

THE QUIET REVOLUTION: JAPANESE WOMEN WORKING AROUND THE LAW

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I. INTRODUCTION

Japan is not renowned for the muscle flexed by its feminist movement.¹ Although legal protections for women do exist, the stereotype of the subservient geisha² dominates Japanese women's international image, and fringe feminist activity has been sporadic at best. In fact, the Japanese media has a history of mocking the more radical women's movements.³

Despite the absence of a conventional feminist movement, women have made progress in the area of employment, partially due to the 1985 Equal Employment Opportunity Law (EEOL). Although the issue of women's employment has received a great deal of attention in the context of anti-discrimination law, with many in-depth studies analyzing both the EEOL's potency and its inadequacy, to date the law has not been placed within a meaningful social context. In order to evaluate the law's potential for spurring social change, it must be examined not in a vacuum, but within the framework of women's lifestyle choices.

Contrary to international perceptions of Japanese women, many social indices point to the conclusion that women in Japan are quietly re-

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In this Article the author refers to several articles and interviews that were either written or conducted in Japanese. Unless otherwise indicated, the author is responsible for the accuracy of all Japanese translation.

¹ For example, when companies reduced hiring for female college graduates in the 1990s due to the continuing recession, one author noted that "it would not have been surprising to see female students rioting, yet they did not even show any appetite for feminism." Kanai Yoshiko, *Issues for Japanese Feminism*, in VOICES FROM THE JAPANESE WOMEN'S MOVEMENT 5 (AMPO-Japan Asia Q. Rev. ed., 1996).

² Geishas are traditional female entertainers trained to provide singing, dancing, conversation, and companionship to customers (generally men) in certain restaurants and professional or social gatherings.

³ For instance, in the 1970s, a radical feminist group known as the "pink helmets"—a name given for the headgear they wore—provoked ridicule rather than respect. Led by Misako Enoki, a pharmacist, the high-profile group advocated women's rights and focused on issues involving contraception. See Kay Itoi, *The Great Viagra Emergency*, NEWSWEEK, Feb. 8, 1999, at 39.

volting. In an economy that depends on their disposable labor, women are silently voting with their actions. Social phenomena documented by the press reflect that Japanese women are marrying later, having fewer children, and focusing their energies away from the traditional labor market. This Article posits that women's failure to act in a traditional way is a direct response to the specific obstacles that Japanese women face in the job market.

In addition to claiming the dubious distinction of last hired and first fired, Japanese women are not given jobs with responsibilities commensurate with their abilities and education. This situation has influenced women to adopt coping strategies that lead them to work around the system rather than conform to it. Frequent talk of the aging society and shrinking labor pool seems to point in the direction of increased utilization of women and their skills in the workplace. This Article argues, however, that recent changes in women's work styles will effectively preclude their utilization and the future ability of the country's economic leaders to call on women's labor at their convenience. With an impending labor shortage due to demographic changes, the government finds itself in a position where it is unable to ignore the effects of women's private actions. The government's increased attention to this area, however, is not necessarily motivated by a concern for women's equality, but by a fear for the security of the economy and the pension system.

The EEOL has progressed in tandem with these external social occurrences. The law's introduction signifies an important milestone for Japanese women that has produced some tangible results; however, to date, many of the successes that have been attributed to the law are, in reality, the product of labor shortages caused by an economic boom and demographic demands. The EEOL's revision in 1997 heralded an opportunity for the law to shape women's employment, but recent evidence suggests that the amendments are not sufficiently strong. While it remains to be seen what role this law will play in the future of women's employment, women have instigated a quiet revolution, providing pressure for change from within the system. In the meantime, women continue to work around the law.

Focusing primarily on recent behavioral trends of working women, this Article illustrates the interplay between legal developments and women's reactions in the arena of employment discrimination. Part II examines women's traditional work patterns and evaluates the improvements women experienced in the mid-1980s, taking into consideration the role labor shortages played vis-à-vis the law. It then turns to recent work-related social phenomena and develops a typology of coping mechanisms women employ in the face of persistent stereotyping and discrimination. Finally, it fleshes out the conclusion that a quiet revolution has begun. Part III summarizes the development of the background law prior to the EEOL, and analyzes the EEOL and its recent revision.

Part IV offers a discussion of suggested further amendments, given the history of the EEOL and the present social context of Japan. It concludes with a discussion of social change in Japan and the role played by law and external pressure, with an eye toward the potential for women to bring about legal and subsequent social change by harnessing the internal pressure they are capable of exerting.

II. SOCIETAL CONTEXT FOR WOMEN AND EMPLOYMENT

A. *A Brief History of Japanese Women and Work*

Despite the increased participation of women in the Japanese labor force,⁴ structural impediments affect women's employment patterns and hinder their formal integration into the workforce. Two qualities of the Japanese style of management—lifetime employment and seniority-based promotions—distinctly influence women's labor force participation.⁵ In a lifetime employment model, the bulk of hiring occurs at entry-level positions as opposed to lateral hiring. Japanese corporations traditionally target recent high school and college graduates when hiring regular employees for entry-level jobs.⁶ These new employees will eventually “constitute the backbone of corporate society” as they advance systematically within the company structure.⁷ Furthermore, advancement takes place within the company's internal structure, where status and wages are determined by age and length of service.⁸

This requirement of uninterrupted service creates a unique disadvantage for many women. In the event that a woman opts to suspend work upon marriage or childbirth and subsequently decides to reenter the workforce, she must do so either on a part-time basis or as a temporary worker. In other words, she must sacrifice her previously acquired seniority and start from “the bottom of the job hierarchy,” regardless of her educational level or previous work achievement.⁹ Consequently, the job interruption and resumption that many women find necessary in order to balance the competing demands of home and work significantly diminish their potential for job advancement and status attainment.

⁴ Takashi Araki, *Recent Legislative Developments in Equal Employment and Harmonization of Work and Family Life in Japan*, JAPAN LAB. BULL., Apr. 1, 1998, at 5, available at <http://www.jil.go.jp/bulletin/year/1998/vol37-04/05.htm>.

⁵ See Kyoko Kodera, *The Reality of Equality for Japanese Female Workers: Women's Careers Within the Japanese Style of Management*, SOC. JUST.: J. CRIME, CONFLICT & WORLD ORD., 136–37 (Summer 1994).

⁶ Linda N. Edwards, *Equal Employment Opportunity in Japan: A View from the West*, 41 INDUS. & LAB. REL. REV. 227, 244 (1988) [hereinafter Edwards, *View from the West*].

⁷ *Recruiting Plans for New Grads for Fiscal 1995*, JAPAN LAB. BULL., July 1, 1994, at 2, available at <http://www.jil.go.jp/bulletin/year/1994/vol33-07/02.htm>.

⁸ Kodera, *supra* note 5, at 138.

⁹ *Id.*

Traditionally, the first priority for Japanese women has consisted of the home and the family, as reflected by women's cycle of exiting and reentering the labor market to accommodate marriage and children. Women's employment behavior resembles a pattern commonly referred to as the M-curve, because their peak participation in the labor market occurs at ages twenty to twenty-four as regular workers and again at ages thirty-five to fifty, albeit this time as temporary workers.¹⁰ Typically, after graduating from junior college or college, women in their early twenties work for several years until marriage or childbirth. In the past, the decision to exit the workforce was often influenced by company policies that pressured or forced women to quit upon marriage.¹¹ Women return to work in their mid-thirties or forties, after the childrearing years have passed.¹² Thus, the M-curve pattern allows women to minimize the difficulties of balancing a job with a family and to fulfill their roles as mothers and wives while freeing their husbands to devote themselves to corporate Japan.

Employers have utilized female labor both to reduce labor costs and to increase the flexibility of the labor force in order to meet the demands of the economy. In the past, many employers cut costs by hiring only female high school and junior college graduates, rather than college graduates, because their lower educational levels justified paying them lower salaries. Since their jobs did not require special skills, compounded by the fact that they were often required to quit upon marriage, companies could replace these women with new graduates before they acquired enough seniority to become expensive labor.¹³

The part-time labor of middle-aged women has been similarly profitable for employers. Although part-time workers often clock hours commensurate with those of full-time employees,¹⁴ their labor is less expensive because they are not afforded the same wages, benefits, or stability as regular employees.¹⁵ Because they can be hired and fired in accordance with economic conditions,¹⁶ women constitute a group of temporary employees that function as a safety valve that affords firms flexibility during economic downturns,¹⁷ thereby protecting men's permanent employment

¹⁰ FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 125–26 (1987).

¹¹ Yoko Kawashima, *Female Workers: An Overview of Past and Current Trends*, in *JAPANESE WOMEN: NEW FEMINIST PERSPECTIVES ON THE PAST, PRESENT, AND FUTURE* 281 (Kumiko Fujimura-Fanselow & Atsuko Kameda eds., 1995).

¹² ALICE C. L. LAM, *WOMEN AND JAPANESE MANAGEMENT: DISCRIMINATION AND REFORM* 14 (1992) [hereinafter LAM, *WOMEN AND JAPANESE MANAGEMENT*].

¹³ Kawashima, *supra* note 11, at 280–81.

¹⁴ UPHAM, *supra* note 10, at 127.

¹⁵ *Id.* at 126; Nakano Mami, *Ten Years Under the Equal Employment Opportunity Law*, in *VOICES FROM THE JAPANESE WOMEN'S MOVEMENT*, *supra* note 1, at 68.

¹⁶ Millie R. Creighton, *Marriage, Motherhood, and Career Management in a Japanese "Counter Culture"*, in *RE-IMAGING JAPANESE WOMEN* 194 (Anne E. Imamura ed., 1996).

¹⁷ Daniel H. Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of—Stability?*, 43 *UCLA L. REV.* 635, 660 (1996).

status.¹⁸ Thus, in what some describe as a “low cost welfare system,”¹⁹ women are excluded from the group of core workers, and they have fewer privileges than their male counterparts.²⁰ In essence, structural impediments such as the seniority system, the lifelong employment system, and the M-curve pattern of employment allow companies to profit from the manipulation and curtailment of women’s labor force participation.

B. Improvements and What Accounts for Them

Following the EEOL’s passage in 1985, women were inundated with unprecedented job opportunities. For the first time, companies no longer recruited them separately from their male counterparts,²¹ career track positions became a viable option, and women’s labor force participation increased. In anticipation of increased opportunities at work, many college women opted for more marketable majors, choosing economics over literature.²² In light of these advances, many praised the EEOL as a success because the improvements coincided with the law’s introduction. Unpacking the chronology of events, however, suggests an alternate conclusion: the improvements formerly attributed to the law can be linked, instead, to a simultaneously occurring labor shortage caused by an economic boom coupled with a demographic decline.

This Section addresses the market’s interplay with the law and proposes that labor shortages—not the law—have played a major role in the increased utilization of women’s labor in Japan. Furthermore, it finds this increased utilization has not led to the employment of women in responsibility-wielding positions. These findings not only suggest that increased utilization does not necessarily equate with advancement, but also prompt an analysis of the effectiveness of the law’s ability to improve employment opportunities for women in the absence of labor shortages.

1. Improvements Because of Labor Shortages and Not the Law

In order to track the progress women have made in relation to the law and economic trends, it is necessary to examine women’s situations

¹⁸ Susan L. Houseman & Catherine G. Abraham, *Female Workers as a Buffer in the Japanese Economy*, AM. ECON. REV. 45 (May 1993).

¹⁹ Briitta Koskiahio, *Japanese Women in Their Society*, in WOMEN, THE ELDERLY AND SOCIAL POLICY IN FINLAND AND JAPAN: THE MUSE OR THE WORKER BEE? 107 (Briitta Koskiahio et al. eds., 1995).

²⁰ See Koderu, *supra* note 5, at 137.

²¹ *More New College Graduates [sic] to be Recruited in 1989*, JAPAN LAB. BULL., Aug. 1, 1988, at 2–3; *Recruitment of New Graduates for 1990*, JAPAN LAB. BULL., Sept. 1, 1989, at 3.

²² Linda N. Edwards, *The Status of Women in Japan: Has the Equal Employment Opportunity Law Made a Difference?*, 5 J. ASIAN ECON. 224 (1994) [hereinafter Edwards, *The Status of Women*].

in four discrete time periods: before the 1985 EEOL, during the “bubble economy” of the mid-1980s, during the recession of the 1990s, and following the passage and enactment of the 1997 EEOL.

Before the 1985 EEOL, women exclusively occupied secretarial—also known as “office lady”—positions.²³ Not only were managerial positions for women nonexistent, but it was also far easier for high school and junior college graduates to find employment because employers operated under the premise that they would not be able to extract as many years of work out of older university graduates before those women married.²⁴ As one scholar, Thomas Rohlen, aptly describes the situation: “In the final analysis, the [company] is run by older men, and it is a universal opinion among them that married women belong in the home. Only an extreme labor shortage could change their minds.”²⁵ Indeed, it was a labor shortage beginning in 1983 in the area of technical experts that first prompted the utilization of women in positions of substantially more responsibility.²⁶ The shortage of technology-savvy graduates resulted in increased hiring of female university graduates that continued into 1986—the year the EEOL was enacted. Hence, the shift toward inclusion of women in the labor force first appeared before the law was even passed and as a result of a labor shortage in a specific field of employment.

Expanding upon this tendency toward hiring women, the mid-1980s ushered in the “bubble economy,” and with this intense economic expansion, industries across the board experienced a shortage of workers.²⁷ It was at this time that EEOL supporters touted both the formal introduction of a two-track system separating managerial and clerical jobs and the increase in hiring for university women as “evidence” of the law’s efficacy. But the encouraging results lasted only as long as the boom economy, and when Japan was hit in 1991 with a recession—the worst it had seen in the post-war period²⁸—women bore the brunt of the ensuing cutbacks. As scholar Daniel Foote notes, during the late 1980s “when Japan was experiencing an intense labor shortage, women college graduates had little trouble finding jobs When the economy soured in the early 1990s, jobs for women graduates largely dried up.”²⁹ The media

²³ Kathleen Cannings & William Lazonick, *Equal Employment Opportunity and the “Managerial Woman” in Japan*, 33 *INDUS. REL.* 46 (1994).

²⁴ Kawashima, *supra* note 11, at 280–81.

²⁵ THOMAS P. ROHLEN, *FOR HARMONY AND STRENGTH: JAPANESE WHITE-COLLAR ORGANIZATION IN ANTHROPOLOGICAL PERSPECTIVE* 78 (1974).

²⁶ “Technical experts” refers to fields related to computers, new materials technology, and biotechnology. *Marked Tendency to Refrain from Employment of New School Graduates Next Spring*, *JAPAN LAB. BULL.*, Oct. 1, 1982, at 2.

²⁷ *Results of Surveys on Labor Shortage*, *JAPAN LAB. BULL.*, Jan. 1, 1990, at 2.

²⁸ *The Worst Recession Since WWII Appears Certain*, *JAPAN LAB. BULL.*, Feb. 1, 1994, at 1, available at <http://www.jil.go.jp/bulletin/year/1994/vol33-02/01.htm>.

²⁹ Foote, *supra* note 17, at 696.

dubbed the dilemma women found themselves in the “ultra ice age” for job hunting.³⁰

The recession of the 1990s and the corresponding “ice age” exposed women’s progress in the late 1980s as fragile and possibly fleeting. Many companies found themselves saddled with excess labor hired during the economic boom and confronted with the need to adjust employment levels. Due to the constraints of the lifetime employment system, companies sought to reduce labor costs in the only way they could: reductions in hiring.³¹ With the 1985 EEOL in place, one would expect to see uniform reductions in new graduate hiring; however, that was not the case. Instead, women fared much more poorly in the job market during the “ice age,” while men continued to find employment with relative ease.³²

The “ice age” continued steadily throughout the 1990s until the 1997-1998 academic year,³³ when newspapers began to report the “ice’s melting”³⁴ and a “warm air”³⁵ is blowing in, bringing with it an increase in women’s hiring. However, by the 1998-1999 academic year, media accounts pointed to an “ice age relapse,” with the Ministries of Labor and Education reporting employment offers for college seniors to be at the lowest level since they started tracking these figures in 1994.³⁶ Only 67.5% of job-hunting college seniors in March of 1999 found jobs by October of their senior year, and, as usual, males fared better than females, with 71.3% and 59.2% having found work, respectively.³⁷ The “ice age” and the accompanying drop in the employment rate for female university graduates finally bottomed out in the 1999-2000 academic year, and, according to the Ministry of Education and the Ministry of Labor, the proportion of university students graduating in 2000 who had been promised jobs increased as the figure for female students rose. Curiously, the percentage for male students dropped that year to a record low.³⁸

While the “ice age” influenced employers’ actions, and the law did little to intervene, women’s determination to work was not affected. In as much as educational choices reflect female students’ desire to place

³⁰ For an in-depth study of the “ice age” and the obstacles women faced in finding jobs during that period, see Robbi Louise Miller, *Women’s Job Hunting in the “Ice Age”: Frozen Opportunities in Japan*, 13 WIS. WOMEN’S L.J. 223, 233 (1998).

³¹ *The 2000 White Paper on Labour: A Summary of the Analysis*, JAPAN LAB. BULL., Sept. 1, 2000, at 14 [hereinafter *2000 White Paper*], available at <http://www.jil.go.jp/bulletin/year/2000/vol39-09/07.htm>.

³² Miller, *supra* note 30, at 225.

³³ The academic year in Japan begins in April and ends in March.

³⁴ *Mata Hyougaki [The Ice Age Again]*, CHUKOKU SHIMBUN, May 25, 1998.

³⁵ *Medatsu Kinmu Jigenteisei [A Work System of No Transfers Stands Out]*, NIHON KEIZAI SHIMBUN, Dec. 2, 1997.

³⁶ *Job Situation for College Seniors Worst in Years: Women Faring Worst*, JAPAN DIG., Nov. 10, 1998, <http://www.japandigest.com/complete/labor/19981110-labor-1.html> (last visited Oct. 12, 2001) (on file with author).

³⁷ *Id.*

³⁸ *End to the Decline in Rate of Promised Employment*, JAPAN LAB. BULL., Feb. 1, 2001, at 4, available at <http://www.jil.go.jp/bulletin/year/2001/vol40-02/02.htm>.

themselves in a competitive position for hiring and to prepare themselves for the rigors of work, the previously observed shift in choice of majors in the 1980s was mirrored in the late 1990s. Female students responded to escalations in the "ice age" by steering clear of majors in "bridal departments" such as literature, which is seldom on the list of majors that employers will consider for hiring purposes.³⁹ In fact, newspapers reported that female students were just as preoccupied with job prospects as male students; between 1990 and 1999, the number of high school females sitting for the literature entrance exam to Keio University⁴⁰ decreased by thirty-four percent, whereas female applicants for the economics department jumped 111% and in the business and commerce department rose by 59%.⁴¹ Therefore, between the years 1990 and 1999, when female applicants were kept out of the job market, women reaffirmed their commitment to working by preparing themselves for careers.

The recession of the 1990s provides a window through which to gauge the law's efficacy in the absence of a labor shortage. The law proved ineffective, as evidenced by the unabated recruitment and hiring discrimination female graduates experienced. The "ice age," one expert observes, "led to a realization of the limitations of the current regulations."⁴² The EEOL's fitful performance in the "ice age" raises the fundamental quandary of what role the law can and should play given its poor performance during times of economic downturn. The 1985 EEOL provided insufficient protections for women, but the much anticipated amendments to the law passed by the Diet⁴³ in 1997 gave rise to the hope for equality protections strong enough to remain effective even in the absence of a labor shortage.

In the wake of the amended EEOL's 1999 enactment, the media applauded employers' efforts to comply with the new law. Newspapers detailed the car industry's responses to the revised EEOL. For example, Toyota hired more women to its production lines and modified its tools in order to reduce the physical demands of the job.⁴⁴ Likewise, Mazda reportedly granted raises to roughly one-third, or 500, of its female white-collar workers, and promoted two or three of them to genuine management positions.⁴⁵ Although the media reported that these events were in

³⁹ *University Lit Departments Suffer as Women Opt to Study for Paying Careers*, JAPAN DIG., Sept. 17, 1999 [hereinafter *Lit Departments Suffer*], <http://www.japandigest.com/complete/education/19990917-education-1.html> (last visited Oct. 12, 2001) (on file with author).

⁴⁰ A prestigious private university in Tokyo.

⁴¹ *Lit Departments Suffer*, *supra* note 39.

⁴² Araki, *supra* note 4, at 6.

⁴³ The Diet is the Japanese Parliament.

⁴⁴ *Toyota Will Hire More Women, Modify Assembly Lines So They Can Work*, JAPAN DIG., Apr. 7, 1999 [hereinafter *Toyota Will Hire More Women*], <http://www.japandigest.com/complete/labor/19990407-labor-4.html> (last visited Oct. 12, 2001) (on file with author).

⁴⁵ *Mazda Will Give 500 White Collar Women Raises, Promote a Handful*, JAPAN DIG., Aug. 5, 1999 [hereinafter *Mazda Will Give 500 Raises*], <http://www.japandigest.com/com->

response to the passage of the EEOL's amendments that mandated men and women be treated more equally, there is reason to believe that the law does not fully deserve the credit for these corporate giants' gestures.

Given the fact that prior advances for women seem to be attributable to labor shortages working concomitantly with the law, this current change in the tide for women's employment should be viewed skeptically. Indeed, when evaluating whether the 1997 EEOL is the impetus behind these improvements, it is important to note that the media also acknowledges an increasingly grave demographic situation predicted to lead to a labor shortage. One newspaper account added the editorial comment that Toyota is "implicitly recognizing that years of ultra-low birthrates are now shrinking the available pool of young workers, making it necessary to hire women for such jobs."⁴⁶

The imminent labor shortage is a product of a rapidly aging society and a plummeting birthrate. According to the 2000 census, senior citizens age sixty-five and older account for 17.5% of Japan's population, making Japan the oldest society after Italy.⁴⁷ It is estimated that by 2020, one in every four Japanese will be over sixty-five, in part because young Japanese are avoiding marriage.⁴⁸ Increases in the average age for first marriage and first childbirth are cited as contributing factors in the birthrate decline.⁴⁹ In fact, 1999 marked the lowest number of children born in Japan since record-keeping began one hundred years earlier. 1999 also marked the lowest birthrate—or number of children the average woman will bear in a lifetime—in the last one hundred years.⁵⁰ Overall, a labor shortage is expected because Japan's population is growing slowly—people are marrying less, divorcing more, and feeling less compelled to have children.⁵¹

Optimism typically surrounds the expected labor shortage in terms of its positive implications for female employees. For instance, as the 2000 White Paper on Labour expounds: "In order to respond to changes in the composition of the labor force due to the aging of society and the

plete/labor/19990805-labor-1.html (last visited Oct. 12, 2001) (on file with author).

⁴⁶ *Toyota Will Hire More Women*, *supra* note 44.

⁴⁷ In Italy, senior citizens age sixty-five and older account for 18.2% of the population. *Seniors Now Outnumber Children by Almost Four Million*, JAPAN DIG., July 2, 2001 [hereinafter *Seniors Now Outnumber Children*], <http://www.japandigest.com/recent/society/20010702-society-1.html> (last visited Oct. 12, 2001) (on file with author).

⁴⁸ *Id.*

⁴⁹ *Birth Rate Inched Up in 2000, Government Blames "Millennium Effect,"* JAPAN DIG., June 21, 2001, <http://www.japandigest.com/recent/society/20010621-society-1.html> (last visited Oct. 12, 2001) (on file with author).

⁵⁰ *Births Fell to 100-Year Low in '99; Birth Rate at Record Low . . .*, JAPAN DIG., June 30, 2000 [hereinafter *Births Fell to 100-Year Low*], <http://www.japandigest.com/complete/society/20000630-society-1.html> (last visited Oct. 12, 2001) (on file with author).

⁵¹ *More Japanese Feel Marriage and Children Are Optional, Divorce Is Okay*, JAPAN DIG., Jan. 7, 1998 [hereinafter *Marriage and Children Are Optional*], <http://www.japandigest.com/complete/society/19980107-society-1.html> (last visited Oct. 12, 2001) (on file with author).

declining number of children . . . the shrinking labor force requires that firms consider carefully how to make more effective use of . . . females in the population.”⁵² Scholars often hold out the promise of the shortage as a panacea to the problems women face, especially those problems exposed in the “ice age,” and predict that such a shortage will encourage an increase in the utilization of women. One author hypothesizes that “[a]lthough the women have been feeling the heat of the recession more than the men, with a labor shortage, the Japanese will have to hire more female workers which will, with the EEOL already in place, change the face of discrimination in Japan more than any coercive laws.”⁵³ This prediction raises the danger of conflating equal opportunity with labor shortage-induced utilization of women's labor.

Assuming the predictions are true and that the improvements apparent in the car industry are indicative of a growing concern regarding a labor shortage, the theory that the conditions of women's employment are more dependent upon the economy than the law is strengthened. When viewed through the lens of recent history, it becomes clear that labor shortages caused by the booming economy of the mid-1980s and demographic changes in the 1990s are driving improved employment opportunities for women. Given the relative weakness of the law,⁵⁴ it is misdirected praise that attributes these changes to the legal advances embodied in the 1985 and 1997 EEOL. While the law and its revision represent a significant advancement for women's legal standing in Japan,⁵⁵ the economy seems to have driven the bulk of the material improvements that women experienced.

It is possible that as more women venture into the workplace, society will gradually become accustomed to their presence and will come to accept their increased workforce participation over time. But, the law as it stands is not a feasible vehicle for progress if advances reverse every time the economy slows. For women's employment to follow the economy so closely, improving only when labor pools are depleted, places women in a precarious position. If one takes seriously the notion of equal opportunity, one cannot mean for it to operate only when it is economically expedient.

⁵² 2000 *White Paper*, *supra* note 31, at 14.

⁵³ Allen D. Madison, *The Context of Employment Discrimination in Japan*, 74 U. DET. MERCY L. REV. 187, 207 (1997) (construing Kiyoko Kamio Knapp, *Still Office Flowers: Japanese Women Betrayed by the Equal Opportunity Law*, 18 HARV. WOMEN'S L.J. 83 (1995)).

⁵⁴ See discussion *infra* Parts III.B.2.d, III.B.3.b.

⁵⁵ See discussion *infra* Parts III.B.2.c, III.B.3.a.

2. *The Positions Made Available to Women Are Not Really Improvements*

Given the increasing utilization of women in the workforce, it is important to advance the analysis one step further and examine the content of the positions made available to them. If labor shortages are indeed responsible for improving job opportunities for women, then a breakdown of the types of jobs women receive is necessary in order to determine the actual extent of that improvement. For that purpose, this Section evaluates the jobs the majority of women occupy, and concludes that the increased utilization took place within the strict framework of labor market segregation.

From the onset, the 1985 EEOL led primarily to an increase in women in secretarial (*ippan shoku*), rather than managerial (*sogo shoku*), positions. During the “ice age,” this phenomenon became more pronounced as companies reduced the number of secretarial positions in favor of part-time and temporary workers. Thus, women are employed in jobs wielding less responsibility than men, and this segregation, in and of itself, is a form of discrimination.

a. *White-Collar Positions*

Even though the 1985 EEOL opened the white-collar managerial track to women, companies only allowed a select few to enter. Career track jobs are divided into three categories, in descending order of prestige and responsibility: bureau chief (*bucho*), department chief (*kacho*), and section chief (*kakaricho*).⁵⁶ Women hold only 3.5% of career track positions in Japanese companies,⁵⁷ and 60.6% of those women indicate they are “certainly subject to discrimination” in the areas of promotion, salary, and job content.⁵⁸ A 1999 survey conducted by the Ministry of Labor concluded that promotion of women to managerial jobs is limited, the highest percentage of women on the career track reside on the lowest rung of management (*kakaricho*), and the percentage of women in the two highest positions of *bucho* and *kacho* has actually decreased since 1995.⁵⁹

In short, women are conspicuously absent from positions of decision making authority in Japanese corporations, as demonstrated by both sta-

⁵⁶ Tadashi Hanami, *Equal Employment Revisited*, JAPAN LAB. BULL., Jan. 1, 2000, at 8, available at <http://www.jil.go.jp/bulletin/year/2000/vol139-01/05.htm>.

⁵⁷ *Women Make Up Just 3.5% of “Career Track” Workers After 14 Years of “Equality,”* JAPAN DIG., June 8, 2000 [hereinafter *Women Make Up Just 3.5% of “Career Track”*], <http://www.japandigest.com/complete/labor/20000608-labor-1.html> (last visited Oct. 12, 2001) (on file with author).

⁵⁸ *Id.*

⁵⁹ Hanami, *supra* note 56, at 8.

tistical and anecdotal evidence. When Mazda announced the promotion of women to managerial positions, it was referring to promotions to the lowest position, section chief, for only two or three out of one thousand white-collar female employees.⁶⁰ Since only a quarter of those companies surveyed offer career track jobs to women,⁶¹ and those companies that do offer such jobs hire few women to these positions, it is apparent that the majority of female employees are confined to the pink-collar world of clerical positions.⁶²

b. Pink-Collar Positions

While women were increasingly hired to clerical jobs starting in the mid-1980s,⁶³ many companies cut back by slowing or halting the hiring of new graduates for clerical track employees⁶⁴ during the "ice age," and opted instead for dispatched or temporary workers (*hakken*).⁶⁵ For the first time, a large influx of recent female university graduates found their first jobs at temporary staffing agencies.⁶⁶ Thus, the clerical track began to disappear as firms replaced clerical workers with temporary employees, and, correspondingly, women's relative position in the labor market sunk another notch as a result of this outsourcing.

Temporary positions do not offer the stability⁶⁷ or benefits provided to regular employees. One scholar notes that the law authorizing private temporary employment agencies, the Worker Dispatching Act of 1985, undermines the EEOL in that it allows firms to continue to control the employment and dismissal of women in clerical positions who may refuse to retire upon marriage.⁶⁸ In this way, the dispatching law revokes that which the EEOL is purported to grant.

As the opportunities available to women narrow, employers encourage female graduates to adjust their expectations downward and to take whatever positions are presently available to them, while comforting the women with the remote *possibility* of promotion to the jobs—be it mana-

⁶⁰ *Mazda Will Give 500 Raises*, *supra* note 45.

⁶¹ *Women Make Up Just 3.5% of "Career Track"*, *supra* note 57.

⁶² Miller, *supra* note 30, at 239.

⁶³ Koskiaho, *supra* note 19, at 110.

⁶⁴ *Gourika Ga 'Kintou' Jistugen [Equality Appears in Restructuring]*, YOMIURI SHIMBUN, July 3, 1998.

⁶⁵ This pattern became apparent during the mid- and late 1990s. *Best Use of General Clerical Workers*, JAPAN LAB. BULL., Sept. 1, 2001, available at <http://www.jil.go.jp/bulletin/year/2001/vol40-09/02.htm#1>; *Mata Hyougaki [The Ice Age Again]*, *supra* note 34.

⁶⁶ *Shinsotsu Haken [New Graduates as Temps]*, YOMIURI SHIMBUN, July 5, 1998; *Shinsotsu Josei Haken Wo Kakudai [A Magnification in Female New Graduate Temporary Workers]*, NIHON KEIZAI SHIMBUN (evening), Dec. 22, 1997.

⁶⁷ Firms are not legally permitted to employ temporary workers for more than one year, with the exception of specified types of jobs. See *Best Use of General Clerical Workers*, *supra* note 65.

⁶⁸ Foote, *supra* note 17, at 674.

gerial or secretarial—they originally sought. In essence, companies dissuade women seeking managerial posts from pursuing those jobs and instead suggest that they apply for secretarial positions that may lead to promotion to the career track in a few years.⁶⁹ Similarly, they prod new female graduates to view temporary employment positions as another route to the clerical track, insisting that in some cases temps are invited to become regular employees at the host firm after having worked there a year.⁷⁰

The 1998-1999 academic year's job hunt for female university students reflected these trends. Women wishing to find jobs were expected to "adjust" their expectations downward and accept any job available. In place of the work they originally sought, these "Adjusters" were offered the slim prospect of promotion. "Adjusters" recount how company representatives impressed upon them that "all the women who want to be hired by this company come in through the secretarial track."⁷¹ One female university student explains:

[E]ven after I told the interviewer I was only interested in the managerial track, he recommended I apply for the secretarial one. He said there was always the chance I could be promoted to a managerial job after a few years if I performed well; but when I asked him how often that actually happens, he admitted not very.⁷²

Thus, in their quest to find work, many women find themselves required to recalibrate their expectations. In addition, as attorney Nakano Mami points out, new graduates with no special skills who become dispatch workers run the risk of ending up as short-term labor that is moved about from place to place.⁷³

In sum, the increased utilization of women's labor occurred not at the management level but has concentrated primarily in pink-collar secretarial work and, more recently, in temporary positions. Consistent with this analysis, when Toyota decided to hire more women in order to abide by the amended EEOL, the women hired joined the low skill blue-collar work of the production lines.⁷⁴ Seeing that the managerial track has never seriously been open to large numbers of women, this series of events is tantamount not only to blocking women from the more desirable jobs but

⁶⁹ Some companies are planning to expand women's limited opportunities by promoting clerical track workers to managerial posts in incremental expansions of responsibility. *Best Use of General Clerical Workers*, *supra* note 65.

⁷⁰ *Shinsotsu Haken [New Graduates as Temps]*, *supra* note 66.

⁷¹ Interview with "Jun," Female University Student, in Tokyo, Japan (May 1998) (on file with author).

⁷² *Id.*

⁷³ *Shinsotsu Haken [New Graduates as Temps]*, *supra* note 66.

⁷⁴ *Toyota Will Hire More Women*, *supra* note 44.

also to phasing women out of the formal employment pool and cornering them into temporary positions. When labor shortages replace the law as the driving force behind increased opportunities, and when those opportunities come in the form of lower paying, less prestigious jobs—as represented by the “Adjusters” who are forced by employers to recalibrate their original expectations—the law’s ability to promote women’s advancement must be questioned.

C. Work-Related Social Phenomena

Both the government and the media have expressed their deep concern about what appears to be a growing trend in Japan: women are delaying both marriage and childbirth. According to the 2000 census, fifty-four percent of women between the ages of twenty-five and twenty-nine are unmarried—a 5.9% increase from just five years before.⁷⁵ It was not long ago that unmarried women over the age of twenty-five were considered “Christmas cakes,” named for the fact that they both are unwanted after the twenty-fifth has passed.⁷⁶ The unexpected shift in women’s behavior in the private sphere toward the end of the 1990s appears to be causally related to the treatment of women in the realm of employment.

One of the primary corporate rationales behind relegating women to secondary jobs is the difficulty that women have balancing the competing demands of work and family. This difficulty is aggravated by the fact that Japanese husbands are notorious for the negligible contribution they make toward household chores.⁷⁷ It becomes a self-fulfilling prophecy: firms claim that women’s true dedication is to the family in order to justify placing them in jobs with limited responsibilities, and subsequently women display less commitment to their jobs, given the reality that the content of the jobs offered to them is less than stimulating. Overall, the less control women have over the work opportunities available to them, in part because of balancing difficulties arising from work and family, the more control they seize over decisions they can regulate: the age at which they begin having the very families that inhibit their career prospects.

1. Balancing Home and Work Life Has Always Been Difficult

In Japan, the typical problems associated with balancing a career and a household are compounded by the societal expectation that the burden of caring for both the elderly and the young falls squarely on the woman.⁷⁸ Women who attempt to reconcile the competing commitments

⁷⁵ *Seniors Now Outnumber Children*, *supra* note 47.

⁷⁶ *Id.*

⁷⁷ See Dirk Johnson, *Until Dust Do Us Part*, NEWSWEEK, Mar. 25, 2002, at 41.

⁷⁸ UPHAM, *supra* note 10, at 145.

of family and work often find themselves alone, without the support of their husbands, employers, colleagues, or even the mothers of their children's playmates.⁷⁹ Labor legislation has aimed to address the harmonization of work life and home life,⁸⁰ but the task remains difficult.

Indicative of the governmental objective of harmony between these spheres, on January 6, 2001, the Ministry of Labor merged with the Ministry of Health and Welfare to form the new Ministry of Health, Labor, and Welfare, supervising a vast range of policies related to all stages of people's lives.⁸¹ Significantly, the Ministry addresses issues from childbirth and childcare to employment and work-related concerns, including matters affecting the shrinking population and the aging society.⁸² This combination of responsibilities involving women's capacity to balance family and work signals the government's understanding that matters at home affect how women behave in the labor market. Further illustrating the inextricable link between family and women's employment, the EEOL, the Labor Standards Law, and the Child Care and Family Care Leave Law were revised concurrently in the late 1990s in an effort to provide equal employment opportunities by prohibiting discrimination and providing legal assistance to help employees balance family with work.⁸³

Recent governmental attention to the problem highlights the uphill battle Japanese women face in balancing their potential careers with their potential families. This struggle to balance is a motivating factor behind both women's familial decisions—including the most basic decisions of whether to marry or have children—and their movement away from the structured job market. In recent years, social phenomena such as forestalled marriages, lower birthrates, and adult children remaining in the family home have dominated the press. Young women are opting for less traditional lifestyle choices and job routes. This Section explores the interrelation between women's difficulties in balancing a work life with a personal life and recent social trends.

2. *Demographic Shifts, the Causal Connection, and the "Feedback Effect"*

Japan is experiencing a demographic shift of enormous dimensions. In the background lurks an aging population, and in the foreground, the

⁷⁹ See generally MURIEL JOLIVET, JAPAN: THE CHILDLESS SOCIETY? THE CRISIS OF MOTHERHOOD 169–88 (Anne-Marie Glasheen trans., Routledge 1997) (giving various testimonies of working women and analysis of their personal accounts).

⁸⁰ See generally Araki, *supra* note 4, at 8 (citing Michiyo Kurokawa, *The Harmonization of Working Life and Family Life: Japan*, 30 BULL. COMP. LAB. REL. 45 (1995)).

⁸¹ *Ministry of Health, Labour and Welfare Founded*, JAPAN LAB. BULL., Jan. 1, 2001, at 1–3, available at <http://www.jil.go.jp/bulletin/year/2001/vol40-01/01.htm>.

⁸² *Id.*

⁸³ Araki, *supra* note 4, at 5.

plummeting fertility rate and rising age of marriage decrease the potential labor pools upon which employers may call. Additionally, the marriage and birth declines have the potential to spell disaster for the national social security system because as the birth rate decreases, the government must raise the taxes needed to support retirees accordingly.⁸⁴ Both problems stem from the labor market's inability to incorporate women in worthwhile jobs on equal footing with men.

Belying the stereotype that Japanese women seek marriage as their capstone accomplishment, in 1998 only 30.1% of people in their twenties supported the statement that "[a] woman's happiness is found in marriage. It's better that a woman get married"—a decrease of 9.1% from 1992.⁸⁵ Furthermore, the same survey indicates an increase in societal support for divorce.⁸⁶ This trend is apparent in the younger generation as well; the findings of a Japan Youth Research Institute poll indicate that only twelve percent of Japanese female junior and senior high school students (twenty percent when male students are included) view marriage as a necessity, compared to seventy-nine percent of their counterparts (males and females combined) surveyed in New York.⁸⁷ Because Japanese women now find themselves in a position where they are financially self-sufficient, they are able to maintain their career orientation longer by remaining single, while leaving open the option to marry later.⁸⁸ Generally, then, it appears that Japanese women today do not place the same emphasis on marriage as previous generations have.

Deeply intertwined with the issue of delayed marriage is the accompanying decline in the birth rate. This too has been linked to the difficulty that a growing number of highly educated women in the labor force experience in balancing their office work with their unpaid responsibilities at home.⁸⁹ Women's reduction in the number of children they have is symptomatic of the underlying balancing problem, which is compounded by the often-cited inadequacy of Japan's child daycare facilities⁹⁰ and the uncertainty many women face as to whether their jobs will

⁸⁴ *Births Fell to 100-Year Low*, *supra* note 50; Kikuyo Komesu, *More Working Women Needed to Save Pension System*, KYODO NEWS SERV. JAPAN ECON. NEWSWIRE, June 9, 2000.

⁸⁵ *Marriage and Children Are Optional*, *supra* note 51.

⁸⁶ According to a survey by the Management and Coordination Agency, 54.2% of those surveyed indicated an acceptance of divorce if members of the couple are not satisfied in their relationship, contravening the stigma divorce once carried in Japanese society. This is a 9.8% increase from a similar survey in 1992. *Id.*

⁸⁷ *20% of Students See Marriage As Must*, JAPAN TIMES, Aug. 1, 2001, at 2.

⁸⁸ Kazuko Tanaka, *Changing Marriage and Family Structure: Women's Perspective*, JAPAN LAB. BULL., Jan. 1, 1992, at 5, *cited in* Jacqueline M. Efron, Comment, *The Transnational Application of Sexual Harassment Laws: A Cultural Barrier in Japan*, 20 U. PA. J. INT'L ECON. L. 133, 169 (1999).

⁸⁹ Katsutoshi Kezuka, *Legal Problems Concerning Part-Time Work in Japan*, JAPAN LAB. BULL., Sept. 1, 2000, at 7, available at <http://www.jil.go.jp/bulletin/year/2000/vol39-09/06.htm>.

⁹⁰ *1997 White Paper on Working Women*, JAPAN LAB. BULL., Apr. 1, 1998, at 2, *cited*

be waiting when they return from maternity leave.⁹¹ In 1998, almost forty-three percent of the respondents to a government survey asserted that children were not a necessary component of marriage—a twelve percent increase from 1993.⁹² When questioned as to the source of this new phenomenon, many cited the “difficulties of juggling work and family responsibilities.”⁹³

Recognizing the severity of the situation, the government has implemented studies and panels designed to find the causes of, and a “solution” to, the declining birthrate.⁹⁴ However, commentators have criticized the fact that ever since the birth rate “shock” first hit in 1990, the government has exerted huge efforts to stop the baby decline but has taken “precious little action to make women want to bear more children.”⁹⁵ For example, in 1997, Prime Minister Hashimoto—infamous for his suggestion in 1990 that women’s excess education was to blame for the baby shortage—established the Gender Equality Council, designed as a government panel to explore, among other things, the reasons behind the birthrate decline.⁹⁶ Under the Council’s direction, Prime Minister Mori created a panel to devise plans to assist working women with childrearing.⁹⁷ The suggestions, however, took the form of examining the prospect of “childbirth allowances” or interest-free loans to help defray childbirth costs.⁹⁸ By focusing on the financial worries of marriage and children, the government—motivated by an obvious concern for more babies rather than concern for women—may be missing the point. Japanese feminists blame the baby shortage on the lack of equality, indicating the need for improvements in women’s opportunities.⁹⁹ The government has overlooked the underlying problem of women’s employment and has opted instead for gimmicks aimed at encouraging women to marry sooner and have more children.¹⁰⁰ Some analysts fear that by meddling in entirely

in Efron, *supra* note 88, at 168.

⁹¹ *Births Fell to 100-Year Low*, *supra* note 50.

⁹² *Marriage and Children Are Optional*, *supra* note 51.

⁹³ *Id.*

⁹⁴ For example, the Health & Welfare Ministry has planned a long-term study of fifty thousand couples due to begin a family. The study purports to examine the differences in childrearing by working and non-working mothers and to establish whether or not a relationship exists between household finances and a propensity to have children. *Government Will Track 50,000 Couples Long Term to Understand Baby Bust*, JAPAN DIG., Oct. 12, 2000, <http://www.japandigest.com/complete/society/20001012-society-1.html> (last visited Oct. 12, 2001) (on file with author).

⁹⁵ *Births Fell to 100-Year Low*, *supra* note 50.

⁹⁶ Steven Butler, *In Japan, Finally the Women Catch a Break: But Will the Salaryman Do More at Home?*, U.S. NEWS & WORLD REP., July 5, 1999, at 41.

⁹⁷ *Behind the Quest for More Babies*, JAPAN TIMES, Jan. 10, 2001, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?ed20010110a1.htm>.

⁹⁸ *Id.*

⁹⁹ Butler, *supra* note 96.

¹⁰⁰ For instance, women still feel pressure to quit working after marriage or childbirth, and still experience difficulty reentering the market in positions of responsibility. Further, women are not optimistic about the 1997 EEOL and the government’s ability to assist them

private matters, the government's proposals may have the opposite effect of that which is intended.¹⁰¹

An apparent causal connection exists between society's treatment of women's employment and women's personal actions in the private sphere—actions that, in turn, produce dire effects on the labor market. The operation of this “feedback effect” is twofold. First, when a low fertility rate leads to an anticipated labor shortage, the obvious response by employers is to increase the utilization of women. It follows that, in a society where women are accountable for a disproportionate amount of the familial duties, it becomes necessary to encourage women's employment participation by mitigating the difficulties they face in balancing home and work.¹⁰² Second, the very difficulties that women face in balancing work and family are the main factors behind the decrease in marriage and childbirth that ultimately cause the labor shortage. According to one professor at the University of Tokyo, “[T]he low fertility rate is said to be closely linked with an undesirable, but inevitable, choice on [the] part of working women . . . amidst the current Japanese practices it would be nearly impossible to be able to balance both work and family responsibilities simultaneously.”¹⁰³

In other words, a vicious cycle is set in place where (1) poor working conditions, both in the sense that women do not hold positions of responsibility and in the sense that balancing a career and a family is a near impossibility, result in (2) women's decisions to delay marriage and children, which subsequently produces (3) a demographically induced labor shortage, thus necessitating (4) the increased utilization of female labor, often under poor working conditions, again looping back to the

in having both a family and a job. *Behind the Quest for More Babies*, *supra* note 97. According to Nancy Patterson, “In response to this perceived crisis, the government introduced a ‘baby bonus’ as an incentive to have children: [less than fifty dollars] per month for each of the first two preschool children and twice that for a third child.” Nancy Patterson, Recent Development, *No More Naki-Neiri? The State of Japanese Sexual Harassment Law*, 34 HARV. INT'L L.J. 206, 208 (1993).

¹⁰¹ *A Promise of Change for Women*, JAPAN TIMES, May 1, 1999; *Behind the Quest For More Babies*, *supra* note 97. Although it goes beyond the scope of this Article, it is interesting to note that a permeable membrane divides the private and the public arena concerning what the appropriate roles should be of the family and the State in guiding behavior. The boundary surrounding what issues the State should address is malleable, as evidenced by the fact that while today women may complain that the government is intruding on their “private” choice of whether to have children, during the Meiji period the government instituted a policy of *ryousai kenbo*, or “good wife, wise mother,” that encouraged women to “focus on motherhood and raise loyal subjects to the emperor.” See Robert Larsen, *Ryosai Kenbo Revisited: The Future of Gender Equality in Japan After the 1997 Equal Employment Opportunity Law*, 24 HASTINGS INT'L & COMP. L. REV. 189, 190–91 (2001). In Larsen's view, the Japanese government consistently manipulates ancient Confucian tradition through slogans as a tool to generate support for its specific policy agendas. *Id.* He concludes contemporary gender stereotypes in Japan regarding women's work can be attributed to government-sponsored Confucian based ideologies. *Id.* at 227–28.

¹⁰² Araki, *supra* note 4, at 8.

¹⁰³ *Id.*

initial problem. From the point of view of employers, this system functions effectively and economically. Conspicuously absent, however, is the point of view of women.

Unfortunately, when thinking about ways to increase women's participation in the labor market, the attention inevitably diverts to worries that the low fertility rate will irrevocably damage the labor pool or the social security system,¹⁰⁴ thus failing to appreciate that the cause of such instability is rooted in the status quo of women's employment. The very system that confines the role of women's labor to that of a safety valve and relies on women for use when the economy turns sour, is also responsible for creating the conditions of employment that directly lead to women's reproductive reductions and, ultimately, the utilization of women's labor. It is only due to the impending labor shortage that an effort is being made to ease the combined burden of working and caring for a family. According to the "feedback effect" theory, that very labor shortage is arguably caused by the balancing issues that are only now being addressed—not out of a recognition that equal opportunity for women is long overdue, but out of the realization that the labor market needs women, especially those in simple, repetitive jobs. Only by addressing the issue of women's working conditions directly, rather than an afterthought to ameliorate the effects of the labor shortage, will the cycle be broken and lasting progress achieved.

The media bemoans Japanese women's reluctance to produce babies in much the same fashion as it chronicles Japanese women's inability to find jobs in the "ice age." The situation is lamented for the effects it will have *on* the economy but not for what it reflects *about* the economy. When addressing issues of women directly, the press—foreign and Japanese alike—holds up labor shortages as the solution to employment discrimination, asserting that such shortages will force firms to rely on the help of female labor, which will be advantageous to women. According to one journalist, "Creating an environment in which women feel comfortable having children and creating incentives for more women to join the work force will be key to revving up the Japanese economic engine."¹⁰⁵ However, there is reason to doubt whether cheap female labor will be there for companies to rely on in the future.

3. *Lifestyle Changes*

Under current trends, it can be forcefully argued that women may not be available in the future as "safety valves" for employers. As women have reacted to their work conditions by increasing the age at which they marry and decreasing their fertility rates to ensure an increase in their

¹⁰⁴ *Id.*

¹⁰⁵ Butler, *supra* note 96.

productive work years, they have also shifted their focus inward and altered their attitudes toward work. Rather than attempt to buck the employment system that does not include them, they prioritize their private life, remain single (often living in their family home) and work purely to finance their active social lives. Additionally, owing in part to the inherent discriminatory tendencies of Japanese firms, younger women have adopted coping mechanisms in the labor market that not only assist them in finding work, but also remove them from potential pools on which companies can fall back in times of economic malaise. Many of these women focus on skill acquisition in order to allow them to work as freelancers with portable skills so that they can transition in and out of the market without resorting to meaningless part-time work after beginning a family. Others, driven away from Japanese companies, flee to foreign firms and foreign countries. These quiet social trends and lifestyle changes cast doubt on the significance and effectiveness of the EEOL.

a. Singles Focus on Fun Rather Than Work

On the micro level, women have reacted to their employment situation by quietly altering their expectations, lifestyles, and work habits. Many of those women not having babies are out having fun—fun that is supported by their secretarial, part-time, or dispatch jobs and, in some cases, even by their families' indulgence.

i. "Freeters"

Suggestive of the impending demise of the lifetime employment system, the recession that began in the early 1990s resulted in hiring freezes for young workers.¹⁰⁶ Accompanying the lack of sufficient career opportunities for youth in the deteriorating economy¹⁰⁷ has been a rapid increase in industry's use of non-regular employees.¹⁰⁸ The Industrial Bank of Japan believes that as companies continue to shave off redundant full-time employees, a shortage of 200,000 part-time workers has been created.¹⁰⁹ One by-product of this systemic collapse has been an increase in the number of companies choosing to hire young workers in low wage, futureless jobs¹¹⁰—workers often referred to as "freeters."¹¹¹

¹⁰⁶ James Brooke, *Young Japanese Breaking Old Salaryman's Bonds*, N.Y. TIMES, Oct. 16, 2001, at A3; *2000 White Paper*, *supra* note 31, at 13.

¹⁰⁷ Ken Hijino, *Taste of Freedom Starts to Turn Sour as Choice Narrows: Young People*, FIN. TIMES (London), Sept. 25, 2001, at 6; Brooke, *supra* note 106.

¹⁰⁸ *2000 White Paper*, *supra* note 31, at 14.

¹⁰⁹ Hijino, *supra* note 107.

¹¹⁰ Brooke, *supra* note 106; Hijino, *supra* note 107; *2000 White Paper*, *supra* note 31, at 15.

¹¹¹ *The "Freeters" Issue*, JAPAN LAB. BULL., Nov. 1, 2000, at 3, available at <http://www.jil.go.jp/bulletin/year/2000/vol39-11/02.htm#1>.

The term “freeter” is a hybrid combination of the English term “free” and the German word for worker, *arbeiter*.¹¹² “Freeters” are defined as men and unmarried women¹¹³ between the ages of fifteen and thirty-four who work part-time continuously for less than five years; their numbers are estimated to have been 1.51 million in 1997—almost twice as many as those recorded a decade earlier.¹¹⁴ When the definition is expanded to include dispatched or temporary workers, the number balloons to an estimated 3.4 million.¹¹⁵

An increase in such semi-employed youths is the effective equivalent of an army of job-hoppers, free to eschew the salaryman’s lifestyle and devotion to their employers primarily because of the dearth of corporate jobs.¹¹⁶ Some scholars are hopeful that the surge in “freeters” will lead to “more flexible attitudes toward changing jobs” with a possible “transforming effect on the world of work in the long-term.”¹¹⁷ In the meantime, however, the only tangible result is a generation of self-indulgent young workers, many of whom continue to live at home with their parents.¹¹⁸

ii. “Parasite Singles”

Unmarried women who work—either in “freeter” or permanent positions—but still live at home have been termed “parasite singles,”¹¹⁹ because they live with their parents and are not burdened with either domestic responsibilities like household chores or expenses such as groceries and rent. Since the bulk of the income from their jobs is disposable, “parasite singles” are the ultimate consumers, spending their salaries on themselves in pursuit of hobbies, travel, and fashion.¹²⁰

According to the Health and Welfare Ministry, as many as seventy percent of single women ages twenty to forty-nine depend on their parents for meals and laundry. Since these women are still dependent on their families, the conclusion is that they have never left home.¹²¹ Al-

¹¹² *Id.*; Brooke, *supra* note 106.

¹¹³ Although both men and women either choose or are forced to become “freeters,” this Article focuses on women in this position. Yumiko Ono, *For Japanese Grads, a Job is No Longer a Matter of Degree*, WALL ST. J., June 14, 1999, at A1.

¹¹⁴ *The “Freeters” Issue*, *supra* note 111, at 3.

¹¹⁵ *Id.*

¹¹⁶ Brooke, *supra* note 106; Susan J. Pharr, *In the Eye of the Storm: For Japan, a “Lost Decade”—and After*, HARV. MAG., Nov.-Dec. 2001, at 38.

¹¹⁷ Pharr, *supra* note 116, at 38.

¹¹⁸ *Id.*; Brooke, *supra* note 106.

¹¹⁹ Pharr, *supra* note 116, at 38.

¹²⁰ *Id.*; Brooke, *supra* note 106.

¹²¹ HEALTH AND WELFARE MINISTRY SURVEY, *quoted in Singles Seem Increasingly to Stay Home & Live Off Their Parents*, JAPAN DIG., Mar. 13, 2000, <http://www.japandigest.com/complete/society/20000313-society-2.html> (last visited Oct. 12, 2001) (on file with author).

though rent can be prohibitively expensive and Japanese women earn less than their male counterparts,¹²² the impetus for staying home is not merely financial constraints. The implication is that young women expect more from life these days than a “Prince Charming.”¹²³ These women are reluctant to emulate their mother's patterns of resuming work after childbirth at part-time jobs while logging full-time hours.¹²⁴ Instead, aided by the relaxed social expectations regarding marriage, these women have chosen to temporarily reject marriage in favor of enjoying their lives.¹²⁵ The mantra of these “parasite singles” consists of the simple phrase “live for myself and enjoy my life.”¹²⁶

Although these women are the ideal consumers and their incessant spending supports the troubled economy, social commentators suggest that their “skittishness” about assuming traditional roles threatens to “capsize” the economy.¹²⁷ Critics' chief gripe centers on the women's status as singles.¹²⁸ While these women chant their seemingly harmless self-prioritizing philosophy—understandably preferring their freedom to the traditional roles that obligate women to choose between work and family—they are criticized for their “hedonistic” and “selfish” lifestyles and blamed for driving Japan's social insurance contributions and birth-rate lower by delaying marriage.¹²⁹ Sociologist Masahiro Yamada, who originally coined the term “parasite single,” characterizes the parasites' growing numbers as problematic because these “spoiled” women, by focusing solely on “pleasure seeking,” have caused the current demographic predicament.¹³⁰

Women offer a different explanation for this social phenomenon. Japanese companies have chosen to hire talented, educated females—some of whom are even bilingual—but they have failed to utilize them in positions of responsibility. The result has been a population of underused women and overworked men.¹³¹ One young woman muses, “I suppose if this were America, women in that position would feel discriminated against, and they'd try to do something about it. We just react by going out and having fun, by not being part of it.”¹³²

¹²² Interestingly, before the EEOL, many companies used to require that single women live at home. Peggy Orenstein, *Parasites in Prêt-à-Porter*, N.Y. TIMES MAG., July 1, 2001, at 33.

¹²³ See JOLIVET, *supra* note 79, at 141.

¹²⁴ *Id.* at 142.

¹²⁵ Orenstein, *supra* note 122, at 33.

¹²⁶ *Id.* at 34.

¹²⁷ *Id.* at 32.

¹²⁸ *Id.*

¹²⁹ *Over 60% of Japan's "Parasite Singles" Have Decent Income*, KYODO NEWS SERV. JAPAN ECON. NEWSWIRE, June 4, 2001; Brooke, *supra* note 106.

¹³⁰ Pharr, *supra* note 116, at 38; Brooke, *supra* note 106; Orenstein, *supra* note 122, at 32.

¹³¹ Salarymen in Japan are often referred to as “worker bees.”

¹³² Orenstein, *supra* note 122, at 35.

When questioned about the origins of “parasite singles,” Mariko Bando, Director General of the Gender Equality Bureau Cabinet Office, echoed the belief that the phenomena can be traced back to an economy that pressures women to choose between a job and a family, and then makes it difficult for them to reenter the workforce after having children.¹³³ In support of this view, studies have shown that single working women in their thirties desire marriage and children eventually, but are less willing to compromise their present lifestyle just for the sake of getting married. Dubbed “non-para” by sociologist Takayo Yamamoto because they no longer live with their parents, these women are financially independent.¹³⁴ The existence of “non-paras” who are older and more independent than “parasite singles” suggests that the growing number of single women may be more than a passing trend.

Under these circumstances, it makes sense that women postpone marriage and children. Some view this response as a positive step. Mitsuko Shimomura, a journalist and director of the Fukushima Gender Equity Center, notes that with politicians “begging” women to give birth, they will have to create a society in which women feel comfortable both having children and working. Shimomura asserts: “[C]hild subsidies aren’t going to do it. Only equality is.”¹³⁵

For the first time, a generation of young Japanese women is questioning the housewife ideal and reacting against it. Avoiding early marriage, they revel in their freedom, sporting a single-woman lifestyle entirely foreign to Japan.¹³⁶ Interestingly, young women with disposable incomes in countries like the United States and England are also spending an extraordinary amount of time and money on recreation.¹³⁷ In what has been dubbed the “Bridget Jones economy,”¹³⁸ wealthy singles have put off husbands and babies,¹³⁹ although they have not stopped looking for potential partners. Reportedly, these American and British women are disproportionately focused on a “boyfriend hunt” not engaged in by Japanese women.¹⁴⁰ Perhaps the most striking difference between the Bridget Joneses and their Japanese sisters is that the Bridget Joneses, as well-educated professionals earning an income closer to that of their male

¹³³ *Id.* at 34.

¹³⁴ Takayo Yamamoto, Research Director at Hakuho Institute of Life & Living and author of the book entitled NON-PARA, quoted in *Single Women in Their 30s Scoff at Idea of Marrying in Haste*, NIKKEI WEEKLY, Sept. 10, 2001.

¹³⁵ Orenstein, *supra* note 122, at 35.

¹³⁶ Koskiahio, *supra* note 19, at 98.

¹³⁷ *Singles and the City: The Bridget Jones Economy*, ECONOMIST, Dec. 22, 2001, at 70.

¹³⁸ *Id.* at 68.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 69.

counterparts, attest to finding self-fulfillment in work that is satisfying and well-paying.¹⁴¹

Overall, by focusing inward, "parasite singles" prioritize their private lives over their working ones. Some argue that women prefer the atypical employment arrangements of part-time and temporary work because it allows them to engage in employment that is compatible with their lifestyle.¹⁴² This logic dictates that because their private lives are more important to them, these women deliberately choose a form of employment that frees them to engage in the activities they desire. However, the inverse argument is equally plausible: because women are afforded inadequate opportunities in the workforce, they have little choice but to divert their energy elsewhere.

It has been shown in a Western context that when both men and women find themselves in jobs that leave little chance for upward mobility, they tend to avoid defining themselves by their jobs, focusing instead on activities that are not work related.¹⁴³ In other words, people's work attitudes and aspirations are dependent upon the opportunities presented to them. When opportunities are blocked, they respond by looking elsewhere for fulfillment.¹⁴⁴ The "parasite single" trend confirms that the same incentive structure appears to be operating in Japan. When "parasite singles" run up against blocked opportunities at work, they redirect their energies toward their private lives.

When presented with limited employment opportunities, women in Japan have created new options for themselves. Just as the "parasite singles" choose to focus inward and the "Adjusters" choose to recalibrate their expectations, other women have utilized various coping mechanisms in the labor market. The following Section categorizes the strategies used by women having difficulty finding a job in the "ice age" into three typologies, and explores how these approaches could potentially change the labor market in Japan.

¹⁴¹ *Id.* at 68.

¹⁴² Hiroki Sato, *Is "Atypical Employment" a Flexible Form of Working Life?*, JAPAN LAB. BULL., Apr. 1, 2001, at 7-12, available at <http://www.jil.go.jp/bulletin/year/2001/vol40-04/05.htm#1>.

¹⁴³ See, e.g., ROBERT BLAUNER, *ALIENATION AND FREEDOM* (1964); ELY CHINYO, *AUTOMOBILE WORKERS AND THE AMERICAN DREAM* (1955); THEODORE V. PURCELL, *BLUE COLLAR MAN: PATTERNS OF DUAL ALLEGIANCE IN INDUSTRY* (1960); Robert Dubin, *Industrial Workers' Worlds: A Study of the "Central Life Interests" of Industrial Workers*, 3 SOC. PROBS. 131 (1956); Robert H. Guest, *Work Careers and Aspirations of Automobile Workers*, 19 AM. SOC. REV. 155 (1954); see also Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1827 (1990) (citing R. KANTER, *MEN AND WOMEN OF THE CORPORATION* 140, 147-48 (1977)).

¹⁴⁴ Schultz, *supra* note 143, at 1828 (citing R. KANTER, *MEN AND WOMEN OF THE CORPORATION* 140, 159 (1977)).

b. Specific Coping Mechanisms Used by Women in the Job Market

What the “ice age” made clear is that women conducting their job search during a recession have a disproportionately harder time finding work than their male peers, and that the law offers little, if any, protection against this discrimination. Rather than accept the two-track choice facing them, many women have responded by navigating within the labor market and creating new options for themselves. As one journalist rightly observes, “Japan’s Generation X is being forced to adapt . . . they are staying in school longer, working for foreign companies, taking part-time jobs with little future and depending more on parents to subsidize their extravagant consumer lifestyles. Many say they are losing faith in the system.”¹⁴⁵

In addition to the “parasite singles” working to finance their fun and the “Adjusters” accepting the jobs at hand with the distant hope of being promoted, the author has observed three additional groups of women: the “Acquirers,” the “Absconders,” and the “Avoiders.” Members of these groups work around a system that refuses to include them.

i. “Acquirers”

“Acquirers” gather portable skills (*shikaku*) that allow them to carve out their own place in the labor market as freelance workers. Either through self study or by attending specialty (technical) schools (*senmon gakkou*), “Acquirers” learn business skills such as translation, bookkeeping, and word processing.¹⁴⁶ College women who began attending specialty schools during the “ice age” triggered what has been referred to as a “double school boom.”¹⁴⁷ Skill “Acquirers” adapt to a market that forces a choice between work and family by refusing to choose. Their specialization and skills enable them to adopt a flexible work style, positioning them to be able to leave the labor market, raise a family, and still return to a position of relative responsibility, rather than conform to the part-time work model described by the M-curve.

When Japanese companies began reducing secretarial positions, they shifted their hiring philosophy by only hiring those students who already possessed usable skills such as computer expertise.¹⁴⁸ In the wake of this trend, many female students responded by accepting less time-consuming jobs on the secretarial track while studying on the side to pursue their

¹⁴⁵ Hilary E. MacGregor, *Japan’s Jobless Generation*, L.A. TIMES, May 4, 1996, at A1.

¹⁴⁶ *Mata Hyougaki [The Ice Age Again]*, *supra* note 34.

¹⁴⁷ *Id.*; *Shuushoku Nobashi Senmon Gakkou e: Joshidaisei “Shingaku Shimasu” [Putting Off Work and Going to Technical School: Female Students Continue Their Education]*, NISHINIHON SHIMBUN, Jan. 31, 1994 [hereinafter *Shuushoku Nobashi*].

¹⁴⁸ MacGregor, *supra* note 145; *Gourika Ga “Kintou” Jistugen [Equality Appears in Restructuring]*, *supra* note 64.

skills. For example, "Mari" will work as a secretary while studying to become an English translator.¹⁴⁹ "Nozomi" also expects to eventually fall back on her language skills. "Translation is something I can do my entire life, and even from home when my children are young, therefore I will continue to study Russian while working in order to obtain my translator's license."¹⁵⁰

While some women originally plan to specialize from the beginning of their careers, others are forced down the path due to limited options. A death in "Yukako's" family derailed her job search for a managerial position, and she decided to accept a secretarial job and study English on the side.¹⁵¹ "A friend of mine is studying pharmacy while working as a secretary. She has lots of free time, so I will study English when I'm not serving tea or making copies. Marriage isn't everything . . . I don't want to work at a meaningless part-time job after I begin a family."¹⁵²

For "Acquirers," skills are stepping-stones to a more flexible work style. They provide reentry into a system that does not otherwise allow women to return as equal workers. With specialized and portable skills, women can change jobs or exit the workforce and still be assured substantive jobs in the future. For "Acquirers," skill acquisition and freelancing are creative answers to the dilemma of balancing work and family.

ii. "Absconders"

"Absconders" escape to foreign companies, located in Japan and abroad, for job opportunities. Especially with the onset of the "ice age," increasing numbers of college women began looking abroad to find work after graduation.¹⁵³ Significantly, as the number of Japanese male expatriots working abroad has declined, the number of Japanese women living abroad has increased. In the year 2000, the number of Japanese women living abroad surpassed men for the first time since the Foreign Ministry began keeping records in 1976.¹⁵⁴ Women, recognizing that they are the first to be fired by companies undergoing downsizing, have abandoned the hope of trying to find jobs at home. Instead, they are traveling

¹⁴⁹ Interview with "Mari," Female University Student, in Tokyo, Japan (May 1998) (on file with author).

¹⁵⁰ Interview with "Nozomi," Female University Student, in Tokyo, Japan (Apr. 1998) (on file with author).

¹⁵¹ Interview with "Yukako," Female University Student, in Tokyo, Japan (June 1998) (on file with author).

¹⁵² *Id.*

¹⁵³ *Josei no Kaigai Keikou [Women's Tendency to Go Overseas]*, CHUNICHI SHIMBUN, Nov. 26, 1998.

¹⁵⁴ ASAHI SHIMBUN, quoted in *More Japanese Women Than Men Now Live Abroad, and the Reason is Jobs*, JAPAN DIG., May 9, 2000, <http://www.japandigest.com/complete/society/20000509-society-1.html> (last visited Oct. 12, 2001) (on file with author).

to foreign countries to study, to work for non-governmental agencies, and to find jobs in the private sector.¹⁵⁵

Consistent with the “Absconder” profile, “Yumi” explains that she is looking for a job in Japan where it will be possible to both work and have a family: “Even though I would like to stay in a Japanese company, it is harder for women to work there.”¹⁵⁶ From her perspective, foreign companies pay well, offer reasonable hours, and give women more of a chance to do meaningful work. Even though her father discourages her desire to work in the “high power” finance world and presses her to consider a cosmetics company instead, “Yumi” is determined to join a foreign company, especially since she will study abroad in Australia for a fifth year of college. “First of all, I’m a woman,” she explains, “and second of all, I’ll be a year older than the others. Now more than ever I need to consider seriously the prospect of working for a non-Japanese company.”¹⁵⁷

iii. “Avoiders”

Rather than work around the system, “Avoiders” delay their job hunt, hoping for conditions to improve in the interim. Some choose to study abroad¹⁵⁸ or attend specialty schools full-time after graduation.¹⁵⁹ Still others go to graduate school,¹⁶⁰ hoping that the economy will rebound before their next graduation ceremony. A decided minority even voluntarily fail to graduate on time, allowing them to participate in recruiting the following year.

As “Acquirers” become free agents, navigating their way in and out of the labor market using their skills as passports, and “Absconders” escape to foreign companies and countries willing to give women responsibility commensurate with their education and ability, the possibility emerges that even if Japanese companies are willing to utilize women during labor shortages, there will be significantly fewer women to em-

¹⁵⁵ *Id.* Ironically, while Japanese women have the option of going overseas to the United States for advancement, American women relinquish their Title VII protections when working for U.S. companies located outside of the United States because, according to the holding in *EEOC v. Arabian America Oil Co.*, 499 U.S. 244 (1991), Title VII does not apply to U.S. companies that employ U.S. citizens abroad. 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, 421. (1994).

¹⁵⁶ Interview with “Yumi,” Female University Student, in Tokyo, Japan (Apr. and June 1998) (on file with author).

¹⁵⁷ *Id.*

¹⁵⁸ Interview with “Yumi,” Female University Student, in Tokyo, Japan (June 1998) (on file with author); *Shuushokunan de Kaigai Hinan* [Students Troubled by the Job Hunt Seek Shelter Overseas], ASAHI SHIMBUN, May 26, 1994.

¹⁵⁹ *Shuushoku Nobashi*, *supra* note 147.

¹⁶⁰ *Daigakuin e Joshigakusei “Hinan”* [Female Students Take Shelter in Graduate School], SANKEI SHIMBUN (evening ed.), Aug. 22, 1994.

ploy. The best and the brightest seem to be preparing contingency plans that will effectively remove them from the running when companies recruit for "safety valve" positions. The "Avoiders" and the "Adjusters" will remain, but one can imagine that they will increasingly join the ranks of the "parasite singles," who have given up on the job market's ability to provide them with opportunities and have therefore focused their aspirations away from work and toward more personal endeavors.

III. THE LAW: ITS DEVELOPMENT AND EVOLUTION

A. *The Legal Backdrop*

Japanese law provides various protections for women, including those present in the Constitution, the Labor Standards Law, the Civil Code, and the EEOL. The EEOL, in both its 1985 and its 1997 codifications, is the most encompassing in its provisions of equality relevant to working women.

1. *The Constitution*

A legal anchoring for women's rights exists in Article 14 of the 1947 Japanese Constitution. Effectively an Equal Rights Amendment, Article 14 establishes legal equality of opportunity for men and women in relations between citizens and the State.¹⁶¹ Specifically, it provides, "All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, *sex*, social status or family origin."¹⁶² Despite this unambiguous prohibition of sex discrimination, the courts have read the requirement of reasonableness into this provision.¹⁶³ Under this reasonableness standard, the prohibition only applies to "unreasonable discrimination" by the State.¹⁶⁴ Accordingly, while the constitutional protection establishes a framework on which to base equality, its potency is limited to unreasonable discriminatory acts by the State and cannot in and of itself be utilized to regulate the actions of private employers.

¹⁶¹ KAZUO SUGENO, *JAPANESE LABOR LAW* 123 (Leo Kanowitz trans., University of Washington Press 1992); Mutsuko Asakura, *Current Legal Problems Concerning Women Workers in Japan*, 12 WASEDA BULL. OF COMP. L. 1, 3 (1994); Jennifer S. Fan, Recent Development, *From Office Ladies to Women Warriors?: The Effect of the EEOL on Japanese Women*, 10 UCLA WOMEN'S L.J. 103, 111 (1999).

¹⁶² KENPO, art. 14, available at <http://www.solon.org/Constitutions/Japan/English/english-Constitution.html> (last visited Feb. 29, 2003) (emphasis added).

¹⁶³ UPHAM, *supra* note 10, at 130.

¹⁶⁴ 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, 297 (1991).

2. *The Labor Standards Law*

The Labor Standards Law (LSL), the statute governing the relationship between labor and management,¹⁶⁵ extends the principle of equal treatment beyond the scope of the State to include a similar notion of equality in the actions of private employers.¹⁶⁶ Before the enactment of the EEOL, the LSL was the only law to address such private discrimination.¹⁶⁷

According to Article 3 of the LSL, “Employers are forbidden to engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of the nationality, creed or social status of any worker.” Conspicuously absent, however, is any mention of a prohibition of discrimination based on sex such as that present in the Constitution. Ironically, the fact that sex is not a protected category is attributable to the protections afforded to women elsewhere in the LSL.

The LSL set different work standards for men and women by granting women special maternity protections and limiting or prohibiting women’s late-night, holiday, and overtime work.¹⁶⁸ Accordingly, Article 4 of the LSL requires equal treatment with regard to wages only.¹⁶⁹ The principle of equal pay for equal work in Article 4 provides that “an employer shall not engage in discriminatory treatment of a woman as compared with a man with respect to wages by reason of the worker being a woman.”¹⁷⁰ Although the LSL provides criminal sanctions for violations of the equal treatment principle,¹⁷¹ the law does not address discrimination against women outside the realm of wages. Since women are almost entirely excluded from men’s work, the principle of equal pay for equal work is often inapplicable and, therefore, rendered useless for prospective plaintiffs.¹⁷²

¹⁶⁵ UPHAM, *supra* note 10, at 130.

¹⁶⁶ SUGENO, *supra* note 161, at 123.

¹⁶⁷ UPHAM, *supra* note 10, at 130.

¹⁶⁸ SUGENO, *supra* note 161, at 126; Asakura, *supra* note 161, at 4 (citing the LSL, Law No. 49 of 1947); UPHAM, *supra* note 10, at 130. Until the LSL’s 1985 revision, Articles 61–67 limited hours and types of work for women and also provided privileges relating to their reproductive capacity. Some protections have since been abolished or relaxed in conjunction with the 1985 and 1997 EEOL.

¹⁶⁹ SUGENO, *supra* note 161, at 127; Asakura, *supra* note 161, at 4.

¹⁷⁰ *Id.*

¹⁷¹ SUGENO, *supra* note 161, at 125, 127 (citing the LSL, Law No. 49 of 1947, art. 119); Loraine Parkinson, *Japan’s Equal Employment Opportunity Law: An Alternative Approach to Social Change*, 89 COLUM. L. REV. 604, 655 (1989).

¹⁷² Edwards, *The Status of Women*, *supra* note 22, at 218; UPHAM, *supra* note 10, at 130.

3. *The Civil Code as a Basis for Case Law*

Because the Japanese Constitution governs only state actors and the LSL focuses exclusively on wage discrimination, women with non-wage related discrimination complaints against private employers had to rely on the tenuous legal hook of the Civil Code before the passage of the EEOL.¹⁷³ Aimed at governing the legal relations between private parties that are not specifically dealt with by statutes such as the LSL,¹⁷⁴ Article 90 of the Civil Code provides that any "juristic act whose object is such as to be contrary to public order or good morals is null and void."¹⁷⁵ Although Article 90, when read in conjunction with Article 1-2 (explicating that the Code is to be construed "from the standpoint of the dignity of individuals and the essential equality of the sexes"),¹⁷⁶ does not create any substantive rights,¹⁷⁷ it has nonetheless served as the rationale behind a series of judicial decisions holding that gender discrimination in employment is contrary to the "public policy and good morals" protected by Article 90.¹⁷⁸

Notwithstanding the fact that judicial decisions in the civil law system possess no binding precedential value, discrimination victims were able to build up a line of cases beginning in the mid-1960s that provided redress for sexual discrimination. The courts developed the legal principles for equal treatment of the sexes in employment by reading the Constitution's protection of freedom of contract and Article 14's mandate of male-female equality, as well as Article 1-2 of the Civil Code, into Article 90 of the Civil Code as components of "public policy and good morals."¹⁷⁹ In other words, the case law established the legal rule that discriminatory practices against women that were not justified on reasonable grounds were void as violations of "public policy and good morals."¹⁸⁰ Illustrative of this litigation campaign is *Sumitomo Cement v. Suzuki*,¹⁸¹ holding mandatory retirement for women upon marriage to be illegal.¹⁸² Through these cases, Japanese women successfully attacked overtly discriminatory systems requiring women to resign upon marriage or retire at an early age and thus established the illegality of explicit discrimination

¹⁷³ Asakura, *supra* note 161, at 5; UPHAM, *supra* note 10, at 136.

¹⁷⁴ UPHAM, *supra* note 10, at 130.

¹⁷⁵ MINPO [CIVIL CODE], Law. No. 89 of 1896, art. 90.

¹⁷⁶ MINPO [CIVIL CODE], Law. No. 89 of 1896, art. 90; Law No. 9 of 1898, art. 1.

¹⁷⁷ *Id.*

¹⁷⁸ Asakura, *supra* note 161, at 5.

¹⁷⁹ SUGENO, *supra* note 161, at 128.

¹⁸⁰ *Id.*

¹⁸¹ UPHAM, *supra* note 10, at 131 (citing 17 *Roushuu* 1407, decided by the Tokyo District Court on December 20, 1966).

¹⁸² *Id.* at 133.

against women at work.¹⁸³ The introduction of the EEOL, however, abruptly halted the progress being made through the litigation channel.

B. *The Equal Employment Opportunity Law*

From its inception, some onlookers praised the 1985 EEOL as an appropriate mechanism for gradual change given the non-litigious culture of Japan,¹⁸⁴ while others condemned the law as “toothless.”¹⁸⁵ Although the 1997 EEOL addressed many of the criticisms directed at its 1985 predecessor, inherent in it are weaknesses that continue to compromise the position and protection of working women.

1. *Foreign Influences Along the Road to Equality*

In addition to internal demands for equality and employment reform evidenced by the string of successful court cases in the 1960s,¹⁸⁶ international pressure also contributed to Japan’s EEOL. The EEOL was spurred by the international community’s newfound focus on women’s issues that began with the United Nations’ designation of 1975 as the International Women’s Year.¹⁸⁷ This, in addition to the U.N. Decade for Women (1975-1985) provided the impetus for the creation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁸⁸

When the Japanese government signed the Convention in 1980—in part to improve its image in the international community as a nation whose social progressivism is commensurate with its economic power¹⁸⁹—it formally committed itself to providing equal employment opportunities for women by the 1985 ratification deadline.¹⁹⁰ In order to ratify the Convention, each signatory country was required to ensure that domestic law conformed to the international standards.¹⁹¹ According to the Convention, each nation was required to take “all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women”¹⁹² prior to

¹⁸³ SUGENO, *supra* note 161, at 128; UPHAM, *supra* note 10, at 129, 138.

¹⁸⁴ See generally Parkinson, *supra* note 171.

¹⁸⁵ Hanami, *supra* note 56, at 8.

¹⁸⁶ In addition to domestic pressure in the form of successful litigation and the accompanying administrative measures by the Ministry of Labor to gain compliance with the *Sumitomo Cement* decision, there was international pressure from the declaration of 1975 as International Women’s Year. UPHAM, *supra* note 10, at 138.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 148.

¹⁸⁹ Larsen, *supra* note 101, at 202.

¹⁹⁰ Chizuko Ueno, *The Impact of Industrialization and Post-Modernization from the Gender Perspective*, in *THE PREDICAMENT OF MODERNIZATION IN EAST ASIA* 146 (Eric Wu & Yun-han Chu eds., 1995); UPHAM, *supra* note 10, at 148.

¹⁹¹ *Id.*; Asakura, *supra* note 161, at 6; Larsen, *supra* note 101, at 201–02.

¹⁹² Fan, *supra* note 161, at 114; Convention on the Elimination of All Forms of Dis-

ratification. In response to this condition, Japan revised its laws, and part of the reform that took place included amending the 1972 Working Women's Welfare Law to become the EEOL.¹⁹³ Japan subsequently ratified the Convention on June 25, 1985, without reservations.

2. *The 1985 EEOL*

Prior to the establishment of the EEOL, Japanese law did not specify the right to equality of employment opportunities.¹⁹⁴ The 1985 EEOL, officially known as the "Law Respecting the Improvement of the Welfare of Women Workers, Including the Guarantee of Equal Opportunity and Treatment between Men and Women in Employment," attempted to address the various discriminatory employment practices inherent in Japan's lifetime employment system.¹⁹⁵

a. *The Debate*

Although the role of outside pressure (*gaiatsu*) in the passage of the 1985 EEOL raised questions concerning the extent to which the law was a true indicator of Japanese aspirations for equality, the creation of the EEOL represented a significant step in bringing labor and management together in an unsteady compromise.

A committee comprised of representatives from business, labor, and public interest groups convened to discuss the legal form that "nondiscrimination" should take. They presented their report—a compilation of conflicting opinions—to the Ministry of Labor.¹⁹⁶ Using this report as the basis for the law, the Ministry of Labor's Advisory Commission on Women's and Minors' Problems Subcommittee on Women's Employment proposed its recommendations for the law.¹⁹⁷

Dividing labor and management most definitively was the tension between gender equality and protection for female workers. Employers argued that the protections afforded to women in the LSL were antithetical to equality, and labor unions and feminists alike were reluctant to forfeit these protections given the long hours that company men worked and the difficulty women would have in balancing that work style with their domestic duties. They insisted that, given the societal norms that

crimination Against Women, G.A. Res. 180, U.N. Doc. A/34/180 (1980), 19 I.L.M. 33 (entered into force Sept. 3, 1981).

¹⁹³ SUGENO, *supra* note 161, at 129. The EEOL formally applies to all female workers, including foreign laborers. However, in practice, workers who are in the country illegally will not attempt to utilize the law for fear that they will be sent back to their country of origin.

¹⁹⁴ *The Equal Employment Opportunity Law*, JAPAN LAB. BULL., July 1, 1985, at 5.

¹⁹⁵ SUGENO, *supra* note 161, at 127.

¹⁹⁶ Kawashima, *supra* note 11, at 284.

¹⁹⁷ UPHAM, *supra* note 10, at 148–49.

imposed the responsibility for household management and childrearing primarily upon women, women would be forced to work the impossibly long hours of the male employee model without the LSL protections limiting hours.¹⁹⁸ The two sides also disagreed as to which provisions should be mandatory (thereby carrying penalties for non-compliance) and which areas should be considered only voluntary.¹⁹⁹

With the 1985 deadline rapidly approaching, the Ministry of Labor reached a compromise between labor and management. In many ways, however, the resulting law was a victory for business, because women relinquished protections without gaining any specific rights that they had not already won through litigation.²⁰⁰

b. The EEOL's Purpose and Provisions

The 1985 EEOL aimed to achieve two competing purposes: it was designed to provide equal employment opportunities for women and, according to Article 1, to promote women's welfare and elevate the status of female workers.²⁰¹ Following the law's basic ideals set out in this two-pronged approach, Article 2 acknowledged women's role as mothers and emphasized the law's function in assisting the harmonization of work and family life.²⁰² In conjunction with the EEOL's passage and as part of the compromise that brought it to fruition, the LSL was amended to relax and abolish certain protections made available to women under the LSL.²⁰³

The 1985 EEOL employed two types of equal treatment provisions: in some cases employers were prohibited from discriminating against women, and in others, they merely had a duty to endeavor to provide equal opportunities. Whereas the endeavor duty had no effect in private law,²⁰⁴ the mandatory prohibitions had judicial force, effectively nullifying contracts which violated those provisions and permitting the award of damages in tort suits.²⁰⁵

¹⁹⁸ Kawashima, *supra* note 11, at 285; Barbara Molony, *Japan's 1986 Equal Employment Opportunity Law and the Changing Discourse on Gender*, SIGNS 284-85 (Winter 1995); UPHAM, *supra* note 10, at 148.

¹⁹⁹ UPHAM, *supra* note 10, at 149.

²⁰⁰ Joyce Gelb, *Tradition and Change in Japan: The Case of Equal Employment Opportunity Law*, 1 U.S.-JAPAN WOMEN'S J. 55 (1991) (English Supplement); UPHAM, *supra* note 10, at 152.

²⁰¹ Araki, *supra* note 4, at 6; SUGENO, *supra* note 161, at 130.

²⁰² SUGENO, *supra* note 161, at 129-30.

²⁰³ UPHAM, *supra* note 10, at 152.

²⁰⁴ LAM, WOMEN AND JAPANESE MANAGEMENT, *supra* note 12, at 106; Parkinson, *supra* note 171, at 656. Unlike Title VII of the American Civil Rights Act of 1964, which provided a private right of action, the "duty to endeavor" clauses in Articles 7 and 8 did not confer a private right of action. UPHAM, *supra* note 10, at 164.

²⁰⁵ Unlike the LSL, the EEOL is not sanctioned by criminal provisions. Araki, *supra* note 4, at 5.

Most controversial were the hortatory provisions of Articles 7 and 8 regarding the employer's duty to endeavor to provide women with opportunities equal to those provided to men in the areas of recruitment, hiring, assignment, and promotion.²⁰⁶ This duty to endeavor was particularly troublesome given the fact that the law included no sanctions or punishment for violators.²⁰⁷ Instead, Article 12 authorized the Ministry of Labor to utilize the powerful tool of administrative guidance and to create guidelines for employers to follow to ensure that they treated female workers equally.²⁰⁸ These guidelines, issued in 1986 and reinforced in 1994, outlined measures that employers should attempt to implement in order to secure equal employment opportunities for women.²⁰⁹ In contrast, Articles 9, 10, and 11 prohibited discriminatory treatment in vocational training, fringe benefits, mandatory retirement age, mandatory retirement by reasons of marriage, pregnancy or childbirth, and dismissals,²¹⁰ in accordance with the Ministry's guidelines.²¹¹

In lieu of sanctions, the 1985 EEOL took a voluntary approach toward resolving differences between employers and employees. Specifically, Articles 13 through 21 established an informal dispute resolution system based on mediation. Those disputes that could not be handled in-house received guidance from the Women and Minors Office when one side requested it or, when there was mutual assent to mediation, the case was referred to the Equal Opportunity Mediation Commission.²¹²

²⁰⁶ Danjyo Koyo Kikai Kinto Ho [Equal Employment Opportunity Law], Law No. 45 of 1985, arts. 7–8 (amended 1997), *reprinted and translated in JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS* 628–29 (Curtis J. Milhaupt et al. eds., 2001). Article 7 of the 1985 EEOL states, “[w]ith regard to the recruitment and hiring of workers, employers shall endeavor to provide women equal opportunity with men”; Article 8 states, “[w]ith regard to the assignment and promotion of workers, employers shall endeavor to treat women equally with men workers.”

²⁰⁷ *Id.* at 627–31. *See also* UPHAM, *supra* note 10, at 153.

²⁰⁸ Administrative guidance is often an effective tool in achieving the bureaucracy's goals. UPHAM, *supra* note 10, at 156.

²⁰⁹ Araki, *supra* note 4, at 5; *Ordinance and Guidelines for Implementing the Equal Employment Opportunity Law*, JAPAN LAB. BULL., Apr. 1, 1986, at 5–8 (Akira Watanabe trans.).

²¹⁰ These provisions are repeated in the 1997 EEOL as Articles 6, 7, and 8.

²¹¹ UPHAM, *supra* note 10, at 153.

²¹² *Id.* If, in attempting to resolve a workplace dispute, a woman moves through the first two formal levels created by the EEOL without any resolution, and the case proceeds to mediation, it is heard by a commission of three persons of “learning and experience” appointed by the Ministry of Labor. Because settlements are not binding like court decisions, the commission can recommend that a business follow the settlement terms but has no power to enforce them. It is tempting to postulate that the reason behind the perpetuation of mediation as an option is the influence of interest groups of mediators wishing to preserve their jobs; however, given the sparse utilization of mediation over the course of the EEOL's lifetime, this explanation does not ring true. Fan hypothesizes that one reason the EEOL lacks sanctions and fails to authorize litigation as a remedy “may be because the EEOL was crafted to appease the business community that opposed any real change.” Fan, *supra* note 161, at 121. In this sense, the informal process of mediation impacts women's

c. Strengths

It is indisputable that with the enactment of the EEOL, Japanese women did experience real improvements in the labor market. No longer recruited by companies separately from their male peers, female graduates were permitted to participate in the process that had formerly been closed to them.²¹³ Within a year, help wanted advertisements changed in response to the law. By 1987, ads that had previously been bifurcated into “male” and “female” columns in newspapers and magazines were combined in a single “either sex” column, usually accompanied by an additional “female” column.²¹⁴ Furthermore, companies began considering women from four-year universities for employment, breaking away from their traditional focus on high school and two-year college graduates. Most importantly, companies began allowing women to compete for career-track positions instead of automatically siphoning them off to secretarial posts. Finally, companies made efforts to narrow the pay gap and to revise their rules, specifically in the area of new-employee training, in light of the new law.²¹⁵ In response to these advances, some scholars voiced concern that the law and its guidelines, in opening managerial positions to university-educated women, focused too heavily on the progress of the “elite.”²¹⁶ Setting aside the debate as to the specific beneficiaries, it is important to recognize that the law stimulated palpable changes.

Societal attitudes toward women’s employment and the behavior of women themselves underwent transformation during this period as well. Enhanced social consciousness regarding equal employment was evident in general opinion polls indicating that while in 1987, 16.1% of those surveyed by the Women’s Bureau of the Ministry of Labor supported the notion that women should continue to work within their careers after childbirth, by 1995 this number had more than doubled to 32.5%.²¹⁷ Similar studies illustrated not only greater labor force participation by women—increasing from 15,480,000 in 1985 to 20,840,000 in 1996—but also lengthened years of service in a broader range of job categories.²¹⁸ Perhaps encouraged by mounting opportunities, enrollment in universities for female students rose, and women expanded their studies to in-

rights by creating a hurdle to potential litigation. Mediation possesses the illusion of effective process; however, in practice, it never leads to concrete change on the part of management.

²¹³ ROHLEN, *supra* note 25, at 64–65; Miller, *supra* note 30, at 233.

²¹⁴ Parkinson, *supra* note 171, at 645.

²¹⁵ *Id.* at 648.

²¹⁶ Cannings & Lazonick, *supra* note 23, at 46; Kazuo Sugeno, *The Impact of the EEOL at Its First Stage of Enforcement*, JAPAN LAB. BULL., Oct. 1, 1987, at 7.

²¹⁷ Araki, *supra* note 4, at 6 (citing *Roudoushou Josei Kyoku Kaisei Danjo Koyo Kikai Kintou Hou No Kaisetsu* [The Ministry of Labor’s Commentary on the Revised Equal Employment Opportunity Law]).

²¹⁸ *Id.* at 5.

clude business-minded majors,²¹⁹ demonstrating an intent to prepare for careers.

The aftermath of the EEOL's passage supported the conclusions of scholar Loraine Parkinson, who commended the EEOL's unorthodox approach of gradualism and volunteerism as the appropriate formula for promoting social change in Japan.²²⁰ According to Parkinson's characterization, in lieu of legal sanctions compelling compliance, the 1985 EEOL effectively utilized noncoercive means—such as administrative guidance—to encourage employer cooperation.²²¹ This preference for voluntary cooperation is based on the theory that allowing employers to implement change incrementally will cause them to gradually recognize the economic benefits of equal employment and, in turn, will lead to further progress.²²² By contrast, change brought about by legal force, although potentially more expedient, would come to fruition at the price of employer resentment.²²³

Before the law's passage, Japanese society was fraught with obstacles to equal employment: many people did not recognize the need for change and still more were not prepared to accept wholesale changes to the status quo. In order to ensure permanent change given this general climate, society's basic values had to evolve, and the EEOL's approach seemed best suited for cultivating the necessary social consensus.²²⁴ The EEOL's enactment brought with it attitudinal changes illustrating a general acclimation to the concept of equality within Japanese society. Nonetheless, the 1985 EEOL contained its fair share of weaknesses.

d. Weaknesses

Notwithstanding the advances in societal views of equality that accompanied the law's introduction, the 1985 EEOL was plagued by weaknesses, including its failure to create new rights, its introduction of an alleged "one-sided" equality, and its acceleration of the adoption of a two-track system of employment which further segregated female labor. Often criticized for lacking enforcement "teeth," the law created a weak mediation option and has proven to be generally ineffective during recessions. Given this laundry list of complaints, its amendment in 1997 was welcomed.

²¹⁹ Edwards, *The Status of Women*, *supra* note 22, at 222, 224.

²²⁰ *See generally* Parkinson, *supra* note 171.

²²¹ *Id.* at 604 (claiming that the law eschews both a private right of action and civil or criminal suits brought by the government in favor of voluntary change).

²²² *Id.* at 631–32 (citing the benefit of an untapped pool of new talent).

²²³ *Id.*

²²⁴ *Id.* at 660.

i. The Law Offered No New Protections

Despite accolades depicting the EEOL as a breakthrough for equality, in reality the legislation merely codified existing case law,²²⁵ and, with the exception of the prohibition of discrimination in training, the law failed to provide women with any new legal rights beyond those already gained through earlier litigation.²²⁶ Because the law clearly indicated that discrimination in any of the “endeavor” areas (recruitment, hiring, placement, and promotion) did not violate any legal duty, scholar Frank Upham speculated that it was unlikely that future plaintiffs would be successful in utilizing the courts—the way they did with retirement discrimination—to broaden the interpretation of Article 90 of the Civil Code and Article 14 of the Constitution to include other forms of discrimination.²²⁷

By removing the issue of women’s employment from the courts and returning control to the bureaucracy, Upham suggests, the law had the potential to chill the possibility for social change by eliminating the role of the courts. At the very least, it allowed the government to determine, through its interpretation and enforcement of the law, at what pace that change would occur.²²⁸

ii. The EEOL’s One-Sidedness

Legal scholars criticized the EEOL for its ostensibly “one-sided” approach to equality.²²⁹ Attributed in part to the contradictory purposes of equal opportunity and welfare promotion, the resulting law created an equality that prohibited disadvantageous treatment of women with respect to men, but permitted more favorable treatment of women, justified by the idea that women’s opportunities are generally more limited.²³⁰

²²⁵ SUGENO, *supra* note 161, at 128; Foote, *supra* note 17, at 671–73.

²²⁶ UPHAM, *supra* note 10, at 153.

²²⁷ *Id.* at 154.

²²⁸ *Id.* at 155, 163–64. An argument can be made, however, that allowing the bureaucracy to exert control over the process of social change differs little from leaving the responsibility in the hands of the judiciary, given the fact that some scholars argue that judges in Japan are not wholly independent. See J. Mark Ramseyer & Eric B. Rasmusen, *Skewed Incentives: Paying for Politics as a Japanese Judge*, 83 JUDICATURE 190–95 (Jan.–Feb. 2000). Japanese judges are incentivized to respond to political considerations and consequently to the policies of bureaucrats. This is due, in part, to the reality that judges’ careers can effectively be derailed if they dare to rock the boat with a ruling that flies in the face of the policies the ruling party condones. (The Liberal Democratic Party has been in almost continuous power in post-war Japan, with the exception of a brief intermission in the early 1990s.) Therefore, according to this viewpoint, it follows that judges did not necessarily exercise the unbridled independence with which Upham credits them during the sex discrimination employment cases of the 1960s and 70s, and that the bureaucracy may, in fact, have endorsed the judges’ decisions.

²²⁹ SUGENO, *supra* note 161, at 130.

²³⁰ Araki, *supra* note 4, at 6.

The language of the law focused entirely on improving employment conditions for women workers, with no mention of equal treatment for men. While provisions such as “an employer shall not discriminate against a woman worker as compared with a man by reason of her being a woman,”²³¹ and “an employer shall endeavor to give women equal opportunity with men”²³² highlighted the import of raising women's treatment to the level of men's, the law did not address discrimination against men as compared with women as one would expect a comprehensive anti-discrimination law to do. Illustrative of this point, the Ministry of Labor's official interpretation of the EEOL outlined in its guidelines for implementation delineated that restricting job offerings or recruitment to “men only” violated the law.²³³ However, the guidelines did not address situations targeting only female candidates,²³⁴ because jobs open to “women only” would serve to increase the opportunities available for women.²³⁵

“One-sided” equality is problematic not only on a theoretical level, but also on a more practical one. In light of the law's wording, it appeared that reverse discrimination claims would be impossible to pursue under the EEOL. In addition, critics have extended arguments against “one-sided” equality to implicate the EEOL's role in cabining women in less desirable, lower-paying jobs.²³⁶ By elevating women's opportunities until they are on par with those of men instead of treating women and men equally, the law thwarted the realization of true workplace equality.

iii. The Implementation of a Two-Track System

A two-track hiring system emerged in Japanese companies as a tangible by-product of the EEOL's enactment. The new career tracking system purportedly allowed employees to exercise individual choice and enter careers based on merit and preferences,²³⁷ in contrast to the previous system that doled out appropriate positions based on sex. Yet, it soon became apparent that the “new” system operated to preserve the status quo, admitting only a limited number of women to the predominantly male “career track.”

²³¹ Hanami, *supra* note 56, at 6 (citing arts. 9–11).

²³² *Id.* (citing arts. 7 and 8).

²³³ Guideline 2 reads, in part, “The following [is] regarded as discriminatory treatment of women in selection and employment: (a) Job offerings to or recruitment of males only in certain job fields.” *Ordinance and Guidelines for Implementing the Equal Employment Opportunity Law*, *supra* note 209, at 6.

²³⁴ For instance, limiting part-time jobs to women only.

²³⁵ Araki, *supra* note 4, at 6.

²³⁶ SUGENO, *supra* note 161, at 130; Araki, *supra* note 4, at 6; Hanami, *supra* note 56, at 7.

²³⁷ Madison, *supra* note 53, at 207 (citing Knapp, *supra* note 53).

The dual-track personnel system, which is still in effect, allows women to apply either to the career, or managerial, track that includes the potential for promotion as well as transfers, or to the general, or clerical, track that consists of administrative work without the possibility of either transfers or promotions.²³⁸ Although the implementation of this system ostensibly opened management positions to both sexes based on merit and allowed women to choose jobs with responsibility, it amounted to little more than a nominal adjustment that funneled the majority of women into the traditional secretarial “office lady” roles in which they shuffle paper and serve tea.

Critics have labeled the two-track system “a form of employer evasion”²³⁹ that institutionalizes discrimination and leads to the division of core and non-core workers according to gender.²⁴⁰ A survey conducted by the Ministry of Labor reveals that ninety-nine percent of males are automatically placed on the managerial track, as opposed to only 3.7% of women.²⁴¹ Although long hours and geographic mobility help to explain the ultimate separation of the two tracks along gender lines,²⁴² the underrepresentation of women in the managerial track is not the result of women’s choices alone. Companies can legally limit the available slots for women because, due to the wording of the EEOL, companies that hire only a few token women to this track have essentially fulfilled their responsibility to endeavor not to exclude women. Thus, the pre-EEOL practice of differentiating between the male and female work track does not differ substantially from the career and non-career track system.²⁴³

iv. Lack of Enforcement Mechanisms

Commentators characterizing the EEOL as “toothless” decried the absence of sanctions, criminal or civil, for employers’ noncompliance with the law’s prohibitory and endeavor provisions. In many ways, this depiction is apt: in addition to lacking penalties for violators of the law’s

²³⁸ Kawashima, *supra* note 11, at 286–87; Asakura, *supra* note 161, at 11. There are additional tracks, including the managerial track without transfers (*chuukan shoku*). Alice C. L. Lam, *Equal Employment Opportunities for Japanese Women: Changing Company Practice*, in *JAPANESE WOMEN WORKING* 212 (Jane Hunter ed., 1993) [hereinafter Lam, *Changing Company Practice*].

²³⁹ SUSAN J. PHARR, *LOSING FACE: STATUS POLITICS IN JAPAN* 193 (University of California Press 1990).

²⁴⁰ Maki Omori, *Gender and the Labor Market*, 19 *J. JAPANESE STUD.* 91, 97 (1993); Koderu, *supra* note 5, at 146; Edwards, *View from the West*, *supra* note 6, at 248; Lam, *Changing Company Practice*, *supra* note 238, at 215. *See also* Madison, *supra* note 53, at 123–24; Larsen, *supra* note 101, at 209–10.

²⁴¹ Knapp, *supra* note 53, at 106 (quoting a June 1990 survey by the Ministry of Labor’s Women’s Occupations Foundation). *See also* Madison, *supra* note 53, at 123.

²⁴² Edwards, *View from the West*, *supra* note 6, at 248. *See also* Lam, *Changing Company Practice*, *supra* note 238, at 213.

²⁴³ Creighton, *supra* note 16, at 195.

narrow scope of prohibited activities, the endeavor clause urged employers to act without providing any incentives or mechanisms to ensure compliance.²⁴⁴ Tadashi Hanami, research director general of the Japan Institute of Labour, denounced the law's "total lack of specific compliance-enforcement measures,"²⁴⁵ and explained that "[v]ery different from Western laws, the 1985 EEOL neither gave power to courts to provide relief through orders to cease and desist, affirmative orders, or punitive damages, nor did it establish any administrative agency to enforce compliance with rules prohibiting discrimination."²⁴⁶

In place of enforcement mechanisms or a private cause of action, the law entrusted dispute resolution to administrative guidance and consensual mediation.²⁴⁷ However, administrative guidance has been weak in the area of employment discrimination,²⁴⁸ and the mediation channel has not proven itself to be an efficient means for resolving employment disputes, in part because in order to progress to this stage, the employer's consent is required.²⁴⁹ The weakness of the mutual assent mediation process is exemplified by the fact that only one case was mediated in the ten years following the 1985 EEOL's enactment.²⁵⁰ Even that case was not settled because, although the employer agreed to participate in mediation, the employer later refused to accept the terms of the Mediation Committee's proposed settlement.²⁵¹ The ineffectiveness of mutual mediation is further compounded by the fact that the proposed settlement has no binding effect on its own.²⁵²

Additional evidence pointing to limitations in the law's enforcement potential emerged during the economic recession that followed on the heels of the bubble economy. The recruitment and hiring discrimination faced by female graduates during the "ice age" of the 1990s revealed the true nature of the law's ineffectiveness.²⁵³ The brainchild of compromise, the EEOL attempted to bridge the gap between the two camps of protection and equality, at the expense of sanctions with "teeth."²⁵⁴ The general consensus was that, although the EEOL brought some improvements for

²⁴⁴ Araki, *supra* note 4, at 5.

²⁴⁵ Hanami, *supra* note 56, at 6.

²⁴⁶ *Id.*

²⁴⁷ 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, 39–40 (1995). The 1997 EEOL employs the same methods.

²⁴⁸ Administrative guidance, usually an effective means of enforcement in Japan, has generally been weak in its implementation of the EEOL. *See* Madison, *supra* note 53, at 118–22. *But see* Parkinson, *supra* note 171, at 639–44.

²⁴⁹ Hanami, *supra* note 56, at 6.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*; Araki, *supra* note 4, at 7.

²⁵³ Araki, *supra* note 4, at 6; *see generally* Miller, *supra* note 30.

²⁵⁴ *See* Araki, *supra* note 4, at 5.

women's employment, the law's effects were "slow and limited,"²⁵⁵ and the 1985 law appeared to have exhausted its potential. The dilemma at hand, then, is whether the 1997 amendments will be able to cure the original law's weaknesses and, if not, what path the law should take in the future.

3. *The 1997 EEOL*

In 1997, the EEOL was amended for the first time in ten years. The amendment of the law was an effort to strengthen the voluntary nature of the EEOL. In conjunction with these changes, the LSL also underwent an amendment process. The 1997 amendments deleted the concept of improvement of women's welfare from both the law's title and purpose. The EEOL's official name, originally the "Law Respecting the *Improvement of the Welfare of Women Workers* Including the Guarantee of Equal Opportunity and Conditions for Men and Women in the Field of Employment,"²⁵⁶ became the "Law Respecting the Guarantee of Equal Opportunity and Conditions for Men and Women in the Field of Employment."²⁵⁷ In accordance with this change, the 1997 EEOL also removed the purpose of welfare improvement from Article 2, the law's Basic Principle section.²⁵⁸ Consequently, the revised EEOL altered the basic concept of the law by refocusing it away from protection and toward the promotion of equality.

The amended LSL does away with the special protections afforded women with the exception of those regarding maternity.²⁵⁹ The amended version abolishes restrictions on women's holiday and overtime work, as well as prohibitions on women's nighttime work.²⁶⁰ In short, the revised LSL eliminates protections, thus resolving the initial divide between protection and equality apparent in the earlier EEOL debates.

Although the EEOL was strengthened, it is still relatively early to evaluate its efficacy—the amended EEOL took effect on April 1, 1999;

²⁵⁵ Hanami, *supra* note 56, at 8.

²⁵⁶ *Id.* at 7 (emphasis added).

²⁵⁷ *Id.*; Araki, *supra* note 4, at 6.

²⁵⁸ Araki, *supra* note 4, at 6; Danjyo Koyo Kikai Kinto Ho [Equal Employment Opportunity Law], Law No. 45 of 1985, art. 2 (amended 1997), *reprinted and translated in* JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS, *supra* note 206, at 627. Article 2, the Basic Principle, reads:

The basic principle of this Law is that women workers be enabled to engage in a full working life, with due respect for their maternity but without discrimination based on sex. Employers, the State and local public bodies shall, in compliance with the basic principle set forth in the preceding paragraph, endeavor to promote the full working life of women workers.

²⁵⁹ Araki, *supra* note 4, at 5.

²⁶⁰ *Id.* at 6; Hanami, *supra* note 56, at 7.

nevertheless, an initial analysis of the law reveals both strengths and shortcomings. In deconstructing the law's amendments, it is important to consider whether the new law succeeds in addressing the old law's problematic provisions.

a. Provisions Strengthening the Law

In response to the mixture of progress and stagnation of the decade under the 1985 EEOL, the 1997 EEOL offers various noteworthy provisions. First, the most significant change is the elimination of the "endeavor clause" of Articles 7 and 8 and its replacement with a prohibition of discrimination in recruitment, hiring, assignment, and promotion.²⁶¹ The bolstered regulation against discrimination represents yet another compromise between labor and management—one acquired by labor in exchange for the abolishment of the LSL's protective provisions for women.²⁶²

Second, in addition to the law's broadened scope, the 1997 EEOL now provides sanctions for violations of the law.²⁶³ When an employer violates the discrimination prohibitions in terms of recruitment, hiring, assignment, promotion, training, fringe benefits, or termination, and fails to comply with the Labor Minister's advice,²⁶⁴ the Labor Minister may "make a public announcement to that effect."²⁶⁵ The theory behind this sanction is that the threat of publicizing noncompliance will deter companies from discriminating in the first place.

Third, the 1997 EEOL adjusts the dispute resolution procedure to allow mediation to commence upon the application and consent of only one of the parties concerned.²⁶⁶ Moreover, Article 13 prohibits employers from retaliating against women who apply for mediation.²⁶⁷ In practice, this modification will allow employees to initiate mediation without the employer's consent.

Fourth, the new law's policy toward the preferential treatment of women also differs from that of its 1985 predecessor. Article 9 of the 1997 EEOL generally prohibits preferential treatment of women, only allowing the exception of affirmative or positive action where the pur-

²⁶¹ Danjyo Koyo Kikai Kinto Ho [Equal Employment Opportunity Law], Law No. 45 of 1985, arts. 5–6 (amended 1997), *reprinted and translated in JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS*, *supra* note 206, at 628; *see also* Araki, *supra* note 4, at 5.

²⁶² Araki, *supra* note 4, at 7.

²⁶³ Danjyo Koyo Kikai Kinto Ho [Equal Employment Opportunity Law], Law No. 45 of 1985, art. 26 (amended 1997), *reprinted and translated in JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS*, *supra* note 206, at 631.

²⁶⁴ *Id.* art. 25, para. 1, at 631.

²⁶⁵ *Id.* art. 26, at 631.

²⁶⁶ *Id.* art. 13, at 629.

²⁶⁷ *Id.* art. 13, para. 2, at 629.

pose is to rectify or mitigate present obstacles to equal employment.²⁶⁸ In line with this amendment, the new guidelines state that it is illegal for firms to specify the gender of employees to be hired for specific types of jobs, such as hiring exclusively women for the secretarial track.²⁶⁹ In essence, this puts an end to discriminatory company practices such as “women only” job advertisements and recruiting only women for part-time jobs.

Finally, Article 21 of the 1997 EEOL recognizes sexual harassment as a legal claim.²⁷⁰ According to the amendment, “Employers shall give necessary consideration . . . so that women workers they employ do not suffer any disadvantage in their working conditions by reason of [their] responses to sexual speech and behavior . . . and their working environments do not suffer any harm due to said sexual speech and behavior.”²⁷¹ Prior to this amendment, Japanese law did not consider sexual harassment to be a type of discrimination; instead, victims pursued damages on the theory of tort liability.²⁷² Article 21 came after plaintiffs in the 1990s won a surge of sexual harassment cases relying on the Civil Code rather than the EEOL.²⁷³ It basically states that employers have a duty of care to prevent sexual harassment, be it in the form of a hostile work environment or quid pro quo harassment.²⁷⁴

Considering the law’s redirection in title and purpose away from protection and welfare, it appears that great strides have been made in reconceptualizing women’s work in terms of equality. But whether this ideological shift will be enough to dismantle prior stereotypes remains to be seen. When viewed in conjunction with the replacement of the endeavor clause, the provision of sanctions, the enhancement of mediation initiation, the elimination of a preference for women, and the creation of a sexual harassment claim, this shift signifies, at the very least, progress in form, if not in substance. Even though the fundamental contradiction between equality and protection has been addressed in theory, it remains unclear as to what concrete results this will lead to in practice. The following Section examines some of the revised law’s potential loopholes and pitfalls.

²⁶⁸ *Id.* art. 9, at 629. Article 9 of the 1997 EEOL reads: “improv[e] circumstances that impede the securing of equal opportunity and treatment between men and women in employment.” See also Araki, *supra* note 4, at 7.

²⁶⁹ “Matters for Special Attention” in *Hiring Employees by Status*, JAPAN LAB. BULL., Sept. 1, 2000, at 5, available at <http://www.jil.go.jp/bulletin/year/2000/vol139-09/05.htm#1>.

²⁷⁰ Danjyo Koyo Kikai Kinto Ho [Equal Employment Opportunity Law], Law No. 45 of 1985, art. 21 (amended 1997), reprinted and translated in JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS, *supra* note 206, at 630.

²⁷¹ *Id.*

²⁷² Araki, *supra* note 4, at 7.

²⁷³ *Id.* at 7–8; see also Fan, *supra* note 161, at 126–33.

²⁷⁴ Araki, *supra* note 4, at 8.

b. Weaknesses

The new law responds haphazardly to the criticisms that the first law provided a one-sided equality that segregated women into lower-paying jobs while lacking enforcement mechanisms.²⁷⁵ Although it may be too early to accurately gauge the extent of the 1997 EEOL's efficacy, problematic provisions and potential weaknesses are already evident.

First, the revised law remains one-sided on its face. Since it persists in dealing only with discrimination against women as compared to men,²⁷⁶ the 1997 EEOL does little to further the development of a comprehensive discrimination prohibition law for both sexes.²⁷⁷ Whereas the amended law does prohibit preferential treatment for women and therefore no longer allows job designations for "women only,"²⁷⁸ the abolition of this notification system fails to balance the law's inherent one-sided nature.

Unfortunately, the withdrawal of preferential treatment may create as many problems as it attempts to solve. Employers can no longer publish job advertisements for "women only" or note the exact number of men and women they plan to hire.²⁷⁹ Evidence suggests that this new regulation has prompted many companies to simply forego hiring entirely, rather than avoid sex-specific advertising.²⁸⁰ In other cases, some firms admit their preference of specifying men only, but due to its illegality, resort to posting ads for job openings available to both men and women; they then are inundated with resumes from many women they have no intention of hiring.²⁸¹ In response, female students register their anger at being forced to waste their time interviewing at companies that have no intention of hiring women.²⁸² In order to get around this obstacle,

²⁷⁵ Hanami maintains that the four "critical defects" of the 1985 law still remain after its 1997 revision. Hanami, *supra* note 56, at 6.

²⁷⁶ Danjyo Koyo Kikai Kinto Ho [Equal Employment Opportunity Law], Law No. 45 of 1985, arts. 5–8 (amended 1997), *reprinted and translated in JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS*, *supra* note 206, at 628–29. Article 5 reads: "[E]mployers shall provide women equal opportunity with men;" and Articles 6–8 state, in part, that "employers shall not discriminate against a woman worker as compared with a man by reason of her being a woman."

²⁷⁷ Hanami, *supra* note 56, at 6; Araki, *supra* note 4, at 9–10. It is important to note that Araki views the 1997 revision as a "transitional stage" toward "a genuine equal employment law for both sexes."

²⁷⁸ Araki, *supra* note 4, at 9; Danjyo Koyo Kikai Kinto Ho [Equal Employment Opportunity Law], Law No. 45 of 1985, art. 9 (amended 1997), *reprinted and translated in JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS*, *supra* note 206, at 629.

²⁷⁹ Fan, *supra* note 161, at 134.

²⁸⁰ *Increase in Temping Helped Push Jobless Rate Down To 4.6% in May*, JAPAN DIG., June 30, 1999 (quoting NIHON KEIZAI SHIMBUN), <http://www.japandigest.com/complete/labor/19990630-labor-1.html> (last visited Oct. 12, 2001) (on file with author).

²⁸¹ Kawaru "Josei no Tame no" *Younin Zashi* [Want Ad Magazines Specifying Jobs "For Women" Will Change], TOKYO SHIMBUN, Jan. 22, 1999.

²⁸² Danjyo Kubetsushita *Younin Dame* [Want Ads Distinguishing Between Male and

some instructors at university job placement centers suggest that female students visit the career services offices of all-women's colleges because companies that place ads there must be willing to hire women.²⁸³

There is truth in the statement that prohibiting "women only" notifications is not just a matter of semantics. When there is a presupposition that a particular job is a "woman's job," it diminishes the job content and the salary. As Nakano Mami points out, eliminating sex-specific advertising is "an important first step toward eliminating discrimination."²⁸⁴ From the point of view of women on the front lines, however, it may also be a mixed blessing. Until companies decide to hire women—or decide that the price they pay for not hiring women is too high—this first step will remain merely symbolic.

Perhaps the 1997 EEOL's most conspicuous shortcoming is the persistence of its negligible enforcement mechanisms. The law provides for sanctions, albeit diluted ones, in the form of public announcements of companies in noncompliance, but these notifications are insufficient penalties.²⁸⁵ Even granting the fact that reputations are important in Japanese society and business,²⁸⁶ there is not a culture or tradition of consumer boycotts that would constitute a deterrent equal to that of substantial monetary fines or criminal penalties. Similarly, the nominal changes made to the mediation process do not constitute an effective dispute resolution mechanism primarily because even though mediation can commence with the consent of only one party, the final settlements are non-binding without the consent of both sides. As a result, while the 1997 EEOL may contain several innovative provisions, the means for enforcement remain weak.

C. *The Quiet Revolution and "Expectation Theory"*

As a first attempt at assessing the implication behind these social trends, one must consider what women are reacting to in conjunction with the role the law has played, and will potentially play in the future, in shaping women's employment.

With the proliferation of "freeter" work styles, young men and women across Japan have embarked on a "generational revolt."²⁸⁷ The premium the current generation places on freedom stems from their lost faith in an employment system that can no longer absorb them. This is

Female Employees Prohibited], ASAHI SHIMBUN (Osaka), Feb. 23, 1999.

²⁸³ *Kawaru "Josei no Tame no" Younin Zashi [Want Ad Magazines Specifying Jobs "For Women" Will Change]*, *supra* note 281.

²⁸⁴ *Kawaru Younin Yougo [The Language of Want Ads Changes]*, SHINNOU MAINICHI SHIMBUN (evening), Feb. 1, 1999.

²⁸⁵ *Kaisei Kintouhou [The Revised EEOL]*, SANKEI SHIMBUN, Dec. 24, 1997 (quoting a speech made in Tokyo by attorney Nakano Maki in 1997).

²⁸⁶ See Larsen, *supra* note 101, at 222.

²⁸⁷ Brooke, *supra* note 106.

particularly true for women who experience greater difficulty obtaining jobs and, when employed, find themselves in less desirable secretarial and temporary positions. Rather than attempting to break down the barriers to conventional employment, women are quietly rebelling against the constraints of tradition and the male employment pattern. Their revolution is not an organized, raucous, or radical feminist movement, but it is a movement nonetheless.

Author Muriel Jolivet refers to Japanese women's delaying marriage and children as a "silent little revolution."²⁸⁸ To borrow the term and expand upon it, this Article proposes that the quiet revolution encompasses women's newly emerging work-style choices, as well as their reproductive decisions. Women are quietly rebelling against their lack of equal opportunity and the mentality that demotes women's potential labor contributions to a safety valve mechanism. As women escape the drudgery of repetitive work through altered lifestyles and creative coping mechanisms, they may not be there to fill in when companies decide more repetitive work needs doing.

The "parasite singles," "non-paras," "Acquirers," and "Absconders"²⁸⁹ challenge society's employment status quo by revolting "against the rigidity of both traditional family roles and Japan's punishing professional system."²⁹⁰ Not only are they opting out of traditionally female work patterns, but they are also altering the fabric of the Japanese familial system.

Despite legal guarantees for women's employment, Japan is a country known for its "workaholic culture" and lack of childcare infrastructure.²⁹¹ This dangerous combination denies the professional aspirations of mothers just as it eliminates career women's incentives for entertaining the idea of motherhood.²⁹² The government has taken note of the quiet revolution, not necessarily because equality ranks high on their political agenda, but because the government is concerned about plummeting birth rates. The government's main response to the "baby bust," however, has been to raise child allowances in order to encourage women to stay home.²⁹³ Perhaps politicians hope this Band-Aid approach will render widespread systematic reforms unnecessary, but there appears to be a disconnect between the opportunities the EEOL purports to provide and the conditions women are experiencing.

²⁸⁸ "[W]ithout being at all aggressive, Japanese women are making their *silent little revolution*, instigating change by . . . gentle resistance." JOLIVET, *supra* note 79, at 191 (emphasis added). Jolivet emphasizes that for these women, marriage is neither rejected nor rushed.

²⁸⁹ "Adjusters" and "Avoiders" are not included in this analysis due to the fact that they appear more willing to accept the status quo.

²⁹⁰ Orenstein, *supra* note 122, at 32.

²⁹¹ *See id.*, at 34.

²⁹² *Id.*

²⁹³ *Id.* *See The "Freeters" Issue*, *supra* note 111, at 3.

Some scholars insist that women themselves do not demand greater equality in the workplace. In 1989, Parkinson explained that women had a vested interest in the status quo when the EEOL was first passed, and that their consciousness was not at the point of demanding equal employment opportunity. “Once the consciousness of the women themselves has been raised,” she opined, “they can become the driving force in the achievement of future progress. Major change can and will come no faster than Japanese women themselves want it.”²⁹⁴ Given recent social phenomena, it appears that women are ready for change. The question is whether the law can facilitate it.

To say that women are not demanding equality is too simplistic an explanation for the current situation in Japan. Instead, the lack of equality actually decreases women’s motivation toward work. In other words, an “expectation theory” is in place, where women’s work-related aspirations are largely defined by the expectations of companies, their families, and society at large. Generally, women rise to the expectations placed upon them. But, in an atmosphere where families expect little of their daughters and corporations expect less of women than of men, it is understandable that women conform to these minimal expectations.

This is not to imply that women do not possess a strong desire to work. On the contrary, many express an eagerness to join the ranks of the managerial track, but are greeted with slim prospects. Representative of corporate expectations of women, “Rie” describes her job search: “I am happy with my job offer on the managerial track, but I realize how lucky I am—I am one of only three women hired by my company for this track this year.”²⁹⁵

The women from families who encourage them to attend prestigious universities and join prominent companies as secretaries in order to find equally impressive husbands tend to place less importance on their work.²⁹⁶ Some women are openly upset that their parents place such low expectations on them.²⁹⁷ “I don’t understand why my parents spent all this money on me and told me to study when all they expect of me is that I’ll become a secretary and find a husband,” explains “Asuka.” “I am definitely influenced by what they want. But I’ve studied so hard . . . why am I joining the secretarial track? I could have gone to junior college for this.”²⁹⁸

²⁹⁴ Parkinson, *supra* note 171, at 633.

²⁹⁵ Interview with “Rie,” Female University Student, in Tokyo, Japan (June 1998) (on file with author).

²⁹⁶ Interview with “Ranko,” Female University Student, in Tokyo, Japan (May 1998) (on file with author); interview with “Kyoko,” Female University Student, in Tokyo, Japan (May 1998) (on file with author).

²⁹⁷ Interview with “Asuka,” Female University Student, in Tokyo, Japan (May 1998) (on file with author).

²⁹⁸ *Id.*

On the other hand, women whose mothers work as regular employees²⁹⁹ or whose families support their independence tend to expect more from themselves during their job hunt and aspire to more rigorous jobs. As "Yoko" articulates:

Most of my girlfriends don't care what company they work at—it's only the men who need to make sure they are placed in a position to use their skills. But I'm different, and it's probably because of the way I was raised. My parents advise me and urge me on—they encourage me to rely on myself and find the job I want to do instead of going to a large company, marrying early, and relying on someone else.³⁰⁰

Thus, the expectations placed on women by society and family alter and mold women's attitudes toward work. A strong legal culture supportive of women's equality could have a similar effect.

Based on the theory that offering equal opportunities to women will strengthen their commitment toward work, it becomes clear that the law has the potential to play a prominent role in shaping women's employment patterns by increasing the societal expectations placed on women, women's will to work, and the number of desirable jobs available to them. Until now, the EEOL has offered only superficial improvements lacking enforcement mechanisms. In the future, Japan must guarantee that the law succeeds in insuring that companies provide women with equal employment opportunities.³⁰¹

IV. CONCLUSION: THE LAW AND ITS FUTURE IN THE CONTEXT OF SOCIAL CHANGE

Given the importance of placing the law in the social context of Japanese women's lifestyle choices within the labor market, the current EEOL must be examined and analyzed with the influence of the quiet revolution in mind. This Part offers an analysis of the current law, suggestions for the new EEOL amendments, and a conclusion analyzing the current employment situation for women in Japan and the inefficacy of the EEOL.

²⁹⁹ Interview with "Hiromi," Female University Student, in Tokyo, Japan (May 1998) (on file with author).

³⁰⁰ Interview with "Yoko," Female University Student, in Tokyo, Japan (May 1998) (on file with author).

³⁰¹ This is true if for no other reason than the reality of the impending labor shortage. As Jolivet describes, "The time is fast approaching when the country will be forced to choose between opening its doors to foreign workers or making intelligent use of its female workers." JOLIVET, *supra* note 79, at 192.

A. *Analysis of the New Law*

The amended EEOL represents yet another step in the right direction for true equality, but a disconnect remains between the law's purpose and the existing level of equality women actually experience. Japan is on the cusp of yet another labor shortage, and analysts claim that increased utilization of women will be unavoidable, thus placing improvement in women's employment at the mercy of a mercurial economy. In the past, the improvements spawned by labor shortages have been short-lived. For equality of opportunity to occur, rather than rely on economic downturns, it is necessary to sharpen the teeth of the 1997 EEOL.³⁰² On the whole, the 1997 EEOL signifies progress and indicates a metamorphosis in the law's theoretical underpinnings. However, due to some of its previously articulated weaknesses, the following changes are recommended.

B. *Proposed Amendments*

Clearly, in order to create a true anti-discrimination law, there must be reciprocity in equality. It follows that, instead of only prohibiting discrimination against women, the law must also deal with discrimination against men. Only when such reverse discrimination claims are available will there be true equality rather than the appearance of protection for women.

Most pressing, though, is the need to reexamine the divergent paths of mediation and litigation. Now that the endeavor clause has been replaced with a prohibition, companies that discriminate in the areas of recruitment, hiring, placement, and promotion are deemed to be violating a legal duty not to discriminate. Consequently, contrary to Upham's pre-

³⁰² This begs the question to what extent is social change driven by law, and to what extent is it really influenced by larger considerations? Examining the legal landscape in other countries helps illuminate how law produces change. Some authors argue that the law has played a significant role in propelling social change in the area of employment discrimination and gender equality in countries such as the United States, suggesting that Japan could stand to learn from other countries' experience. *See generally* Kiyoko Kamio Knapp, *Don't Awaken the Sleeping Child: Japan's Gender Equality Law and the Rhetoric of Gradualism*, 8 COLUM. J. GENDER & L. 143 (1999). For example, Knapp examines Japan's EEOL and compares it to its U.S. counterpart, Title VII of the Civil Rights Act of 1964, concluding that the law has played a pivotal role in the United States as an effective "instrument of social reform." *Id.* at 179. While acknowledging the limitations of legal reform, she avoids asserting that coercive legislation provides a complete solution, and maintains that "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." *Id.* at 147. Finally, Knapp recommends that Japan follow the United States' lead in using the law as a means of enforcing gender equality in the workforce. *Id.* *See also* Andrews, *supra* note 155, at 421 (comparing American, European, and Japanese employment law, and examining the hurdle of enforcement in the implementation of equal employment opportunity laws).

diction,³⁰³ the 1997 EEOL has effectively reopened the option of litigating in an attempt to expand the legal hook of Article 90 of the Civil Code to encompass these additional areas of employment discrimination. Yet, because neither the 1985 nor the 1997 EEOL establishes a private cause of action, mediation remains the official alternative for dispute resolution. As long as mediation is non-binding, however, the superficial 1997 amendment allowing the consent of only one party to trigger its commencement will have no effect other than delay. Whereas companies used to refuse to mediate, they are now free to reject the proposed settlement. One clear solution is to amend the law to provide for binding mediation to prevent this form of dispute resolution from degenerating into yet another time-consuming hurdle for women to clear on their way to litigation.

In the event that the law is not amended regarding mediation, the tension between the potential litigation option and the law's mediation preference should be resolved by explicitly creating a private cause of action in the EEOL to expressly permit litigation. One could argue that an explicit litigation provision is not necessary because the effect of repealing the endeavor clause reinstates the option of litigation in this area. However, that argument cuts both ways: if litigation is a true option, then there is no harm in making that option clear, rather than sending the mixed message that mediation is preferred, even though its results are not enforceable and there have been no mediations where both sides have abided by the settlement terms since the law's enactment. Opponents who view this measure as unnecessary might cite the time and cost of litigating in Japan, a country well known as a non-litigious society. But if the courtrooms are opened to potential plaintiffs, there is no reason to assume that the progress that women made in the 1960s with dismissal and termination cases will not be repeated. Without an amendment creating either binding mediation or a private cause of action, the 1997 EEOL is truly a toothless document: it offers the promise of equality with no real means for achieving or enforcing it.

Finally, the 1997 EEOL does little in the way of granting women effective forms of redress. Although it departs from the 1985 EEOL in sanctioning companies guilty of noncompliance by publicizing their names, it would add force to these public announcements if they were supplemented by hefty fines and criminal sanctions.³⁰⁴ In addition to the publication of companies that "misbehave," the Koizumi administration has adopted a method for ranking and publishing "family friendly" companies that assist their employees in managing both work and childcare responsibilities.³⁰⁵ Along those lines, the government should monitor and

³⁰³ See discussion *supra* Part III.B.2.d.i.

³⁰⁴ Fan, *supra* note 161, at 137.

³⁰⁵ *Gender Panel Calls for More Daycare Space, Flexible Work Schedules*, JAPAN DIG., June 20, 2001, <http://www.japandigest.com/recent/society/20010620-society-1.html> (last visited Oct. 12, 2001) (on file with author); *Companies Grapple with the Dwindling Fam-*

publish the names of companies that exhibited positive track records in hiring a significant number of women to positions of responsibility.

In general, many of the 1997 amendments appear to be merely cosmetic adjustments devoid of any real bite. Women relinquished their LSL protections in exchange for an end to the endeavor clause and an unequivocal prohibition of discrimination. The lingering fear is that the removal of protections will lead to women working longer hours on the job without any decline in their domestic duties, rendering the revised EEOL a pyrrhic victory for women.

One way to address this concern is for Japanese society as a whole to experiment with creative ways—such as increased daycare facilities and the introduction of flexible working hours³⁰⁶—to ameliorate balancing difficulties. In addition, to ensure that the LSL protections were not relinquished in vain, strong legal mechanisms are required to enforce the right to equal employment opportunity.

C. The EEOL: Limitations in the Face of the Quiet Revolution

There is little doubt that since the 1985 EEOL emerged, Japanese women have made great strides in the employment arena. Throughout the first decade of the EEOL, the opportunities available to women broadened and women responded accordingly. It appears, at least initially, that Parkinson's optimism concerning the law's gradual and non-coercive qualities deserves merit. In the mid-1980s, women prioritized marriage over careers, and neither the men nor the women of Japan were completely prepared to accept true equality.³⁰⁷ In that sense, Parkinson is correct in stating that the EEOL gave women something for which they had not asked.³⁰⁸ Taking this environment into consideration, Parkinson contends that "evolution rather than revolution" was necessary in Japan to effectuate change in the world of sex-based employment discrimination.³⁰⁹ She opines that in the long run women will only achieve equality "when they want it very much and are willing to fight for it."³¹⁰

In the interim, the social climate has shifted, and women no longer indicate a desire to preserve the previous employment environment, in which work represented a temporary transitional period between schooling and marriage. Admittedly, women are not "fighting" in the conventional sense, but there are compelling reasons to believe that Japanese society has outgrown the utility of an "evolution" approach to equality.

ily, JAPAN LAB. BULL., July 1, 2000, at 4, available at <http://www.jil.go.jp/bulletin/year/2000/vol39-07.htm>.

³⁰⁶ *Companies Grapple with the Dwindling Family*, *supra* note 305, at 4.

³⁰⁷ Parkinson, *supra* note 171, at 627.

³⁰⁸ *Id.* at 633.

³⁰⁹ *Id.* at 605.

³¹⁰ *Id.* at 653.

Although Parkinson rightly predicted that law could spur positive social change without the use of force and coercion, unforeseeable work-related social phenomena followed on the heels of the law's improvement. Drastic changes in women's behavior have accompanied the law's gradual push toward equal opportunity provision: "parasite singles" and "non-paras" postpone marriage and childbirth, and "Acquirers," "Absconders," "freeters," and even temporary workers opt-out of the formal labor force entirely. This Article characterizes these responses as women's quiet revolution in reaction to insufficient employment opportunities. Parkinson asserted in 1989 that women's attitudes needed to change,³¹¹ and this quiet revolution demonstrates that indeed they have.

The current externalities of the quiet revolution indicate that Japan has finally reached the limits of a weak EEOL's potential, leading to the conclusion that the evolution period marked by the success of volunteerism has ended. However, the revised EEOL is not equipped to contend with the work-related social phenomena that have appeared. Although Parkinson feared that an overly powerful law would produce shaky results that could "ebb out with the next political tide,"³¹² women's employment has proven to correlate more closely with rising and falling tides of the economy.³¹³ Even though unprecedented demographics supply an important long-term strategic reason for encouraging the utilization of women, the market's past interplay with women's employment indicates that the 1997 revisions to the EEOL are insufficient to ensure equality in the absence of a labor shortage. The role that women will play in the future of Japan's labor market hinges on the legal protections made available to them, as well as on the strength of the mechanisms enforcing those legal rights.

Overall, the ratification of CEDAW not only spurred the EEOL's enactment, it also signified a symbolic shift in Japan's ideas and ideals surrounding women's role in the workplace. For all of the criticism that the EEOL received for having international pressure as its impetus,³¹⁴ "outside pressure," or *gaiatsu*, has proven effective in instigating change in Japan in many arenas. In the context of U.S.-Japan trade policy, *gaiatsu* emerged during both the George H. Bush and the Clinton administrations as a means for "forcing the Japanese to adopt policies really in their domestic interest."³¹⁵ According to one American commentator, "*Gaiatsu*

³¹¹ *Id.* at 633.

³¹² *Id.* at 661. According to Parkinson, "The voluntary . . . approach of the EEOL was adopted precisely because Japan hoped to achieve long-term, permanent change rather than stop-gap, short-lived measures that would ebb out with the next political tide."

³¹³ See *supra* note 228 and accompanying text, discussing how the Liberal Democratic Party has been a political fixture in Japan, indicating that the political tides most likely have not shifted significantly.

³¹⁴ See Parkinson, *supra* note 171, at 614-15.

³¹⁵ RAYMOND COHEN, *NEGOTIATING ACROSS CULTURES: INTERNATIONAL COMMUNICATION IN AN INTERDEPENDENT WORLD* 171 (U.S. Institute of Peace Press, 1997). This

came to be seen as a kind of ‘magic bullet’ for dealing with Japanese procrastination.”³¹⁶ A Japanese analyst of U.S.-Japan relations similarly concedes, “It’s shameful really that we [Japanese] need *gaiatsu* to improve our lifestyle, but the fact is we need the pressure to make changes in our society.”³¹⁷

In the context of employment, *gaiatsu* may very well have urged the initial adoption of the 1985 EEOL, but over the course of a decade the law itself accustomed society to increased numbers of women in the workforce. The opposite of *gai* in Japanese is *nai*, meaning internal. With the quiet revolution, Japan is experiencing internal pressure—or what can be termed “*naiatsu*” as a whimsical play on words—to take action. A new consensus appears to have developed among women that the present employment conditions are unacceptable. They are registering this discontent quietly and individually with lifestyle choices that reverberate loudly. The formidable challenge will be whether the government responds with a law strong enough to answer this call for change.

comment was made in regard to the 1993 framework talks between the United States, represented by Deputy United States Trade Representative Charlene Barshefsky, and Japan.

³¹⁶ *Id.*

³¹⁷ *Id.* (quoting Atsushi Kuse).