips v. Taco Bell Corporation* was touched in a sexual manner once in March and then four times in June.¹⁴¹ Two days after the fourth incident in June, the employee reported the conduct.¹⁴² The court characterized the delay as three months, notwithstanding the fact that the first event was isolated, more than two months before the other four events, and the employee reported the harassment within days of the escalating events in June.¹⁴³

In *Conatzer v. Medical Professional Building Services, Inc.*, the court deemed even a shorter delay as unreasonable.¹⁴⁴ There, the supervisor brushed up against the employee’s chest on September 28.¹⁴⁵ On October 11 and October 13, the supervisor escalated the conduct and put her head in a headlock between his knees.¹⁴⁶ Conatzer reported the conduct on October 15.¹⁴⁷ The court concluded that she should have reported the conduct after the first incident.¹⁴⁸ Such a conclusion does not take into

Passenger Corp. v. Morgan, 536 U.S. 101 (2002), did delay the charge filing period for hostile environment harassment claims by holding that the charge filing period does not begin to run until the last event contributing to the hostile environment occurs. *Id.* at 121–22. Nevertheless, this does not disturb the early reporting requirements of *Ellerth* and *Faragher*.

¹³⁷ *Matvia*, 259 F.3d at 269.

¹³⁸ *Id.*

¹³⁹ See, e.g., *Thornton v. Fed. Express Corp.*, 530 F.3d 451, 457 (6th Cir. 2008) (at least two months delay in reporting unreasonable); *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1277 (11th Cir. 2003) (two and a half months delay unreasonable); cf. *Lauderdale v. Tex. Dep’t of Criminal Justice*, 512 F.3d 157, 164 (5th Cir. 2007) (one day delay before complaining to supervisor unwilling to help deemed unreasonable because employee did not pursue another avenue for complaint); *Collette v. Stein-Mart*, 126 Fed. App’x 678 (6th Cir. 2005) (two days delay unreasonable for failure to take advantage of measures to correct or prevent harassment).

¹⁴⁰ L. Camille Hebert, *Why Don’t “Reasonable Women” Complain about Sexual Harassment?*, 82 IND. L.J. 711, 722 (2007) (arguing against finding short delays in reporting as unreasonable).

¹⁴¹ 83 F. Supp. 2d 1029, 1033 (E.D. Mo. 2000); Hebert, *supra* note 140, at 722.

¹⁴² *Phillips*, 83 F. Supp. 2d at 1034.

¹⁴³ *Id.*

¹⁴⁴ 255 F. Supp. 2d 1259, 1270 (N.D. Okla. 2003); Hebert, *supra* note 140, at 723–24.

¹⁴⁵ *Conatzer*, 255 F. Supp. 2d at 1264.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1270.

account the fact that the employee reported the conduct within days of when the conduct escalated. Requiring an employee to report the first incident immediately leaves no room for her to make the judgment of whether such conduct was indeed harassing. It would be reasonable for an employee to think the first act of brushing up against her chest could be an accident. Only with the benefit of hindsight, by putting the three acts in context, would a reasonable person know that the first incident was an act of harassment. Not only did the court require the employee to report immediately, but it also found fault with her method of reporting. Because Conatzer merely reported the conduct to her supervisors, instead of filing a formal report, the court found that aspect of her conduct unreasonable as well.¹⁴⁹

Such an interpretation of the affirmative defense is incongruous with the EEOC's own guidelines, which state that the failure to report the first instance of sexual harassment—or even the second or third—is not presumptively unreasonable.¹⁵⁰ It would seem reasonable for an employee, like Conatzer, to ignore the first minor incident, or a small number of incidents, in hopes that the harassment will stop. She may also be able to find other methods of diffusing the situation without resorting to the formal method of filing a complaint. As Part III of the Article contends, behavioral science research supports this view.

Some courts have followed this line of reasoning and have been more reluctant to establish an absolute rule that complainants must immediately report a first act of harassment.¹⁵¹ The U.S. Court of Appeals for the Fifth Circuit, for example, in *Watts v. Kroger Company* reversed summary judgment on the grounds that the employer could not, as a matter of law, establish that the employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer” when the employee endured harassment for nearly a year and only complained when the harassment intensified.¹⁵² The court held that a jury may find it “not unreasonable” to hold off complaining under these circumstances.¹⁵³ Likewise, the U.S. Court of Appeals for the Ninth Circuit in *Craig v. M&O Agencies, Inc.* concluded that a

¹⁴⁹ *Id.* at 1269. Interestingly, Hebert points out that courts have been more accepting of employers' delays in acting on reports of sexual harassment than of employees' delays in making those reports. Hebert, *supra* note 140, at 724.

¹⁵⁰ See U.S. Equal Employment Opportunity Commission, Notice No. 915.002, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, 2 EEOC Compl. Man. (BNA) No. 289, at 615:0101 (June 18, 1999) [hereinafter EEOC Enforcement Guidelines].

¹⁵¹ *Reed v. MBNA Mktg. Sys.*, 333 F.3d 27, 35 (1st Cir. 2003) (“There is no bright-line rule as to when a failure to file a complaint becomes unreasonable, but *Faragher* and *Ellerth* do provide some indirect guidance.”). The court in *Reed* reversed summary judgment for the employer and acknowledged that it would not be unreasonable for the jury to find a ten months delay in reporting reasonable. *Id.* at 37. However, this conclusion may be limited to the particular facts of *Reed*, which involved a seventeen-year-old girl who had been assaulted by a supervisor twice her age. *Id.*

¹⁵² 170 F.3d 505, 510 (5th Cir. 1999).

¹⁵³ *Id.*

nineteen-day delay in reporting supervisory harassment was not unreasonable because the employee may have hoped that the situation would resolve itself without resorting to the formal complaint mechanism.¹⁵⁴

The rationale for requiring employees to report harassment and to do so in a timely manner was articulated by Justice Kennedy in *Ellerth*.¹⁵⁵ There, he emphasized that one of the goals—if not the ultimate purpose—of Title VII is to “encourage the creation of antiharassment policies and effective grievance mechanisms.”¹⁵⁶ An employee’s notice of harassment to the employer is critical because without it, the employer has no chance—and thus no duty—to take corrective action. Without the employee’s cooperation, the problem of workplace discrimination cannot be corrected.¹⁵⁷ Moreover, imposing on employers the duty to create such policies and requiring employees to use such policies “promote[s] conciliation rather than litigation in the Title VII context.”¹⁵⁸ Requiring employees to report harassing conduct early,¹⁵⁹ as many courts have done, and “before it becomes severe or pervasive,”¹⁶⁰ achieves the deterrent purpose of Title VII.

Some empirical research supports this assertion.¹⁶¹ Employers enjoy up to a 30% decrease in EEOC complaints following the implementation of internal conciliatory mechanisms.¹⁶² This is particularly significant in light of the general increase in the filing of harassment charges filed with the EEOC from the 1980s to the 2000s.¹⁶³ The increase in the number of harassment charges means that legal expenditures for both courts and litigants would be significant.¹⁶⁴

But such rigid requirements for reporting harassment, and particularly the imposition of a strict time limit for doing so, in some ways undermine the conciliation purpose of the framework in *Ellerth*, and ultimately the deterrent purpose of Title VII.

¹⁵⁴ 496 F.3d 1047, 1057–58 (9th Cir. 2007).

¹⁵⁵ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).

¹⁵⁶ *Id.*

¹⁵⁷ *See Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1302 (11th Cir. 2000) (citing *Ellerth*, 524 U.S. at 764) (holding the employee acted unreasonably by her delay in using employer’s reporting procedures and by reporting to mid-level managers instead of individuals identified in the sexual harassment policy).

¹⁵⁸ *Id.* at 1297.

¹⁵⁹ *Ellerth*, 524 U.S. at 764. Justice Kennedy stated that the “deterrent purpose” of Title VII would be served by “encouraging” employees to report harassing conduct. *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Marshall*, *supra* note 128, at 588.

¹⁶² *Id.*

¹⁶³ *See Harassment Charges EEOC & FEPAs Combined: FY 1997–FY 2010*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/harassment.cfm> (last visited Dec. 10, 2011). The number of claims filed increased steadily from 1997 to 2010. *Id.* From the 1980s to 1990s, there was a fivefold increase in the harassment charges filed with the EEOC. *Marshall*, *supra* note 128, at 582 n.200. Harassment charges constituted only 3% of the charges in the 1980s but 14% in the 1990s. *Id.*

¹⁶⁴ *Marshall*, *supra* note 128, at 589.

If courts continue to evaluate the reasonableness requirement ex-post with the benefit of hindsight, and not from the ex-ante perspective of the employee and the information available to her at the time of the events, then employees have no realistic choice but to report the first incident.¹⁶⁵ But, as in Conatzer's case, the first incident may seem offensive only when examined in context of the second and third events.¹⁶⁶

For Conatzer, it turns out that the first incident of her supervisor brushing up against her chest led to more offensive conduct.¹⁶⁷ In other circumstances, such an isolated event may not be the prelude to additional offensive behavior. Given the considerable risk an employee faces by formally complaining to the employer, the law should leave that choice up to the employee, even if she does not report the first incident, for it is just as reasonable for an employee to "ignore a small number of incidents, hoping that the harassment will stop . . . and then wait to see if that is effective in ending the harassment before complaining to management."¹⁶⁸ Otherwise, the law will incentivize "every minor, unwelcome remark based on race, sex, or another protected category [to trigger] a complaint and investigation," making the workplace a "battleground."¹⁶⁹

III. STRUCTURAL AND GENDER BARRIERS: A COMPARATIVE ANALYSIS OF WOMEN'S SEXUAL HARASSMENT CLAIMS

Much of the legal scholarship and behavioral science research on the barriers that prevent the reporting of Title VII claims concern women and their reluctance to bring sexual harassment claims.¹⁷⁰ Social scientists have identified several structural barriers that prevent all people, regardless of gender or cultural background, from reporting claims for harassment and discrimination.¹⁷¹ These structural barriers include the desire

¹⁶⁵ Some courts have acknowledged this view. *See* *Pinkerton v. Colo. Dep't. of Transp.*, 563 F.3d 1052, 1064 (10th Cir. 2009) ("In this case, the lapse of time was not vitiated by the fact that events giving rise to the complaint were relatively minor. If that were the situation presented here, then a two or two and a half month delay might be reasonable, because an employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment. We will not require plaintiffs to report individual incidents that are revealed to be harassment only in the context of additional, later incidents, and that only in the aggregate come to constitute a pervasively hostile environment.").

¹⁶⁶ *See* *Conatzer v. Med. Prof'l Bldg. Serv., Inc.*, 255 F. Supp. 2d 1259, 1263–64 (N.D. Okla. 2003).

¹⁶⁷ *Id.* at 1264.

¹⁶⁸ EEOC Enforcement Guidelines, *supra* note 150, at 615:0112–13.

¹⁶⁹ *Id.*

¹⁷⁰ *See, e.g.*, Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 275 (2000); Louise F. Fitzgerald et al., *Why Didn't She Just Report Him?: The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 118 (1995); Hebert, *supra* note 140, at 712.

¹⁷¹ *See* Gruber & Smith, *supra* note 17, at 557–58.

to maintain social relationships, the lack of power in the workplace,¹⁷² and the fear of retaliation.¹⁷³ For women, gender differences heighten these structural barriers to reporting harassment. Part III provides a comparator for Parts IV and V of this Article, that apply the behavioral science research concerning women's reluctance to report sexual harassment claims to argue that cultural differences for Asian Americans, like gender differences for women, magnify the structural barriers to reporting discrimination.

A. The Structural Barriers to Reporting Sexual Harassment Claims

In their much-cited study of women's responses to sexual harassment, sociologists James Gruber and Michael Smith found that "women's responses to sexual harassment stem from two primary sources: the management of social relationships and the dynamics of power in the workplace."¹⁷⁴ As structural barriers, these two sources or concerns affect both men and women. Regarding the management of social relationships, the research revealed that both men and women tended to avoid conflict.¹⁷⁵ Moreover, the less assertive response to conflict was more common among both men and women.¹⁷⁶ Gruber and Smith characterized such conflict avoidance measures as the basis of all social interaction.¹⁷⁷ For example, all social interactants in their study employed methods to avoid embarrassment or inappropriate behavior.¹⁷⁸ They used "various face-saving (and situation-saving)" techniques in response to others who behaved outrageously, bungled the social situation, or otherwise violated social norms.¹⁷⁹ Some of these measures included avoidance—either switching the topic of discussion or physically leaving the scene—"or explaining away the behavior as exceptional."¹⁸⁰ Thus, what proved exceptional were not the so-called passive responses to inappropriate behavior, but the aggressive ones that threaten the social organization.¹⁸¹

Concerning the dynamics of power in the workplace, the higher the level of objective or subjective power employees have or perceive that they have, both inside and outside the workplace, the more likely that they would respond assertively to harassment.¹⁸² Gruber and Smith characterize power in three forms: "sociocultural, organizational, and personal resources."¹⁸³ They point to the organizational power level of employees as being an especially important indicator of willingness to

¹⁷² *Id.*

¹⁷³ *Id.* at 547.

¹⁷⁴ *Id.* at 557.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 558.

¹⁸³ *Id.*

respond assertively to violations in the workplace.¹⁸⁴ For example, they found that employees “who experience[d] harassment from an employer or supervisor [were] especially limited in their responses compared to” others harassed by their peers.¹⁸⁵ Also, the more support that employees felt they had in the workplace, the more likely they were to report harassment.¹⁸⁶

Social psychologists frame the power dynamic in slightly different, though related, terms. One such way attributes the reluctance to report discrimination to—and as a function of—self-esteem.¹⁸⁷ According to one study, people either perceived or did not perceive discrimination in order to guard their self-esteem.¹⁸⁸ To illustrate, those who perceived discrimination tended to so do in an effort to protect their performance state self-esteem.¹⁸⁹ Attributing an unfavorable outcome to discrimination allowed that person to protect her performance self-esteem.¹⁹⁰ But in so doing, that person experienced lower social state self-esteem, as she felt singled out on account of her minority status.¹⁹¹ A majority of those studied chose not to perceive discrimination as an effort to maintain a perception of control in the social domain.¹⁹²

Another way social psychologists have framed the power dynamic analysis is by attributing the reluctance to report discrimination to the fear of retaliation. Indeed, retaliation fear was one of the most common reasons people gave for not reporting harassment.¹⁹³ For example, 62% of state employees in one study reported some form of “retaliation for their responses to harassment.”¹⁹⁴ Retaliation forms “includ[ed] lowered job evaluations, denial of promotion, and being transferred,” with “the most assertive harassment responses . . . incurr[ing] the greatest [retaliation] costs.”¹⁹⁵ In another study, one-third of the victims of sexual harassment who filed claims stated that filing “made things worse.”¹⁹⁶ In a study of the Navy, one-third of the victims stated that they were humiliated by others after speaking out.¹⁹⁷ Indeed, in many

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 559.

¹⁸⁶ *Id.*

¹⁸⁷ Karen M. Ruggiero & Donald M. Taylor, *Why Minority Group Members Perceive or Do Not Perceive the Discrimination That Confronts Them: The Role of Self-Esteem and Perceived Control*, 72 J. PERSONALITY & SOC. PSYCHOL. 373, 384 (1997).

¹⁸⁸ *Id.* at 385.

¹⁸⁹ *Id.* at 384.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 385.

¹⁹³ Fitzgerald, *supra* note 170, at 122.

¹⁹⁴ *Id.* (citing P. H. Loy & L. P. Stewart, *The Extent and Effects of Sexual Harassment of Working Women*, 17 SOCIAL FOCUS 31, 31–43 (1984)). The high percentage reported by this study may be a result of the small sample size of eighty-six participants. *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 123 (citing a 1981 study of merit system victims).

¹⁹⁷ *Id.* (citing AMY L. CULBERTSON ET AL., NAVY PERS. RESEARCH & DEV. CTR. ASSESSMENT OF SEXUAL HARASSMENT IN THE NAVY: RESULTS OF THE 1989 NAVY-WIDE

surveys, negative outcomes, be they job-related or health-related, were the result of the more assertive response to harassment.¹⁹⁸ Such evidence shows the considerable risk that employees take when they report harassment.

In their analysis of whether an employee's actions were reasonable in employer liability suits, courts have been unwilling to excuse an employee's reluctance to report for fear of retaliation or her general discomfort with reporting. In *Shaw v. AutoZone, Inc.*, the U.S. Court of Appeals for the Seventh Circuit considered an appeal from a grant of summary judgment for the employer by the district court.¹⁹⁹ The employee's supervisor made several sexually explicit comments to her.²⁰⁰ Although she was apprised of the company's sexual harassment policy upon her hire, she did not report the harassing incidents to anyone and quit.²⁰¹ During her deposition, she said that she did not report the conduct for "a lot of reasons," including "uncomfortableness about being around [the harasser]," as well as the "lack of support from . . . [the] manager, letting the employees take advantage of [her] or not support[ing] [her]."²⁰² In affirming summary judgment for the employer because the employee's failure to report satisfied the employer's burden under the second prong of the *Ellerth* affirmative defense, the court reasoned that "an employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty under *Ellerth* to alert the employer of the allegedly hostile environment."²⁰³

The court in *Matvia* was more sympathetic, recognizing that "the reporting of sexual harassment can place 'the harassed employee in an awkward and uncomfortable situation.'"²⁰⁴ "Not only is it embarrassing to discuss such matters with company officials, but after the harassed employee overcomes this hurdle she may have to deal with a negative reaction from coworkers."²⁰⁵ Despite recognition of such "stress" and "unpleasantness" engendered by reporting, the court underscored an employee's "duty to report," pointed to the essentiality of the reporting requirement to the logic of

SURVEY 17 (1992), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2+doc=GetTRDoc.pdf&AD=ADA248546>).

¹⁹⁸ *Id.* at 123. Fitzgerald, Swan, and Fischer note that even when harassment victims take legal action and file suit, the percentage of those who win such cases ranges from one-third to one-half. *Id.* Of those who prevail, the settlements have been quite small. They cite a study of claims filed with the Illinois Department of Human Rights, which found the average settlement was around \$3,000. *Id.*

¹⁹⁹ 180 F.3d 806, 808 (7th Cir. 1999).

²⁰⁰ *Id.* at 809–10.

²⁰¹ *Id.* at 810.

²⁰² *Id.*

²⁰³ *Id.* at 810–13; see also *Meadows v. Cnty. of Tulare*, No. 98-16412, 1999 WL 685960, at *2 (9th Cir. Sept. 1, 1999) (holding that "generalized fears of retaliation" do not excuse an employee from her duty to report under the second prong of the *Ellerth* affirmative defense).

²⁰⁴ *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 270 (4th Cir. 2001).

²⁰⁵ *Id.* at 261 (quoting *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 268 (4th Cir. 2001)).

Title VII, and reasoned that a “nebulous fear of retaliation” cannot form the “basis for remaining silent.”²⁰⁶ The court gave no credence to the employee’s subjective fears.

For the court, the availability of a retaliation claim was enough to assuage the complainant and should not have prevented her from reporting harassment.²⁰⁷ However, if that complainant is reluctant to use the internal grievance mechanism to report harassing behavior, it is also likely that she would show the same reluctance to bring a much more public retaliation claim. Moreover, courts have been diluting the protection from retaliation under the retaliation clause of Title VII in certain circumstances. For example, in *Clark County School District v. Breeden*,²⁰⁸ the U.S. Supreme Court affirmed “the view long adhered to by lower courts that the retaliation clause of Title VII provides employees with far less protection when submitting complaints internally than when filing charges with the” EEOC.²⁰⁹ Though those who file charges with the EEOC receive “absolute protection from retaliation in connection with their EEOC charge,” employees who use the employer’s internal grievance procedures receive far less protection—only “to the extent their complaint was based on a good faith and reasonable belief in the unlawfulness of the [opposed] practice.”²¹⁰ Such diluted protection tempts and gives too much power to employers to unilaterally assess the unlawfulness of the employee’s conduct and subject her to reprisal when the employer has any reason to doubt the employee’s good faith and reasonable belief in reporting.²¹¹ If courts are serious about offering retaliation protection as a way to assuage an employee’s fear of retaliation, and thus her reluctance to report harassment, then they should strengthen retaliation protection, not erode it.²¹²

B. Gender Differences and the Consequent Disproportionate Impact on Women

Behavioral science research shows that gender differences heighten the structural barriers that prevent reporting of harassment claims. For example, some scholars have

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ 532 U.S. 268 (2001).

²⁰⁹ Marshall, *supra* note 128, at 551; *see also Breeden*, 532 U.S. at 271–74 (rejecting plaintiff’s claims of retaliation).

²¹⁰ Marshall, *supra* note 128, at 551 (internal quotation marks omitted).

²¹¹ *Id.* at 552.

²¹² Marshall points out another problem with such dilution of retaliation protection. He states that “declining to provide protection to employees filing internal grievances until they could ‘reasonably’ perceive the complained of harassment as unlawful may effectively delay the attachment of protection until the harasser’s conduct actually reaches a level of actionable severity” *Id.* That would be incongruous with Title VII’s deterrence function, which the Court in *Ellerth* concluded would be “effectuated . . . by internal complaint procedures designed to ‘encourage employees to report harassing conduct before it becomes severe or pervasive.’” *Id.* at 552–53.

shown that women are less likely “to engage in active responses to experiencing sexual harassment,” including formally reporting harassment claims.²¹³ One study attributed that reluctance to gender differences in orientation to conflict.²¹⁴ According to this study, most women prefer informal methods of dispute resolution to formal ones such as using the grievance procedures of their employer.²¹⁵ Some have attributed such reluctance to women’s socialization to avoid conflict.²¹⁶ Other feminist scholars have rooted such conflict-avoidance in the heavy sanctions that some women have faced for engaging in conflict or behavior that violates gender stereotypes.²¹⁷ One scholar has shown that many women hold values that emphasize responsibility for and to others and the restoration of harmony and bonds among individuals.²¹⁸ Because such values were incongruous with reporting, they were reluctant to formally report their grievances.²¹⁹

According to some scholars, gender differences for women would intensify the structural barrier of the desire to maintain social relationships.²²⁰ They have shown that women exhibit a greater tendency to avoid and ignore conflict and other behavior which violated social norms.²²¹ Some studies show that men are generally more aggressive than women in social situations, “women are responsible for the maintenance work of social interactions,” and such “roles are culturally proscribed and organizationally reinforced” over generations.²²² Some have argued that such evidence points to women bearing the primary responsibility for “articulating the appropriateness of work roles by reacting” passively, such as ignoring or avoiding the provocative conduct.²²³ For example, according to some, the times women acted “offensively” were most likely when they were “helping others save face” or even “protecting the

²¹³ Hebert, *supra* note 140, at 730–31.

²¹⁴ See Stephanie Riger, *Gender Dilemmas in Sexual Harassment: Policies and Procedures*, in *AMERICAN WOMEN IN THE NINETIES: TODAY’S CRITICAL ISSUES* 213, 219–21 (Sherri Matteo ed., 1993).

²¹⁵ *Id.*

²¹⁶ Hebert, *supra* note 140, at 730–31 (citing Denise H. Lach & Patricia A. Gwartney-Gibbs, *Sociological Perspectives on Sexual Harassment and Workplace Dispute Resolution*, 42 *J. VOCATIONAL BEHAV.* 102 (1993)). Hebert also presents some studies which show that men are less likely to report than women because male victims are less upset by the sexual behavior. *Id.* at 11.

²¹⁷ Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Towards Agentive Women*, 57 *J. SOC. ISSUES* 743, 845 (2001).

²¹⁸ Deborah Ware Balogh et al., *The Effects of Delayed Reporting and Motive for Reporting on Perceptions of Sexual Harassment*, 48 *SEX ROLES* 337, 339 (2003).

²¹⁹ *Id.*

²²⁰ Gruber & Smith, *supra* note 17, at 557.

²²¹ Riger, *supra* note 214, at 221.

²²² Gruber & Smith, *supra* note 17, at 558.

²²³ *Id.*

harasser.”²²⁴ And, as others have reported, many women when asked why they did not report the harassment gave the reason that they did not wish harm to the harasser.²²⁵

As Gruber and Smith note, gender differences also influence the power dynamics in the workplace.²²⁶ That women may not act assertively in the workplace because they objectively lack power to do so is a structural framing of the reason for underreporting. But, according to Gruber and Smith, women also may not act assertively on account of some gender differences or gender roles which have been culturally proscribed and organizationally reinforced over time.²²⁷ Such differences or roles may lead some women to believe that they lack power to assertively challenge harassing or discriminatory conduct.²²⁸ Or, as Kristin Bumiller argues, women and other minorities are hesitant to complain about discrimination because admitting victimhood is disempowering, particularly when their minority status already places them in a structurally less powerful position at work.²²⁹

According to Gruber and Smith, the more power women possessed or perceived to have possessed—be it sociocultural, organizational, or personal—the more likely they were to report harassment.²³⁰ Women’s minority status²³¹ also intensifies the fear of retaliation. Women’s perceived lack of power, relative to men, may or may not be on account of some innate gender differences, but women’s gender status confers on them a minority status, particularly in the workplace. Numerous studies have documented that women still lag behind men in pay and positions in management.²³² According to the Government Accountability Office statistics, for example, in 2007, women managers in the finance industry earned 58.8 cents for every dollar earned by men.²³³ Contrary to most people’s assumptions, this figure represents a widening of the pay gap between men and women compared to year 2000 figures when women earned 63.9 cents to every dollar earned by men.²³⁴ Less than twelve percent of all corporate executives are women.²³⁵ Given such lack of gender power balance in the

²²⁴ *Id.*

²²⁵ *Id.* at 546.

²²⁶ *Id.* at 557.

²²⁷ *Id.* at 558.

²²⁸ *Id.*

²²⁹ KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 3–4 (1988).

²³⁰ Gruber & Smith, *supra* note 17, at 558.

²³¹ The minority status refers to their structural minority status and their lack of power in the workplace in relation to men, not numerical minority status.

²³² Dawn Kopecki, *Wall Street Says Women Worth Less as Disparity Over Pay Widens*, BLOOMBERG, (Feb. 11, 2011) <http://www.bloomberg.com/news/2010-10-06/wall-street-says-women-worth-less-as-pay-disparity-widens-in-finance-ranks.html>.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Glass Ceiling Statistics*, R.I. AFFIRMATIVE ACTION PROF’LS, <http://riaapro.org/documents/GLASS%20CEILING%20STATISTICS.pdf> (last visited Dec. 10, 2011).

workplace, there may be a lack of a supportive network—either perceived or real—in place for women to feel comfortable speaking out against harassment. Sociologists have shown that most women feel more comfortable speaking to other women about their experience with harassment.²³⁶ Thus, their gender differences and the minority status they confer in the workplace make women even more vulnerable to the risks of negative outcomes that accompany speaking out.²³⁷

IV. CULTURAL BARRIERS: FROM THE CULTURAL DIVERSITY DATABASE

Parts IV and V return the Article's focus to Asian Americans and apply to cultural minorities the behavioral science evidence on structural barriers to reporting harassment claims. These Parts argue that cultural differences particular to Asian Americans intensify the structural barriers to reporting discrimination claims. Cross-cultural theorists have identified cultural norms and dimensions that differ among national societies, similar to social science research on gender differences.²³⁸ In their work on the dimensions of cultural diversity, Charles Hampden-Turner and Fons Trompenaars have identified six dimensions of cultural diversity, two of which enlighten the reluctance of Asian Americans to report discrimination and harassment.²³⁹

A. *Universalism vs. Particularism*

Universalist cultures emphasize rules, codes, and laws and seek to apply them equally to all.²⁴⁰ They “search [] for . . . similarity and [try] to impose on all members of a class . . . the laws of their commonality.”²⁴¹ Particularist cultures recognize exceptions and special circumstances.²⁴² They value special relationships between family and friends and distinguish relationships based on that special status.²⁴³ To

²³⁶ See Gruber & Smith, *supra* note 17, at 559 (stating that the existence of explicit policies and procedures against sexual harassment helped women overcome the power disparities due to gender).

²³⁷ *Id.* at 558–59. Thus, the courts' strict reporting requirements would have a disproportionate impact on women. This has prompted some scholars to argue for the adoption of the “reasonable woman standard.” See Hebert, *supra* note 140, at 743. *But see* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 471–77 (1997); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398, 1415–20 (1992) (discussing problems with the reasonable woman standard).

²³⁸ CHARLES M. HAMPDEN-TURNER & FONS TROMPENAARS, *BUILDING CROSS-CULTURAL COMPETENCE: HOW TO CREATE WEALTH FROM CONFLICTING VALUES* 1–12 (2000).

²³⁹ *Id.* at 11.

²⁴⁰ *Id.* at 13–14.

²⁴¹ *Id.* at 14.

²⁴² *Id.* at 11.

²⁴³ *Id.*

illustrate the difference, Hampden-Turner and Trompenaars posed the following hypothetical dilemma: “You are riding in a car driven by a close friend,” who is driving thirty-five miles per hour in a twenty mile per hour speed zone. He hits a pedestrian, and you are the only witness. “His lawyer says that if you testify under oath that [your friend] was driving only twenty miles per hour, you will save him from serious consequences. What right has your friend to expect you to protect him?”²⁴⁴

According to Hampden-Turner and Trompenaars, the universalist would place more value on the obligations to the law and would not testify to the lower speed.²⁴⁵ A particularist, on the other hand, would see a greater obligation to the close friend and would testify to the lower speed or not testify at all.²⁴⁶ Nearly 80% of Americans fell into the universalist category, compared to around 20% of Koreans, 30% of Chinese, and 40% of Japanese.²⁴⁷ According to the results of this survey, seven of the eight most universalist countries are Protestant and stable democracies: Switzerland, the United States, Canada, Sweden, Australia, the United Kingdom, and the Netherlands.²⁴⁸ Asian countries, where Confucianism, Hinduism, Buddhism, and Shintoism have had much influence, are more particularist: South Korea, China, Japan, Indonesia, and Singapore.²⁴⁹

In a case study of the management of a copyright dispute, Hampden-Turner and Trompenaars relate a story of how executives at Samsung, a South Korean company, sent them a translated copy of their previously published book on cross-cultural studies and a thank you note praising the book’s utility among Samsung executives.²⁵⁰ The problem was that the authors had not translated the book, nor had Samsung asked the authors for copyright permission to translate or reproduce the book.²⁵¹ The advice of the authors’ British publisher was to sue Samsung, which, as a multibillionaire conglomerate, surely must have known that such action violated copyright laws in Korea and in any other nation in which Samsung distributed the translation.²⁵²

The authors viewed this breach of copyright law in light of Korea’s particularist culture and did not take legal action.²⁵³ Instead, they saw a business opportunity. Samsung had translated the book at its own expense, the cost of which would have been \$18,000, and the translation was of a high quality.²⁵⁴ Thus, the authors reciprocated the thank you letter with another thank you letter, expressed delight that the book was popular among Samsung executives, and inquired about how to locate a

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 19.

²⁴⁶ *Id.* at 16.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 46.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 47.

²⁵⁴ *Id.*

Korean publisher.²⁵⁵ Within two weeks, the authors had three publication offers.²⁵⁶ Within a month, the authors had entered into a legal contract with Samsung to protect their copyright.²⁵⁷ The sale of the book in Korea has been brisk, and the economic value of lost sales to Samsung was outweighed by the savings in cost of translation.²⁵⁸

For particularist cultures, a warm relationship must precede—and may even be more important than—the exercise of a legal right.²⁵⁹ It motivates a friend to be more willing to testify that his friend had been driving at the lower speed or, at the very least, not testify against the friend. To a universalist, it may seem as though a particularist, by testifying falsely, endorses the violation of the law or eschews the importance of the legal system. To some extent, the lack of willingness to participate in the legal system or adhere strictly to its mandates may not reflect a particularist's wholesale rejection of the legal system, but his or her distrust of it.²⁶⁰ Trust in the legal system is low in particularist countries such as Venezuela, Nepal, South Korea, China, and Russia, which have experienced their share of political corruption.²⁶¹ If citizens of these countries have a reason to distrust their own national laws and question their lawmakers, then the incentive to obey the law would be low. This explains why they would place their trust in their families and friends, rather than in the law.²⁶²

B. Individualism vs. Communitarianism/Collectivism

Social psychologists consider the distinction between individualism and communitarianism or collectivism to be the most significant cultural difference among societies.²⁶³ A way to think about this difference is to consider the focus in which

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 47–48.

²⁵⁹ See HAMPDEN-TURNER & TROMPENAARS, *supra* note 238, at 47.

²⁶⁰ Particularists do not necessarily reject laws or universal values, but recognize that universal values must be realized in their local settings. Many Asian countries, for example, have criticized the universal human rights concepts that do not account for cultural differences. See generally MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

²⁶¹ HAMPDEN-TURNER & TROMPENAARS, *supra* note 238, at 16. The distrust of the legal system may be due to the authoritarian regimes. In Asia, the history of Korea, China, and Vietnam has been affected by political strife and the ascendance of authoritarian regimes. Such governments would certainly enable a citizen's distrust of the legal systems as authoritarian regimes. See also Stuart J. Ishimaru, *Employment Discrimination and Asian Americans*, 3 AAPI NEXUS 1, 10 (2005) (stating that “some recently immigrated Asian Americans may not trust the government due to experiences with corrupt or hostile governments in their countries of origin”).

²⁶² HAMPDEN-TURNER & TROMPENAARS, *supra* note 238, at 16.

²⁶³ Harry C. Triandis, *Individualism-Collectivism and Personality*, 69 J. PERSONALITY 907, 907 (2001).

each places his or her primary responsibility: on the good of the individual or on the good of the group. An individualist is self-reliant, values competition, and focuses on personal growth and fulfillment.²⁶⁴ Conversely, a communitarian places value on cooperation and is more sensitive to the will of the group.²⁶⁵ The United States and Canada are among the most individualist nations, whereas the most communitarian countries included Japan, Singapore, and China.²⁶⁶

Harry C. Triandis describes this distinction in terms of individualism and collectivism.²⁶⁷ He depicts individualist cultures as populated by people who largely act autonomously and independently from their in-groups.²⁶⁸ They prioritize their personal goals over the goals of the group, act primarily on their preferences, and do not follow the norms of their in-groups.²⁶⁹ In collectivist cultures, however, people act interdependently within their in-groups, including their family, tribe, and nation.²⁷⁰ They are much more sensitive to the norms and goals of their in-groups and shape their behavior according to them.²⁷¹ In resolving conflict, collectivists “are primarily concerned with maintaining their relationships with others, whereas individualists are primarily concerned with achieving justice.”²⁷² Moreover, collectivists prefer methods of conflict resolution that preserve the relationship, such as mediation, whereas individualists do not mind severing the relationship and are willing to litigate to settle disputes.²⁷³ Triandis identifies the United States as the model individualist culture, whereas many East Asian countries, including China, Japan, and Korea, are collectivist cultures.²⁷⁴

Such findings echo the work of social psychologist Geert Hofstede,²⁷⁵ whose innovative work on cross-cultural databases has been acknowledged and borrowed

²⁶⁴ HAMPDEN-TURNER & TROMPENAARS, *supra* note 238, at 68.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 71.

²⁶⁷ Triandis, *supra* note 263, at 907.

²⁶⁸ *Id.* at 909.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*; Kwok Leung, *Negotiation and Reward Allocations Across Cultures*, in *NEW PERSPECTIVES ON INTERNATIONAL INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY*, 640–85 (P. Christopher Earley & Miriam Erez, eds., 1997); *see also* Ken-Ichi Ohbuchi, Osamu Fukushima, & James T. Tedeschi, *Cultural Values in Conflict Management: Goal Orientation, Goal Attainment, and Tactical Decision*, 30 *J. CROSS-CULTURAL PSYCHOL.* 51, 51–71 (1999).

²⁷⁴ HARRY C. TRIANDIS, *INDIVIDUALISM & COLLECTIVISM* 2 (1995).

²⁷⁵ GEERT HOFSTEDE & GERT JAN HOFSTEDE, *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND* (2d ed. 2005); GEERT HOFSTEDE, *CULTURE’S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS* (2d ed. 2001); GEERT HOFSTEDE, *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND* (1997); GEERT HOFSTEDE, *CULTURE’S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES* (1980).

by many social scientists in the field.²⁷⁶ He characterizes the difference between individualist and collectivist societies mainly in terms of each individual's ties to one another.²⁷⁷ Therefore, individualists are expected to look out for themselves, and their ties usually extend only as far as their immediate families.²⁷⁸ Collectivists, however, are much more integrated into a larger and stronger cohesive network of people—their in-group.²⁷⁹ One is usually born into such a network, and the network protects its group throughout that person's lifetime in return for unquestioning loyalty.²⁸⁰ In Hofstede's survey of cultures, the United States again emerged as the most individualistic.²⁸¹ Japan and Korea were much more collectivist in orientation, forty-sixth and sixty-third respectively in individualism.²⁸²

Closely related to the individualism and collectivism divide is power distance, another cultural dimension which Hofstede defines as “the extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally.”²⁸³ Low power distance cultures try to minimize inequality, whereas high distance ones expect and even desire it.²⁸⁴ High power distances can impair communication, which can have catastrophic real-world outcomes.²⁸⁵ Between 1988 and 1998, Korean Air experienced more plane crashes than most other airlines.²⁸⁶ Malcolm Gladwell attributes this, in part, to Korea's high power distance culture, which impairs the effective communication that is necessary for pilot teamwork.²⁸⁷ In a case study of the Korean Air crash in Guam, a study of the “black box” cockpit recorder revealed that the junior copilot, who had recognized that the senior copilot had made an error, used such mitigated and deferential

²⁷⁶ HAMPDEN-TURNER & TROMPENAARS, *supra* note 238, at x (describing Hofstede as “the father of cross-cultural data bases”). *But see* Brendan McSweeney, *Hofstede's Model of National Cultural Differences and Their Consequences: A Triumph of Faith—A Failure of Analysis*, 55 HUM. REL. 89, 89 (2002) (questioning Hofstede's thesis of cultural differences and methodological approaches).

²⁷⁷ HOFSTEDE & HOFSTEDE, *supra* note 275, at 76.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* This idea comports with Hampden-Turner and Trompenaars's idea that communitarian societies often began as agrarian societies, in which personal success depended on a wider social system. The cultivation of rice, for example, requires the effort of the entire village, which may explain why many Asian cultures are collectivist in orientation. *See* HAMPDEN-TURNER & TROMPENAARS, *supra* note 238, at 69–73.

²⁸¹ HOFSTEDE & HOFSTEDE, *supra* note 275, at 78 tbl.3.1.

²⁸² *Id.*

²⁸³ Ilhyung Lee, *Korean Perception(s) of Equality and Equal Protection*, 31 B.C. INT'L & COMP. L. REV. 53, 70 (2008) (citing HOFSTEDE & HOFSTEDE, *supra* note 275, at 46).

²⁸⁴ *Id.* at 70–71.

²⁸⁵ MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* 179 (2008).

²⁸⁶ *Id.* at 180.

²⁸⁷ *Id.* at 181.

speech to render the urgency of his message ineffective.²⁸⁸ This linguistic indirectness of the junior copilot's speech reflects Korea's high-distance culture and its collective orientation.²⁸⁹ That Japan, Korea, and China share the same collectivist orientation is unsurprising given their common historical tradition of Confucianism.²⁹⁰ Examination of Confucianism explains the predominance of collectivism in these Asian cultures and enlightens the analysis of Asian-American behavior in the workplace.²⁹¹

C. A Common Legal Tradition: Confucianism in East Asia

1. Applicable Confucian Values

Some scholars have articulated the existence of "a common Asian law," despite the diversity of cultures and histories which characterize Asia.²⁹² In East Asia, scholars consider the source of that common Asian law to be Confucianism, which has shaped societal and philosophical norms there for thousands of years.²⁹³ No other philosophy has so deeply influenced the life and thought of the East Asian people and character.²⁹⁴ Though many profess to be Taoist, Buddhist, or Christian, they also simultaneously profess to be Confucianist, as Confucianism has become an inseparable part of East Asian thought and society, and synonymous with what it means to be East Asian.²⁹⁵ Confucianism emphasizes the hierarchy, harmony, and order in society. These "relational rules" not only regulate society independent of laws, but are also reflected in the way laws have been constructed upon those rules.²⁹⁶ East Asian legal scholars argue that Confucianism provided the basis for ancient East Asian jurisprudence.²⁹⁷ It prescribed the spiritual and moral landscape for the law and customs that regulated behavior in ancient China, where Confucianism originated during

²⁸⁸ *Id.* at 182.

²⁸⁹ See Ho-min Sohn, *Intercultural Communication in Cognitive Values: Americans and Koreans*, 9 LANGUAGE & LINGUISTICS 93–136 (1993).

²⁹⁰ SOURCES OF CHINESE TRADITION 21 (Wm. Theodore de Bary et al. eds., 1960).

²⁹¹ Triandis, *supra* note 263, at 77.

²⁹² Takao Tanase, *Global Markets and the Evolution of Law in China and Japan*, 27 MICH. J. INT'L L. 873, 877 (2006).

²⁹³ SOURCES OF CHINESE TRADITION, *supra* note 290, at 17.

²⁹⁴ *Id.* at 17 ("If we were to characterize in one word the Chinese way of life for the last two thousand years the word would be 'Confucian.'").

²⁹⁵ *Id.*

²⁹⁶ Tanase, *supra* note 292, at 877. *But see generally* Eric A. Feldman, *The Culture of Legal Change, A Case Study of Tobacco Control in Twenty-First Century Japan*, 27 MICH. J. INT'L L. 743, 746 (2006) (demonstrating that the adoption of Western legal norms in Korea may suggest otherwise).

²⁹⁷ CHONGKO CHOI, EAST ASIAN JURISPRUDENCE 9 (2009).

the early Han Dynasty.²⁹⁸ Confucianism provided the theoretical basis for imperial government in China, and thereafter spread to Korea, Japan, and Vietnam.²⁹⁹

The most important value in Confucianism is *jen*, translated as “goodness,” “humanity,” and “benevolence.”³⁰⁰ This belief permeates governance and law, emphasizing that governance and law should be benevolent towards their subjects and those whom they rule.³⁰¹ Another important value of Confucianism is propriety, or the code of conduct which defines one’s behavior in relation to others.³⁰² Only when individuals understand and act according to their own status can society as a whole achieve social order.³⁰³ In Confucianism, achieving equality among people is not the aim. Rather, Confucianism emphasizes differences in status among people and seeks to achieve the harmonious operation of these differences to achieve social order.³⁰⁴

In Confucianism, the relationships among people are ordered and operate according to the nature of the relationship.³⁰⁵ Articulated as the Doctrine of Five Relationships, it forms the cornerstone of all Confucian moral and social teaching.³⁰⁶ “Between father and son, there should be affection; between ruler and minister there should be proper distinction; between elder and younger, there should be proper order, and between friends, there should be faithfulness.”³⁰⁷ The emphasis here is on the relationship, not the individuals. Instead, a Confucianist focuses not only on the tie that binds two individuals, but also on the proper way those individuals relate to one another.³⁰⁸ It is this adherence to the appropriate nature of each relationship that is necessary to achieve harmony between and among individuals.³⁰⁹

In only the Confucian relationship of friendship is equality present. There is a hierarchal difference between father and son, ruler and minister, husband and wife, and elder and younger.³¹⁰ Such “inequalities” are openly acknowledged and

²⁹⁸ *Id.* at 10–11.

²⁹⁹ CHOI, *supra* note 297, at 8–10.

³⁰⁰ SOURCES OF CHINESE TRADITION, *supra* note 290, at 28.

³⁰¹ *Id.* at 591–93.

³⁰² *Id.* at 100–01.

³⁰³ *Id.* at 19.

³⁰⁴ *Id.* at 10.

³⁰⁵ SANG-HYUN SONG, KOREAN LAW IN THE GLOBAL ECONOMY 100 (1996).

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ Confucian thought recognizes the continuance of some relationships even after death. For example, the duty of children to take care of their parents continues after the parents’ death, as the children have the duty to conduct ancestral rites and rituals to honor their parents, in what is often called the three years’ mourning. *See* SOURCES OF CHINESE TRADITION, *supra* note 290, at 30. “Tsai Wo questioned the three years’ mourning and thought one year was long enough: ‘If the gentleman for three years abstain from the practice of ritual, ritual will delay. . . . The three years’ mourning is the universal observance in the world.’ [XVII:21]” *Id.*

³⁰⁹ *Id.* at 101.

³¹⁰ *Id.*

entrenched in these relationships. Instead of focusing on the inequality, a Confucianist places the emphasis on the need for deference and reverence of those in the higher position.³¹¹ And in return for such deference, tolerance and reciprocity are shown.³¹²

2. Confucian Values in Contemporary East Asia

In China, Japan, Korea, and Vietnam, Confucianism is no longer the state-sponsored ruling ideology. However, Confucian values continue to persist.³¹³ A recent study measured three Confucian values among contemporary college students in China, Japan, Korea, and Taiwan: (1) interpersonal harmony, which reflected the need to seek harmony and solidarity with others;³¹⁴ (2) relational hierarchy, such as the ordering of relationship by status, loyalty to superior, and obedience to parents, superiors, and elders;³¹⁵ and (3) traditional conservatism, which reflected Confucian principles of restricting one's desires, non-competitiveness, and moderation.³¹⁶

The study found that participants in all four countries strongly endorsed the importance of Confucian values, in varying degrees.³¹⁷ The participants rated interpersonal harmony and relational hierarchy as more important than traditional conservatism.³¹⁸ That traditional conservatism was ranked low may be explained by the significant economic developments, the transition to a market economy, and the rise in consumerism and consumer spending—all incongruous with the traditional conservatism of Confucianism, which emphasizes non-competitiveness and moderation. That interpersonal harmony and relational hierarchy remain strong even amidst an economic transformation and the consequent adoption of Western norms suggests that these Confucian norms are deeply entrenched in East Asian societies. Moreover, the participants in the study were not the older generation but younger college students whom one would most expect to trade traditional Confucian values for modern, Western ones.³¹⁹ Another surprise in the study is that the participants resided in urban centers.³²⁰

³¹¹ *Id.* at 102.

³¹² *Id.* at 14–15.

³¹³ In Korea, perhaps the most Confucian of all East Asian countries, Confucian patriarchal and patrilineal principles have been adopted into the family law of Korea. *See* CHOI, *supra* note 297, at 127–29 (arguing that the prevalence of Confucian values entrenched in Korean family law have hurt the advancement of women in Korea).

³¹⁴ Yan Bing Zhang et al., *Harmony, Hierarchy, and Conservatism: A Cross-Cultural Comparison of Confucian Values in China, Korea, Japan, and Taiwan*, 22 COMM. RES. REP. 107, 108 (2005).

³¹⁵ *Id.* at 110.

³¹⁶ *Id.*

³¹⁷ There are differences across countries and among genders. For example, China was the most traditional Confucian society regarding harmony and social hierarchy, yet Korea was highest in terms of traditional conservatism. *Id.* at 112. Also, Japanese women were found to be more conservative than women in other countries. *See id.* at 112–13.

³¹⁸ *Id.*

³¹⁹ *Id.* at 109.

³²⁰ *Id.*

One would expect Confucian values to persist in rural, agrarian centers, where the allure of and susceptibility to modernization and globalization would be lower. But the fact that college students from cities still endorsed these values suggests that modern values have not eroded Confucian ones and that Confucian values coexist with modern ones.

V. CULTURAL DIFFERENCES AS A BARRIER TO REPORTING DISCRIMINATION

Historical and sociological evidence strongly suggest that for a significant subset of the Asian-American population³²¹ in the United States, their cultural differences make them especially vulnerable to the structural barriers that more generally discourage individuals from reporting discrimination or harassment.³²² Gruber and Smith's formulation of the structural reasons that explain the underreporting of sexual harassment claims would apply equally to a race or national origin harassment claim brought by Asian Americans.³²³ Both of their primary structural barriers are, for persons of Asian descent, strongly connected to cultural values.³²⁴ First, regarding the desire to maintain social relationships,³²⁵ the distinction identified by Hampden-Turner and Trompenaars³²⁶—that East Asians tend to be particularist in orientation—may explain their reluctance to turn to the law to resolve their disputes.³²⁷ Like the friend

³²¹ See *supra* note 8.

³²² System justification theory may provide another reason why Asian Americans underreport discrimination; that theory states that people tend to rationalize the status quo. See Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CALIF. L. REV. 1119, 1121 (2006) (“Victims of discrimination or abuse complain less often than individual and collective self-interest would predict.”).

³²³ Gruber & Smith, *supra* note 17, at 557.

³²⁴ See *id.*

³²⁵ *Id.*

³²⁶ HAMPDEN-TURNER & TROMPENAARS, *supra* note 238.

³²⁷ The sociological and historical data that I rely on to support the argument concerns Asians, not Asian Americans. The EEOC study concerning the reluctance to report focused on Asian Americans. No doubt, Asian Americans differ from Asians because of the acculturation process that happens upon immigration to a new country. The once dominant theory of immigrant integration assumed that immigrant groups tend to assimilate with each generation. Susan K. Brown & Frank D. Bean, *Assimilation Models, Old & New: Explaining a Long-Term Process* (U.C. Irvine Ctr. for Research on Immigration, Population & Pub. Policy, Paper No. 082306) (2006), available at <http://www.migrationinformation.org/USfocus/display.cfm?ID=442>. See generally MILTON GORDON, *ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGINS* 70–71 (1964). This “straight-line” convergence model assumed that the immigrant group and the majority group become alike over time and, with each new generation, the assimilation of the host culture's norms would grow and eventually replace ethnic attachments to the culture of the home country. *Id.* However, immigration scholars have challenged this view, showing that assimilation and ethnic attachments are not necessarily mutually exclusive. See RICHARD ALBA & VICTOR NEE, *REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION* 35–59 (2003) (criticizing the “melting

who places greater value on his friendship than the law by choosing not to testify against his friend, Asian Americans may be reluctant to report discrimination because they feel a greater obligation to maintain and preserve the work relationship, than to sever it by turning to the law.³²⁸ This approach accords with the Confucian principle of valuing and maintaining harmony in relationships.

The reluctance to turn to the law may, however, be due less to the importance of maintaining relationships and more to the distrust some Asian Americans have of the law. Asian Americans who recently emigrated from authoritarian regimes may be even more reluctant to report their grievances to the government or to use its redress procedure because of their distrust and fear of the government in their home country. For example, many Vietnamese immigrants came to this country as political refugees, fleeing persecution by their own governments.³²⁹ Non-refugee immigrants from communist regimes, such as China or Vietnam, may nonetheless associate governments with instruments of oppression. Even immigrants from newly formed democracies like South Korea may have reason to distrust the government because of the relatively recent widespread corruption among government officials and the lack of accountability for their actions.³³⁰ One who distrusts the government or its officials is not likely to turn to it to resolve disputes. Moreover, from a collectivist perspective, the desire to maintain relationships may explain why Asian Americans underreport discrimination. A collectivist would be less likely to report discrimination because, in resolving conflict, he or she is primarily concerned with maintaining relationships with others. Achieving justice would ring hollow to a collectivist if the risk of severing a relationship is high.³³¹

Gruber and Smith's second reason for why women underreport harassment—the power dynamics in and out of the workplace—applies equally to Asian Americans. Like women, Asian Americans have minority status both inside and outside of the workplace, which would affect their perception of power. According to a 2010 federal employee viewpoint survey, Asian Americans make up about 4.6% of the total

pot" assumption); Jennifer Lee & Frank D. Bean, *America's Changing Color Lines: Race/Ethnicity, Immigration and Multiracial Identification*, 30 ANN. REV. SOC. 221, 226–27 (2004); Alejandro Portes & Min Zhou, *The New Second Generation: Segmented Assimilation and its Variants*, 530 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 74 (1993). Ethnic attachments and cultural beliefs persist for generations. See AMY CHUA, BATTLE HYMN OF THE TIGER MOTHER 3–5 (2011) (showing that "Asian" parenting styles persist intergenerationally); see also Won Moo Hurh & Kwang Chung Kim, *Adhesive Sociocultural Adaptation of Korean Immigrants in the U.S.: An Alternative Strategy of Minority Adaptation*, 18 INT'L MIGRATION REV. 188, 196 (showing that for Korean Americans, the addition of American culture did not displace ethnic attachments).

³²⁸ HAMPDEN-TURNER & TROMPENAARS, *supra* note 238, at 16.

³²⁹ See Ishimaru, *supra* note 261, at 10.

³³⁰ *Id.* at 10–11.

³³¹ Triandis, *supra* note 263, at 907.

federal workforce.³³² This figure tracks the percentage of the total Asian population in the United States, which is about 4.2% according to the latest census.³³³ Comparatively, women occupy nearly half of the federal workforce.³³⁴ Based on numbers alone, then, Asian Americans' minority status is even more exaggerated than women's minority status, arguably making them more vulnerable.

Like women, Asian Americans are underrepresented in positions of management.³³⁵ Asian Americans are underrepresented in mid-level management in the federal government and at senior grades in many federal agencies.³³⁶ For example, in the Social Security Administration, Asian Americans comprise about 4% of the workforce.³³⁷ Yet, only 2% of mid-level officials and managers there are Asian-American.³³⁸ In the Department of Veterans Affairs, Asian Americans make up 6.48% of the permanent workforce, yet only 2.62% of mid-level officials and managers are Asian-American.³³⁹ At the Department of Health and Human Services, the Centers for Disease Control, Asians make up 5.31% of the permanent workforce, but only 2.32% of all mid-level officials and managers are Asian-American.³⁴⁰

In the senior executive levels of management, Asian Americans are even more underrepresented. The EEOC Work Group found indications of a "glass ceiling"³⁴¹ at many of the federal agencies that it reviewed.³⁴² For example, at the Department of Health and Human Services, about 7.32% of its permanent workforce is Asian.³⁴³ And 9.12% of its General-Pay-Scale level (GS) 14 and 6.06% of its GS-15 positions are filled by Asians.³⁴⁴ Yet, at the senior executive (SES) level, only 2.19% of its 411

³³² *2010 Federal Employee Viewpoint Survey*, U.S. OFFICE OF PERS. MGMT., at 26, available at http://www.fedview.opm.gov/2010FILES/2010_Govtwide_Report.pdf.

³³³ *The Asian Population: 2000*, U.S. CENSUS BUREAU, at 1, available at <http://www.census.gov/prod/2002pubs/c2kbr01-16.pdf>. This figure includes respondents who identified themselves as Asian alone or in combination with one or more other races. *Id.*

³³⁴ *2010 Federal Employee Viewpoint Survey*, *supra* note 332, at 1.

³³⁵ EEOC WORK GROUP REPORT, *supra* note 7, at 30.

³³⁶ *2010 Federal Employee Viewpoint Survey*, *supra* note 332. According to the Federal General Schedule and Related Pay System, senior or executive pay includes pay grades at or above the GS-15 level. *Id.* Mid-level pay includes pay grades of GS-13 and GS-14. *Id.*

³³⁷ EEOC WORK GROUP REPORT, *supra* note 7, at 30.

³³⁸ *Id.* at 12–13.

³³⁹ *Id.*

³⁴⁰ *Id.* This statistic is even more surprising. Asian Americans are usually overrepresented in scientific and technical positions; for example, although Asian Americans comprise about 4% of the current United States population, 10% of the nation's scientists are Asian-American. *See id.* at 4.

³⁴¹ EEOC WORK GROUP REPORT, *supra* note 7, at 31. The EEOC Work Group defined the glass ceiling as "a phenomenon where an agency has a significant number of Asians and NHOPIs in its permanent workforce and in the pipeline grades that lead to the senior ranks of an agency, but has few or no Asians or NHOPIs participating in its senior ranks." *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

SES positions are filled by Asians.³⁴⁵ Examination of the SES workforce at the Patent and Trademark Office shows similar underrepresentation at the SES level. There, Asians comprise 25.61% of the permanent workforce.³⁴⁶ A similar percentage of Asians—29.17%—occupies the GS-14 level.³⁴⁷ Yet, Asians occupy only 7.14% of the senior executive grades in the agency.³⁴⁸

The EEOC Work Group attributed the reason to discrimination.³⁴⁹ It identified the perception of the lack of leadership as one of the sources of discrimination against Asian-American employees.³⁵⁰ It showed that Asian Americans were perceived to be “unassertive, team players more than leaders, and lacking self-promotion.”³⁵¹ This relates to similar findings that people perceive Asians to lack social skills in management positions. According to the Stereotype Content Model, which was developed from six extensive sociological studies, Asian Americans experienced what was called “mixed envious racial prejudice.”³⁵² Individuals from “out-groups” usually fall into one of two clusters of perception.³⁵³ “Paternalized groups” are liked as possessing warmth but disrespected as incompetent, whereas “envied groups” are “respected as competent but disliked as lacking warmth.”³⁵⁴ Asian Americans fell into the latter category.³⁵⁵ Due to such perception of low sociability, they were excluded from social networks and from positions requiring social skills, such as many leadership positions.³⁵⁶

³⁴⁵ *Id.* The candidates at the SES positions are generally selected from the GS-14 or GS-15 level or from outside the agency. *Id.* Therefore, when there is adequate representation of Asians at the GS-14 or GS-15 level, as is here at the Department of Health and Human Services, but no similar representation at the SES level, then a trigger for a “glass ceiling” exists. *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.* The 7.14% figure is much higher than the percentage of the total workforce (about 4%) that Asians occupy in the federal government. *Id.* On the one hand, this figure suggests that Asians are overrepresented at the senior executive level. Certainly, they are overrepresented at the mid-level official level at 29.17% and at the agency generally when compared to the percentage of Asians in the federal government. *Id.* This may be due to the type of work of the agency, which attracts Asian applicants. *Id.* at 31–32. Studies show that Asians are overrepresented in scientific and technical professions. *Id.* at 4. However, the percentage of Asians in the senior executive level is low when compared to the relatively high percentage of Asians who occupy the GS-14 level, the pool from which agencies often choose their senior executives. *Id.* at 31. If the level of diversity is high in both the permanent work force and in the pipeline to the senior executive level, then one would expect a similar level of diversity at the senior executive level. *Id.* at 31–32.

³⁴⁹ *Id.* at 34.

³⁵⁰ *Id.* at 7–8.

³⁵¹ *Id.* at 7.

³⁵² *Id.*

³⁵³ Lin, *supra* note 26, at 35.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 44–45.

But an under-investigated explanation for underrepresentation may be the result of other structural and cultural reasons that discourage Asian Americans from reporting discrimination. Concerning the structural reasons, the relatively small number of Asians in the workforce, generally and in the senior management positions relative to non-Asians, may deter Asians from applying for such positions. For example, the United States Postal Service found that Asian Americans were reluctant to participate in advanced leadership programs, a mechanism whereby employees are trained for leadership positions within the agency.³⁵⁷ Likewise, a recent study of diversity management in corporate America found that the most popular approaches to increasing diversity in the workplace—diversity training and diversity evaluations—were among the least effective.³⁵⁸ Instead, mentorship programs that create social networks among minorities were among the most effective ways to increase diversity in the workplace.³⁵⁹ Like women who were more empowered to report harassment in a gender-balanced work environment,³⁶⁰ Asian employees may not feel empowered to apply for such positions or believe that such positions are possible for them due to the lack of examples of people in their social network who have occupied such positions in the past.³⁶¹

Similarly, the lack of a social network of people who have reported discrimination in the past and not knowing lawyers who could counsel them may also explain why Asian Americans underreport discrimination. Although Asian Americans have faced civil rights struggles in this country,³⁶² their struggles are underreported and not part of the American narrative, unlike, the African-American struggle for civil rights.³⁶³ This may be a structural reason for why African Americans do not show the same degree of reluctance to report discrimination which Asian Americans show. A related cultural explanation is likely as well. For many African Americans, asserting a civil rights claim may be thought to be empowering, and may even be encouraged among their social network. Yet, asserting a civil rights claim is a very individualistic gesture.³⁶⁴ For someone who subscribes to the collectivist mentality,

³⁵⁷ See EEOC WORK GROUP REPORT, *supra* note 7, at 31.

³⁵⁸ Frank Dobbin et al., *Diversity Management in Corporate America*, 6 CONTEXTS 21, 25–27 (2007).

³⁵⁹ *Id.*

³⁶⁰ See Gruber & Smith, *supra* note 17, at 558.

³⁶¹ See Dobbin et al., *supra* note 358, at 25.

³⁶² See generally ANCHETA, *supra* note 27 (tracing the developments in the Asian-American civil rights movement); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1354, 1378 (1991) (showing the cost of accent discrimination on Asian Americans whose “low status” accents leave them in subordinate positions).

³⁶³ See generally JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEARS, 1954–1965 XI (1988).

³⁶⁴ Interestingly, in some African-American communities, the civil rights claim is cast not in individual terms but for the good of the community at large, and the individual claim becomes one for the group. See BEVERLY DANIEL TATUM, ASSIMILATION BLUES: BLACK FAMILIES IN A WHITE COMMUNITY 12–14 (2000).

making such claims would be unnatural, particularly because that claim is being asserted to or against someone in a higher position, often the supervisor. For someone who is culturally socialized to not challenge authority, making such claims would prove even more difficult.³⁶⁵ Moreover, the associated fear of retaliation attendant to making any challenges to someone in power would be even more exaggerated for the collectivist who is unaccustomed to or fears challenging authority.³⁶⁶

VI. ASSIMILATE OR ACCOMMODATE DIFFERENCES?

Sociological and social psychological studies have shown that structural barriers hinder some Asian Americans from reporting discrimination or harassment.³⁶⁷ Such studies show that Asian Americans' reluctance to report discrimination or harassment is not unique or limited to them.³⁶⁸ Some women demonstrate this same reluctance for similar structural reasons.³⁶⁹ So do other minority groups, including some African Americans, who may be reluctant to report discrimination because of the disempowering effect of acknowledging such discrimination.³⁷⁰ Yet, for Asian Americans, that reluctance to report discrimination or harassment is particularly acute as compared to other minority groups.³⁷¹ This Article has claimed, that though the structural barriers that prohibit some women, African Americans, and members of other minority groups from reporting discrimination or harassment certainly apply to Asian Americans, cultural barriers specific to Asian Americans heighten these structural barriers and make it especially difficult for them to report discrimination or harassment.³⁷² If cultural differences play a role in Asian Americans' reluctance to report discrimination, what—if

³⁶⁵ See *supra* Part IV.

³⁶⁶ See *supra* Part IV.

³⁶⁷ See generally Ruggiero & Taylor, *supra* note 187, at 385 (describing the process through which minority groups minimize instances of discrimination in order to maintain high self-esteem).

³⁶⁸ *Id.*

³⁶⁹ See Gruber & Smith, *supra* note 17, at 557–59.

³⁷⁰ Ruggiero & Taylor, *supra* note 187, at 384. Ruggiero and Taylor show the relationship between the perception of discrimination and maintenance of self-esteem among minorities. They argue that the more Asian and African Americans saw their failure as a result of discrimination, the more they preserved their performance self-esteem. Yet, the trade-off was a lower social self-esteem because “they had to face the fact that they had been socially rejected because of their race.” *Id.* Conversely, the less Asian and African Americans attributed their failure to discrimination, the lower their performance self-esteem because they blamed their lower performance on their lack of ability. This allocation is made in exchange for feeling “socially accepted.” *Id.* Sociologists have also shown that for women, their reluctance to report sexual harassment stems from the desire to protect their social self-esteem. See Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY, 1151–62 (2000) (showing the disempowering effect that reporting sexual harassment has on women).

³⁷¹ See EEOC WORK GROUP REPORT, *supra* note 7, at 3.

³⁷² See *supra* Part V.

anything—can the law and the legal system do about it? Part VI of the Article exposes the tension between assimilation—in this case reporting discrimination—and accommodation of differences. It contends that the cultural costs do not outweigh the benefits of assimilation and shows the need for additional empirical research. In the meantime, it concludes that, at the very least, courts should consider cultural differences when they assess the reasonability of an employee’s delay in employer liability suits.

A. The Benefits of Assimilation

Numerous immigrant integration and civil rights theorists have debated the tension between assimilation and accommodation of cultural differences in a variety of ways.³⁷³ Underlying this tension is the challenge of maintaining equality in the face of an increasingly pluralistic society. Adherents of assimilation contend that the United States was founded on an Anglocentric “core culture” rooted in Christian values and the English common law tradition and that the recognition of other values would have a destabilizing effect on American character.³⁷⁴ Indeed, assimilation has been the dominant paradigm of immigrant integration in the United States,³⁷⁵ as evidenced by the idea of the “melting pot” which has almost become synonymous with the American identity. Particularly after 9/11, adherents of assimilation have advocated even more strongly for the national core model of immigrant integration, which calls for immigrants to adopt themselves to the “core culture” of the United States.³⁷⁶

For Asian Americans, assimilation would mean “overcoming” their reluctance to report discrimination. It would mean assimilating to the general individualistic tenor of the United States and a specific individualistic reporting requirement. Indeed, one of the Work Group’s recommendations to the EEOC was to involve the EEOC in training programs to educate Asian Americans on the benefits of reporting discrimination.³⁷⁷ The EEOC Work Group reported that, because Asians were more likely to claim that

³⁷³ For a comprehensive discussion of the tension between assimilation and multiculturalism and the examination of the challenges of maintaining equality in a pluralistic society, see generally Richard A. Shweder et al., *Introduction to ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES* 3–4 (Richard A. Shweder et al. eds., 2004) [hereinafter *ENGAGING CULTURAL DIFFERENCES*]; MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 9 (1991).

³⁷⁴ See, e.g., SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY* 59–62 (2004); DAVID MILLER, *ON NATIONALITY* 119–54 (1995); Stanley Hoffmann, *More Perfect Union: Nation and Nationalism in America*, 20 *HARV. INT’L REV.* 72 (1997).

³⁷⁵ ALBA & NEE, *supra* note 327, at 35–39; Gilbert, *supra* note 76, at 343–44.

³⁷⁶ See *ENGAGING CULTURAL DIFFERENCES*, *supra* note 373, at 2.

³⁷⁷ *But see* Dobbin et al., *supra* note 358, at 26 (stating that offering diversity training was one of the least effective ways to increase diversity in the workplace).

discrimination occurred when discussing the matter with other Asians,³⁷⁸ EEOC practitioners and Asian affiliation groups should assist in overcoming this barrier.³⁷⁹

There are several advantages to assimilating to the majority norm by encouraging the reporting of discrimination. First, as Part III asserted, the employee benefits by reporting. The law as it has been interpreted currently requires them to report—and report early—if they want to prevail against an employer’s assertion of the affirmative defense in employer liability suits.³⁸⁰ Apart from the litigative advantage of reporting, the employee potentially avoids further racial stigmatization in the workplace. Through reporting, the employer has the chance to remedy and remove the source of harassment. Much has been written about the effects of racial stigmatization and the significant psychological³⁸¹ and physical³⁸² harm it causes. In the first nationally representative study of its kind, researchers confirmed a high correlation between discrimination and chronic health conditions among Asian Americans.³⁸³ Those who experienced discriminatory conduct were at a greater risk of developing heart disease, chronic pain, and respiratory illness.³⁸⁴ In addition to the physical effects of discrimination, “[t]he psychological responses to such stigmatization consisted of feelings of humiliation, isolation, and self-hatred.”³⁸⁵ Suffering in silence merely exacerbated such effects.³⁸⁶ Discrimination not only exacts a heavy cost on the employee—in terms of the loss of health, career, and finances—but also costs the employer in terms of lost productivity and resources in training and hiring a replacement employee. By reporting discrimination, the employee avoids the potential negative consequences and potentially gains a work environment free from conflict if the employee’s perceptions of discrimination are correct.³⁸⁷

The benefits may also extend beyond the workplace and aid the development of the law. Civil rights law develops as a result of those who challenge it. The most likely type of Title VII discrimination claim that an Asian employee could bring would be a claim based on race or national origin.³⁸⁸ Of the nearly 100,000 charges

³⁷⁸ EEOC WORK GROUP REPORT, *supra* note 7, at 39.

³⁷⁹ *Id.*

³⁸⁰ *See generally supra* Part II.

³⁸¹ Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 136–40 (1982).

³⁸² Gilbert C. Gee et al., *A Nationwide Study of Discrimination and Chronic Health Conditions Among Asian Americans*, 97 AM. J. PUB. HEALTH 1275, 1275–76 (2007).

³⁸³ *Id.* at 1278.

³⁸⁴ *Id.* at 1278–79.

³⁸⁵ Delgado, *supra* note 381, at 137.

³⁸⁶ *Id.* at 136–40.

³⁸⁷ Reporting and standing up for one’s rights may also have an empowering effect on the employee’s self-esteem.

³⁸⁸ The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.), also prohibits national origin discrimination as well as alienage discrimination. Section 1981 also prohibits alienage discrimination. 42 U.S.C. § 1981.

filed with the EEOC during 2010, only 11% were national origin claims.³⁸⁹ Only claims based on religion were lower in number.³⁹⁰ Race-based claims constituted the majority of all claims filed at 35.9%, with sex-based claims close behind at 29.1%.³⁹¹ The EEOC does not further aggregate this data by race, but according to the EEOC Work Group, only about 2% of all charges of discrimination in the private sector and 3.26% in the federal sector are filed by Asian Americans.³⁹² By encouraging the bringing of claims, the federal government encourages others who are similarly situated to bring claims. Members of the Asian-American community would be more likely to know others who challenged discriminatory conduct and would be encouraged to do the same.³⁹³ The gains from assimilating in this regard may be greater than the costs of not doing so. In the end, it may enable the ethnic minority to retain their identity because the consequence of not reporting discrimination endangers the survival of the culture.

B. Cultural Costs and the Argument for Accommodation of Differences

While the benefits of assimilation are clear, the question remains whether ethnic minorities *can* assimilate. If the barrier stems in part from some deeply held cultural belief, it is doubtful whether such beliefs can be “overcome” without a significant cost to the individual. Some assimilation studies suggest that ethnic attachments not only last but may grow more intense over time—even across generations.³⁹⁴ One sociological study of acculturation patterns among Korean immigrants in Los Angeles showed the relative low degree of acculturation and high ethnic attachment patterns in terms of exposure to Korean mass media, intimate social relations with fellow Koreans, and participation in Korean voluntary or cultural associations.³⁹⁵ For example, 78% of the respondents regularly subscribed to Korean newspapers, whereas only 22% subscribed to American newspapers.³⁹⁶ Three-fourths of the respondents also maintained close ties with neighbors, most of whom were exclusively Korean.³⁹⁷

³⁸⁹ *Charge Statistics FY 1997 Through FY 2010*, EEOC, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>. The statistics do not show what percentage of these national origin claims were brought by Asians.

³⁹⁰ *Id.* Religion-based claims made up only 3.8% in 2010. *Id.*

³⁹¹ *Id.*

³⁹² EEOC WORK GROUP REPORT, *supra* note 7, at 4.

³⁹³ This may explain why African Americans feel less reluctant to report discrimination. There are more African Americans in social networks who have challenged discrimination and received favorable results or encouragement from the community for doing so.

³⁹⁴ ALBA & NEE, *supra* note 327, at 292 (showing the persistence of cultural practices among Asian Americans across generations and concluding that assimilation is “unlikely to dissolve racial distinctions entirely in the United States and to end the inequalities rooted in them”).

³⁹⁵ Hurh & Kim, *supra* note 327, at 195.

³⁹⁶ *Id.*

³⁹⁷ *Id.*

That ethnic attachment patterns prove to be stronger than acculturation patterns may be explained by the fact that the respondents in this particular study were largely recent arrivals to the United States.³⁹⁸ Nevertheless, the study found that respondents who had been in the United States eleven or more years showed a similar level of ethnic attachments when compared to respondents who had just immigrated to the United States.³⁹⁹ Moreover, though certain aspects of American culture and social relations were added—even as acculturation increased over time—their ethnic attachments remained and, in some cases, strengthened.⁴⁰⁰

Even assuming that assimilation is possible, an equally important question is whether ethnic attachments *should be* overcome. Although the idea of the “melting pot” may be the dominant paradigm of immigrant integration,⁴⁰¹ both immigration and civil rights theorists have criticized it and questioned whether assimilation into the dominant culture should be the goal.⁴⁰² Instead, they have espoused a model of immigrant integration which allows for the recognition and flourishing of cultural differences.⁴⁰³ These theorists believe that ethnic groups should enjoy a certain degree of cultural autonomy, as long as it does not encroach on the liberty of others.⁴⁰⁴ They believe that ethnic groups can—and should—coexist with the dominant culture without totally assimilating into it.⁴⁰⁵

Indeed, assimilation exacts a heavy cultural cost. Scholars have detailed the coercive aspects of the demands of assimilation on a variety of minority communities in the United States.⁴⁰⁶ Assimilation demands on minority communities are morally suspect because they harm a quest for authenticity and, ultimately, human flourishing.⁴⁰⁷ According to Kenji Yoshino, requiring one to “cover”⁴⁰⁸—in this case, one’s deeply held cultural beliefs—to conform to the will of the majority reduces self-esteem and stunts individual authenticity.⁴⁰⁹

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ ALBA & NEE, *supra* note 327, at 35–39; Gilbert, *supra* note 76, at 335–36.

⁴⁰² *See, e.g.*, Lee & Bean, *supra* note 327, at 221.

⁴⁰³ *Id.*

⁴⁰⁴ *See* WILL KYMLICKA, *MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY* 51, 71–72 (2007).

⁴⁰⁵ *See* Rita Sussmuth & Werner Weidenfeld, *The Integration Challenge: Living Together in a Europe of Diversity*, in *MANAGING INTEGRATION: THE EUROPEAN UNION’S RESPONSIBILITIES TOWARDS IMMIGRANTS* xi, xi–xviii (Rita Sussmuth & Werner Weidenfeld eds., 2005).

⁴⁰⁶ *See e.g.*, BARRY RUBIN, *ASSIMILATION AND ITS DISCONTENTS* (1995) (Jewish people); TATUM, *supra* note 364 (African Americans); KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 1–27 (2006) (homosexuals).

⁴⁰⁷ YOSHINO, *supra* note 406, at 1–27 (“This history reveals the dark underbelly of the American melting pot and indicts any civil rights paradigm conditioned on assimilation.”).

⁴⁰⁸ *Id.* Yoshino uses this term to mean assimilation, and states that covering demands assault our civil rights. *Id.*

⁴⁰⁹ *Id.* (narrating the psychological harm covering demands had on the author).

In addition to its coercive effect, assimilation is disempowering.⁴¹⁰ During the process of reporting discrimination, employees must acknowledge that the discrimination bothers them and that they take it personally.⁴¹¹ By not taking it personally, employees deny that they are victims and acknowledge their lack of power and control.⁴¹² This argument accords with some behavioral science studies that show that some Asian Americans cope with discrimination by cognitive avoidance and perceiving the situation as a challenge to overcome.⁴¹³ Cognitive avoidance, such as efforts not to take harassment personally, has short term benefits because by refusing to think about the matter, the person avoids re-experiencing the negative symptoms of the discriminating act.⁴¹⁴ It is a way to preserve social self-esteem.⁴¹⁵

However, accommodation of cultural differences cannot mean exempting the reporting requirement for Asian Americans. What it means—and what this Article proposes—is that a need exists for structural changes in the law and the workplace in addition to encouraging employees to report. The most aggressive of the structural changes is to literally change the work environment around the employee, rather than change the cultural attachments of the individual. The EEOC Work Group endorsed—though implicitly—this option when it recommended increasing diversity in the federal sector through an affirmative action program.⁴¹⁶ In addition to addressing Asian Americans' reluctance to report discrimination, the Work Group also addressed other concerns of the Asian-American community.⁴¹⁷ For example, it identified the need to increase the Asian-American presence in the senior and executive

⁴¹⁰ Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1163 (2000).

⁴¹¹ *Id.*

⁴¹² *See id.*

⁴¹³ Vetta L. Sanders Thompson, *Coping Responses and the Experience of Discrimination*, 36 J. APPLIED SOC. PSYCHOL. 1198, 1202, 1212 (2006).

⁴¹⁴ *Id.*

⁴¹⁵ But findings also suggest that in the long term, avoidance coping mechanisms lead to more negative avoidance symptoms, including a reduction in well-being and self-esteem. Though some may be able to cope with harassment by “rising above it,” others will engage in self-blame, which may lead to a further loss in self-esteem and may increase the chances for mental illness and psychosomatic disease. Fitzgerald et al., *supra* note 170, at 120; *see also* Ruggiero & Taylor, *supra* note 187, at 384 (drawing a link between self-esteem and the perception of discrimination). Without proper coping mechanisms, employees may resort to alcohol, drugs, or other antisocial behavior. Delgado, *supra* note 381, at 138 (the rate of narcotic use and admission to public psychology hospitals are much higher in minority communities than in society as a whole). This has been shown to cause absences at work, leading to termination or, more often, to employees quitting their jobs. Fitzgerald et al., *supra* note 170, at 131 (concluding that women often “endure[] or tolerate[] harassment for some period of time, never speaking out publicly or reporting to management before leaving [their] job[s]”).

⁴¹⁶ *See generally* EEOC WORK GROUP REPORT, *supra* note 7, at 1–44.

⁴¹⁷ *Id.*

management positions.⁴¹⁸ To that end, the EEOC Work Group recommended the reinvigoration of the government-wide Senior Executive Service Candidate Development Program to provide skill-development opportunities for qualified Asian-American employees.⁴¹⁹ The rationale it gave for implementing such affirmative action programs was the value of promoting diversity.⁴²⁰ Creating a diverse workforce was

[n]ot merely for the sole benefit of those individuals belonging to culturally diverse backgrounds . . . [but] [r]ather . . . in furtherance of our American interests that we develop and maintain a federal work force that is reflective of the plethora of cultural and ethnic societies that comprise the APA [Asian and Pacific American] group.⁴²¹

That “American interest,” according to the Work Group, is a business one.⁴²² Because the American economy is inextricably linked to countries in Asia, and with the emergence of China as a global economic leader,⁴²³ having a diverse federal workforce which includes Asian Americans in its leadership would be to America’s economic advantage.⁴²⁴

The EEOC Work Group discussed the problem of the lack of diversity in the senior and executive management levels as separate from the problem of the under-reporting of discrimination by Asian Americans.⁴²⁵ However, the two problems relate in an important way. To put it in Gruber and Smith’s terms, the increase in diversity at the senior and executive management levels increases the minority’s organizational

⁴¹⁸ *Id.* at 1.

⁴¹⁹ *Id.* Related to this recommendation was another to help each agency ensure the “selection and promotion of qualified AAPI [Asian-American and Pacific Islander] candidates to the highest level.” *Id.*

⁴²⁰ *Id.* at 26.

⁴²¹ *Id.* at 16.

⁴²² *Id.* (articulating a “business case for diversity”).

⁴²³ See, e.g., Spencer Swartz & Shai Oster, *China Tops U.S. in Energy Use: Asian Giant Emerges as No. 1 Consumer of Power, Reshaping Oil Markets, Diplomacy*, WALL ST. J., Jul. 18, 2010, A1; Michael Elliott, *China Takes on the World*, TIME, Jan. 11, 2007, <http://www.time.com/time/magazine/article/0,9171,1576831,00.html>; Stefan Theil, *Can China’s Economic Engine Jump-Start the West*, NEWSWEEK, Aug. 5, 2010, <http://www.thedailybeast.com/newsweek/2010/08/05/can-china-s-economic-engine-jump-start-the-west.html>.

⁴²⁴ In addition to the economic rationale for diversity, the EEOC Work Group states the importance of developing a federal “workforce that is both effective in its function and reflective of the population itself.” EEOC WORK GROUP REPORT, *supra* note 7, at 16. It notes that in 2000, about 25% of the population were ethnic minorities. *Id.* “By 2010, 33% of the population will be non-white. By 2040, half of the population will be non-white.” *Id.* The Work Group does not further aggregate the projected minority population to see what percentage of the 2040 figures will be Asian. *Id.* It does state that the Asian population is one of the fastest growing groups in the United States. *Id.* at 2.

⁴²⁵ *Id.* at 2.

and sociocultural power—be it real or perceived.⁴²⁶ Women were more likely to report harassment in a gender-balanced work environment and in environments in which they had or perceived to have more power.⁴²⁷ Increasing the number of women in the workplace and placing more women in positions of power would structurally change the work environment, which would enable the victims of harassment to feel more empowered to respond in a more assertive way.⁴²⁸ Similarly, promoting a diverse federal workforce—increasing the number of Asians in the federal workforce—and ensuring the selection and promotion of qualified Asians at the upper management levels not only makes a business case for diversity, but also may address Asian Americans' reluctance to underreport discrimination by empowering them to act more assertively.

The second accommodation option is for the legislature to strengthen retaliation protection for victims who complain. As Part III showed, the most common reasons employees cited for not reporting discrimination were the fear of retaliation, hurting one's career, and the considerable risk employees take when they stand up against their employer.⁴²⁹ If the law demands reporting harassment because it is trying to fulfill the deterrence rationale of Title VII, then it achieves that objective, in part, by making sure that it protects victims from retaliation after doing what the law requires them to do.

The third option for accommodation is the most readily available and one which the courts are poised to do. In the realm of sexual harassment, some legal scholars have reasoned that the law should accommodate gender differences in light of the behavioral science evidence showing women's reluctance to report sexual harassment.⁴³⁰ For example, when courts consider the reasonableness of women's responses to harassment to assess employers' liability, some legal scholars have argued that women's passive response to harassment should not be considered unreasonable due to the socialization of women, gender expectations that society imposes on them, or the heavy sanctions they face for violating such expectations.⁴³¹ Some courts have already adopted a reasonable woman's standard. In *Ellison v. Brady*, the U.S. Court of Appeals for the Ninth Circuit held that the determination of whether certain behavior constitutes sexual harassment should be based on how a "reasonable woman" would perceive that behavior.⁴³²

⁴²⁶ *Id.*

⁴²⁷ Gruber & Smith, *supra* note 17, at 558 (“[W]omen are more able to adapt a wider range of responses when the source does not have more organizational power, the occupation is gender-balanced or nearly so, or when harassment is perceived as a power issue.”); *see also supra* Part IV.

⁴²⁸ *See* Gruber & Smith, *supra* note 17, at 559.

⁴²⁹ Fitzgerald et al., *supra* note 170, at 122.

⁴³⁰ *See supra* Part IV.

⁴³¹ Hebert, *supra* note 140, at 742; Rudman & Glick, *supra* note 217, at 743.

⁴³² *Ellison v. Brady*, 924 F.2d 872, 875 (9th Cir. 1991); *see* Martha L. Minow & Todd D. Rakoff, *Is the “Reasonable Person” a Reasonable Standard in a Multicultural World?*, in *EVERYDAY PRACTICES AND TROUBLE CASES* (Austin Sarat et al., eds., 1997).

Courts have been less willing to adopt a similar standard for cultural differences and have rejected a culture specific reasonability test. In *Trujillo-Garcia v. Rowland*,⁴³³ the Ninth Circuit Court rejected Trujillo-Garcia's habeas appeal. He argued that the trial court should have taken his cultural background into account when it assessed whether the words that prompted him to shoot another person constituted adequate provocation.⁴³⁴ In essence, he wanted the trial court to substitute the average reasonable person standard with the average reasonable Mexican person standard and argued that such failure violated the Equal Protection Clause. Though the district court concluded that his equal protection argument was "not without merit," the district court did not use a reasonable Mexican person test and concluded that even under that test, he did not act in a way a reasonable Mexican person should have responded.⁴³⁵ The Ninth Circuit affirmed, though not explicitly ruling on whether the failure to consider Trujillo-Garcia's cultural background was error. It simply assumed that even if it were, it was harmless.⁴³⁶ This view not only ignores the possibility that the reasonable person standard may be culturally biased, but it also assumes without benefit of empirical evidence that a reasonable Mexican person would not have acted the way Trujillo-Garcia had.⁴³⁷

In the race or national-origin harassment context, structural reasons that prevent women from reporting also affect Asian Americans. As some scholars believe for some women, some Asian Americans have been culturally socialized to place great importance on maintaining relationships.⁴³⁸ To a collectivist who would emphasize the needs of the group over the needs of the individual, it would be incongruent to make what is essentially an individual claim in reporting or filing a claim for discrimination or harassment.⁴³⁹ Furthermore, making that claim against a figure of authority, such as a supervisor, would make the burden of satisfying the reporting requirement even more onerous for Asian Americans. Moreover, if Asian Americans are expected to act in more deferential ways, when they behave in nonstereotypical ways they suffer interpersonal sanctions. The social consequences of complaining are high.

As the empirical evidence has shown, victims of discriminatory treatment and harassment cope in different ways for different reasons.⁴⁴⁰ One effect discrimination

⁴³³ 9 F.3d 1553 (9th Cir. 1993).

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ Alison Dundes Renteln, *In Defense of Culture in the Courtroom*, in Shweder et al., *supra* note 372, at 201.

⁴³⁸ *See supra* Part V.

⁴³⁹ *Id.*

⁴⁴⁰ *See* Fitzgerald et al., *supra* note 170, at 119 (classifying women's responses to sexual harassment into internally focused or externally focused categories). Examples of internally focused responses to sexual harassment would include "endurance, denial, detachment, reattribution, and illusory control." *Id.* at 119. Examples of externally focused responses would be "avoidance, appeasement, assertion, seeking institutional or organizational relief, and seeking social support." *Id.* Their study shows that by far the most infrequent response among women

and harassment have on the victim is the reduction of self-esteem. Both ethnic minorities and women experience a reduction in self-esteem when they experience harassment and discrimination at work.⁴⁴¹ This reduction in self-esteem is in addition to the effects that being an ethnic minority has on the individual.⁴⁴² It is ironic that the law requires of those with minority status such an assertive response to harassment when they are at their most vulnerable. Instead, the law should not only recognize, but also accommodate that vulnerability and interpret the reasonableness of the victim's response in light of cultural differences.

This does not mean that Asian Americans always act reasonably in failing to report immediately the first incident of harassment or refusing to report at all. Nor does this Article recommend adopting a reasonable Asian standard.⁴⁴³ Instead, it should not necessarily be unreasonable for Asian Americans to delay reporting.⁴⁴⁴ Courts should allow litigants to make culturally based arguments and let triers of fact consider them under the reasonable person standard. The reasonableness inquiry is a flexible, fact-intensive standard that gives triers of fact the room to consider, for example, the prior course of similar dealings between parties to assess the reasonableness of parties' conduct in a contract dispute. It should also give judges and juries the room to consider the structural barriers that prevent the reporting of discrimination and barriers imposed by cultural differences.

CONCLUSION

So why don't reasonable people complain about discrimination? The answer may lie in who or what is "reasonable," which in turn relies heavily on perspective. There is no one reasonable person. This Article has shown the limits of the biased

who experience sexual harassment is seeking institutional or organizational relief, such as notifying a supervisor or lodging a formal complaint action. *Id.* at 121.

⁴⁴¹ See Ruggiero & Taylor, *supra* note 187, at 384. Discrimination either reduces what Ruggiero & Taylor call the ethnic minority's "social self-esteem" or their "performance self-esteem." *Id.*

⁴⁴² Much has been written on the psychological, political, and legal effect that minority status has on the individual. See *e.g.*, *supra* notes 16–46, 169–91, 366–69 and accompanying text. The United States Constitution has been interpreted to confer protection on minorities, be they religious, national, or racial. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Since the Civil Rights Movement of the 1960s, an entire administrative regime, beginning with the Civil Rights Act of 1964 and including a variety of affirmative action programs, has been created to protect minority rights. See *supra* notes 1–6 and accompanying text.

⁴⁴³ See Minow & Rakoff, *supra* note 432, at 44 (discussing some of the difficulties with adopting a gender, race, or culture specific standard, including risk of perpetuating stereotypes about a particular group, reflecting an incorrect assumption that the reasonable person standard has a white male bias, reflecting an incorrect assumption that women or those of a particular culture have enough in common to support that standard, and undermining the possibility of an objective standard).

⁴⁴⁴ Hebert, *supra* note 140, at 742 (making the same argument for women).

assumptions that underlie the idea that all reasonable people react the same way to discrimination. From the perspective of certain cultural or gender norms, it may be more reasonable not to report discrimination. Behavioral science research confirms this to be true. There are significant structural barriers to reporting discrimination and harassment. One barrier is the desire of most human beings to maintain social relationships. The other is the effect of power dynamics both in and outside of the workplace. Although these barriers apply to varying degrees to all persons, they have a disproportionate effect on women and certain minority groups, namely Asian Americans. Due to Asian Americans' collectivist orientation—cultivated for thousands of years under the Confucian norm—that emphasizes conciliation rather than litigation and interdependence rather than individuation, Asian Americans remain vulnerable in the eyes of the law, which demands conduct that is incongruous with their deeply held beliefs.

This Article has exposed the difficult tension between a strict reporting requirements and deeply held cultural values. In some respects, it is in the interest of Asian Americans to assimilate and overcome their culture of silence. By reporting discrimination, they could help fulfill the purpose of Title VII—to deter unlawful conduct and make the workplace free from discrimination and harassment. But that purpose can also be met by using the flexibility of the law to accommodate such differences—which eliminates the coercive effects of assimilation demands on the cultural minority. This Article has argued that for now, courts can begin to address the effects of underreporting discrimination by considering cultural differences when they assess the reasonableness of an employee's delay of reporting in employer liability suits. Before the legal system employs broader structural changes to the workplace, more empirical research, like studies concerning women, needs to be done to confirm the reasons why Asian Americans are reluctant to report discrimination and whether such reluctance can truly be overcome.