# DON'T AWAKEN THE SLEEPING CHILD: JAPAN'S GENDER EQUALITY LAW AND THE RHETORIC OF GRADUALISM

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"Even the longest journey must start from where we are."[1]

## INTRODUCTION

Imagine a Japanese mother of two sitting in a law office for a job interview. Newly admitted to practice, she is eager to join the firm as an associate. "Sorry," a hiring partner shakes his head. "It is our policy that we don't hire married women with children. Our work requires long hours, and how can you prove that you have the ability to combine work and family?"

The preceding scenario is based on a letter to the editor published in Japan's major newspaper, *Asahi Shimbun*, on July 1, 1994.[2] Written by Yayoi Norii, a thirty-five-year-old aspiring female attorney, the letter revealed a harsh reality surrounding Japanese women in the legal profession. Out of eighty law firms in Osaka (Japan's second largest prefecture) which had submitted help-wanted advertisements in the first half of 1993, twenty-three explicitly indicated their intent to hire male lawyers only.[3] "People may automatically perceive that professional women have little difficulty landing

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** Unless otherwise indicated, Kiyoko Kamio Knapp is responsible for the accuracy of all Japanese translations. Japanese authors are cited as they appear on the publications. Some authors follow the traditional Japanese style of placing the author's surname first, followed by their first name; others follow the Western style. For authors in the former category, only surnames are used for subsequent references.

[1] Kenneth L. Karst, Law's Promise, Law's Expression: Visions of Power in the Politics of Race, Gender, and Religion 111 (1996).

[2] Yayoi Norii, Letter to the Editor, Asahi Shimbun [Asahi News], July 1, 1994, at 3.

[3] *Id.*

a job [compared to non-professional women]," Norii wrote, "but we fare no better."[4]

Japanese women have long struggled for gender equality.[5] *Shoku-ba no hana* ("office flowers"), a phrase often used for female workers, aptly describes the traditional role of women in the Japanese workplace: Physically appealing women, fresh out of school, perform supplementary duties and help create a pleasant atmosphere in the office; once married or pregnant, however, they are forced to leave.[6]

With the 1985 passage of the Equal Employment Opportunity Law (hereinafter the "EEOL"),[7] Japan embarked on what appeared to be a journey towards attaining gender equality in the workplace. The EEOL regulates employers' discriminatory practices against women in the following five categories: (1) recruitment and hiring; (2) assignment and promotion; (3) training; (4) fringe benefits; and (5) mandatory retirement age, resignation, and dismissal.[8]

This well-publicized law has failed to launch Japan on its proclaimed journey.[9] Merely *recommending* that employers give women equal

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[4] *Id.*

[5] *See e.g., generally* Counter-Report to the Japanese Government's Second Periodic Report as a State Party to the Convention on the Elimination of all Forms of Discrimination Against Women ("A Letter From Japan" ed., 1994) [hereinafter "Counter-Report"].

[6] Kiyoko Kamio Knapp, Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law, 18 Harv. Women's L.J. 83, 89 (1995).

[7] The official title of the law is: *Koyo no bunya ni okeru danjo no kinto na kikai oyobi taigu no kakuho no sokushin suru tame no rodosyo kankei horitsu no seibi nado ni kansuru horitsu* [An act of the adjustment of laws relating to the Ministry of Labor to promote the assurance of equality of opportunity and treatment for men and women in employment] Law No. 45 of 1985 [hereinafter EEOL]. The law was passed on May 17, 1985 and went into effect as of April 1, 1986.

[8] *See, e.g.*, Kazuo Sugeno, Japanese Labor Law 129-35 (Leo Kanowitz trans., 1992); Masahiro Kuwahara, Danjo Koyo Byodo To Kintoho [Equal Employment Opportunity for Women: A Comparative Study of Japan, Canada, and the United States] 18-20 (1991)(analyzing the characteristics of the EEOL and the comparable laws in Canada and the United States); Knapp, *supra* note 6, at 105-109 (1995).

[9] *See generally* Knapp, *id.* *See also* M. Diana Helweg, Note, Japan's Equal Employment Opportunity Act: A Five-Year Look at Its Effectiveness, 9 B.U. Int'l L.J. 293, 312 (1991)("The present situation provides hope only for employers because they may simply ignore the [EEOL] and continue their traditional employment practices").

treatment[10] and carrying no sanctions, the EEOL completely lacks an enforcement mechanism.[11] Coupled with the lack of the right to sue, the law functions as nothing more than a guideline.[12] Because the business community fiercely resisted the idea of equal opportunity, Japan carefully crafted legislation that does not substantially curtail the traditional management style. Eleven years have passed since the enactment of the EEOL, and Japanese women still find themselves trapped in clerical positions. The law may be best described as a mere ornament embodying equality as an idealistic doctrine inapplicable to real life.[13] The limited effect of the EEOL has elicited extensive criticism.[14]

At the core of the EEOL lies a principle of gradualism that Japanese culture cherishes.[15] *Neta-ko-o okosuna* (Don't awaken the sleeping child), goes a popular Japanese saying.[16] It reflects a widespread belief that

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[10] *See, e.g.*, EEOL, *supra* note 7, at art. 7 ("With regard to the recruitment and hiring of workers, employers shall *endeavor* to give women equal employment opportunity with men")(emphasis added).

[11] *See* Helen A. Goff, Note, Glass Ceilings in the Land of the Rising Sons: The Failure of Workplace Gender Discrimination Law and Policy in Japan, 26 Law & Pol'y Int'l Bus. 1147, 1164-66 (1995).

[12] *See, e.g.*, Merrill Goozner, In Japan, Women Frozen Out, Chicago Tribune, April 2, 1993, at 1.

[13] *See* Jan M. Bergeson & Kaoru Yamamoto Oba, Japan's New Equal Employment Opportunity Law: Weapon or Heirloom Sword? 1986 B.Y.U. L.Rev. 865 (1986). *See also* Robert J. Smith, Lawyers, Litigiousness, and the Law in Japan, 11 Cornell L.F. 53, 54 (1985)(explaining that, in lieu of law, the Japanese have heavily relied upon implicit understanding and shared responsibility). Japanese legal culture bears a striking resemblance to its Chinese counterpart in numerous respects. China developed a public law order in which law functioned independently as "a less effective alternative to moral imperatives and custom as a source of legitimacy and means of social control." John Owen Haley, Authority Without Power: Law and the Japanese Paradox 28 (1991).

[14] *See generally* Knapp, *supra* note 6; Helweg, *supra* note 9; Bergeson & Oba, *supra* note 13.

[15] *See* Loraine Parkinson, Note, Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change, 89 Colum. L.Rev. 604, 605 (1989)(discussing the impetus behind and content of the EEOL).

[16] Another common Japanese saying conveys a similar concept: *Kaho wa Nete Mate* ("Lie down and await good news"). In the Japanese mind, one's life is simply given; it is not to be built. *See, e.g.*, Yamazaki Masakazu, Signs of New Individualism, 11 Japan Echo 8, 14 (1984). Japanese society values the virtue of submission to fate as a sign of one's maturity. *See* Yoshiyuki Noda, Introduction to Japanese Law 173 (A. Angelo transl., 1976)(noting that the

meaningful change must be shaped by evolution, rather than revolution, through which the public builds a consensus.[17] This rhetoric of gradualism has been routinely used to justify exclusion of women from the core labor force. As reflected in the relaxed language of the law[18] and the lack of sanctions, the EEOL exemplifies Japan's attempt to achieve social change through voluntary compliance rather than coercion.[19]

The gradualistic approach does carry an appeal. Even in the United States, where law has played a prominent role in the pursuit of civil liberties, a debate has ensued over whether the battle against social inequality can be most effectively fought in the legal arena. As an alternative to the force of law, some critics advocate consciousness-raising through education as a more effective way of eliminating discrimination. Such critics may in fact support the theory of gradualism embodied in the Japanese law, suggesting that the U.S. can learn from that alternative approach to social change.[20]

This gradual approach, however, warrants critical examination. Although admirable in principle, it conveys the following message to the oppressed: Because little can be gained without institutional changes,[21] victims of discrimination must internalize their grievances and patiently await future improvements. This rhetorical assertion of helplessness confines aggrieved individuals into the passive role of onlookers.[22] At some point, the child's

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Japanese culture has absorbed Buddhist teachings, which embrace submission to fate as "the source of all true happiness.").

[17] Parkinson, *supra* note 15, at 605.

[18] *See generally infra* section II.C.2.

[19] Parkinson, *supra* note 15, at 604-605 (explaining that "[e]schewing legal sanctions to eliminate discrimination in employment, this law instead looks to noncoercive means to achieve social change").

[20] *See generally id.*

[21] *See, e.g.,* Robert Elias, The Politics of Victimization: Victims, Victimology and Human Rights 210 (1986).

[22] *See id.*

sleep must be disrupted,[23] which may require the imposition of force. The restoration of human dignity often demands legal intervention.[24]

Legal reform is no panacea; no matter how carefully crafted or how it is vigorously enforced, law remains incapable of eliminating personal prejudice.[25] Nonetheless, by articulating and enforcing standards of conduct, the power of law can help induce socially desirable behavior and direct the community to move toward declared goals. For this reason, more stringent legislation should serve as a vital part of a catalyst for gender equality in Japan.

The comparison of the EEOL with its United States counterpart may give Japan an instructive example. In America as well, society has continued to draw arbitrarily lines dividing the male and female spheres, and much work must be done to achieve the full integration of women into the core labor force. American women, however, possess a right to address their grievances with the power of law.[26] Embodying America's commitment to the pursuit of individual dignity, Title VII of the Civil Rights Act of 1964[27] has served as an effective tool for challenging employers' gender stereotyping. The concept of "fairness to individuals"[28] underlying Title VII has enabled both men and women to explore a broader spectrum of job opportunities by challenging discriminatory barriers created by societal perceptions. It is meaningful for Japan to explore the U.S. attempt through equal opportunity legislation to

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[23] *See e.g.*, Jill Andrews, Comment, National and International Sources of Women's Right to Equal Employment Opportunities: Equality in Law versus Equality in Fact, 14 NW. J. Int'l L. & Bus. 413, 437 (1994)(observing that Japan's use of gradualism in its attempt to eliminate gender discrimination "provides little recourse for a woman faced with discriminatory practices.").

[24] One American critic asserts that the force of law must be strengthened in Japan, "because the legal rights of the individual are routinely violated." Smith, *supra* note 13, at 55.

[25] *See* Elizabeth Fox-Genovese, Women's Rights, Affirmative Action, and the Myth of Individualism, 54 Geo.Wash. L.Rev. 338, 342 (1986)(stating: "Stripping away legal disabilities does not in itself revolutionize social relations or eradicate social or economic disabilities, much less wipe out deeply ingrained attitudes on the part of men—and of women themselves").

[26] Leslie Bender & Daan Braveman, Power, Privilege and Law: A Civil Rights Reader 602 (1995)(noting that a victim of gender discrimination "would at least have the opportunity to right that wrong by having her day in court.").

[27] 42 U.S.C. Section 2000e - 2000e-17 (1994 & 1996 Supp.).

[28] *See infra* section III.D.

diminish, if not eradicate, traditional gender roles as an alternative approach to workforce equality.

This Article discusses the inability of the EEOL to remove barriers limiting women's access to the job market and analyzes an alternative approach to gender equality based on the U.S. model. In so doing, it explores the Japanese legal culture, which sharply contrasts with its American counterpart. I previously wrote an article entitled Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law,[29] which examined in detail the substance of the legislation and called for specific amendments. This Article, however, focuses largely on the gender bias that manifests itself in the law and the implications of gradualism. Moreover, it deals exclusively with discriminatory practices at the hiring stage, which presents the most serious problems in Japan.[30] Saddled with institutional barriers at the entry level, Japanese women are deprived of their opportunities to prove their capabilities and pursue their aspirations.

Part I compares attitudes toward law and inequality in Japan and the United States, because no law operates in a vacuum, completely separated from its social and cultural environment. Part II gives a broad overview of the EEOL and discusses how the law operates to reinforce and perpetuate gender stereotypes. It also explores the principle of gradualism as Japan's approach to discrimination, which helps explain the EEOL's inability to improve women's status. To evaluate this approach from a comparative perspective, Part III analyzes two landmark U.S. cases, Brown v. Board of Education and Loving v. Virginia, which helped enhance America's commitment to fighting oppression of minorities. Furthermore, this section surveys a U.S. approach to workforce equality through Title VII and highlights the principle of fairness to individuals, which forms the core of Title VII jurisprudence. It then concludes that the pursuit of gender equality should begin with appreciation of the worth of the individual.

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[29] *See generally* Knapp, *supra* note 6.

[30] Because long-term employment is common in Japan, firms exercise great care in their initial hiring decisions. When screening out job applicants, they may even hire private investigators to check on prospects' personal backgrounds. Daniel H. Foote, Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of—Stability? 43 UCLA L.Rev. 635, 654 (1996).

## I. U.S.-JAPAN COMPARISON: ATTITUDES TOWARDS LAW AND INEQUALITY

In the United States, a man from Louisiana challenged the confines of legal powers in Plessy v. Fergeson a century ago.[31] He attacked the constitutionality of a Louisiana statute requiring "separate but equal" railway carriages for whites and blacks.[32] When traveling from New Orleans to Convington, Louisiana, Homer Plessy, who was one-eighth black and appeared white, refused to sit in a coach assigned to blacks.[33] He then sought to challenge the law under the Thirteenth and Fourteenth Amendments.

Sustaining the law, however, the United States Supreme Court declared: "If two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's method and a voluntary consent of individuals."[34] In this now infamous case, the nation's highest court declared that social injustice inevitably escapes the reach of law.

Not until 1954 did the Court attack the separate-but-equal doctrine. In Brown v. Board of Education, the unanimous Court invalidated racial segregation in public education.[35] Although fueling a storm of controversy, the Brown ruling marked a significant milestone in the pursuit of equality in America; it officially renounced "a way of life for an entire section of the nation" following Plessy.[36] As G. Theodore Mitau wrote, Brown "acknowledged judicially what many people had known or felt for a long time:

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[31] 163 U.S. 537 (1896).

[32] *Id.* at 540.

[33] Joan Biskupic & Elder Witt, The Supreme Court and Individual Rights 256 (3rd ed., 1997)(discussing how Plessy was initiated as a test case).

[34] 163 U.S. at 551. Writing the majority opinion, Justice Brown stated: "If one race be inferior to the other socially, the [Constitution] cannot put them upon the same plane." *Id at 552.*

At the state level, similar arguments were made by the Massachusetts court in 1850:

> It is urged, that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law.

Roberts v. City of Boston, 59 Mass. 198, 209 (1850).

[35] 347 U.S. 483 (1954).

[36] Biskupic & Witt, *supra* note 33, at 236.

Segregation was morally indefensible, socially irrational and politically undemocratic."[37] Many other cases came into courts, using Brown as precedent and invalidating other forms of segregation throughout the South.[38] In the 1960s, America embarked on its journey to racial equality through implementation of civil rights legislation. The black civil rights movement, spurred by a series of legal challenges, eventually inspired women to assert their right to gender equality.[39]

The experience of African-Americans parallels that of American women in many respects. In 1994, referring to "the embarrassing chapter in our history,"[40] the Supreme Court declared: "While the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, 'overpower those differences.'"[41] Like African- Americans, women were, for many years, denied the right to vote and the right to serve on juries; they were excluded from or discriminated against in employment and educational opportunities.[42]

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[37] *Id.* (citing G. Theodore Mitau, Decade of Decision: The Supreme Court and the Constitutional Revolution, 1954-1964, 62-63 (1967)).

[38] *Id.* at 236.

[39] *Id.* at 237.

[40] J.E.B. v. Alabama, 511 U.S. 127, 136 (1994).

[41] *Id.* at 135-36 (1994)(quoting Note, Beyond Batson: Eliminating Gender-Based Peremptory Challenges, 105 Harv.L.Rev. 1920, 1921 (1992)). The Court further stated:

> [T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children... And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself 'preservative of other basic civil and political rights'—until adoption of the Nineteenth Amendment half a century later.

*Id.* at 136 (quoting Frontiero v. Richardson, 411 U.S. at 685)).

[42] Sail'er Inn v. Kirby, 5 Cal.3d 1, 19-20, 95 Cal.Rptr. 329, 340-42, 485 P.2d 529 (1972)(discussing the stigma of inferiority and second class citizenship associated with all suspect classifications: "Like black citizens, [women] were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states.").

In contemporary America, the Plessy holding is an infamous part of a shameful past. Some people may simply dismiss the case as archaic and of only historical significance. Incidents of overt discrimination have been substantially reduced, and the public no longer tolerates laws requiring black passengers to sit in separate coaches or black children to study in separate classrooms.

In contrast, the preceding judicial utterance from Plessy may be used to describe Japan's present attitude towards inequality. Japanese society tends to view discrimination "as a matter of the heart, not the law."[43]

Instead of confronting social injustice through imposition of force, the Japanese have averted their eyes from the problem, hoping that change will take place as a product of time. Reflecting this attitude, law in Japan has rarely served as a tool of redressing inequalities. Consequently, various forms of discrimination have prevailed in Japan. In particular, the following groups have endured discrimination: Koreans, Chinese, other Asians, dark-skinned people, the *Burakumin* (social outcasts during the *Tokugawa* Period, 1603-1868, and their descendants),[44] the *Ainu* (the original inhabitants living mostly in Hokkaido, the northern island of Japan), and women.[45] The Japanese live in a "society where discrimination is thought to make perfect common sense."[46]

In general, law has failed to play an instrumental role in Japan.[47] Some scholars have aptly depicted law in Japan as an "heirloom sword that is no more than an ornament or a prestige symbol"; although it is "taken out and shown to outsiders," it is "rarely, if ever, used."[48] Using the same analogy in

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[43] Frank K. Upham, Law and Social Change in Postwar Japan 208-9 (1987) (quoting the Japanese Minister of Justice).

[44] *Id.* at 78-87. *See infra* section III.A.

[45] *See, e.g.*, George A. De Vos, Social Cohesion and Alienation: Minorities in the United States and Japan (1992); William H. Lash III, Unwelcome Imports: Racism, Sexism, and Foreign Investment, 13 Mich. J. Int'l L. 1 (1991); Taimie L. Bryant, For the Sake of the Country, For the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan, 39 UCLA L.Rev. 109 (1991).

[46] Robert M. March, Working for a Japanese Company 119 (1992).

[47] Smith, *supra* note 13, at 55 (noting that "[m]any would argue ...that the force of the law must be strengthened in Japan, because the legal rights of the individual are routinely violated there").

[48] Bergeson & Oba, *supra* note 13, at 865 (citing Kawashima Takeyoshi, Nihonjin No Hoishiki [Legal Consciousness of the Japanese] 47 (1967)).

his article Sheathing the Sword of Justice in Japan: An Essay on Law without Sanctions, John Haley, a leading authority on Japanese law, comments that no other industrial nation has weaker formal law enforcement.[49] In fact, he places Japan and the United States at opposite poles of a spectrum: "In no other industrial society is legal regulation as extensive or as coercive as in the United States or as confined and as weak as in Japan."[50]

In the area of employment as well, Japan has made little concerted effort to promote equality through legislation.[51] As a result, gender-based division of labor has long prevailed. Most notably, strict adherence to gender role stereotypes has confined women to supportive roles.[52] Prevalent forms of discrimination include the following: hiring based on women's age, physical appearance, and the ability to commute from their parents' homes; assigning women to short-term, supplementary chores; and mandating retirement upon marriage, pregnancy, or childbirth.[53]

Japan stands in sharp contrast to the United States, where law has served as a tool for social change.[54] Reflecting the clash of the two widely divergent cultures, recent years have witnessed a rising number of employment discrimination lawsuits filed against Japanese firms in the United States.[55] Especially in the area of gender discrimination, Japanese

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[49] John O. Haley, Sheathing the Sword of Justice in Japan: An Essay on Law without Sanctions, 8 J. Japanese Stud. 265 (1982).

[50] Haley, *supra* note 13.

[51] *See* Uchihasi Katsuo, Downsizing, Japanese Style, 21 Japan Echo 47, 48 (1994).

[52] Masako Owaki, Byodo Eno Sekando Steji E [To the second stage of equality] (1992) (For a general discussion on women's status in Japan); *See* Masako Kamiya, Women in Japan, 20 U.B.C. L.Rev. 447 (1986).

[53] Knapp, *supra* note 6, at 89. *See also* Lash, *supra* note 45, at 19-22; Alice H. Cook & Hiroko Hayashi, Working Women in Japan: Discrimination, Resistance and Reform (1980); Catherine W. Brown, Japanese Approaches to Equal Rights for Women: The Legal Framework, 12 Law in Japan: Annual 29 (1979).

[54] *See, e.g.*, Tatsuo Inoue, The Poverty of Rights-Blind Commonality: Looking Through the Window of Japan, 1993 B.Y.U. L.Rev. 518 (1993)(comparing Americans, who have stressed "the role of individual rights within society," with the Japanese, who have emphasized community values as a hallmark of society); Parkinson, *supra* note 15, at 604 (noting that the law in the United States has served as an instrument of coercion in such areas as civil rights and women's rights).

[55] Two well-known cases that have captured significant scholarly attention are: Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982); and Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991). *See also,* Kiyoko Kamio Knapp, In the World But Not of It:

multinational enterprises have become a target of criticism. In American subsidiaries of Japanese firms, local employees, particularly women, often find themselves trapped in clerical positions with neither authority nor opportunities for promotion.[56]

In 1982, a group of American secretaries pulled their Japanese employer into the legal battleground. In this case, Sumitomo Shoji America, Inc.v.Avagliano, the plaintiffs claimed that Sumitomo Shoji, a Japanese firm in New York, had reserved its upper-level managerial positions for Japanese men.[57] A series of gender discrimination cases has followed the Sumitomo case.[58] Deep concerns over the Japanese corporate behavior finally forced Congress to confront the issue: in 1991, the Employment and Housing Subcommittee of the House Committee on Government Operations held three

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Japanese Companies Exploiting U.S. Civil Rights Law, 24 Denv. J. Int'l L & Pol'y 169 (1995); Eileen M. Mullen, Rotating Japanese Managers in American Subsidiaries of Japanese Firms: A Challenge for American Employment Discrimination Law, 45 Stan. L.Rev. 725 (1993); Dana Marie Crom, Clash of the Cultures: U.S. Japan-Treaty of Friendship, Title VII, and Women in Management, 3 Transnat'l L. 337 (1990).

[56] Lewis Steel, a civil rights lawyer who has handled a series of discrimination cases against Japanese employers, shared his observation of a three-tiered structure within Japanese multinational firms in the U.S.: Japanese nationals rotated from parent companies dominating the managerial positions, "even down to the lowest level of management"; locally-hired men at the middle level with limited chance for promotion; and women at the bottom, providing support services. *See* Congressional Hearings, *infra* note 60, at 158-60. In American companies, women represent 37% of top managerial positions; in their Japanese counterparts, however, less than 0.2% hold managerial posts higher than division chief or corporate director. Crom, *supra* note 55, at 337.

[57] Sumitomo Shoji America, Inc., 457 U.S. 176. ( In holding for the plaintiffs, the Supreme Court viewed Sumitomo, a subsidiary incorporated under the New York laws, as a U.S. company subjected to the U.S. employment law.) *Id.* at 182-83. About five years later, the parties reached a settlement; Sumitomo announced its plan to allocate nearly three million dollars over three years to train, promote and pay its female workers in the United States. The company further agreed to place women in 23 to 25% of the management and sales positions. Ronald C. Brown, The Faces of Japanese Labor Relations in Japan and the U.S. and the Emerging Legal Issues under U.S. Labor Laws, 15 Syr. J. Int'l & Comp. 231, 250 (1989)(citing 10 D.L.R. (BNA) A-7, A-8 (Jan. 5, 1987)). A series of cases have followed Avaglino, challenging discriminatory practices by Japanese firms operating in the United States. *See* Ross v. Nikko Sec. Co. Int'l., 133 F.R.D. 96 (S.D.N.Y. 1990).

[58] In 1995, a former vice president and market strategist of Sanwa Securities filed a four-million-dollar suit in New York. The plaintiff charged that the firm denied her equal pay and permitted verbal and physical harassment to occur within the workplace. Sanwa Sued for Alleged Sex Discrimination, Japan Economic Newswire, at Feb. 27, 1995. *See generally* Nagami Kishi, Uttaeru Zaibei Nihon Kigyo [Employment Discrimination Cases by Japanese-Owned Companies in the United States] (1992).

hearings entitled Employment Discrimination by Japanese-Owned Companies in the United States, led by Rep. Tom Lantos, (D-California).[59]

In 1994, a sexual harassment suit was filed against Mitsubishi Motor Manufacturing of America Inc., and captured international attention.[60] The plaintiffs argued that Mitsubishi's male workers, including some supervisors, had consistently subjected female employees to "relentless sex discrimination, sexual harassment and sexual abuse."[61] The growing number of these discrimination cases has alerted Japanese employers to reevaluate their traditional business practices that have collided with America's commitment to equal employment opportunity.

## II. JAPAN'S EQUAL EMPLOYMENT OPPORTUNITY LAW

### A. Overview

The eagerly-awaited law came into existence in 1985: Japan passed the Equal Employment Opportunity Law as more women began to protest discrimination during the United Nations Decade for Women (1976-1985).[62]

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[59] These hearings were held on July 23, August 8, and September 24 of 1991. The Subcommittee heard testimonies from aggrieved employees, Japanese employers, the Equal Employment Opportunity Commission (EEOC) officials, and labor specialists. Employment Discrimination by Japanese-Owned Companies in the United States: Hearings Before the Subcomm. on Employment and Housing of the House Comm. on Government Operations, 102d Cong., (1991).

[60] *See* Evans v. Mitsubishi Motor Manufacturing of America Inc., 1996 U.S. Dist. Lexis 20993 (C.D. Ill.)(December 12, 1996).

[61] *Id.* at 3. The plaintiffs further claimed that management has not only tolerated but also affirmatively fostered such exploitative working environment. Much of the top management consisted of Japanese males, who told new employees about an aspect of Japanese business culture: "Japanese managers do not believe that women belong in the workplace." *Id.* at 5. In 1997, the parties announced that they had settled the lawsuit and that Mitsubishi promised to donate $100,000 to women's causes in the area. Although they did not disclose other details of the settlement, an attorney for the EEOC said it involved substantial payments to the plaintiffs. Christopher Wills, Mitsubishi Settles in Suit Filed by 17 Women, Orange County Register Aug. 29, 1997.

[62] World Conference of the International Women's Year, G.A.Res. 3520, U.N.GAOR, 30th Sess., 2441st plen. mtg., Supp. No. 34, at 95, U.N.Doc. A/10034 (1975).

The Diet[63] enacted the EEOL on May 17, 1985, and it became effective on April 1, 1986.[64] The law proclaims that its goal is to assist women in harmonizing career and family.[65] The law provides standards for treatment of women workers in the following five categories: (1) recruitment and hiring; (2) job assignment; (3) vocational training; (4) fringe benefits; and (5) compulsory retirement age, retirement, and dismissal.[66] The last three categories (Articles 9, 10, and 11) explicitly prohibit discrimination.[67] In contrast, the first two (Articles 7 and 8) impose mere "duty to endeavor" not to discriminate.[68] Thus, under these provisions, the threshold question would be whether the employer has made good faith effort to treat both genders equally.[69]

The EEOL does not grant a private cause of action, thereby flatly denying women the right to seek redress in a civil suit.[70] This, coupled with lack of sanctions,[71] renders the compliance with the EEOL entirely

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[63] Although the Diet possess legislative powers, the ministers, including the Minster of Labor in the EEOL's case, draft most of the legislation. Nippon Steel Human Resources Development, Nippon: The Land and its People, 60 (1986).

[64] Knapp, *supra* note 6, at 108.

[65] EEOL, *supra* note 7, at art. 1.

[66] *Id.* at arts. 7-11.

[67] *Id.* at arts. 9-11. For example, Article 9 reads as follows: "With regard to the vocational training for the acquisition of basic skills necessary for workers to perform their duties..., employers *shall not discriminate* against a woman worker as compared with a man by reason of her being a woman." *Id.* at art. 9 (emphasis added).

[68] "With regard to the recruitment and hiring of workers, employers shall *endeavor* to give women equal opportunity with men." *Id.* at art. 7 (emphasis added).

[69] "With regard to the assignment and promotion of workers, employers shall *endeavor* to treat women workers equally with men workers." *Id.* at art. 8 (emphasis added).

Kazuko Hitosugi, Director of the Office of Women's and Young Workers' Affairs, stated that the Office could possibly take "some action" against the employer that committed gross discrimination. However, she did not clarify exactly what kinds of conduct would be sufficient to constitute "gross discrimination" nor what specific action can be taken against such an employer. Interview with Kazuko Hitosugi, Director of the Hyogo Women's and Young Workers' Office, Kobe, Japan (June 30, 1994)(on file with author).

[70] Knapp, *supra* note 6, at 117-18.

[71] Haley, *supra* note 49, at 265 (describing the absence of formal sanctions as a common feature of Japanese law.)

voluntary.[72] In lieu of litigation, the EEOL either encourages in-house settlements or dispute resolution through the Prefectural Office of Women's and Young Workers' Office, which conducts administrative guidance[73] for the parties. The Women's and Young Workers' Office, a bureau within the Ministry of Labor, is a "governmental institution which bears most responsibility for industrial relations and a part of social insurance."[74] Specifically, the EEOL prescribes the following three steps in assessing women's claims: (1) in-house settlements; (2) resolution with assistance from the Women's and Young Workers' Office; and (3) mediation by the Equal Employment Opportunity Commission.[75]

As my previous article extensively discussed, the EEOL has failed to deter employers' discriminatory conduct,[76] and many women still serve a mere auxiliary function in the office.[77] In 1989, a U.S. student author wrote an article praising the voluntarism and gradualism of the EEOL and claiming that

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[72] *See, e.g.*, Parkinson, *supra* note 15, at 604 (explaining that "[e]schewing legal sanctions to eliminate discrimination in employment, this law instead looks to noncoercive means to achieve social change.").

[73] Michael K. Young, Administrative Guidance in the Courts: A Case Study in Doctrinal Adaptation, 17 Law in Japan: An Annual 120, 122-23 (1984) (describing administrative guidance as a "common Japanese regulatory technique that, although generally non-binding, seeks to conform the behavior of regulated parties to broad administrative goals").

[74] Tadashi Hanami, Labor Law and Industrial Relations in Japan 47 (1985). The Office's duties include the following: working to heighten public awareness of the EEOL; conducting administrative guidance; providing advice, guidance, and recommendations regarding employers' discriminatory practices; referring proper cases to the Equal Opportunity Mediation for the final stage of administrative guidance; reporting the effects of the EEOL. Kuwahara, *supra* note 8, at 27. *See also* EEOL, *supra* note 7, at arts 13-15.

[75] *See* EEOL, *supra note 7* at arts. 9-11. As of December 2, 1996, Asahi Shimbun, the nation's major newspaper, revealed a surprising fact that only one case had proceeded to the third step (mediation) in ten years since the law's enactment in 1986. 103 employees from eleven companies had requested mediation so far, and sixty-nine persons from four companies had been denied their request. Chotei Seido Kyoka-demo Jikko-ni Gimon [Strengthening Mediation Mechanism: Questionable Effects], Asahi Shimbun [Asahi News], Dec. 2, 1996, at 15. Furthermore, lack of publicly disclosed information by the government makes it difficult to assess the effectiveness of administrative guidance. The vast majority of claims initially filed with the Office are not made public "unless they reach the last two stages of mediation." Facing little or no risk of public exposure, employers are not given an incentive to scrutinize their own discriminatory practices. *See* Goff, *supra* note 11, at 1165.

[76] *See generally,* Knapp, *supra* note 6, at 110-115 (discussing the ineffectiveness of the EEOL).

[77] *Id.* at 112.

this alternative approach to social change should teach the United States valuable lessons.[78] She cautioned against "the immediate gratification of abrupt change" and stressed that no law should be imposed upon a society when the bulk of its citizens are unwilling to obey.[79]

In contrast, numerous other critics, most notably Japanese women themselves, have voiced their complaints and urged critical evaluation of the law.[80] They argue that the EEOL's promise of equal opportunity has largely remained an illusion.

Among a broad range of sources discussing the EEOL's failure, perhaps one of the most eloquent is a report entitled A Letter from Japanese Women.[81] On December 1, 1993, the Women's Circle, a group of women workers and lawyers in Japan, submitted this report on gender discrimination to the United Nations.[82] Containing abundant statistical and anecdotal evidence, the report graphically demonstrates that the EEOL has done little, if anything, to enhance women's status in the Japanese workplace.[83] To take one example, employers have continued to specify a gender preference when they advertise jobs or interview applicants.[84] According to Recruit Research Co. Ltd., a Tokyo-based research firm, college seniors looking for work in

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[78] *See generally* Parkinson, *supra* note 15.

[79] *Id.* at 661.

[80] *See, e.g.*, Goff, *supra* note 11, at 1148 (arguing that "Japanese citizens and women's groups are calling for substantial revision" of the EEOL, which has remained "grossly ineffective" in fighting discrimination). *See also* Knapp, *supra* note 6, at 115-25; Counter-Report, *supra* note 3; Owaki, *supra* note 52, at 64-93; Helweg, *supra* note 9; Junro Honda, Kigyo Syakai ni Okeru Josei Sabetsu [Discrimination Against Women in Corporate Society], Rodo Horitsu Junpo [Labor Law News], Apr. 1994, at 4-5.

[81] Counter-Report, *supra* note 5.

[82] *Id.* at 14.

[83] The members of the Women's Circle emphatically stated:

> [W]e find that the EEOL has minimally improved conditions among employers who do not actively use women workers, and those companies who do actively use women workers have no intention of paying them wages equal to men's for comparable work but continue to require equally hard work of women at lower wages. These practices have not made equal employment a reality but instead have worsened the circumstances surrounding women's labor and even made their work more difficult.

*Id.*

[84] *Id.*

1995 found that there were 45 openings for every 100 women, compared with 133 openings for every 100 men.[85] More recently, in 1996, the Los Angeles Times reported that the passage of the EEOL only temporarily improved career prospects for Japanese women: "[M]uch of that progress seems to have vanished in the harsher light of Japan's recession."[86] Too often, women are the first fired as the nation's unemployment rate reached 3.4% in 1996, the highest since the government began collecting data in 1953.[87]

Most notably, the conspicuous absence of prohibitory language has received criticism from various sources. Harshly criticizing the failure of the EEOL, Professor Junro Honda described the relaxed wording of the law as "the world's lowest level" of legal enforcement.[88] He further raised the question: "When will the Ministry of Labor even listen to the public outcry?"[89] Similarly, Masako Owaki, a prominent lawyer who has written extensively on employment discrimination, simply called the EEOL a "toothless lion."[90]

In fact, the Ministry of Labor itself explicitly acknowledged that the EEOL has remained ineffective in eliminating obstacles women face as they enter the job market.[91] In response to mounting criticism, the Ministry recently announced its proposed amendments to the EEOL.[92]

On December 17, 1996, the Ministry announced its plan to replace the "duty to endeavor" provisions with prohibitory language.[93] The Ministry submitted the report documenting proposed amendments to the Diet in 1997, and the amended law will go into effect on April 1, 1999.[94] It remains to be seen how these amendments will help fulfill the EEOL's failed promise of

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[85] *Id.*

[86] Evelyn Iritani, Japanese Fleeing a Thick Glass Ceiling; Many Bright Young Women are Trying to Escape Corporate Sexism and Bleak Job Prospects by Finding Work Overseas,—Often in the U.S., L.A. Times, Apr. 5, 1996 at A1.

[87] *Id.*

[88] Honda, *supra* note 80.

[89] *Id.*

[90] Owaki, *supra* note 52, at 60.

[91] Ministry of Labor, Kintoho-Ga Kawarimasu ["The EEOL will Change"] 1 (1998).

[92] *Id.*

[93] *Id.* at 18-24. *See also* Danjo-sabetsu "Kinshi"-ni [Gender Discrimination will be "Prohibited"], Asahi Shimbun [Asahi News], Dec. 17, 1996, at 4 (Evening Edition).

[94] Ministry Of Labor, *supra* note 91, at 1.

equality. Until that time, there remains no enforcement mechanism or a private cause of action.

### B. Gender Bias Embraced by the EEOL

Before examining particular gender-role stereotypes inherent in the EEOL, it is worthwhile to consider how gender stereotyping occurs. Stereotyping involves "a set of attributes ascribed to a group and imputed to its individual members simply because they belong to that group."[95] By categorizing people into either men or women, one may exaggerate the differences between the two groups while minimizing the differences within each group.[96] This categorization can defeat equality by creating a polarization between men and women.[97] From the management's perspective, stereotypes provide a useful means of reducing information costs in hiring: "management makes individual decisions about productivity without costly research into individual merit."[98]

In the Japanese context, the following remarks, made by the nation's prominent figures, provide vivid and well-documented examples of pervasive discrimination and stereotyping:

> [An equal number of male and female executives] would deprive men of jobs and cause social unrest. By nature, women are better suited for raising children and domestic responsibilities.

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[95] Mary F. Radford, Sex Stereotyping and the Promotion of Women to Positions of Power, 41 Hastings L.J. 471, 487 (1990) (citing Heilman, Sex Bias in Work Settings: The Lack of a Fit Model, 5 Research in Organizational Behavior 269, 271(1983)). *See also* Tracy L. Bach, Gender Stereotyping in Employment Discrimination: Finding a Balance of Evidence and Causation Under Title VII, Minn. L. Rev. 1251, 1253 (1993).

[96] "[T]o categorize a female employee along the lines of sex produces an evaluation of her suitability as a 'woman' who might be expected to be sexy, affectionate and attractive; this female employee would be evaluated less favorably if she is seen as not conforming to that model without regard for her job performance." Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486, 1502-1503 (M.D. Fla. 1991). *See also* Nadine Taub, Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination, 21 B.C. L. Rev. 345, 413 (noting that male-valued traits include "competence, rationality, and assertion" while "warmth and expressiveness" exemplify the female-valued traits).

[97] Bach, *supra* note 95, at 1254; Taub, *supra* note 96 at 417 (stating that employment decisions based on role expectations result in reinforcing the stereotypes "in the minds of both the employer and the employee").

[98] Theodore Y. Blumoff & Harold S. Lewis Jr., The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task, 69 N.C. L. Rev. 1, 61 (1990).

> —Ohtsuki Bunpei, President of the Japan Federation of Employers Associations.[100]

> [Female university graduates] tend to stop working after a few years. And quite frankly, we find them rather headstrong.
>
> —Furuuchi Masaru, Personnel Director of Kinokuniya, one of Japan's largest bookstores.[101]

> In order to acquire equal jobs, some women are willing to take the same attitude toward life and their jobs as men. The companies, however, cannot distinguish those girls who want to pursue a career from those who do not. And after all, the primary corporate purpose is to increase profits, not to help women establish themselves. Based on the bitter lesson they have learned by employing women, the companies thus give priority to their own interests which do not always comply with the female workers' aspirations.
>
> —Takeuchi Hiroshi, author of Working Women in Business Corporations, in which he shares the typical management view on working women in Japan.[102]

These statements articulate a view widely shared by the business community.

Society automatically perceives women as care-givers simply by virtue of their gender, depriving many female career aspirants of job opportunities. Japanese men have long perceived women's entry into the professional fields as a threat. This perception derives from a belief that the pursuit of a career would impair women's "ultimate goal": to become a *ryosai-kenbo* ("good wife and wise mother").[103]

A basic understanding of lifetime employment, a unique aspect of Japanese management, brings to light a cultural framework within which the Japanese government enacted the EEOL. Lifetime employment, although now failing, has long stood out as the most striking feature of Japanese labor

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[100] Upham, *supra* note 43, at 128 (citing The Mainichi News, Mar. 13, 1983).

[101] *Id.*

[102] Takeuchi Hiroshi, Working Women in Business Corporations, 34 Japan Q. 320, 321 (1982).

[103] Parkinson, *supra* note 15, at 625 (describing a social perception that pursuing a career can hurt a woman's "marriageability or motivation to marry").

practice.[104] Traditionally major Japanese firms hire fresh graduates annually, train them to value corporate loyalty, and retain them until mandatory retirement at age sixty.[105] Life-long job security ultimately produces an "enthusiastic work force that takes pride" in hard work.[106] It is this system, Japanese employers firmly believe, that has partly made Japan's postwar economic triumph possible. Consequently, homogeneity prevails in the Japanese corporate setting; particularly at major firms, the core labor force consists predominantly of men who join the organizations fresh out of college. Employers have long discriminated against women, who are perceived as lacking a long-term commitment.[107] This gender-based grouping has resulted in the exclusion of women from professional fields. William Ouchi, who authored a book on Japanese management, has found that women face more severe discrimination in Japanese companies than in any other organization: "[Japanese firms] simply operate as culturally homogeneous social systems" which withstand no internal diversity.[108]

### C. Critical Analysis of the EEOL

#### *1. Harmonization of Family and Career for Women*

First and foremost, the EEOL expressly embraces a gender-role stereotype that a woman is the primary caregiver in the home. Article 1 of the EEOL proclaims that its goal is to assist women (and women only) in harmonizing career and family: The purpose of this law is to promote equal opportunity and treatment between men and women in employment...and attempts to harmonize [women's] working life with family life; and thereby to further the welfare and improve the status of women workers.[109]

This proclamation reinforces the long-held assumption that "only women, who must struggle in combining family and career, deserve special

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[104] Edwin O. Reischauer, The Japanese Today 320 (1988) (discussing the characteristics of the Japanese employment system).

[105] Japan: A Country Study 116 (Ronald E. Dolan & Robert L. Worden eds., 1992).

[106] Reischauer, *supra* note 104, at 324. *See also* Arthur M. Whitehill, Japanese Management: Tradition and Transition, 154-55 (1991).

[107] Thomas Mcrozkowski & Masao Hanaoka, Continuity and Change in Japanese Management, Japanese Bus. 271, 273 (Subhash Durlabhji & Norton E. Marks, eds. 1993).

[108] William Ouchi, Theory Z, 74 (1981).

[109] EEOL, *supra* note 7, at art. 1.

protection in playing their dual role."[110] It reflects Japan's desire to seek a compromise between two goals in tension: promotion of workforce equality and preservation of women's traditional role in the home.[111] Japan viewed this approach as necessary, because the law emerged "while employers still found themselves unprepared to question their own gender bias."[112] One may ask, however, how women could further their careers on an equal footing with men while being solely responsible for household chores.[113] "Career advancements must be made compatible with family life" for both men and women.[114]

Also, by protecting women only, the EEOL fails to address any discriminatory practices against men. Numerous scholars have criticized the EEOL's failure to enhance working women's status. In contrast, critics have given little attention to the law's silence on equal treatment of men. The EEOL completely disregards the possibility that men may be placed in a disadvantageous position because of their gender. Thus, the EEOL, which could help women become construction workers or investment bankers, remains entirely powerless to help men become nurses or flight attendants. This one-sidedness has harmful implications for women as well. In her article on the inattention to oppression of men, Nancy Levit argues that "any discrimination against men may ultimately result in harm to women."[115] The EEOL's wholesale exclusion of men works to perpetuate a prevailing norm that nurturing roles are properly reserved for women.[116]

The lack of protection for both genders merits re-evaluation, especially in light of a growing trend among young Japanese men: Outside the corporate world, Japanese men are now entering into a broader array of

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[110] Knapp, *supra* note 6, at 135.

[111] *See* Parkinson, *supra* note 15, at 634-635.

[112] Knapp, *supra* note 6, at 108. *See also* Parkinson, *supra* note 15, at 605.

[113] *See* Parkinson, *supra* note 15, at 635.

[114] Knapp, *supra* note 6, at 135.

[115] Nancy Levit, Feminism for Men: Legal Ideology and the Construction of Maleness, 43 UCLA L. Rev. 1037, 1052 (1996) (stating that both men and women can be victimized by gender role stereotypes). *See also* Deborah A. Calloway, Dealing with Diversity: Changing Theories of Discrimination, 10 St. Johns J. Legal Comment 481, 491 (1995) (asserting that "[e]quality in one dimension means inequality in another dimension").

[116] *See* Levit, *supra* note 115 at 1040. *See also id.* at 1041 ("The feminist movement has brought us images of competent women at work, but not of caring and nurturant men at home").

occupations, including traditionally female arenas. The November 1994 issue of Nikkei Woman, a monthly magazine for working women in Japan, featured an article on some of these men, who had chosen to become a dog groomer, a nurse, a nurse's aid, and a kindergarten teacher.[117] Entitled *Onna no Shigoto-ni Tsuku Otoko-tachi* ("men who enter women's fields"), this article conveys a powerful message: More men are now refusing to choose the path to corporate success simply to fulfill their culturally expected role as bread-winners.[118] They view work, instead, as an expression of their individuality.

Given the diversification of values, it is not unreasonable to assume that some men feel deprived of their freedom to pursue occupations of their genuine interest. The dominant gender bias has deprived both men and women of their right to be treated as individuals with varied career aspirations.[119] The gradual shift in men's labor consciousness will necessitate the expansion of the EEOL to protect both genders. Full attainment of equality will be possible only if both men and women gain equal access to employment opportunities.

### *2. "Duty to Endeavor" Provisions*

The EEOL conspicuously lacks prohibitory language in the following employment categories: recruitment, hiring, assignment, and promotion.[120] Instead, the law merely dictates that employers "endeavor to provide equal opportunity" in those areas. Articles 7 and 8 read as follows:

> Article 7. With regard to the recruitment and hiring of workers, employers shall *endeavor* to provide women equal opportunity with men.
>
> Article 8. With regard to the assignment and promotion of workers, employers shall *endeavor* to treat women equally with men. (Emphasis added.)

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[117] Onna no Shigo-to Tsuku Otoko-tachi [Men Who Enter Women's Fields], Nikkei Woman, Nov. 1994, at 138-43.

[118] *Id.* at 138.

[119] *See, e.g.,* Owaki, *supra* note 52, at 268-69 (questioning the gender-based segregation in the Japanese labor force).

[120] EEOL, *supra* note 7, at arts. 7 & 8.

Put another way, these provisions require nothing more than a good faith effort to give equal treatment.

A brief discussion of the legislative history helps explain the adoption of such relaxed language. When the Ministry of Labor drafted the Equal Employment Opportunity Bill and submitted it to the 101st Extraordinary Session of the Diet in 1984,[121] employers voiced strong objections, which delayed its passage for one year.[122] The business community expressed its fear that achievement of gender equality would disrupt lifetime employment, which it viewed as an integral part of the Japanese labor practice.[123] Employers forcefully argued that "equality in employment would mean the end of [the] pillars of postwar growth and social stability, permanent employment and seniority-based compensation."[124]

The Ministry of Labor agreed that imposition of a mere "duty to endeavor" would be proper given the female labor force.[125] At the Diet session where this issue was discussed, the Ministry concluded:

> Lifetime employment is the core of the Japanese labor market. Under this system, the length of service becomes a decisive factor in recruitment, hiring, assignment, and promotion [which Articles 7 and 8 cover.] Considering the shorter length of work among women, we initially find it reasonable to require only duty to endeavor.[126]

In sum, the Ministry viewed certain discrimination as unavoidable—as a natural consequence of women's shorter duration of work—without questioning whether the discrimination was causing women to leave their jobs.[127]

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[121] Parkinson, *supra* note 15, at 618 (citing Rodosho Fujinkyoku ("Mol Bureau of Women's Affairs"), Shinpan danjo koyo kikai kintoho - kaisetsu ("Explanation of procedures required by the Equal Employment Opportunity Law and Labor Standards Law as amended").

[122] Knapp, *supra* note 6, at 107 (detailing the debate on the EEOL).

[123] *Id.* (citing Upham *supra* note 43, at 150).

[124] Upham, *supra* note 43, at 150.

[125] Knapp, *supra* note 6, at 115.

[126] Kuwahara, *supra* note 8, at 135 (citing Sakamoto, Ministry of Labor official, Kaigi-Roku (session record)) at 986.

[127] Knapp, *supra* note 6, at 115.

The ambiguity of the "endeavor" provisions has allowed employers to justify their continued discrimination. Contrary to the stereotypical assumption about the mobility of the female labor force, however, recent surveys show a rising number of women who stay longer in the job market.[128] "The average age of Japanese female employees rose from 26.3 years in 1960 to 35.7 in 1990."[129] In contemporary Japan, women by no means comprise a culturally heterogeneous group that can be easily molded into a stereotyped role. Stressing that point, one scholar shares the following observation:

> Just two decades ago, one could describe the typical 35-year-old educated middle-class female as being the wife of a white-collar worker, living in a housing complex with him and her two children, her life revolving around her family. Today's 35-year-old female may be single, married, or divorced. She may be working or even continuing her education. The fact is, it is no longer possible to characterize the typical educated middle-class Japanese women.[130]

This emergence of diversified lifestyles should encourage employers to make a case-by-case assessment to determine an individual job applicant's capabilities and aspirations.

### *3. Two-Track System*

The enactment of the EEOL led to a now widespread practice in the Japanese business community: institution of new personnel policies known as two-track systems.[131] Today many Japanese employers, especially banks and large firms,[132] maintain two separate tracks for women: *sogo-shoku* (the

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[128] *Id.* at 94-95.

[129] Hiroko Hayashi, Women's Rights as International Human Rights: Sexual Harassment in the Workplace and Equal Employment Legislation, 69 St. John's L. Rev. 37 n. 2 (1995) (citing Alice C. L. Lam, Women and Japanese Management: Discrimination and Reform 13 (1992).

[130] Iwao Sumiko, Japanese and American Women Today: A Comparison, 20 Japan Echo 69, 73 (1993).

[131] Sugeno, *supra* note 8, at 132. Although the EEOL does not prescribe the adoption of this policy, many observers have recognized that the law has motivated employers to implement it to "cope with the concept of equal opportunity." *Id.*

[132] The Ministry of Labor found in 1992 that about 50% of firms with more than 5,000 employees have adopted the management track for women. Chieko Kuriki, Off the Path Japanese Law Does Little to Reach Workplace Equality, Survey Says, Chic. Trib., Sept. 18,

"management track") and *ippan-shoku* (the "standard track").[133] The former includes duties related to planning, development, and negotiations, whereas the latter involves clerical work.[134] Firms generally treat employees on the management track as full-fledged members of the corporate team who are guaranteed permanent employment as well as promotional opportunities. In contrast, they treat employees on the standard track as temporary workers with low wages. Viewed in a different light, however, the management track requires religious devotion by workers, with grueling working hours, frequent travel and periodic job transfers that include overseas assignments, work-related socializing, and other constraints.[135] The rigor of corporate culture demands a life pattern men have traditionally adopted.

Before the passage of the EEOL, most firms staffed the managerial posts exclusively with men.[136] Thus, one may value the two-track system, which now gives women the opportunity to work on equal footing with men. In reality, however, most firms reserve the management track for a small percentage of women.[137] These employers tend to impose higher standards upon female candidates for the management track; they may give competitive examinations or require qualifications such as a degree from a prestigious university or fluency in a foreign language.[138] In contrast, they automatically assign men to the management track, regardless of the men's individual desires.[139] As of the early 1990s, 99% of men were on the management track, whereas 3.7% of women were on the same track.[140]

To justify the vast under-representation of women in managerial posts, most firms have used the following explanation: Because managerial positions require a long-term commitment, women, who are more likely to quit jobs

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1994, at 14 .

[133] Sugeno, *supra* note 8, at 132.

[134] *See* Knapp, *supra* note 6, at 123.

[135] *See e.g.*, Hayashi, *supra* note 129, at 40-41.

[136] Satomi Ban, Fast Track, in 37 Look Japan 36 (1991).

[137] Sugeno, *supra* note 8, at 132.

[138] Parkinson, *supra* note 15, at 631; Owaki, *supra* note 52, at 84.

[139] Ban, *supra* note 136, at 36.

[140] Hayashi, *supra* note 129, at 32 n.37 (citing Victor Fic, Sexual Harassment Still a Fixture in the Japanese Office, Tokyo Bus. Today, Dec. 1994, at 22, available in LEXIS, AsiaPC Library, TOKBUS File)).

than men, must go through a stringent screening process. Although admitting that more women are now becoming serious about pursuing a career, management firmly believes that some selection device is necessary to screen out such women.[141] As one observer describes, women candidates must convince their prospective employers of their "strong aspirations, high levels of competence and a determination to choose a career to the exclusion of a family."[142] Describing the two-track system as "a distinctively Japanese approach" to gender discrimination, one scholar stated that "such a solution would be unthinkable" in American society.[143] Many Japanese observers agree that companies have adopted the two-track system, which "has no substance" as "a public relations gimmick."[144]

The Women's and Young Worker's Office has held that the adoption of two-track systems does not violate the EEOL.[145] Consider an example at Sumitomo Life Insurance Company. Instituted in April 1, 1986, the year when the EEOL went into effect, Sumitomo's two-track system required that men be assigned to the management track and women to the standard track.[146] The firm permitted women to switch to the management track only after being promoted to a position above that of supervisor on the standard track and later passing a competitive examination.[147] Furthermore, married women on the standard track were excluded from consideration for those promotions. Attacking this discriminatory practice, twenty-two females brought their claim to the Women's and Young Workers' Office. They requested mediation, a recourse available in lieu of litigation under Article 15 of the EEOL.[148] The Director of the Office, however, rejected their claim, asserting that no

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[141] Takeuchi, *supra* note 102, at 319 (explaining management's view that assignment of women to managerial posts is simply a waste of time and that serving tea should be an "established practice" for women, including university graduates).

[142] Parkinson, *supra* note 15, at 631.

[143] Iwao, *supra* note 130, at 72.

[144] Kuriki, *supra* note 132, at 15-16.

[145] Chotei Seido Kyoka-demo Jikko-ni Gimon [Strengthening Mediation Mechanism: Questionable Effects], Asahi Shimbun [Asahi News], December 2, 1996, at 15.

[146] Hayashi, *supra* note 129, at 42.

[147] *Id.*

[148] The Director of the Prefectural Women's and Young Workers' Office shall refer a dispute...to the Equal Employment Opportunity Mediation Commission for mediation, when both of the parties concerned apply for mediation or either one of them so applies and the Director considers it necessary to settle the said dispute...EEOL, *supra* note 7, at art. 15.

mediation would be available because "there were no men on the [standard] track who could be compared to the married women to support the women's allegation of sexual discrimination."[149]

### *D. Gradualism at the Core of the EEOL*

To fully understand the EEOL's inability to eradicate discrimination, one must grasp the notion of gradualism underlying the law as a reflection of Japanese culture.[150]

The relaxed wording of the "duty to endeavor" provisions best exemplifies a non-coercive and voluntary approach to discrimination.[151] Because the Japanese share a vision of equality that results from a gradual and consensual process,[152] they prefer to create social change "through evolution rather than revolution, through voluntary compliance rather than coercion."[153] As one observer puts it, Japan evaluates equality over the long term, whereas the United States evaluates it at a given point in time.[154]

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[149] Hayashi, *supra* note 129, at 43.

[150] *See, e.g.,* Andrews, *supra* note 23, at 428 (explaining that the EEOL does not provide a private cause of action partly because the Japanese legislature considered it necessary to "create a social consensus that the change was necessary, a more gradualistic approach would better foster this consensus.").

[151] *See, e.g.,* Hayashi, *supra* note 129, at 25-26 n.12.

[152] *See, e.g.,* Iwao, *supra* note 130, at 74 (noting that the Japanese consider it essential, for the purpose of promoting equality, to cultivate "[l]ong term relationships based on trust...calculated over the long haul."); Parkinson, *supra* note 15, at 638 (explaining that important decision-making in Japan requires a high level of consensus).
*See also* Iwao, *id.* at 71-72.

[153] Parkinson, *supra* note 15, at 605. *See also id.* at 635-6 (explaining the voluntarism and gradualism of the EEOL as a "tacit recognition of the immense difficulties involved—on both an economic and social level—in shifting away from the present gender-based division of labor to full participation by women in the labor force.").

[154] Iwao, *supra* note 130, at 74 (discussing different concepts of equality in Japan and the United States). Iwao also states: "In a society where job changes are frequent and the divorce rate is high, as in the United States, people feel they must claim what is owed them now, or else they may never receive it." *Id.* Many Japanese observers criticize the American approach to equality, which often demands a confrontational stance and immediate, visible results. Such an approach, says Iwao, creates a backlash phenomenon, because it poses a threat to men, who "have been forced to change and see themselves as under siege." *Id.* at 72.

This argument proceeds as follows: Law does not provide a powerful vehicle for social change unless it truly reflects a consensus of society.[155] Mostly composed of men, the business community resists the idea of severely curtailing their traditional management practice. Because such resistance could diminish only over time, it is desirable to seek a long-term solution to the problem, which emphasizes valued elements of Japanese culture, such as patience, non-confrontation, and perseverance.[156]

This assertion of judicial helplessness bears some resemblance to the remark made by the U.S. Supreme Court in the century-old Plessy case. Proclaiming that law cannot overcome racial prejudices, the Plessy Court allowed the legislature to accommodate "the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."[157] The Court viewed the guarantee of equality embraced by the Fourteenth Amendment as "virtually nonexistent except as a bulwark of the rights of corporations."[158]

Some may praise the structures of the EEOL, viewing them as closely tailored to Japanese cultural and social landscape.[159] It is precisely this

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[155] *See e.g.*, Haley, *supra* note 13, at 90. Haley explained that Japan's new industrialists had long resisted the enactment of Western-style labor legislation with the following argument:

> The situation is entirely different here from what it is in those countries where rights and obligations are set by law. To create laws hastily without realizing this fact would, in short, destroy our beautiful national customs and create a people who are cold-hearted and without feelings.

*Id.* (quoting Kanda Koichi, Nihon Kojoho to Rodo Hogo (Factory law and protection of labor in Japan, in Byron K. Marshall, Capitalism and Nationalism in Prewar Japan (1967)).

[156] Goff, *supra* note 11, at 1152. *See also* Parkinson, *supra* note 15, at 605 (explaining Japan's approach to effectuating social change "through evolution rather than revolution, through voluntary compliance rather than coercion"). Professor Iwao describes how Japan tends to seek a solution to a problem: "The Japanese are not inclined to drive single-mindedly toward a preconceived goal. They are content to move forward gradually, taking into consideration various mitigating factors, occasionally stopping to remark how much better off they are than their mothers or grandmothers." Iwao, *supra* note 130, at 71.

[157] Plessy v. Ferguson 163 U.S. 537 (1896).

[158] Biskupic & Witt, *supra* note 33, at 11 (quoting Irving Brant, The Bill of Rights 367 (1965)).

[159] *See* Goff, *supra* note 11, at 1147-8 (observing that the EEOL "received acclaim for being particularly sensitive to the unique aspects of Japanese social and business culture."). One scholar has described development in employment law and practice in Japan as "painfully slow."

sensitivity to Japanese culture, however, that has turned the EEOL into a mere ornament.[160] The law, which absorbed community norms in Japan, operates to reinforce and perpetuate gender bias, creating a greater polarization between women and men.[161] A weak societal commitment to equality should not be used to justify continued discrimination. The question arises as to how long grave injustice must prevail if Japanese women patiently await a change in attitudes and values.[162] The following discussion of discrimination against the *Burakumin* helps illustrate the point.

The *Burakumin* originally referred to a class of Japanese such as butchers and undertakers, placed at the very bottom of a caste system established during the *Tokugawa* Period (1603-1868).[163] "Racially, linguistically, and culturally identical to other Japanese", they were segregated based purely on their occupational backgrounds.[164] They performed job duties involving blood and death (such as the execution of criminals, the butchering of animals, and the tanning of leather), which were considered unclean by Japan's two main religions, Buddhism and Shintoism.[165] They were labeled *eta* or *hinin*, which literally means "filth or non-human respectively".[166] The *Burakumin* were "forbidden to marry commoners, to live outside their designated ghettos, or even to serve as commoners' servants."[167]

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Yoichiro Hamabe, Inadvertent Support of Traditional Employment Practices: Impediments to the Internationalization of Japanese Employment Law, 12 UCLA Pacific Basin L.J. 306, 328 (1994).

[160] Goff, *supra* note 11, at 1148 (arguing that "the law has failed and will continue to fail precisely because it is tailored too closely to an inherently discriminatory Japanese business culture").

[161] *Id.* at 1148.

[162] *See* Parkinson, *supra* note 15, at 636.

[163] *See generally* Kigyo To Jinken Handobukku [Handbook on Corporations and Human Rights (hereinafter Corporations and Human Rights)] (Tokyo Jinken Keihatsu Kigyo Renraku-kai ed. 1994).

[164] Upham, *supra* note 43, at 79.

[165] Shintoism is a native Japanese religion. *See generally* Nippon Steel Human Resources Development, *supra* note 63, at 274-77.

[166] *See* Crane Stephen Landis, Comment, Human Rights Violations in Japan: A Contemporary Survey, 5 J. Int'l. L. & Prac. 53, 65 (1996); Allen D. Madison, The Context of Employment Discrimination in Japan, 74 U.Det.Mercy L.Rev. 187, 192 (1997).

[167] Upham, *supra* note 43, at 79.

Today descendants of the *Burakumin* comprise more than two million or about two percent of the Japanese population.[168] Despite the abolition of the caste system in 1871,[169] they have continued to suffer "discrimination of a most pervasive and pernicious nature."[170] For instance, they have endured "higher rates of family instability, relatively poor performance in schools, higher rate of alcoholism, and...higher rate of delinquency."[171] Many of the *Burakumin* still engage in common labor, paid on a daily basis.[172] To identify and exclude the *Burakumin*, employers have subjected job applicants to rigorous scrutiny.[173] Most notably, some corporations have purchased directories that detective agencies compiled to identify the *Burakumin* by geographical origin.[174] Japanese society has subjected the *Burakumin* to a lifelong penalty and stigma solely due to their status that lies beyond the individual's control. Law has utterly failed to compensate the *Burakumin* for their pain and humiliation.

The *Burakumin* have not remained silent, however. Beginning in early 1900s, they have formed extensive networks and engaged in various grass-roots activities to enhance societal awareness that change is necessary.[175] Despite that conscious-raising effort, the Japanese have avoided confronting the issue, passing on the same message from one generation to the next: Don't awaken the sleeping child.[176] This message also reflects people's superficially optimistic attitude: Yes, we do admit that the problem exists, but it will eventually take care of itself; so why bother now?[177] This sweet-sounding rhetoric of gradualism asserted itself as the dominant force in the grave injustice has thrived for nearly four centuries in Japan.

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[168] De Vos, *supra* note 45, at 140.

[169] The caste system was completely abolished in 1871, three years after the Meiji Restoration, which ended military dictatorship by shoguns. Corporations and Human Rights, *supra* note 162, at 91.

[170] Lash, *supra* note 45. Corporations and Human Rights, *supra* note 163, at 81.

[171] These tendencies have been observed also among Koreans, another minority group in Japan. De Vos, *supra* note 45, at 140.

[172] Corporations and Human Rights, *supra* note 163, at 81.

[173] *Id.*

[174] *Id.*

[175] *See id.* at 92-95.

[176] *See id.* at 97.

[177] *See id.* at 97.

The egalitarian ideals tend to be buried in an abstract, ideological discussion; therefore, society must take affirmative steps to breathe life into such principles, making the ideal a reality. This attempt may require the power of law, which can help bridge the distance between ideology and behavior.[178] Individual dignity is too precious to be sacrificed in the name of gradualism.

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[178] Kenneth L. Karst, Belonging to America: Equal Citizenship and the Constitution, 42 (1989). One scholar writes that the law serves the following functions: "to enable a large mass of diversified human beings to live together, to serve as a repository of society's most cherished values, and to promote justice." Norman Bowie, The Law: From a Profession to a Business, 41 Vand. L.Rev. 741, 748 (1988).

## III. U.S. APPROACH TO EQUALITY

### A. Significance of Legal Challenges: Brown and Loving

The pages of American history are filled with stories of minority groups earnestly seeking inclusion in the national community.[179] The current of individualism and egalitarianism runs deep in a culturally diverse nation such as the United States.[180] Equality has remained "a rallying cry, a promise, an article of national faith" in American society.[181] American society "abhor[s] the totalitarian arrogance which makes one say that he will respect another man as his equal only if he has 'my race, my religion, my political views, my social position.'"[182] From the Declaration of Independence to the Pledge of Allegiance, the ideal of equality permeates the symbols of nationhood.[183]

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[179] *See e.g.*, Bill Ong Hing, Race and Remedy in a Multicultural Society: In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good, 47 Stan. L.Rev. 901, 908 (1995); Karst, *supra* note 178, at 28.

[180] Karst, *id.* at 1. *See also* Inoue, *supra* note 54, at 518 (comparing Americans, who have stressed "the role of individual rights within society ,"with the Japanese who have emphasized community values as a hallmark of society); Body Politics, Newsweek, Sept. 12, 1994, at 22 (stating that "[i]t's a good American ideal—that all individuals have rights. But applied to other cultures, it has explosive connotations.").

[181] Kenneth L. Karst, Why Equality Matters, 17 Ga. L.Rev. 245 (1983). One Japanese scholar describes the origin of equal opportunity in the U.S. as follows:

> Because the United States is such a physically large and diverse country, with a society composed of ethnic groups from all over the world, tremendous importance has been placed on the goal of equality. In a country with little history and tradition to fall back on, the tendency is to judge people on their superficial success or failure, and a "level playing field" is necessary to ensure that the winners and losers are decided fairly.

Iwao, *supra* note 130, at 74.

[182] Juan F. Perea, Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination under Title VII, 35 Wm. & Mary L.Rev. 805 (1994).

[183] Karst, *supra* note 181, at 245. *See also* Regents of University of California v. Bakke, 438 U.S. 265, 326 (1978) (Brennan, J., dissenting) ("Our Nation was founded on the principle that 'all Men are created equal'" ).

Today, many see the Supreme Court's ruling in Brown v. Board of Education as inevitable.[184] The idea of equality did not receive broad national support when America embarked on its journey toward racial equality through implementation of civil rights legislation in the 1960s. Likewise, when the *Brown* court invalidated school segregation, many American parents may have felt they were unprepared for a classroom where black and white children studied side-by-side. Despite the absence of a consensus for equal educational opportunity, the Court did not set aside the legal challenge to segregation by employing the rhetoric of "voluntary consent." True, "Martin Luther King's marches and peaceful protests have done as much as the courts have for African Americans, if not more"; yet, there is no denying that law played its own dynamic role in attacking the legalized system of "separate but equal" segregation.[185]

Loving v. Virginia signified another monumental victory. Like Brown, it was one of America's earliest attempts to subject racial discrimination to judicial scrutiny. In this 1967 case, the Supreme Court confronted the Virginia anti-miscegenation statute prohibiting racially mixed marriage of whites and blacks. The law was initially issued as "A Bill to Preserve the Integrity of the White Race."[186] The State sought to justify the law, calling it a response to harsh social realities surrounding children of racially intermarried parents.[187] The State also introduced a scholarly writing which stressed that intermarriage is "definitely inadvisable," because people who enter into such marriages "have a rebellious attitude toward society, self-hatred, neurotic tendencies, immaturity, and other detrimental psychological

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[184] Karst, *supra* note 178, at 15. People readily perceive Brown as one of the most significant Supreme Court decisions that led to the passage of landmark civil rights legislation in the mid-1960s. One critic wrote an article, arguing that very few observers have devoted attention to corroborating this conventional estimation of Brown's significance. Michael J. Klarman, Brown, Racial Change, and the Civil Rights Movement, 80 Va.L.Rev. 7 (1994). Klarman observes that "Brown was directly responsible for only the most token forms of southern public school regulation." *Id.* at 9.

[185] Helweg, *supra* note 9, at 312-13.

[186] May it Please the Court: The Most Significant Oral Arguments Made Before the Supreme Court Since 1955, 279-80 (Peter Irons & Stephanie Guitton eds., 1993)[hereinafter May it Please the Court]. This book contains a transcript of edited and narrated arguments in the Supreme Court. It is of particular help in fully understanding Loving v. Virginia, because the written opinion itself is rather brief.

[187] *Id.* at 284 ("It is not infrequent that the children of intermarried parents are referred to, not merely as the children of intermarried parents, but as the 'victims' of intermarried parents, and as the 'martyrs' of intermarried parents.").

factors."[188] The State further attempted to equate interracial marriage with polygamous or incestuous marriage.[189] Referring to this assertion, Justice White pointed out the following: If society disdains racially mixed marriages, it is precisely because the existence of the kind of law at issue fosters such an attitude.[190] As in the Brown case, the Court unanimously invalidated the statute.

People's attitudes have changed with the law. Increased support for mixed marriages provides one example: Fifty years ago, nine out of ten Americans opposed such marriages; recent polls show only one in four are still opposed, most of them older.[191] When Loving went to the Court, Virginia was one of sixteen states that banned interracial marriages.[192] Today the United States has a million interracial couples, including Supreme Court justice Clarence Thomas and his wife.[193]

The Brown and Loving decisions both served as milestones in America's quest for equality. The United States has progressed towards celebrating racial diversity, and law enforcement has played a vital role in that progress. Today respect for diversity is considered an American tradition.[194] Racism still runs deep, but incidents of overt discrimination have been reduced.[195] Kenneth Karst, a leading authority on constitutional equality, declared: "Racism is far from dead, but open racist expression in our public life is outside today's bounds of decency."[196] Tolerance, if not appreciation,

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[188] *Id* at 283.

[189] *Id.*

[190] *Id.* During the State's oral argument, Justice White broke in with the following statement: "I suppose it could be argued that one reason that marriages of this kind are sometimes unsuccessful is the existence of the kind of laws that are in issue here, and the attitudes that those laws reflect. Isn't that correct?" *Id.* The State replied: "[I]t is more the latter, the attitudes that perhaps the laws reflect." *Id.* at 284.

[191] *Id.* at 286.

[192] Loving v. Virginia 388 U.S. 1, 6 (1967)

[193] May it Please the Court, *supra* note 186, at 286.

[194] *See, e.g.*, Mississippi University for Women v. Hogan, 458 U.S. 718, 745 (1982) (Powell, J., dissenting) (discussing respect for diversity in the United States).

[195] *See, e.g.*, Karst, *supra* note 181, at 241.

[196] *Id.*

of diversity, can be proclaimed as the nation's goal.[197] Thurgood Marshall recognized that law has historically functioned as a major device in determining the conditions of African Americans: "They were enslaved by law, emancipated by law, disenfranchised and segregated by law; and finally, they have begun to win equality by law."[198]

## B. Fighting Gender Bias

The world sees the United States as a leader in gender equality law.[199] The Japanese media often create and enforce an image of America as an egalitarian nation where gender bias has been substantially diminished.[200] Consequently, Japanese women tend to perceive that American working women are in an enviable position, which enables them to pursue a career without many gender-based constraints.[201] American women may, however, assert that such a perception is incorrect. History and case law confirm that American women, too, have long struggled to overcome gender bias.[202] Generalizations based on sex, an immutable but externally visible characteristic, have subjected many American women to discrimination.[203] The following series of cases helps illustrate the hard-fought struggles of

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[197] *Id.* at 183 (explaining: "To take seriously today's ideals of individualism and egalitarianism is to reject domination in favor of tolerance."). In contemporary American society, the following remark made by Judge Bazile in upholding Virginia's antimiscegenation statute would immediately elicit criticism: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents." May it Please the Court, *supra* note 186, at 280.

[198] Thurgood Marshall, Reflections on the Bicentennial of the United States Constitution, 101 Harv. L. Rev. 1, 5 (1987).

[199] *See,* e.g. Sarah C. Zearfoss, Note, The Convention for the Elimination of All Forms of Discrimination Against Women: Radical, Reasonable, or Reactionary? 12 Mich. J.Int'l L 903, 905 (1991) (discussing the controversy surrounding ratification).

[200] *See, e.g.*, Mitsuyo Arimoto, Achievement and Struggles: Japanese Women Working Abroad, 22-23 (1996).

[201] *Id.*

[202] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 684 - 5 (1973) (tracing a "long and unfortunate history" of social paternalism towards women); Mississippi University for Women v. Hogan, 458 U.S. 718, 725 n. 10 (1982) (stating that "[h]istory provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function").

[203] *See, e.g.*, Frontiero 411 U.S. at 685.

American women to eliminate "archaic and overbroad assumptions" about their abilities.[204] These cases arose from societal prejudices against the female gender, which was repeatedly labeled as inherently unfit to pursue professions.

A now infamous 1873 decision, Bradwell v. Illinois[205] sustained the Illinois law which denied Myra Bradwell, a married woman, the right to practice law. In concurring, Justice Bradley asserted: "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life....The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."[206] From this expression of patriarchal values at the highest level of the nation's legal system, one can understand the magnitude of the problem in the public at large. As the Bradwell Court eloquently articulated, the Supreme Court often upheld unfair treatment of women based on gender-stereotyping.[207]

Four years later, the Wisconsin Supreme Court employed the same rhetoric of exclusion when it deprived Lavinia Goodell of her right to practice law: By entering the legal profession, a woman commits "treason" against "[t]he law of nature [which] destines and qualifies the female sex for the bearing and nurture of the children."[208]

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[204] Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984).

[205] Bradwell v. State of Illinois, 83 U.S. 130 (1872).

[206] *Id.* (citing Bradwell v. State of Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring). Other expressions of gender bias in Bradley's opinion include the following: "Man is, or should be, woman's protector and defender"; and "So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state...." *Id. See also* J.E.B. v. Alabama, 511 U.S. 127, 132 (1994) (stating that "[w]omen were thought to be too fragile and virginal to withstand the polluted courtroom atmosphere"); Bailey v. State, 215 Ark. 53, 61, 219 S.W.2d 424, 428 (1949) (stating that "[c]riminal court trials often involve testimony of the foulest kind, and they sometimes require consideration of indecent conduct, the use of filthy and loathsome words, references to intimate sex relationships, and other elements that would prove humiliating, embarrassing and degrading to a lady").

[207] Bender & Braveman, *supra* note 26 at 266.

[208] 39 Wis. 232, 245 (1876). The court further stated:

> The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field. Womanhood is moulded for gentler and better things.

More than a century has passed since Justice Bradley defined the boundaries of women's identity and livelihood. Much work still remains before full integration of women into the core labor force is achieved.[209] To take one example, in Price Waterhouse v. Hopkins,[210] a 1989 Supreme Court case, gender role stereotypes became the focal issue: At a major accounting firm, male colleagues had labeled the female plaintiff as a "macho" individual who needed to take a "course at charm school," "wear make-up, have her hair styled, and wear jewelry."[211] As the Ninth Circuit Gender Bias Task Force reported in 1992, "[g]ender bias is alive and well. It has just gone underground."[212]

Despite the deep-seated prejudice that has not been swept away,[213] there has been a marked change in the legal arena, including a growing willingness of judges to challenge stereotyped distinctions between men and women. In Justice Blackmun's words, the American courts are willing to strike down gender discrimination especially where the discrimination "serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."[214] At least partly due to increased judicial efforts to challenge gender bias, women have gradually moved beyond their culturally expected roles.

In the United States, the law's coercive powers to challenge gender bias lie within the grasp of women.[215] Instead of directing their grief inward, aggrieved individuals can resort to the formal legal order to make their voices

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*Id.*

[209] One of the most prevalent forms of discrimination occurs in the area of wages: Women tend to earn 65% of what men earn. Allen D. Madison, The Context of Employment Discrimination in Japan, 74 U. Det. Mercy L. Rev. 187, 202 (1997).

[210] 490 U.S. 228 (1989).

[211] *Id.* at 228. *See also* E.E.O.C. v. Sears, Roebuck & Co., 839 F.2d 302, 361 (7th Cir. 1988) (Cudahy J., dissenting) (challenging the stereotype that "women are by nature happier cooking, doing the laundry and chauffeuring children to softball games than arguing appeals or selling stocks").

[212] Preliminary Rept. of the Ninth Circuit Gender Bias Task Force, 44 (1992).

[213] Fox-Genovese, *supra* note 25 at 342.

[214] J.E.B. v. Alabama, 511 U.S. 127, 130-31 (1994).

[215] *See* Bender & Braveman, *supra* note 26 at 602 (explaining that today's victims of gender discrimination "would at least have the opportunity to right that wrong by having her day in court").

heard.[216] The women's legal battles reflect their beliefs that "one path to effective inclusion in American society is the path of law."[217] Employment discrimination exemplifies an area where Americans have effectively used law as an instrument of social reform. The American experience shows that the law can play a pivotal role in enhancing public awareness of and sensitivity to the oppressed.

### C. Title VII of the Civil Rights Act of 1964

More than three decades ago, the United States took up the challenge of eradicating gender discrimination. Congress enacted Title VII of the Civil Rights Act of 1964,[218] "the cornerstone, as well as touchstone of employment discrimination law."[219] The Act prohibits employment discrimination by employers, labor organizations, and employment agencies on the basis of race, color, religion, sex, or national origin. In 1978, Congress amended Title VII by the Pregnancy Discrimination Act to prohibit discrimination on the basis of pregnancy.[220]

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[216] Jody Armour discusses the instrumental concept of the law in the United States:

> [T]he law cannot merely be concerned with accommodating a cultural belief system that induces individuals to repeatedly traverse stereotypical channels (and make some of us susceptible to pathological phobias.) The law must also strive to lay out the channels of the maze, and to eliminate those pathways that foster the oppression of minorities.

Jody A. Armour, Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes, 46 Stan. L. Rev. 781, 815 (1994).

[217] Karst, *supra* note 1, at 4.

[218] The Act provides in relevant part:

> "[I]t shall be unlawful employment practice for an employer—(.)to fail or refuse to hire or discharge any individual or otherwise to discriminate against any individual...because of such individual's race, color, religion, sex or national origin..."

42 U.S.C. section 2000e-2 (1994 & 1996 Supp.).

[219] Employment Discrimination Law: Cases and Materials, 15 (Mack A. Player *et al.*, eds., 1990).

[220] The PDA amended the "Definitions" section of Title VII, 42 U.S.C. section 2000e, to add a new subsection (k) reading in pertinent part as follows:

McDonnell Douglas v. Green [221] set forth the four elements of a prima facie case of intentional discrimination in hiring. The plaintiff bears the initial burden of proving the following: (1) that she belongs to a class Title VII protects; (2) that she applied and was qualified for the job at issue; (3) that she was rejected despite her qualifications; and (4) that the position remained open after the rejection, and the employer continued to seek applicants from persons of the plaintiff's qualifications. The burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for rejecting the plaintiff. Finally, the plaintiff may rebut the reasons asserted by the employer by showing that they were a mere pretext for discrimination.

The legislators' statements concerning enactment of Title VII largely focus on race.[222] In Griggs v. Duke Power Co., the Supreme Court cited an interpretive memorandum entered into the Congressional Record by Senators Case and Clark, co-managers of the bill in the Senate, to describe the purpose of Title VII: "to promote hiring on the basis of job qualifications, rather than on the basis of race or color."[223] On the other hand, Congress adopted the amendment adding the word "sex" one day before the House of Representatives approved Title VII.[224] Therefore, little legislative history guides one's interpretation of discrimination on the basis of sex.

In contrast to its Japanese counterpart, the Act protects both genders.[225] Following the passage of Title VII, many victims of

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"The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes..."

[221] 411 U.S. 792, 802 (1973).

[222] Griggs v. Duke Power Co., 401 U.S. 424, 434 (citing 110 Cong. Rec. 7247 (1964)). *See also* 110 Cong. Rec. 6548 (1964) ("Title VII is designed to give Negroes...a fair chance to earn a livelihood and contribute their talents to the building of a more prosperous America.").

[223] Griggs v. Duke Power Co., 401 U.S. at 434 (citing 110 Cong. Rec. 7247) (1964).

[224] *See e.g.,* 110 Cong. Rec. 2577 (remarks of Rep. Smith) 2581-82 (remarks of Rep. Green)(1964); Leo Kanowitz, Sex Based Discrimination in American Law: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963, 20 Hastings L.J. 305, 310-12 (1968).

[225] Title VII permits male plaintiffs to challenge so-called reverse discrimination. For instance, Diaz v. Pan American World Airways, Inc. arose over the societal perception of women as being more suitable in creating a cosmetic effect. The issue was whether the airline may properly refuse to hire a male flight attendant on the basis of his gender. Pan American

discrimination, men and women, have used the statute in combating gender inequality.[226]

Among observers, opinions vary as to the effectiveness of Title VII in combating gender discrimination. Critics have identified certain shortcomings of the Act. First, the law has been helpful to women only at entry level employment.[227] Although Title VII has succeeded in removing barriers to entry into some positions traditionally closed to women,[228] it is ill-equipped to assist upward movement of women to positions of power and authority within organizations.[229] This phenomenon is often referred to as the "glass ceiling."[230] In fiscal year 1990, nearly 61% of the bias charges filed

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sought to justify its discriminatory act by arguing that "[its] passengers overwhelmingly preferred to be served by female stewardesses." *Id.* at 387. In its analysis, the Fifth Circuit initially distinguished mechanical functions of the flight attendant's job (to transport passengers safely) from non-mechanical functions (to provide a pleasant atmosphere). The court then noted that the latter is merely tangential to safe transportation of passengers. In other words, the court did not deny the existence of the ornamental effect that women had provided. Nonetheless, the court rejected such a factor alone to be used as a justification for excluding all males. Diaz, 442 F.2d 385.

[226] Referring to gender stereotyping, the court in Robinson v. Jacksonville Shipyards, Inc. provided the following articulation:

> [T]o categorize a female employee along the lines of sex produces an evaluation of her suitability as a "woman" who might be expected to be sexy, affectionate and attractive; this female employee would be evaluated less favorably if she is seen as not conforming to that model without regard for her job performance.

760 F.Supp. 1486, 1502-03 (M.D.Fla. 1991).

[227] Ramona L. Paetzold & Rafael Gely, Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling? 31 Hous. L.Rev. 1517, 1520 (1995).

[228] *Id.* at 1519.

[229] *Id.* Advocates of "distributive justice," for instance, argue that it is insufficient to insure equal opportunity to change the existing patterns of inequality in the foreseeable future. They tend to believe that "in a just society all major segments of that society must in fact share society's economic benefits." Defining "justice" to require equality of result, these advocates "urge that the law be defined or construed to insure fair income distribution, comparable jobs, and proportional representation of each discrete group in all job categories." Employment Discrimination Law, *supra* note 193, at 12.

[230] The U.S. Department of Labor defined the glass ceiling as "those artificial barriers based on attitudinal or organizational bias that prevent qualified individuals from advancing upward in their organization." Paetzold & Gely, *supra* note 227 at 1519 at n.5 (citing U.S. Dep't of Labor, A Report on the Glass Ceiling Initiative 1 (1991)).

with the EEOC involved advancement and discharge, whereas only eight percent involved hiring.[231] Glass ceiling issues go beyond the scope of this paper, which focuses on the hiring stage as previously noted. It suffices to say that, Title VII, although not a panacea, has helped ease American women's path to the labor force. The Supreme Court found that "Congress' primary purpose was the prophylactic one of achieving equality of employment 'opportunities' and removing 'barriers' to such equality."[232] Before eliminating discrimination at all levels of employment, the law must first help individuals get a firm grip on the career ladder. For this reason, Title VII's success in removing barriers at the entry level does provide an instructive example to Japan.

Second, it is not the province of Title VII to strike down all forms of discrimination. The Act does not empower judges to preempt an employer's business judgment and to propose a solution that appears less restrictive.[233] For instance, discrimination against persons having hair of certain length does not lie within the purview of the Act.[234] A grooming code requiring different hair lengths for males and females does not constitute gender discrimination, because it is perceived as being more closely related to the employer's choice of how to run its business.[235]

Finally, a legislatively imposed obligation, by itself, cannot provide a complete solution to the problem of discrimination.[236] However, being

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[231] *Id.* at 1527 n.49 (citing Joann S. Lublin, Rights Law to Spur Shifts in Promotions, Wall St.J., Dec. 30, 1991, at B1).

[232] Connecticut v. Teal, 457 U.S. 440, 448 (citing Griggs v. Duke Power Co., 401 U.S. 324, 329-30 (1971)).

[233] Garcia v. Gloor, 618 F.2d 264, 271 (5th Cir. 1980). Senator Clark explained: "To discriminate is to make distinctions or differences in the treatment of employees, and are prohibited only if they are based on any of the five forbidden criteria (race, color, religion, sex, or national origin); any other criteria or qualification is untouched by this bill." Clark made this statement in response to the following objection: "The language of the statute is vague and unclear. It may interfere with the employer's right to select on the basis of qualifications." 110 Cong. Rec. (1964) at 7218.

[234] Garcia, *id.* at 269.

[235] *Id.* at 269 (citing Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084, 1091 (5th Cir. 1975)).

[236] *See, e.g.*, Fox-Genovese, *supra* note 25, at 342 (stating that "[s]tripping away legal disabilities does not in itself revolutionize social relations or eradicate social and economic disabilities, much less wipe out deeply ingrained attitudes on the part of men—and women themselves").

skeptical about the law's inability to eliminate bias is self-defeating.[237] As the Supreme Court recognized, private biases inevitably escape the reach of law;[238] nonetheless, added the Court, "the law cannot, directly or indirectly, give them effect."[239] Within the context of racial discrimination, one author illustrates greater tolerance of minority groups resulting from law enforcement in the United States: Even the power of law fails to "force a white person to accept a black person (or vice versa)"; yet, the law retains the ability to "force the two people to interact in certain areas of public life."[240]

After all, the most immediate goal of anti-discrimination statutes is to prohibit blatant forms of discrimination. In International Broth. of Teamsters v. United States, the Supreme Court emphasized Congressional intent to combat overt discrimination, "the most obvious evil,"[241] through Title VII. Regulation of employer's outward behavior, although only part of the solution, does represent one vital step Japan must take. It is thus meaningful for Japan to evaluate the U.S. attempt to eliminate conventional stereotypes through Title VII, a far more stringent law than the EEOL.

### D. Fairness to Individuals

Title VII embodies America's commitment to the worth and dignity of the individual.[242] In Robert Bellah's words, "[i]ndividualism lies at the very core of American culture."[243] Running deep in the American concept of justice is a notion that a person should not be penalized due to his or her status

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[237] *See* Helweg, *supra* note 9, at 313.

[238] Palmore v. Sidoti, 466 U.S. 429, 433 (1984). *See also* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985).

[239] *Id.*

[240] Note, Legal Realism and the Race Question: Some Realism about Realism on Race Relations, 108 Harv. L. Rev. 1607, 1616 (1995).

[241] 431 U.S. 324, 335 n. 15 (1977).

[242] *See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 453-54 (1982); Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978).

[243] Robert Abraham, Limitations on the Right of Japanese Employers to Select Employees of Their Choice under the Treaty of Friendship, Commerce, and Navigation, 6 AM. U.J.Int'l & Pol'y 475, 480 (1991) (quoting Robert Bellah, Habits of the Heart Individualism and Commitment in American Life, 142).

determined solely by an accident of birth.[244] In Frontiero v. Richardson, the Supreme Court further stressed the same principle in the context of gender discrimination:

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility... [245]

The ideal of individual dignity manifests itself in the principle of equal employment opportunity. At the heart of Title VII lies the principle of fairness to individuals.[246] As the Supreme Court recognized, the statute aims to protect the individual employee, rather than to protect the minority group as a whole.[247] The legislative history demonstrates Congressional intent to strike discriminatory practices that impede the individual employee's right to be judged according to his or her intrinsic merit.[248] Senator Williams, for instance, stated: "Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job."[249] Consistent with the Supreme Court's interpretation, the Fifth Circuit has construed Title VII as reflecting an "assumption that Congress sought a formula that would not only achieve the optimum use of

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[244] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).

[245] 411 U.S. 677, 686 (1973) (citing Weber v. Aetena Cas. & Sur. Co., 406 U.S. 164 (1972)). *See also* Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 10 (1976).

[246] *See, e.g.*, Peter Brandon Bayer, Mutable Characteristics and the Definition of Discrimination under Title VII, 20 U.C. Davis L. Rev. 769, 845 (1987) (noting that Title VII is "directed towards protecting the dignity, self esteem, and individuality of employees and employment applicants").

[247] Connecticut v. Teal, 457 U.S. 440, 453-54.

[248] 457 U.S. 440, 453-54 (citing *e.g.*, sections 703(a)(1), (b), (c), 704(a), 78 Stat. 255-257, as amended, 42 U.S.C. sections 2000e-2(a)(1), (b), (c), 2000e-3(a); 100 Cong. Rec. 7213 (1964) (interpretive memorandum of Sens. Clark and Case) ( "discrimination is prohibited as to any "individual" ).

[249] 457 U.S. 440, 453-54 (citing *e.g.*, sections 703(a)(1), (b), (c), 704(a), 78 Stat. 255-257, as amended, 42 U.S.C. sections 2000e-2(a)(1), (b), (c), 2000e-3(a); 100 Cong. Rec. 8921 (1964)(remarks of Sen. Williams).

our labor resources but ...would enable *individuals to develop as individuals*."[250] (Emphasis added.) In Rosenfeld v. Southern Pac. Co., the Ninth Circuit explained that the premise of Title VII is to establish an equal footing for men and women, which necessitates evaluating a person in his or her individual capacity.[251] This premise, said the court, should help "eliminate subjective assumptions and traditional stereotyped conceptions regarding the physical ability of women to do particular work."[252]

Thus, disregarding the stereotyped characterization of a gender, courts focus their inquiries on whether the particular individual's right was infringed because of gender.[253] More specifically, Title VII reflects every person's basic desire not to be penalized solely due to a status that bears no relation to individual worth.[254] Because of this focus on the individual,[255] the Act protects whites as well as nonwhites,[256] U.S. citizens as well as immigrants,[257] and men as well as women.[258] Capturing the spirit of Title VII, one scholar pointed out that Title VII embodies the liberal values underlying the Bill of Rights.[259]

The Supreme Court affirmed Title VII's dedication to individual merits in City of Los Angeles Dep't. of Water and Power v. Manhart.[260] The

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[250] Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 386-87 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

[251] 444 F.2d 1219, 1225 (9th Cir. 1971).

[252] 444 F.2d at 1225.

[253] Teal, 457 U.S. at 453-54; Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978).

[254] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).

[255] *See* Teal, 457 U.S. at 455 (stating that Title VII protects every individual employee). *See also* Bayer, *supra* note 246, at 784-85 (noting that a litigant in Title VII litigation may prove discrimination against her individually, against her group, or both) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

[256] Bayer, *supra* note 246, at 785 (citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)).

[257] *See, e.g.*, Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982).

[258] *See, e.g.*, Diaz, 442 F.2d 385.

[259] Mari J. Matsuda, Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 Yale L. J. 1329, 1392 (1991).

[260] 435 U.S. 702 (1978).

Court discussed whether the Los Angeles Department of Water and Power may require its female employees to make larger contributions to its pension fund than male workers. Using a study of mortality tables and its own experience, the Department justified its practice on the ground that women, on the average, tend to live longer than men.[261] Despite substantial factual support for the employer's argument, however, the Court flatly rejected the characterization of women as a class. In holding for the plaintiffs, the Court articulated the principle embodied by Title VII: "Even a *true* generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."[262] (Emphasis added.) The decision in Manhart reflects the core principle of Title VII: It is unfair to exclude the whole category of one gender without a case-by-case evaluation of an individual job applicant. Group membership determined by an accident of birth must not serve as a basis for discrimination, and each person should be treated as an individual with his or her own capabilities and aspirations.

### E. Bona Fide Occupational Qualification ("BFOQ")

#### *1. Overview*

Title VII's commitment to merit-based equality manifests itself in rigorous judicial scrutiny applied in the context of a bona fide occupation qualification (hereinafter BFOQ). When enacting Title VII, Congress carved out an exception, through the BFOQ, to the statute's prohibition of discrimination. Title VII permits intentional discrimination on the basis of sex, religion, or national origin when that particular practice was necessary for the proper operation of the business:

> [I]t shall not be unlawful employment practice for an employer to hire and employ ...on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[263]

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[261] *Id.* at 707.

[262] *Id.* at 708.

[263] 42 U.S.C. section 2000(e)-2(e)(1994 & 1996 Supp.).

The BFOQ functions as an affirmative defense that shields an employer against liability.[264]

Many Title VII cases have explored gender role stereotypes in the context of determining whether or not denial of a particular job to one gender constitutes a BFOQ.[265] To successfully assert a BFOQ, employers must provide compelling justifications for their challenged conduct by establishing that "only one sex can successfully perform the job because it requires the employee to possess unique sexual characteristics."[266] This statutory defense demonstrates Congress' recognition that certain situations justify drawing a line between employment positions open equally to both genders and others open exclusively to members of one gender.[267]

In Dothard v. Rawlinson,[268] the Supreme Court articulated the following two steps in establishing gender as a BFOQ: (1) that the "essence of the business operation[269] would be undermined by not hiring member of one sex exclusively";[270] and (2) there is a factual basis for believing that all or substantially all [members of one sex] would be unable to perform the job

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[264] *See, e.g.*, Norwood v. Dale Maintenance Sys. Inc., 590 F.Supp. 1410, 1415 n.3. (N.D.Ill. 1984) ("In effect, an employer's claim of a BFOQ for the position simultaneously admits gender-based discrimination and attempts to justify it.").

[265] The BFOQ defense is asserted most often in the context of gender discrimination. *See, e.g.*, International Union, UAW v. Johnson Controls., 499 U.S. 187 (1991); Hardin v. Stynchcomb, 691 F.2d 1364 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).

[266] Recommending inclusion of "sex" to the BFOQ section, Representative Goodell of New York made the following argument:

> There are so many instances where the matter of sex is a bona fide occupational qualification. For instance, I think of an elderly woman who wants a female nurse. There are many things of this nature which are bona fide occupational qualifications, and it seems to me they would be properly considered here as an exception.

110 Cong. Rec. 2718 (1964).

[267] The court added that the vast majority of positions fall on the side of the line where discrimination is unlawful. Norwood v. Dale Maintenance System Inc., 590 F.Supp. 1410, 1421 (N.D.Ill. 1984).

[268] 433 U.S. 321 (1977).

[269] *Id.* at 335 (stating that "[t]he essence of a correctional counselor's job is to maintain prison security").

[270] *Id.* at 333 (quoting Diaz, 442 F.2d at 388).

safely and efficiently.[271] Using these steps, the Dothard court upheld the employer's BFOQ defense for its refusal to hire women for contact positions in an all-male, maximum security prison. The Court found that the environment of violence and disorganization would pose a serious risk of threat not only to women but also to other male guards and inmates.[272] Dothard represented a rare situation in which the employer's BFOQ defense prevailed.[273]

The EEOC has stated in its guidelines that the BFOQ exception should be construed very narrowly.[274] Courts as well have repeatedly emphasized the restrictive scope of the BFOQ defense.[275] They have consistently rejected the following as grounds for a BFOQ exception: perceptions of gender roles based upon romantic paternalism[276] and the "divine plan"[277] for the separation of the sexes; customer preference;[278] or

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[271] *Id.* (quoting Weeks v. Southern Bel. Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969)).

[272] *Id.* at 333-36.

[273] Manley v. Mobile County, 441 F.Supp. 1351, 1357 (S.Ala. 1977). *See also* Gunther v. Iowa Men's Reformatory, 462 F.Supp. 952 (N.Iowa, 1979) (rejecting the employer's BFOQ defense in a case involving a female plaintiff who was denied promotion to the position of Correction Officer at the Iowa State Men's Reformatory).

[274] "The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly." 29 C.F.R. section 1604.2(a).

[275] *See, e.g.,* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977); Gunther, 612 F.2d 1079.

[276] Weeks, 408 F.2d 228, 236 (1969) (stating that "Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual woman with the power to decide whether to take on unromantic tasks").

[277] In Hardin v. Stychcomb, the court agreed that the county sheriff's department violated Title VII by refusing to hire women for the positions of deputy sheriffs solely because of their gender. Chief Jailer, L.B. Eason, testified: "...I don't want a woman working and I give them the reason is in the men's sleeping quarters of the jail...I am a firm believer that God created a lady for man to love and to cherish, and I cannot imagine any women wanting to put herself in the position of a man." Hardin v. Stychcomb, 691 F.2d at 1364, 1372 n.20. The court held, as a matter of law, that defendants produced insufficient evidence to sustain their BFOQ defense. *Id.* at 1372.

[278] The Fifth Circuit articulated as follows: "While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid." Diaz, 442 F.2d at 389. *See also, e.g.,* Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (rejecting a BFOQ asserted

administrative convenience.[279] Thus, the BFOQ exemption does not encompass a refusal to hire on the basis of gender stereotyping, such as a belief that "men are capable of assembling intricate equipment or women are less capable of aggressive sales efforts."[280]

The BFOQ defense overcomes a finding of discrimination only in limited circumstances. Those rare situations include cases in which authenticity necessitates gender preference, such as females for the position of a Playboy Bunny, a social escort, or topless dancer.[281] Moreover, exceptions include a BFOQ for the purpose of protecting a customer's fundamental privacy rights.[282] For instance, the court upheld limitations on male employment in a nursing home because of the privacy concerns of female residents.[283] In such cases, courts have been "reluctant to carry Title VII so far as to require those rights to be infringed for the sake of equality."[284] In other words, Title VII does not force employers to promote workforce

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for the position of vice-president in international operations: The argument that Latin American clients would react negatively to a woman executive is insufficient to justify gender discrimination); Witt v. Secretary of Labor, 397 F.Supp. 673, 678 (D.Me. 1975) (rejecting the employer's BFOQ defense for hiring a male hairdresser preferred by customers).

[279] *See, e.g.*, Gunther, 612 F.2d. at1087.

[280] Howard J. Anderson & Michael D. Levin-Epstein, Primer of Equal Employment Opportunity 22 (1982). *See also* Dothard, 433 U.S. at 333-34 (finding it "impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes").

[281] Wilson v. Southern Airlines Co., 517 F.Supp. 292, 301 (N.D.Tex. 1981). Outside the context of gender discrimination, the BFOQ defense may prevail in the following circumstances: "the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players and the preference of a business which seeks the patronage of members of particular religious groups for a salesman to that region..." *Id.* at 297 (citing the Interpretative Memorandum of Title VII submitted by the Senate Floor Managers of the Civil Rights Bill, 110 Cong. Rec. 7212 (1964)).

[282] *See, e.g.*, Fesel v. Masonic Home of Delaware, Inc., 447 F.Supp. 1346 (D.Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979) (recognizing a BFOQ for a female nurse's aid in a residential retirement home to protect the privacy interests of female guests); Norwood, 590 F.Supp. 1410 (recognizing a BFOQ when a gender-based hiring decision is made for a washroom). *See also* Torres v. Wisconsin Dept. of Health and Social Services, 859 F.2d 1523 (7th Cir. 1988); Backus v. Baptist Medical Center, 510 F.Supp. 1191 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982).

[283] Fesel, 447 F.Supp. 1346.

[284] Norwood, 590 F.Supp. 1410, 1422.

equality when at stake is dignity of clients involved; equity is not a rigid concept that demands uniform application of a mechanical test.

Fesel v. Masonic Home of Delaware, Inc. provides a well-documented example of Title VII's flexibility. In this case, a resident retirement home successfully established a BFOQ when it refused to hire a male nurse's aid for a position requiring intimate personal care such as dressing, bathing, toilet assistance, geriatric pad changes, and catheter case.[285] Including testimony of eight female guests and physicians, sufficient evidence compelled the conclusion that the presence of a male nurse's aid at the Home would have undermined the essence of the Home's operation.[286] The court took particular care to closely examine the facts in ensuring that the gender classification is sufficiently job-related. As this fact-specific inquiry suggests, courts do not permit an employer to escape Title VII liability by crafting an overly broad argument without concrete evidence. To withstand close scrutiny under the BFOQ test, the challenged employment practice must be specifically tailored to accomplish a business purpose. The BFOQ serves as a useful tool in regulating employers' outward behavior influenced by arbitrary generalizations of particular groups.[287] The following section further explores the level of scrutiny under the BFOQ analysis.

### *2. Analysis of Case Law*

A 1991 Supreme Court case, International Union v. Johnson Controls Inc.[288] provides guidance as to the heavy burden of proof that courts impose upon the employer asserting a BFOQ defense. This case arose over the employer's fetal protection policy. Johnson Controls, a manufacturer of batteries, excluded all women with presumed childbearing capacity from jobs

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[285] Fesel, 447 F.Supp. 1346, 1352-53.

[286] *Id.* at 1352 (explaining that "female guests would not consent to having their personal needs attended to by a male, and ... some of the female guests would leave the Home if there were male nurse's aids.").

[287] International Broth. of Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977). *See also* United States v. City of Buffalo, 457 F.Supp. 612, 629 (W.D.N.Y. 1978)(discussing Congressional intent to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes").

[288] 499 U.S. 187 (1991).

involving actual or potential lead exposure.[289] Plaintiffs initiated a class action, contesting the policy as gender discrimination in violation of Title VII.[290] Johnson Controls maintained that its sincere concerns for the health of pregnant women and their unborn children led to the adoption of the policy.[291]

The Supreme Court found that the fetal protection policy explicitly discriminates against women on the basis of their gender.[292] Writing for the majority, Justice Blackmun stated that the policy only gives fertile men, not fertile women, "a choice as to whether they wish to risk their reproductive health for a particular job."[293] The Court then turned to the question of whether Johnson Control's policy falls within the restrictive scope of the BFOQ exception.[294] It rejected the BFOQ defense because of the firm's paternalistic concerns about the welfare of the next generation.[295] According to the Court, the employer cannot discriminate against a woman unless her reproductive capacity *actually* stands as an obstacle to her ability to perform her job.[296] In this case, the record indicated that fertile women were, in fact, capable of performing their job duties (participation in the manufacture of batteries) as safely and efficiently as anyone else.[297] A fetal protection policy

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[289] *Id.* at 191. "Occupational exposure to lead entails health risks, including the risk of harm to any fetus carried by a female employee."

[290] *Id.* at 192. Among the plaintiffs were: a woman who had chosen to be sterilized to avoid losing her job; a 50-year-old divorcee, who had suffered a loss in compensation when she was transferred out of a job where she was exposed to lead; and a man who had been denied a request for a leave of absence for the purpose of lowering his lead level because he intended to become a father.

[291] *Id.* at 191-92. In 1982, Johnson Controls adopted a policy of exclusion as follows: "[I]t is [the company's] policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exposure..." The policy defined women capable of bearing children as "[a]ll women except those whose inability to bear children is medically documented." *Id.* at 192.

[292] *Id.* at 197.

[293] *Id.*

[294] *Id.* at 200.

[295] *Id.* at 206.

[296] *Id.*

[297] *Id. See also, id.* at 207 (finding that Johnson Controls provided "no factual basis for believing that all or substantial all women would be unable to perform safely and efficiently the duties of the job involved"). The company had no reported cases of birth defects or other abnormalities. *Id.*

fails to come within the narrow scope of the BFOQ defense unless, for instance, an employer could show that exclusion of women from certain positions was necessary to avoid substantial tort liability.[298] The holding confirms that the employer bears heavy burden of proof in establishing a BFOQ. The Court also took into account the history in which "[c]oncerns for a woman's existing or potential offspring ...has been the excuse for denying women equal employment opportunities."[299]

The implications of Johnson Controls are significant in terms of enhancing women's right to participation in the work force. Protection of "... a woman's existing or potential children has been the guise under which employers operate to discriminate against women in the workplace."[300] However, maximum utilization of female labor requires a system that allows a woman to continue working unless her reproduction function actually erodes her job performance. The employer should be deterred from enforcing fetal protection measures as a wholesale exclusion of women. Johnson Controls confirmed that the issue of a woman's reproductive role lies with each individual, not her employer: "Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents."[301] Outside the context of pregnancy, the Johnson holding can be applied to strike down many other forms of gender discrimination triggered by employers' paternalistic concerns or stereotyped assumptions associated with one gender.

The rigor of the BFOQ test demonstrates Title VII's commitment to elimination of gender stereotyping. As previously noted, the BFOQ is an affirmative defense asserted against charges of discrimination; nevertheless, at a preventive stage, employers can use a BFOQ analysis effectively as a means of self-assessment.[302] In hiring and promotion, employers should critically evaluate the validity of their practices in terms of whether they could

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[298] *Id.* at 212-13. (White, J., concurring) Johnson Controls complies with the lead standard developed by the Occupational Safety and Health Administration (OSHA). OSHA explicitly denied the claim that women with reproductive potential should be excluded from the workplace. *Id.*

[299] *Id.* at 211.

[300] A. L. Cherry, United Auto Workers v. Johnson Controls, Inc.: One Small Step for Womankind, 25 Akron L. Rev. 413, 422 (1991).

[301] International Union, 499 U.S. at 206.

[302] Knapp, *supra* note 55, at 203.

land, if challenged, within the narrow scope of the BFOQ exemption.[303] This process directs employers to focus on job-related factors in their decision-making process and to judge a job candidate on the basis of his or her actual capabilities.[304] Because of this focus on the individual, the BFOQ analysis can serve as a foundation upon which employers build a merit system, a vital element of an egalitarian workplace.[305]

The "fairness to individuals" theory of Title VII has enabled American workers to explore a wider variety of career alternatives by challenging discriminatory barriers created by the social definition of women's role. For the last three decades, Title VII has helped remove gender-based barriers of many occupations traditionally confined to men. Following a series of Title VII challenges by women attacking gender stereotyping, a broader spectrum of occupational choices are available to women today; these include a truck driver;[306] a school principal;[307] a deckhand;[308] an assistance officer in a jail;[309]

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[303] *Id.*

[304] *Id.*

[305] *Id.*

[306] EEOC v. Spokane Concrete Products, Inc., 534 F.Supp. 518 (1982). The court held that no credible evidence supported the employer's contention that gender is a necessary qualification to perform the truck driver job: "While the loading and unloading aspects of the position were portrayed as very strenuous, there was no testimony to the effect that women could not perform the job." *Id.* at 524.

[307] Williams v. Hoffmeister, 520 F.Supp. 521 (E.Tenn. 1981). The defendant, the Knox County school system in Tennessee, assigned women almost exclusively to elementary schools. *Id.* at 535 n.12. The Superintendent of the school system said to the plaintiff, a black female: "[A] lot of time you just need a man...as an administrator because...children need a male image." *Id.* at 529 n.18.

[308] Muntin v. State of California Parks and Recreation Dep't, 671 F.2d 360 (9th Cir. 1982). The hiring official's trial and deposition testimony strongly argued that women shouldn't be standing night watch in San Francisco," because "[i]t's [sic] a lot of problems ...those between the two sexes. Nevertheless, he admitted: "As far as abilities go, I'm sure they're every bit as capable as most of the guys going to sea today." *Id.* at 362.

[309] Manley v. Morbile County, 441 F.Supp. 1351 (S.Ala. 1977). The defendant argued that extraordinary circumstances existing in the jail, such as overcrowding, necessitated the male gender for the position sought: Identification Assistant Officer. The job duties included fingerprinting and photographing all incoming prisoners and inmates against whom additional charges may be filed. *Id.* at 1354. Distinguishing this case from Dothard, 433 U.S. 321, the court rejected the defendant's BFOQ argument.

a firefighter;[310] and a police officer.[311] Title VII has helped advance female spheres beyond "the noble and benign offices of wife and mother."[312] The human drama depicted in each case shows the process of self-definition in which a woman, with judicial aid, expanded the boundaries of womanhood. It further reflects an endeavor by aggrieved individuals to act out the nation's professed ideal of individual dignity.[313]

## CONCLUSION

With the passage of the EEOL, Japan took a monumental step in the right direction. Largely serving a mere ornamental function, however, the law has achieved little towards promoting gender equality. It is time for the Japanese to question their idealized vision of equality resulting from a slow evolution as well as their rhetoric of exclusion in the name of gradualism. The section on the *Burakumin*[314] sheds valuable light on the lengthy and tragic history of oppression as a product of that rhetorical power.

Having decided to amend the EEOL with prohibitory language, the Ministry of Labor itself conceded that the law must be strengthened so that it could more effectively assist women in pursing their career aspirations. The amended EEOL will not be in effect until 1999, and whether this amendment will truly benefit women remains open to speculation.

The U.S. attempt to challenge gender stereotypes through Title VII exemplifies one approach to merit-based equality. Contemporary courts no longer tolerate cultural assumptions that impede an individual's ability to pursue a career of his or her own choice. Recent years have witnessed the growing presence of women in diverse professional fields, and Title VII, with its focus on the worth of the individual, has helped women move beyond their

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[310] United States v. City of Buffalo, 457 F.Supp. 612 (W.D.N.Y. 1978). In this suit attacking discriminatory practices by the Buffalo Police and Fire Departments, the court found that "there had never been a single woman patrolman, cadet or firefighter. ...not a single woman was on the eligibility lists for any of these positions." *Id.* at 629. The defendant offered no evidence to establish a BFOQ to justify "an absolute bar to the hiring of women for positions in question." *Id.* The court reaffirmed Title VII's goal to reject the notion of "romantic paternalism" towards women and to put women on an equal footing with men. *Id.*

[311] *Id.*

[312] *See* note 206 and accompanying text.

[313] Karst, *supra* note 178 at 741.

[314] *See generally supra* section II.D.

traditionally expected role as caregivers. The Act's emphasis on job-related qualifications of the individual manifests itself in the BFOQ theory, which imposes a high burden of proof on employers seeking to justify their gender-based employment practice.

Despite the recognition, this Article does not embody a naive belief that coercive legal powers provide a complete solution to the problem. Indeed, critics are correct to point out that the imposition of force itself remains insufficient to eradicate oppression. Even in the United States, deep-rooted gender bias unavoidably stands beyond the direct reach of law. Yet, the power of law is meaningful because it helps regulate how one interacts with another in public life.

Learning from the U.S. attempt to enforce workforce equality, Japan, too, should mobilize an employment system in which individual employees are evaluated for their intrinsic merit. To attain this goal, the EEOL should serve as a more than an ornament embodying an idealistic principle. Social change does not take place overnight; yet, why claim defeat before the battle? No matter how long the journey may be, we must start traveling the distance here and now.