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I. INTRODUCTION

In the United States, we are surrounded by cultural affirmations of women's successful integration into the labor market. From advertising slogans such as "You've Come a Long Way, Baby" to glossy magazines designed for the "career woman," the popular culture suggests that American women have made great strides in the workplace. In contrast, most Americans familiar with Japan perceive the Japanese workplace as hostile to women, with the role of women limited to serving tea and then quitting upon marriage.

Despite these common perceptions, the situation for working women in the United States and Japan is similar in many respects. For example, in the United States, women's wages have hovered around 65% of men's wages for the past several years,1 while in Japan, the wage differential is roughly 50%.2 Likewise, in both countries, a much higher percentage of women than men are relegated to part-time work.3 Furthermore, women on the average work for a shorter period of time during their lifetimes than do men.4 Both the American and Japanese labor forces are also highly sex-segregated, with men holding an overwhelming majority of the highest paid jobs in both societies.5

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* Associate, O'Melveny & Myers (New York); J.D., Columbia University School of Law, 1990.
2. M. SASSO, WOMEN IN THE JAPANESE WORKPLACE 11 (1990). Ms. Sasso notes that women's earnings as a percentage of men's would be even lower if the wages of "industrial homeworkers" (workers who do low piece-rate work at home) were included. Id.
5. In the United States, roughly half of all working women are employed in occupations that are at least 80% female, and over half of all employed men work in occupations that are at least 80% male. COMMITTEE ON WOMEN'S EMPLOYMENT AND RELATED SOCIAL ISSUES, COMMISSION ON BEHAVIORAL AND SOCIAL SCIENCE AND EDUCATION, NATIONAL RE-
However, the roles of working women in the United States and Japan are by no means perfectly equivalent. These differences are attributable to the varying historical and cultural influences in each country. For example, in Japan, women with college degrees are more likely to drop out of the work force during their child-rearing years than women with only high school educations, while the opposite is true in the United States. However, many factors that create labor market inequality between the sexes are common to both countries.

One such factor is the channeling of women into limited segments of the work force. In general, women of both countries have primarily been employed in the relatively underpaid "helping" professions. These jobs include office assistance and nursing, which are often viewed as extensions of women's domestic responsibilities. This systematic restriction of women's work options stems from both deeply ingrained gender stereotypes and hostility from male workers and male-dominated unions. Often male workers fear that if women enter their occupations, competition for jobs will increase and the prestige of their occupations may be devalued.

Another factor operating on the labor market in the two countries is that women shoulder the primary domestic and child care responsibilities. In addition, the structure of the traditional work day in the United States and Japan is based on the assumption that a worker does not have primary domestic responsibilities. Consequent
quently, women with children in both countries are unable to participate equally with men in the labor market, because they must find ways to reconcile their jobs with their duties at home. Often the accommodations they are forced to make include working only part-time or leaving the work force for extended periods of time.\textsuperscript{11}

Thus, despite significant cultural differences between the United States and Japan regarding the role of women in the workplace, American and Japanese working women share much in common. However, the legal response of the two countries to gender-based inequality in the workplace has been quite different. This Article will examine the legal processes utilized in the United States and Japan for sex discrimination complaints stemming from the workplace. In addition, this Article will compare the two system's operative definitions of "sex discrimination."

\textbf{II. THE LAWS AND PROCEDURES OF GENDER-BASED DISCRIMINATION IN EMPLOYMENT IN THE UNITED STATES AND JAPAN}

The United States' primary source of employment discrimination doctrine is Title VII of the Civil Rights Act of 1964,\textsuperscript{12} as amended by the Civil Rights Act of 1991 ("Title VII"). Under Title VII, any employer with more than fifteen employees\textsuperscript{13} who discriminates on the basis of race, color, religion, gender, or national origin commits an unlawful employment practice.\textsuperscript{14} Furthermore, the statute created the Equal Employment Opportunity Commission ("EEOC"), an in-

\textsuperscript{11}In the United States, approximately one-third of all working mothers work part-time. Frug, \textit{supra} note 9, at 57. "Although part-time work allows women the time and flexibility they need to fulfill their family duties, it is dramatically underpaid in comparison with full-time employment. Moreover, it is characterized by inadequate fringe benefits or credits toward promotion, tenure, or salary adjustments." \textit{Id.}


\textsuperscript{13}The statute was originally limited to employers with more than twenty-five employees, but the number was reduced to fifteen by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000a.

\textsuperscript{14}Title VII also makes it unlawful for a labor organization or employment agency to discriminate on the basis of any of these factors. However this Article focuses only on gender-based discrimination.
dependent federal agency responsible for investigating employment discrimination complaints.\textsuperscript{15}

Depending on the circumstances of a particular case, other sources of law may apply in addition to, or instead of, Title VII to combat employment discrimination. These sources include the Due Process Clause of the Fifth Amendment\textsuperscript{16} and the Due Process and Equal Protection Clauses of the Fourteenth Amendment,\textsuperscript{17} which have been interpreted to prohibit discrimination in government employment; the Equal Pay Act of 1963,\textsuperscript{18} which requires equal pay for equal work without regard to gender; the Pregnancy Discrimination Act of 1978,\textsuperscript{19} which prohibits discrimination against pregnant women in the workplace; Presidential Executive Order 11246, which forbids discrimination by federal contractors; state and local fair employment practice laws, which are often more comprehensive than Title VII;\textsuperscript{20} and collective bargaining agreements, many of which contain anti-discrimination provisions.\textsuperscript{21}

In practice, however, these alternate sources of anti-discrimination law are of limited use against gender-based discrimination in employment. The constitutional provisions, for example, can only be invoked against a government employer. Moreover, since the United

\textsuperscript{15} In the area of gender-based discrimination, the EEOC operates as follows: The Commission’s regional field offices receive written complaints of employment discrimination under either Title VII or the Equal Pay Act. The complaints may be made against public or private employers, labor organizations, or public or private employment agencies. Charges generally must be filed with the EEOC within 180 days of the alleged violation, and the EEOC must notify the persons charged within ten days of receiving the complaint. The EEOC will then investigate the complaint, and, if there is reasonable cause to believe the charge is true, it will attempt to remedy the problem by means of conciliation, conference or persuasion. If an acceptable agreement is not reached by those informal means, the EEOC may bring suit in an appropriate federal district court or encourage the complaining party to do so. See JAMES E. JONES, JR., ET AL., CASES AND MATERIALS ON DISCRIMINATION IN EMPLOYMENT 13-15 (5th ed. 1987).

\textsuperscript{16} U.S. CONST. amend. V.

\textsuperscript{17} U.S. CONST. amend. XIV, § 1.

\textsuperscript{18} The Equal Pay Act is Section 6(d) of the Fair Labor Standards Act, 29 U.S.C. § 206(d).

\textsuperscript{19} The Pregnancy Discrimination Act of 1978 was passed as an amendment to Title VII, 42 U.S.C. § 2000e.

\textsuperscript{20} For example, while Title VII only applies to employers with fifteen or more employees, state laws often cover all employers. Many state laws also cover additional categories of discrimination, such as handicap, marital status and arrest record. See JONES, supra note 15, at 10.

\textsuperscript{21} A 1973-1974 Bureau of National Affairs survey showed that 69% of collective bargaining agreements contain provisions that prohibit discrimination by the employer or union on the basis of race, creed, gender, national origin or age. Id. at 11.
States Supreme Court has declared gender to be a "non-suspect classification,"\(^\text{22}\) these constitutional clauses are not as effective against gender-based discrimination as they are against race discrimination. Likewise, the Equal Pay Act may only be invoked in a limited set of circumstances, such as when an employer pays female and male employees unequally for precisely the same job.\(^\text{23}\) Because the work force in the United States is highly gender-segregated, with companies often hiring women in low-paying jobs in which no men are employed, the Equal Pay Act provides no relief for the many women who hold historically undervalued "women's jobs."\(^\text{24}\)

Similarly, Japanese law contains several sources of anti-employment discrimination doctrine. Article Fourteen of the Japanese Constitution prohibits discrimination in political, economic, and social relations based on race, creed, gender, social status, or family origin.\(^\text{25}\) Despite its broad language, the Japanese courts have interpreted this article to require state action.\(^\text{26}\) Therefore, a party cannot bring an action for discrimination by private employers directly under Article Fourteen of the Constitution.

Another source of anti-employment discrimination law is the Labor Standards Act.\(^\text{27}\) This Act addresses all aspects of the employer-employee relationship, and applies to private employers,\(^\text{28}\) but it provides only limited protection to female workers. Although Article Four of the statute contains the principle of equal pay for equal

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22. Constitutional doctrine in the United States provides that a state government may use most criteria for classifying people as long as the classification is rationally related to a permissible state policy. This standard of review is known as the "rational relation" test. Certain classifications, however, such as classifications based on race, are considered inherently "suspect," and are held to a higher standard known as "strict scrutiny." Under strict scrutiny, a classification will only be upheld if it is necessary to accomplish a compelling state purpose. Classifications based on gender are not considered "suspect classifications" and do not receive strict scrutiny. In Craig v. Boren, 429 U.S. 190 (1976), the Supreme Court held that gender classifications should be put to an "intermediate" standard of review, in between strict scrutiny and the rational relation test. To be allowed, a classification based on gender "must serve important governmental objectives and must be substantially related to achievement of those objectives." Id. at 197.


24. Weiler, supra note 3, at 1779.

25. KENPO [Constitution] art. XIV (Japan).


27. Rodo Kijunho, Law No. 49, 1947 (formerly art. 61) [hereinafter Labor Standards Act].

28. The Act applies to all employers except those that only employ domestic servants or family members who live together. Labor Standards Act, art. 8.
work, its effectiveness is limited by the high degree of gender-segregation in the Japanese work force, as well as the minimal recognition of the concept of comparable worth. Moreover, Article Three, the broadest provision of the Act prohibiting discrimination in wages, working hours, and other conditions of employment, does not address gender-based discrimination. Instead, it only applies to discrimination on the basis of nationality, creed, or social status.

Furthermore, the Labor Standards Act originally contained a number of protective provisions which were detrimental to a woman's advancement in the workplace. These provisions restricted women from engaging in most overtime and nighttime work, and from working in certain areas that were considered to be dangerous or overly strenuous. With regard to overtime, for example, women were restricted to a maximum of two hours of overtime work per day, six hours of overtime work per week, and one hundred fifty hours of overtime work per year, with all holiday work prohibited. Since most management-level employees were regularly required to work long overtime hours, these protective measures limited women's ability to gain managerial positions in most companies. Many of these protective provisions, however, were eliminated or relaxed by the Labor Standards Act Amendment of 1985.

The Japanese Civil Code also contains anti-discrimination provisions. Two provisions are significant in this regard. First, Article 1-


Article Four has only once been the basis of a successful court challenge of an employment practice. In Nawataya v. Akita Sogo Bank Case, 321 HANTA 162 (Akita D. Ct. April 10, 1975), a female employee sued her employer because of its discriminatory wage system. Under the system, employees with dependents received a higher wage. All men, regardless of whether they actually had dependents, were paid at this higher rate, and all women were automatically assigned the lower rate.

30. "Apart from the case of youths initially hired on the same terms, the Japanese law appears to have had a minimal impact, because the wage gap between women and men has been exacerbated by the designation of different titles for identical jobs." SASSO, supra note 2, at 19.

31. Labor Standards Act, art. 3.

32. Id.


34. See SASSO, supra note 2, at 17.

35. See The Equal Employment Opportunity Act, 6 DOING BUSINESS IN JAPAN § 4.01 (Zentaro Kitagawa ed., 1991). With regard to overtime, the amendment, which was passed in conjunction with the Equal Employment Opportunity Act, removed all overtime work restrictions for women in managerial, professional, and technical positions and greatly increased the maximum number of overtime hours for women in other fields.
236 states that the Code should be interpreted to reflect the dignity of individuals and the essential equality of the sexes. Second, Article 90 provides that any juristic act contrary to public policy and good morals is null and void. Because judges turn to the Constitution as a guide when determining public policies, Article 90 provides a way in which Article Fourteen of the Constitution, prohibiting sex discrimination, may be utilized against private employers.38

These provisions have been the bases of a number of lawsuits by women challenging alleged discriminatory practices. However, the potential scope of the employment practices that may be attacked under Article 90 is somewhat limited, because Japanese courts have consistently held that only overt acts of “unreasonable discrimination” violate public policy.39 Moreover, since Article 90 applies only to “juristic acts,” certain employment practices by private employers have been deemed to be unreviewable under the Civil Code.40 Discriminatory employment advertising is not, for example, considered a juristic act, as it possesses no legal effect.41

In addition, the Equal Employment Opportunity Act of 1985 (“EEOA”)42 establishes guidelines for employers. The guidelines state that employers “shall endeavor” not to discriminate in terms of recruiting, hiring, assigning, and promoting employees.43 Further, employers “shall not” discriminate in terms of training and benefits.44

36. UPHAM, supra note 3, at 130.
37. Id.
38. Oki v. Nagoya Broadcasting Co., 756 HANJ 56, 58 (Nagoya High Ct. Sept. 30, 1974), illustrates the way in which judges can use Article 90 of the Civil Code to bring the weight of Article 14 of the Constitution to bear against private employers. The court stated,
The legal system of Japan with the Constitution at the top intends to forbid any unreasonable discrimination based on sex, for the purpose of realizing the essential equality of the sexes. These principles are stipulated in Article 14 of the Constitution as to the relations between the state or public organizations and individuals, and in Article 1-2 of the Civil Code as to relations between two or more individuals, and the prohibition of such discrimination is in accordance with public policy. Thus, conspicuously unreasonable sexual discrimination shall be invalid as violating public policy under Article 90 of the Civil Code.
Id.
39. UPHAM, supra note 3, at 132-133.
40. Id.
41. See Kuwahara, supra note 5, § 4.03.
42. Koyo no Bunya ni okeru Danjo no Kinto na Kikai oyobi Taigu no Kakuhodo no Fukushi no Zoshin ni kansuru Horitsu (Law No. 45, 1985), passed as an amendment to the Working Women’s Welfare Law (Kinro Fujin Fukushiho), Law No. 113, 1972.
44. Bergeson, supra note 11, at 875.
The difference between the two standards is unclear, because the EEOA as a whole requires only voluntary compliance by employers and does not provide any penalties for non-compliance. However, the EEOA provides that the Ministry of Labor may issue additional guidelines in the future.\footnote{Perhaps these different standards suggest that the Ministry will put particular effort into eliminating discrimination in training and benefits.}

The EEOA also established a three-tier grievance procedure. First, an employee experiencing discrimination must use the complaint resolution mechanisms established by her employer.\footnote{First, an employee experiencing discrimination must use the complaint resolution mechanisms established by her employer.} Second, if this process proves inadequate, she may ask the prefectural office of the Ministry of Labor to assist in resolving the dispute.\footnote{Second, if this process proves inadequate, she may ask the prefectural office of the Ministry of Labor to assist in resolving the dispute.} Finally, and only if both the employer and the employee agree, an Equal Employment Opportunity Mediation Commission\footnote{Finally, and only if both the employer and the employee agree, an Equal Employment Opportunity Mediation Commission may mediate the complaint.} may mediate the complaint.\footnote{The Commission, however, has no binding authority over the parties, and may only draft proposed settlements and recommend their acceptance.}

### III. Litigation and Mediation in the Two Systems

In both the United States and Japan, employment discrimination law is enforced by litigation and bureaucratically-controlled, non-binding mediation. However, the two legal systems place differing emphases on these enforcement mechanisms.

In the United States, a woman who files an employment discrimination claim under Title VII must first file her complaint with the EEOC.\footnote{In the United States, a woman who files an employment discrimination claim under Title VII must first file her complaint with the EEOC.} The claimant then waits for the EEOC to respond before commencing private legal action.\footnote{The claimant then waits for the EEOC to respond before commencing private legal action.}

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45. Parkinson, \textit{supra} note 43, at 610.
46. Article 13 of the EEOA provides that employers should create a labor-management body within their companies to deal with discrimination complaints. \textit{See} Up\textit{ham}, \textit{supra} note 3, at 153.
47. Article 14 of the EEOA states that the director of the prefectural Women and Minor's Office may render necessary advice, guidance or recommendations if requested by either or both sides. \textit{See} id.
48. Article 16 of the EEOA created these commissions. Parkinson, \textit{supra} note 43, at 607.
49. A Commission consists of three non-lawyers chosen from the local community. However, the mediation provisions of the EEOA may not be used to challenge recruitment or hiring practices. \textit{See} Bergeson \\& Yamamoto Oba, \textit{supra} note 11, at 873.
50. Up\textit{ham}, \textit{supra} note 3, at 153.
dependent enforcement authority, the process may be viewed as a roadblock to effective private enforcement.

Historically, though, the EEOC has not been a hurdle to the enforcement of employment discrimination law. Rather, the Commission has been an active ally of grievants, often strengthening their cases through the EEOC investigation process. In addition, the EEOC encourages private litigation upon finding evidence of a violation, which it cannot correct by means of its statutorily defined powers of conference, conciliation, and persuasion. The EEOC also has the power to bring suits in federal court on behalf of private parties. Furthermore, because the EEOC’s investigation and conciliation procedures are enhanced by a significant threat of litigation, it has the power to exert pressure on employers to cure violations.

Hence, the required mediation procedure in the United States does not obscure the importance of litigation. In fact, the initial mediation process built into Title VII centers around the vindication of legally enforceable rights and the threat of court action. Additionally, the emphasis of anti-discrimination law is placed squarely on enforcement through the court system.

In contrast, Japanese employment discrimination law, with the enactment of the EEOA, places primary emphasis on mediation rather than litigation. Although the EEOA retains a female worker’s right to challenge an alleged discriminatory practice in court, the three-tiered mediation procedure created by the statute may deemphasize legal rights and channel potential litigants away from the court system. For example, the EEOA delegated primary responsibil-

53. Unlike the National Labor Relations Board (“NLRB”), which has administrative enforcement authority, the EEOC is a comparatively “weak” agency. When Title VII was passed in 1964, Professor Michael Sovern called the EEOC a “poor, feeble thing [with] power to conciliate but not to compel.” See MICHAEL I. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 205 (1966).

54. “Far from inhibiting private litigation . . . the passage of Title VII and the creation of the EEOC established a partnership between private litigants and EEOC officials that accelerated the pace and significance of private antidiscrimination litigation.” UPHAM, supra note 3, at 163.

55. Id.

56. Originally, the EEOC did not have the power to bring its own suits, but that authority was granted to the Commission by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000a (1982). The only exception is suits against state or local authorities, which may not be brought directly by the EEOC, but which the EEOC may refer to the Justice Department for enforcement. See generally JONES, supra note 15, at 7.

57. The Equal Employment Opportunity Mediation Commissions created by the EEOA are composed of three non-lawyers, whereas the typical bureaucratic commission in Japan consists of one judge and two non-lawyers. “There is no assurance that the commissioners will
ity for dealing with discriminatory employment practices first to the employer and then to the bureaucracy, while creating no new causes of action.\(^{58}\)

The converse emphasis of employment discrimination law in the United States and Japan appears to validate the prevailing stereotypes concerning the litigiousness of the two societies. Briefly, such stereotypes include the notion that Americans view all disputes in terms of legal rights enforceable in a court of law, while the Japanese dislike open confrontation and consider mediation the preferable method of resolving conflicts.

A culturally-based explanation for the differing litigation rates in the United States and Japan is comprehensively discussed elsewhere,\(^{59}\) making it unnecessary to re-open that debate in this Article. Without disregarding the notion that much of the difference between employment discrimination law in the United States and Japan may be rooted in cultural factors, it is noteworthy that in developing the legal system the governments of both countries were acting in different political contexts. Consequently, the choices made in the two countries with regard to employment discrimination laws reflect these political factors as well as cultural preferences.

The primary source of anti-employment discrimination law in the United States, Title VII, is a product of the extended struggle by civil rights advocates in the early 1960s to bring discriminatory prac-

consider the law, even if just as a guideline, in making their decisions." Bergeson & Yamamoto Oba, supra note 11, at 882.

58. Unlike Title VII, the EEOA does not require a complaint to be filed with a bureaucratic agency before a court action can be brought. However, judges may be hesitant to apply an Article 90 analysis to areas covered by the EEOA. See Upham, supra note 3, at 154.


This generalization is discussed and critiqued by Professor Haley, who argues that institutional barriers to litigation in Japan, such as the lack of access to the court system and the intentionally inadequate number of lawyers and judges, are the primary reasons for Japan's relatively low litigation rate. John Owen Haley, The Myth of the Reluctant Litigant, 4 J. JAPANESE STUD. 359 (1978). See also J. Mark Ramseyer, Reluctant Litigant Revisited: Rationality and Disputes in Japan, 14 J. JAPANESE STUD. 111 (1988); Robert J. Smith, Lawyers, Litigiousness, and the Law in Japan, 11 CORNELL L. F. 53 (1984).

The degree to which the generalization is correct for the United States is discussed in Marc Galanter, Reading the Landscape of Disputes, 31 UCLA L. REV. 4 (1983).
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Many state governments were perceived to be indifferent about protecting minority groups from discrimination by private parties. Thus, proponents of civil rights legislation, such as Title VII, believed that the federal government had to intervene against private discrimination in order to protect minority groups.61

This desire to federalize the area of employment discrimination was not, however, equivalent to a desire to make litigation in federal court the primary mechanism of enforcement. Many original proponents of a federal employment discrimination statute strongly criticized the congressional act, precisely because they believed that Title VII overemphasized litigation.62 The proponents hoped the act would create a federal agency with extensive administrative enforcement powers so that the purposes of Title VII could be accomplished more efficiently than by private lawsuits. Many of proponents derided the new commission as a "toothless tiger,"63 because it had no binding authority. In fact, many commentators believed that Title VII's primary emphasis on litigation was evidence of the civil rights movement's defeat caused by too many Democratic compromises in Congress.64

Thus, the history behind the enactment of Title VII does not support the generalization that Americans consistently believe that the court system is the most effective forum for resolving disputes. In actuality, the importance that the statute places on litigation as an enforcement mechanism may have been a political victory for certain conservatives who opposed federalizing this area of the law, and believed that an emphasis on private lawsuits could minimize the legislation's effectiveness.65

60. See generally Belton, supra note 51.
61. Id.
62. "It seems questionable that much can be accomplished through suits in federal court by persons aggrieved by acts of discrimination. The practical advantages will lie heavily with the defendants, and even where the evidence of discrimination is overwhelming, it cannot be expected that many complainants will undertake the burden of an individual suit." Richard K. Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 BROOK. L. REV. 62, 96-97 (1965); See also Belton, supra note 51, at 227.
63. Belton, supra note 51, at 227.
64. See SOVERN, supra note 53, at 205; Berg, supra note 62, at 96-97; ALFRED W. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 57-58 (1971).
65. The bill, as it was originally reported out of the House Judiciary Committee, called for the creation of a federal agency, patterned after the National Labor Relations Board, to deal with employment discrimination. The agency was to be composed of an administrator and a five-member board, and was to be empowered to issue cease and desist orders which
Likewise, the emphasis on mediation in the Japanese system evolved as much from political motivations as from cultural preferences.\textsuperscript{66} The enactment of the EEOA may be seen as part of a general governmental policy of attempting to remove social problems from the court system, and, instead, deal with the problems through bureaucratically-controlled processes.\textsuperscript{67}

Since the mid-1960s, private litigation of gender-based discrimination in employment claims proceeded at a fairly steady pace.\textsuperscript{68} Although judicial reluctance to extend the scope of Article 90 of the Civil Code beyond unreasonable and overt gender-based policies limited the scope of such litigation, the ruling Japanese Liberal Democratic Party ("LDP") may have desired to remove the issue from the court system before more extensive legal norms against sex discrimination could develop.\textsuperscript{69}

The desire to channel employment discrimination disputes into a

\begin{footnotes}
\footnotetext{66}{ALICE H. COOK & HIROKO HAYASHI, WORKING WOMEN IN JAPAN: DISCRIMINATION, RESISTANCE, AND REFORM 35 (1980).}

\footnotetext{67}{"There seems little doubt that the EEOA is part of a government attempt to follow the time-honored Japanese pattern of dealing with social conflict by simultaneously ameliorating its causes and incorporating the antagonists into government-controlled mediation machinery." UPHAM, supra note 3, at 163.}

\footnotetext{68}{For a comprehensive discussion of the course of private litigation in the 1960s and 1970's, see Catherine W. Brown, Japanese Approaches to Equal Rights for Women: The Legal Framework, 12 LAW IN JAPAN: AN ANNUAL 29 (1979); COOK, supra note 66.}

\footnotetext{69}{It has been suggested that the primary motivation behind the enactment of the EEOA was the United Nations' declaration of 1976-1985 as the "Decade of Women," and by Japan's pledge to ratify the Convention on the Elimination of All Forms of Discrimination Against Women ("Convention on Sex Discrimination") by 1985. See UPHAM, supra note 3, at 151; see also Parkinson, supra note 43. This argument is not, however, entirely persuasive.}

The Convention on Sex Discrimination has been ratified with more reservations than any other United Nations human rights document. Twenty of the eighty-nine countries which have ratified the Convention made reservations, with a total of more than eighty substantive reservations among them. For example, Egypt and Bangladesh both ratified the Convention but reserved the right not to impose any rules that are contrary to Islamic Law. This reservation was allowed even though it gives those two countries tremendous latitude in determining the degree of gender-based discrimination that is permissible. CASES AND MATERIALS ON INTERNATIONAL LAW 431 (Louis Henkin et al. eds., 2d ed. 1987). Japan, likewise, could have ratified the Convention with reservations based on their own cultural values. \textit{Id.}

Furthermore, although there was no great public outcry for a new equal employment law, the idea had been pushed for some time in the Diet by several of the opposition parties. In 1978, for example, the Japanese Socialist Party presented a "Bill Concerning the Promotion of the Equal Treatment of Men and Women Workers," which was shelved by the LDP. See
\end{footnotes}
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non-binding, bureaucratically-controlled process does not necessarily imply that the LDP is completely hostile to women’s rights. Although the EEOA’s reliance on mediation and administrative guidance by the Ministry of Labor may lead most American observers to believe the Act is ineffective, the procedure could effect some important changes provided that the Ministry adopts, as one of its primary goals, reduction or eradication of gender-based discrimination in employment. The LDP may have chosen to enact legislation with fairly weak enforcement provisions not as a means to prevent change in this area entirely, but simply to maintain bureaucratic control over the speed and scope of the changes.

The LDP is interested in regulating the course of change in the area of gender-based discrimination laws because the gender inequalities in the current employment system are perceived to be advantageous for the Japanese economy. The employment system that has facilitated Japan’s tremendous economic growth since World War II is highlighted by two factors: (1) a high degree of employee loyalty to the company, including the willingness to work overtime regularly and relocate on short notice, and (2) lifetime employment for full-time workers.

Both of these factors are made possible by women’s role in the economy. For example, when a married woman assumes all the primary housekeeping and child-care responsibilities, her husband may easily commit himself to his company completely. Moreover, women form a secondary labor pool for Japanese business; part-time workers who can be easily hired during up-cycles and fired during down-cycles. This supply of women’s labor, although at the woman’s expense,

Brown, supra note 68, at 31. The LDP may have wanted to take preemptive action before greater pressure for a strong statute could be generated by the opposition parties.

70. “[T]he effectiveness of the law will depend on both the willingness and the ability of the Ministry of Labor to apply sanctions to non-cooperating firms. That is, even though direct legal enforcement is not an option, the Ministry of Labor can create administrative or other burdens for firms that do not comply with the law, and award extra-legal benefits to firms that do comply.” Edwards, supra note 4, at 244. See also Michael K. Young, Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan, 84 COLUM. L. REV. 923 (1984).

71. See generally Edwards, supra note 4; Parkinson, supra note 43.

72. This description of the employment system applies only to the larger Japanese companies. Smaller firms are rarely able to guarantee lifetime employment for their workers and it is estimated that fewer than 25% of all Japanese employers enjoy the benefits of lifetime employment. Fumito Komiya, Dismissal Procedures and Termination Benefits in Japan, 12 COMP. LAB. L.J. 151, 152 (Winter 1991). For an interesting look at the Japanese employment system, see JON P. ALSTON, THE AMERICAN SAMURAI 223-55 (1986).
allows companies to make lifetime commitments to their full-time employees regardless of short-term business conditions.\footnote{See Edwards, supra note 4, at 249.}

The reaction of many Japanese companies to the recent downturn of the country’s economy illustrates the way that women workers function as a secondary labor pool. While Japan’s economy boomed during the 1980s, many companies began to hire women in record numbers.\footnote{David E Sanger, Women in Japan Job Market Find the Door Closing Again, N.Y. TIMES, Dec. 1, 1992, at A1.} The women who entered the labor force during these boom years included mothers re-entering the workforce as part-time workers after their children reached school age as well as recent school graduates.\footnote{Id.} Now, however, with the Japanese economy slumping and companies trimming their workforces, women are bearing the brunt of the cutbacks.\footnote{See id.; Women Graduates Draw Short Straw, NIKKEI WkLY., Oct. 12, 1992, at 21; Facing Tough Times, Companies Cut Recruitment, NIKKEI WkLY., Oct. 26, 1992, at 12; Jon Woronoff, Discrimination Remains at Work in Japan, ASIAN WALL ST. J. WkLY., Oct. 14, 1991, at 15.} Female part-time workers have been the first to be let go in most company workforce reductions and even women graduates from the top universities in the country are finding their career opportunities shrinking dramatically.\footnote{In 1992 there were 2.22 job openings for every male graduate seeking a position, and 0.93 job openings for every female graduate. Women Graduates, supra note 76, at 21. In 1992, 10% or more of the applications from college seniors to three of Japan’s largest and most prestigious trading companies, Mitsubishi, Itochu and Nissho Iwai, were from women. Mitsubishi hired four women and 213 men, Itochu hired five women and 198 men and Nissho Iwai hired three women and 127 men. Sanger, supra note 74, at A10.}

In short, the LDP and its business constituents prefer not to see any sudden, wrenching changes made to the employment system. By railing employment discrimination suits into a system of informal, case-by-case mediation, it is highly unlikely that any new legal standards will emerge to challenge the status quo in the area of employment discrimination.\footnote{For a discussion of the tendency of Japanese elites to view litigation as a threat to the social and political status quo, see Upham, supra note 3, at 16; J. Mark Ramseyer, The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan, 94 YALE L.J. 604 (1985).} Thus, the stereotypes concerning the contrasting litigiousness of the Americans and the Japanese may not completely account for the different emphases on litigation and mediation in the two systems. Political factors also motivated the differing emphases of employe-
ment discrimination law in the two nations.  However, different cultural attitudes about the function of law in society placed different parameters on the types of choices that were available to the two governments. For example, in 1964, it was highly unlikely that the United States Congress would have passed legislation like the Japanese EEOA, which was enforced only by non-binding mediation. An act like the EEOA would almost certainly have appeared to be too weak for the Americans in light of the historical context. The Japanese, on the other hand, were more accustomed to resolving disputes through informal compromise, and may even have been wary of strict legal rules in areas where no societal consensus had clearly emerged. A mediation-centered statute was, therefore, a permissible option for the Japanese government.

IV. WHAT CONSTITUTES "DISCRIMINATION" IN THE TWO SYSTEMS?

Laws in both the United States and Japan refer to the term "discrimination in employment" without ever defining precisely what is meant by the term. This lack of a clear definition creates a high degree of uncertainty in the administration of employment discrimination statutes. Although in both countries certain employment practices are unambiguously known to be discriminatory, judges and others who are interpreting the laws often have a great deal of discretion in determining whether a particular act constitutes unlawful discrimination.

The problem is particularly acute in Japan. Because the Japanese civil law system does not recognize previous case precedents as binding on later decisions, it is difficult for Japanese courts to de-

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80. Ramseyer, supra note 78, at 607.
81. In 1964, the civil rights advocates, who criticized Title VII for placing the burden of enforcement on private litigation, did not argue that enforcement based on informal compromise and non-binding mediation would be preferable. Rather, what they had hoped for, a strong administrative agency with enforcement power, would, like a court, have based its decisions on binding legal rules. For a defense of the traditional American trust in legal rules over informal compromise, see Owen M. Fiss, Against Settlement, 93 YALE L.J. 1073 (1984).
82. Regardless of whether this acceptance of informality is something innate in the Japanese culture, or something that has been imposed by elite groups eager to maintain their control, the value of informal processes over binding legal rules appears to be generally accepted in Japanese society. For a discussion of Japan's legal informality and the "culture of consensus," see Upham, supra note 3, at 205-21.
83. Cook, supra note 66, at 22.
84. Id. at 36-37.
velop a uniform definition of discrimination. Thus, a practice declared discriminatory by one court may not be so declared by another. This difficulty is mitigated to some extent by the tendency of Japanese judges to follow, to an extent, major earlier decisions in a given area of the law. This unofficial and non-binding variation of stare decisis, however, has failed to produce a consistent definition of discriminatory employment.

The leading case in the area of sex discrimination in employment is Suzuki v. Sumitomo Cement Co. ("Sumitomo Cement"), which was decided in 1966. The plaintiff in this case was a female employee who challenged the legality of the company's policy of requiring women workers to retire upon marriage. Relying on Article 90 of the Civil Code, the Tokyo District Court held that "unreasonable" discrimination based on gender is contrary to public policy, and invalidated the company's retirement system on those grounds. Although Sumitomo Cement is not cited in later opinions, the "unreasonable discrimination" standard articulated in this case has generally been adopted by Japanese courts to analyze explicitly sex-based employment practices.

The Sumitomo Cement decision did not, however, provide courts with a uniform definition of discrimination. Because a company may treat its female employees differently than its male employees as long as the policy is reasonable in the mind of the judge hearing the case,

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85. For the proclivity of Japanese courts to pattern their reasoning in a case after a leading decision, see Brown, supra note 68, at 34. See also JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 47 (2d ed. 1985). In discussing the general characteristics of most civil law systems, Professor Merryman writes, "Although there is no formal rule of stare decisis, the practice is for judges to be influenced by prior decisions . . . A lawyer preparing a case searches for cases on point and uses them in his argument; and the judge deciding a case often refers to prior cases." Id.

86. "[R]adically divergent attitudes toward women exist in Japan today; what seems "reasonable" to one employer or court may not seem so to others. Although most courts have found sex-based employment systems unreasonable, the standard still involves the risk that an idiosyncratic decision will be rendered, and the courts are still a long way from the goal of developing consistent forms of analysis that could lessen the possibilities of inconsistent results." Brown, supra note 68, at 51.


88. Brown, supra note 68, at 32; Bergeson, supra note 11, at 870.

89. In evaluating the reasonableness of the defendant's policy, the court considered evidence supplied by the company that women were inefficient workers and that a seniority-based wage system required early retirement for female employees. The court held that the evidence did not sufficiently prove that all women workers become inefficient after marriage, and ruled that the plaintiff was entitled to a new employment contract and back wages. See Brown, supra note 68, at 33.

90. Brown, supra note 68, at 32-33.
the particular facts of each case must be examined. Ultimately, the
determination of whether the practice meets the reasonableness stan-
dard and, thus, is acceptable under Article 90 depends on a judge’s
own view of public policy and good morals. The Sumitomo Cement
document, therefore, is no guarantee that employment policies will be
evaluated consistently throughout the court system.

For example, in Karatsu v. Red Cross Hospital, the Saga Dis-
trict Court ruled contrary to the general trend of invalidating gender-
based retirement systems by permitting a hospital to continue a pol-
cy of retiring men at sixty and women at fifty-five. The court ac-
cepted the hospital’s argument that the practice was reasonable
because women physically deteriorate faster than men.

The potential for anomalous results from the “unreasonable dis-
 crimination” standard as articulated in Sumitomo Cement, is also il-
lustrated in Watanabe v. Furukawa Mining Co. In this case, the
plaintiff challenged the company’s singling out of married women for
an economically necessitated lay-off. The Maebashi District Court
reasoned that the policy of laying off married women during a reces-
sion was reasonable because married female workers are best able to
bear the loss of a job. The court made this determination despite the
company’s admission that it had not investigated the actual economic
circumstances of any of the women who were laid-off.

As the Watanabe and Karatsu courts demonstrate, the danger
exists that a court will base its determination of whether a sex-based
employment practice is “reasonable” on very traditional attitudes
about gender roles. The extent to which the EEOA clarifies this am-
biguous concept of discrimination as established by the Sumitomo Ce-

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91. 881 HANJI 149 (Saga D. Ct. Nov. 8, 1977).
92. Important cases that have invalidated gender-based retirement systems as unreasona-
   ble discrimination include: Izu Cactus Park Case, 770 HANJI 18 (Tokyo High Ct. Feb. 26,
   1975) (mandatory retirement of women at age 47 and men at age 57); Mitsui Shipbuilding
   Case, 654 HANJI 29 (Osaka D. Ct. Dec. 10, 1971) (forced retirement for women at childbirth);
   Tokyu Kikai Kogyo Case, 560 HANJI 23 (Tokyo D. Ct. July 1, 1969) (forced retirement of
   women at age thirty); Onoda Cement Case, 523 HANJI 79 (Morioka D. Ct. Apr. 10, 1968)
   (lay-offs focusing disproportionately on married women and women over thirty).
93. 881 HANJI 149 (Saga D. Ct. Nov. 8, 1977).
94. Id.
95. 21 ROSHÜ 1475 (Maebashi D. Ct. Nov. 5, 1970).
96. The court wrote that it “was obvious that the amount of damage to the interests of
   married women with working husbands who resign and lose their salaries is generally less than
   it would be in the case of other workers who would resign.” Translated in Brown, supra note 68,
at 43.
97. See Watanabe, 21 ROSHÜ 1475.
The employer guidelines in the statute may potentially replace some of the subjectivity of the *Sumitomo Cement*’s reasonableness doctrine with definitive legal standards. The guidelines are not, however, in any way binding on the courts, and would only be authoritative in Article 90 litigation assuming that the courts accepted them as the controlling statements of public policy in employment discrimination law.

Conversely, for the purpose of Article 90 litigation, the EEOA could restrict or regulate the development of a definition for discrimination. Passage of the EEOA did not take away a female employee’s private right of action in areas that were formerly the subject of Article 90 litigation; namely, salary discrimination and retirement benefits. However, the question remains whether courts will extend the Article 90 analysis to other conditions of employment encompassed by the EEOA, such as recruitment and assignments. Because a system of non-binding arbitration enforces the guidelines in the statute, a court may interpret the act as taking those practices covered by the guidelines completely out of the realm of the court system.

The definition of discrimination that is being applied by the Equal Employment Opportunity Mediation Commissions is also unclear. Because the commissions are composed of leading members of the community who are not necessarily trained in law, the *Sumitomo Cement* doctrine may have little or no influence on the compromises worked out by these commissions. In mediating disputes, the commissioners may rely more on their own attitudes of the proper role of women in the work force than on the concept of discrimination that has developed through Article 90 litigation.

Likewise, a clear and understandable definition of discrimination also has not been established in the United States. Unlike the Japanese system, however, in which the determination of what constitutes “unreasonable discrimination” can be reinterpreted on a case-by-case basis by each court, the common law system of *stare decisis* allows United States courts to look to prior decisions for general parameters

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98. See generally UPHAM, supra note 3.
99. See UPHAM, supra note 3, at 154.
100. See generally Bergesen & Yamamoto Oba, supra note 11.
101. "If mediation commissioners disregard the law (the EEOA), their decisions will probably rest upon the customs and mores of Japanese society. . . . In addition, mediation commissioners are typically chosen from among the more prominent members of the community (usually men), and their decisions or mediation plans tend to favor traditional institutions and reflect conservative values." Id. at 882.
Employment Discrimination

of the word's meaning. The United States Supreme Court decisions have been particularly important in establishing the principles behind Title VII's prohibition against employment discrimination by definitively declaring a number of employment practices to be illegal.

For example, in the area of gender-based discrimination, the Court has held that policies such as refusing to hire women with young children, requiring women to make larger contributions to pension plans than men, keeping women out of higher paying night shifts, and a variety of other gender-based employment practices, are all invalid under the Act. The Supreme Court, however, has yet to completely define the substantive reach of Title VII, and, thus, many questions still remain about the precise scope of the term "discrimination."

One of the principal sources of this uncertainty in defining discrimination under Title VII is the existence in American legal thought of two competing models of equality. These models are the "equal opportunity" model and the "equal achievement" model. The equal opportunity model discourages decisions based on discriminatory motives, and thus, focuses on the intent of the employer in making an employment decision. The equal achievement model, on the other hand, stresses that the problem of employment inequality is based not only on individual discriminatory acts, but also on the general subordination of certain groups in society. This later model analyzes the discriminatory effect as well as the discriminatory intent on those groups. Title VII's broad prohibition against discrimination could encompass either of these theories and both theories have influenced judicial interpretations of the statute. As a result, under Title VII, both discriminatory intent and discriminatory effects may invalidate an employment practice.

Uncertainties persist while American courts decide on how to apply the "equal opportunity" and "equal achievement" models. A recent example of such efforts is the 1988 Supreme Court case of Wat-
The issue facing the Court was whether a completely subjective promotion system violated Title VII solely because its effect was to promote white workers at a faster rate than black workers. Justice Sandra Day O'Connor's plurality opinion argued that, generally, proof of a discriminatory intent is required to invalidate a promotion decision based entirely on subjective criteria. Evidence of discriminatory effect alone is sufficient only if the plaintiff identifies specific criteria responsible for that effect.

The Watson holding was expanded by the Court the following year in Wards Cove Packing Co. v. Atonio. In this case, Justice Byron White, writing for the majority, stated that in all disparate impact cases, the plaintiff must identify a specific employment practice that is responsible for any statistical disparity. This element of the Wards Cove decision was then partially restricted by section 105 of the Civil Rights Act of 1991, which states that if "the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice."

As this brief summary of the recent development of disparate impact analysis illustrates, the degree to which Title VII calls for equal opportunity or equal achievement continues to be debated more than twenty-five years after the passage of the statute. The firm establishment of disparate impact as a recognized theory for a Title VII claim is a victory for the proponents of the equal achievement model. However, through Watson and Wards Cove, opponents of that model severely restricted the theory's use by procedural means. The future of this conflict between the two models of equality should be centered around the interpretation of the Civil Rights Act of 1991.

To the extent that effects alone are enough to invalidate an em-

112. Id.
113. Id.
114. Id. at 987.
116. In Wards Cove, the plaintiff alleged that several "objective" employment practices, such as nepotism and separate hiring channels, as well as subjective decisionmaking, were responsible for the disproportionately low number of non-whites in the better paying jobs at the company. Id. at 647. Justice White wrote that to succeed, the plaintiff would have to show that "each challenged practice has a significantly disparate impact on employment opportunities for whites and non-whites." Id. at 657.
ployer's policy, the definition of discrimination in the United States system differs greatly from Japan. For instance, in the course of developing the "unreasonable discrimination" standard under Article 90, Japanese courts have never suggested that equal achievement is a goal of the law. Moreover the EEOA fails to change that position.\textsuperscript{118}

Thus, while employment discrimination law in both countries lacks a clear definition of discrimination, the scope of the term is broader in the United States than it is in Japan. For instance, Article 90 litigation in Japan has only been used to attack a limited number of explicitly gender-based policies, primarily those concerned with retirement and benefit policies or practices that are on their face unequal. Title VII, on the other hand, has been used to invalidate policies which have both the intent and effect of limiting women's role in the labor market.

V. CONCLUSION

The American legal system allows for more rapid social change with regard to the alleviation of gender-based discrimination in employment than the Japanese system. American legal doctrine contains a broader definition of discrimination and the legal processes for gender-based discrimination complaints are more advantageous for complainants. For instance, the United States system, through the EEOC, creates a type of partnership between a private plaintiff and the government to pursue employment discrimination claims against employers. In contrast, the Japanese system, uses a more restrictive definition of discrimination limits the possibility for rapid change by emphasizing informal, case-by-case compromises. These differences may be attributed to Americans' more progressive attitudes about gender roles. However, such an explanation is not supported by the history behind the enactment of Title VII.

As originally envisioned, Title VII was not an attempt to achieve gender equality in the American work force. Like the rest of the Civil Rights Act of 1964, Title VII was first and foremost about racial equality.\textsuperscript{119} In fact, Southern opponents of the bill proposed an

\textsuperscript{118} A linguistic argument has been made that the title of the EEOA carries in it a refutation of the concept of equality of achievement. The argument is that the word "kinto" was chosen to be used in the law's title because it has the meaning of equal opportunity. In contrast, the other word that could have been chosen, "byodo," could mean equality in result. \textit{See} Edwards, \textit{supra} note 4, at 243.

\textsuperscript{119} "The primary purpose of Title VII was to improve the economic status of blacks as a group. Of all the civil rights legislation enacted prior to 1965, Title VII alone was aimed at the
amendment adding the word "sex" to the list of protected classes one day before the House vote.\textsuperscript{120} The opponents, in an effort to stop Title VII's passage, proposed the amendment because they believed that gender-segregation was such a dominant part of the American labor market that Congress would not be able to declare it illegal. Their plan backfired, however, when the House a day later passed Title VII, as amended. Apparently, many of the representatives who voted for the bill believed that, even though gender had been added, Title VII would not affect gender-segregated occupations.\textsuperscript{121}

Due to the statute's legislative history, it was originally uncertain whether gender-based discrimination would be analyzed differently than race discrimination.\textsuperscript{122} As late as 1974, a union accused of gender-based discrimination argued that principles developed in race discrimination cases were not necessarily applicable to gender-based discrimination claims.\textsuperscript{123} The union's argument was rejected, and thus ten years after the enactment of Title VII, the notion of a separate body of legal principles for gender-based discrimination was finally put to rest.

At the time of Title VII's passage, there was as little consensus in the United States about the importance of gender equality in the work force as there is presently in Japan. However, women workers in the United States have been able to employ legislation that was aimed primarily at combatting race discrimination to make important strides against gender inequality in employment. Japanese women have not enjoyed such good fortune.

Because of the relatively small number of minorities in Japan,\textsuperscript{124} employment discrimination and gender-based discrimination are essentially one and the same issue. Thus, when Japanese legislators address of employment discrimination, they are aware that their actions will most significantly affect women's roles in the work force. The possibility is, therefore, remote that strong legal remedies inadver-

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\textsuperscript{120} For a more complete discussion of the legislative history of Title VII, see Belton, \textit{supra} note 51, at 276.

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{See id.} at 277.

\textsuperscript{123} Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. Cir. 1974).

tently will be made available to women in Japan as they were by Title VII in the United States.

Although working women in the United States, as compared to Japan, possess stronger legal tools at their disposal to eradicate gender-based discrimination in employment, the wage statistics paper suggest that the role of women in the labor markets of the two countries is quite similar. Undoubtedly, in both countries, the participation of women in the workforce may be increased by further strengthening the legal sanctions against gender-based discrimination. Achieving full equality of employment opportunity for women appears, however, to require more than simply improving women’s legal remedies. Fundamental changes in the division of domestic responsibilities, the structure of the work day, and the evaluation of women’s and men’s services are necessary to meaningfully improve women’s position in the labor market.

Title VII has been in effect in the United States for more than twenty-five years and American women still earn only sixty-five percent of men’s wages. It is doubtful that Title VII will create more significant changes during its next twenty-five years of existence. Consequently, Japanese women, armed with a much weaker statute in the EEOA, can gain little reassurance from the United States’ example that their own equal employment legislation will improve their situation substantially. The EEOA’s record has not been impressive thus far. For example, the year before the EEOA was enacted, there were 140,000 women in managerial jobs in Japan. In 1990, five years after the EEOA’s enactment, the number had risen to only 190,000. Thus, without fundamental social changes, it appears that American and Japanese women entering the workforce today cannot reasonably expect to see true equal employment opportunity during their working lives.

125. See supra notes 105 and accompanying text.
126. For some interesting proposals for change in the United States, see Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 COLUM. L. REV. 1118 (1986).