Beyond Maryland v. Craig: Can and Should Adult Rape Victims be Permitted to Testify by Closed-Circuit Television?

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**INTRODUCTION**

Anna is a rape victim. The man accused of raping her is scheduled to stand trial next week. Both Anna’s psychiatrist and an expert hired by the state to examine her have determined that Anna would suffer serious emotional distress and thus be unable to communicate coherently if she were forced to testify in the presence of the defendant. However, they agree that Anna would be able to testify over one-way closed-circuit television with both attorneys and her doctor in the room with her, while the judge, jury, and the defendant watched from another room.

Whether Anna will be allowed to testify in the manner suggested by the psychiatrists may depend on her age. In *Maryland v. Craig*, the Supreme Court held that it is constitutional to permit a child victim of sexual abuse to testify over one-way closed-circuit television when necessary to protect the child from the trauma of testifying in the presence of the defendant. However, the question of whether the identical procedure would be constitutional when applied to an adult victim has not been addressed by the Supreme Court.

Although the technique upheld in *Craig* is governed by a statute that applies only to victims of child abuse, in the absence of an explicit statute, it would still be possible to allow any witness to testify over one-way closed-circuit television by using the unavailability exception to the hearsay rule.  

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2. *Id.* at 3170.
4. Numerous states have statutes creating alternative ways for child abuse victims to testify. See infra notes 45-49 and accompanying text.
5. Federal Rule of Evidence 804, which codifies the unavailability exception to the hearsay rule, will be the basis of the discussion of that exception throughout this Note. Testimony by closed-circuit television, even if shown live during a trial, must still be viewed as hearsay. Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. Miami L. Rev. 19, 90 (1985). But see Craig, 110 S. Ct. at 3167 (The Supreme Court declined to hold that testimony by closed-circuit television is hearsay, although noting that it may technically be considered out-of-court testimony.).
To do this, the judge would first make a finding that the witness was "unavailable" because she would be essentially unable to communicate in the presence of the defendant due to her emotional trauma. Once the witness was declared unavailable, any statement made by the witness over closed-circuit television and subject to cross-examination by the defendant's attorney would be admissible under the prior testimony exception to the hearsay rule. The use of any rule of evidence to admit hearsay is, of course, limited by the confrontation clause of the sixth amendment to the United States Constitution. Thus, the question remains whether the technique used in Craig would pass constitutional muster if it were applied to adults.

The answer to that question must be found in the Court's analysis of the confrontation clause, both historically and in the Craig opinion. Therefore, Part I of this Note will examine the confrontation clause and its historical relationship to exceptions to the hearsay rule. Part II will examine the Court's application of the confrontation clause to statutes designed to protect child witnesses, culminating in Craig. Finally, Part III will assess whether adult rape victims could, and should, constitutionally be afforded similar protection, either by statute or through application of the unavailability exception to the hearsay rule.

I. THE CONFRONTATION CLAUSE

The Supreme Court, in holding the confrontation clause applicable to the states through the fourteenth amendment, stated: "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the

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6. A witness who "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity" is considered unavailable. FED. R. EVID. 804(a)(4).

7. FED. R. EVID. 804(b)(1). The rule provides that the following is not excluded as hearsay if the declarant is unavailable:
- Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered ... had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

See infra notes 133-40 and accompanying text for an application of this rule to closed-circuit television testimony.

8. See California v. Green, 399 U.S. 149, 155 (1970) ("It is a mistake to say that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law."). But see Jonakait, Restoring the Confrontation Clause to the Sixth Amendment, 35 UCLA L. REV. 557, 574 (1988) ("The confrontation clause is not now a constitutional provision controlling evidence law. Instead, evidence law dominates the confrontation right.").
kind of fair trial which is this country's constitutional goal." Unfortunately, there has not always been such consensus in defining exactly what the "right . . . to be confronted with the witnesses against him" entails, especially when out-of-court statements are involved. It is important, therefore, to understand the way in which the Supreme Court's view of the confrontation clause has evolved historically in order to determine how modern confrontation clause problems should be approached.

The Supreme Court first defined the "primary object" of the confrontation clause as being

to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

This statement of the purpose behind the confrontation clause is consistent with the perception that Sir Walter Raleigh's 1603 trial for treason had a major influence on the development of the common law right to confrontation. During his trial, Raleigh, whose conviction was based primarily upon the written confession of an absent co-conspirator, demanded to "[c]all [his] accuser before [his] face." This statement symbolizes the long-established belief behind the confrontation clause: "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"

The Court later recognized, however, that an absolute requirement of face-to-face confrontation would "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." Thus, the Court held in California v. Green that an out-of-court statement by a

10. U.S. CONST. amend. VI.
11. See Owen, Recent Development, The Confrontation Clause Applied to Minor Victims of Sexual Abuse, 42 VAND. L. REV. 1511, 1515 (1989) (Not even the Supreme Court claims to know the intent of the framers of the confrontation clause.).
12. See Jonakait, supra note 8, at 558-59.
14. F. Heller, The Sixth Amendment 104 (1951) (citations omitted). But see Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 CRIM. L. BULL. 99, 100 n.4 (1972) (The story of Sir Walter Raleigh's contribution to the right of confrontation is merely a "convenient but highly romantic myth.").
15. 2 T. Howell, A Complete Collection of State Trials 15-16 (1816), quoted in Graham, supra note 14, at 100.
16. Coy v. Iowa, 487 U.S. 1012, 1019 (1988). This same idea was immortalized by Shakespeare in Richard II, act 1, scene 1: "Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . ."
witness present at trial could constitutionally be admitted if three distinct
criteria mandated by the confrontation clause were met: the witness gave
testimony under oath at trial; the witness was subjected to cross-examination
by the defendant at trial; and, finally, the jury was able to observe the
witness's demeanor in order to assess his or her credibility. Thus, even
though the witness's out-of-court statement may not have been made under
the above conditions, the Court held that the defendant's right to confront
the witness concerning the statement would be satisfied as long as the
witness was available to be cross-examined about it at trial.

Justice Harlan wrote a concurring opinion in Green in which he expressed
his disapproval of the tendency of lower courts and commentators to
misinterpret the Supreme Court decisions concerning the confrontation
clause as equating "confrontation" and "cross-examination." As Justice
Harlan noted, this misinterpretation is "understandable" considering the
seemingly explicit language in numerous Supreme Court opinions suggesting
just such an equation. Harlan believed that all such language should be
considered dicta; under the Supreme Court's analysis, the right to confront-
tation was and should be "confined to an availability rule, one that requires
the production of a witness when he is available to testify." Under this
view, common law hearsay exceptions permitting statements made by una-
vailable declarants to be admitted would be constitutional, even though
some of them do not require that the defendant have the opportunity for
cross-examination.

In Ohio v. Roberts, the Court, consistent with the ideas expressed by
Justice Harlan in Green, broadened the exceptions to the confrontation
clause by establishing a two-prong test for admitting out-of-court statements

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19. Id. at 158.
20. Id. ("[If the declarant is present and testifying at trial, the out-of-court statement for
all practical purposes regains most of the lost protections [guaranteed by the three criteria for
admission].").
21. Id. at 172 (Harlan, J., concurring).
22. Id. (Harlan, J., concurring).
the constitutional confrontation rule is to give a defendant charged with crime an opportunity
to cross-examine the witnesses against him.").
24. Green, 399 U.S. at 182 (Harlan, J., concurring).
25. An example is the dying declarations exception to the hearsay rule, now codified in
Federal Rule of Evidence 804(b)(2). Note, however, that Justice Harlan joined the majority in
disputing the idea that the confrontation clause was meant by its framers as merely a way to
constitutionalize common law hearsay rules. Green, 399 U.S. at 179 (Harlan, J., concurring)
("[T]he Clause was intended to ordain common law rules of evidence with constitutional
sanction is doubtful . . . . Rather, having established a broad principle, it is far more likely
that the Framers anticipated it would be supplemented, as a matter of judge-made common
law, by prevailing rules of evidence.").
26. 448 U.S. 56.
made by unavailable declarants. First, the proponent of the statement must prove that the declarant is unavailable to testify at trial. Then the Court requires that the statement "bear[] adequate indicia of reliability," which will be inferred if "the evidence falls within a firmly rooted hearsay exception." If the statement cannot be admitted under a "firmly rooted" hearsay exception, it may still be admitted if the circumstances in which it was made provide it with a "particularized guarantee of trustworthiness." A reliable statement is admissible without actual confrontation because the statement will still further the purpose of the confrontation clause—enhancing the reliability of the truth-finding functions of a criminal trial.

Thus, the Court has established that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." The Court now views the confrontation clause as reflecting a "preference" for face-to-face confrontation, allowing the admission of certain "reliable" hearsay evidence and opening the door for states to attempt to define interests that outweigh this "preference." One such state interest is, as Craig demonstrates, the protection of the psychological well-being of child abuse victims who give testimony against their alleged abusers.

II. THE CONFRONTATION CLAUSE VERSUS THE PROTECTION OF CHILD ABUSE VICTIMS

The problem of sexual abuse of children has become one of tremendous public interest over the past few years. This is understandable if, as studies suggest, as many as one in every three adult women in this country today was sexually abused when she was a child. Unfortunately, a majority of

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27. In other words, when application of the unavailability exception to the hearsay rule is constitutional.
29. Id. at 65-66.
30. Id. at 66. For a discussion of the difficulty of applying the "firmly rooted" standard and a suggestion that a case-by-case determination of the reliability of the hearsay statement involved should replace it, see Goldman, Not So "Firmly Rooted": Exceptions to the Confrontation Clause, 66 N.C.L. Rev. 1 (1987).
31. Roberts, 448 U.S. at 66 (footnote omitted).
34. Roberts, 448 U.S. at 63.
35. AMERICAN BAR ASSOCIATION GUIDELINES FOR THE FAIR TREATMENT OF CHILD WITNESSES IN CASES WHERE CHILD ABUSE IS ALLEGED 7 (1985) (approved by the ABA Board of Delegates in 1985) (citing Finkelhor, How Widespread Is Child Sexual Abuse?, in PERSPECTIVES ON CHILD MALTREATMENT IN THE MID '80's 18, 19 (Nat'l Center on Child Abuse & Neglect, U.S. Dept. of Health & Human Services 1984)).
child sexual abuse cases are never reported, and prosecution of those that are is often made difficult by the fact that the child victim’s testimony is the only real evidence available. The ability of some child witnesses to communicate can be severely hampered, indeed sometimes eliminated altogether, by the trauma of testifying in front of the alleged abuser. Although the experience can be psychologically detrimental to some children, it should be noted that not all child sexual abuse victims are traumatized by testifying in court. In fact, “[a]ttorneys and psychologists that were present at a conference on child sexual abuse unanimously reported that a great majority of children are capable of testifying at trial without much difficulty.”

When a child would be traumatized by testifying, forcing her to do so would not only be damaging to her, but also could prove fruitless, “undermining the truth-finding function of the trial itself.” This results from a child’s reluctance, or even inability, to testify in front of the defendant. “The physical presence of a defendant [sic] who is a threatening figure in a child’s life . . . along with the stigmatizing and guilt-provoking presence of the general public, often constitute the primary impediments to a child’s ability to testify about sexual abuse.”

Conversely, many believe that permitting children to testify out of the defendant’s presence undermines the truth-finding process. They feel that face-to-face confrontation enhances the ability of juries to detect false accusers and that allowing a witness to testify without facing the defendant.

36. Finkelhor, supra note 35, at 18; see also Russell, The Incidence and Prevalence of Intrfamilial and Extrafamilial Sexual Abuse of Female Children, 7 CHILD ABUSE & NEGLECT 133, 145 (1983) (“[O]nly a minute percentage of [child sexual abuse] cases ever get reported to the police.”).

37. Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987); see also Berliner, The Child Witness: The Progress and Emerging Limitations, 40 U. MIAMI L. REV. 167, 171 (1985) (“Most cases involve only the child and the offender, without the traditional corroborative evidence such as medical or physical findings, or witnesses to the crime.”) (citing Radbill, A History of Child Abuse and Infanticide, in THE BATTERED CHILD 3, 17 (Helfer & Kempe eds. 1974)).

38. “[T]o a child who does not understand the reason for confrontation, the anticipation and experience of being in close proximity to the defendant can be overwhelming,” D. WHITCOMB, E. SHAPIRO & L. STELLWAGEN, WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS 17-18 (1985), quoted in Coy v. Iowa, 487 U.S. 1012, 1031 (1988) (Blackmun, J., dissenting).

39. See, e.g., Berliner, supra note 37, at 172.

40. Graham, supra note 5, at 83 n.141. In fact, “[c]ounselors have found that children sometimes psychologically benefit by participating in the criminal justice system.” Berliner, supra note 37, at 174-75; see also Melton, Child Witnesses and the First Amendment: A Psychological Dilemma, 40 J. SOC. ISSUES 109, 120 (1984) (“[I]t is conceivable that for some youngsters the opportunity to have their day in court would be cathartic and symbolically put an end to the episode in their minds.”).

41. Coy, 487 U.S. at 1032 (Blackmun, J., dissenting) (citation omitted).

42. MacFarlane, Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases, 40 U. MIAMI L. REV. 135, 149 (1985) (Kee MacFarlane is the director of the Child Sexual Abuse Diagnostic Center of the Children’s Institute International in Los Angeles.).
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makes it easier for her to lie on the witness stand.\textsuperscript{43} This concern is especially relevant where child victims are concerned because many fear that child victims are often "brainwashed" into "remembering" abuse that never happened or are encouraged by adults to exaggerate their stories, making the risk of false accusations by children very great.\textsuperscript{44}

In response to the growing problem of child sexual abuse and increased public concern over the detrimental effect that testifying in court had on some child victims, state legislatures began searching for ways to protect child witnesses from emotional trauma. Various methods have been implemented, including closing the courtroom to the public while the child testifies,\textsuperscript{45} creating hearsay exceptions to admit certain out-of-court statements made by child victims,\textsuperscript{46} allowing child victims to testify on videotape instead of live in the courtroom,\textsuperscript{47} using one-way mirrors or screens to keep

\textsuperscript{43} See supra notes 13-16 and accompanying text.

\textsuperscript{44} But see Berliner, supra note 37, at 177 ("There is no real support for this contention. It is not clear that it is even possible to induce children to describe an experience they never had.").

\textsuperscript{45} Twenty-six states have statutes allowing judges to close courtrooms while child victims of sexual abuse testify. See Forman, Note, To Keep the Balance True: The Case of Coy v. Iowa, 40 Hastings L.J. 437, 443 & n.45 (1989).

In Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), the Supreme Court held unconstitutional a Massachusetts statute that allowed such courtroom closure in all cases involving child sex abuse victims. However, the Court did not hold that closing courtrooms in such circumstances would always be unconstitutional; instead, it advised that a case-by-case analysis of the individual need for closure should be undertaken to insure that the child's need for protection outweighs the first amendment rights of the public and the press. The Court suggested that such factors as the age and psychological maturity of the victim, the nature of the crime involved, the desires of the child victim, and the interests of the child's parents and relatives should be used to determine whether and to what degree the individual child involved would be harmed by testifying in open court. Id. at 608.

\textsuperscript{46} Twenty-two states have enacted specific hearsay exceptions for out-of-court statements made by child victims. See Forman, supra note 45, at 442 & n.34. It is also possible for such statements to be admitted under the residual exception to the hearsay rule if the child is deemed unavailable to testify and the court determines that the statement has "circumstantial guarantees of trustworthiness." Fed. R. Evid. 804(b)(5).

The Supreme Court has refused to "read into the Confrontation Clause a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant." Idaho v. Wright, 110 S. Ct. 3139, 3148 (1990). This suggests that even in states where there are statutory hearsay exceptions for child victims the confrontation clause requires a case-by-case showing of the reliability of any statement offered under such an exception. For a detailed discussion of the use of such hearsay exceptions, see Graham, supra note 5, at 21-61.

\textsuperscript{47} Videotaped testimony by child victims of sexual abuse is permitted in thirty-seven states. See Maryland v. Craig, 110 S. Ct. 3157, 3167 & n.2 (1990). State courts have given these statutes varied treatment. See, e.g., State v. Jarzbek, 204 Conn. 683, 704-05, 529 A.2d 1245, 1255 (1987) (requiring a case-by-case determination that taking the videotaped deposition outside the presence of the defendant was necessary to insure that the reliability of the child's testimony would not be precluded by the trauma of seeing the defendant), cert. denied, 487 U.S. 1061 (1988); State v. Lamb, 14 Kan. App. 2d 664, 671, 798 P.2d 306, 510-11 (finding Craig criteria satisfied by a videotaped interview admitted pursuant to a Kansas statute; the interview provided "sufficient indicia" of reliability and the trial judge had the opportunity at a pretrial hearing to evaluate the potential trauma to the witness).
the defendant out of the child's sight, and, finally, using closed-circuit television to permit the child to testify without being exposed to the defendant.

Few would argue with the proposition that the goal of protecting children, especially children who have been victimized, is an admirable one. However, any procedure that allows a child to testify without providing for actual, physical confrontation with the defendant has the potential to violate the defendant's sixth amendment rights. Therefore, the use of any of the methods listed above is subject to constitutional scrutiny.

A. Coy v. Iowa

The first method considered by the Supreme Court, in Coy v. Iowa, was a statute which allowed children testifying about sexual abuse to testify behind a screen without having to see the defendant. The defendant was able to see and hear the child and confer with his attorney during the child's testimony. Coy, who had been charged with sexually assaulting two thirteen-year-old girls, objected to the use of the screen, arguing that the confrontation clause gave him the right to face-to-face confrontation with his accusers.

The Court was once again faced with attempting to delineate the guarantees inherent in the confrontation clause. Justice Scalia, writing for the majority, outlined the history of the right to confront one's accusers, going as far back as Paul's treatment as a prisoner of the Roman Governor Festus and the literal Latin derivation of the word "confront." The opinion is "embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a

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48. This is the procedure found unconstitutional in Coy v. Iowa, 487 U.S. 1012 (1988). See infra notes 51-71 and accompanying text for a discussion of Coy.
49. Child abuse victims may testify by one-way closed-circuit television in twenty-four states, and eight states allow the use of two-way systems. Craig, 110 S. Ct. at 3168 & nn.3 & 4. This procedure is constitutional under certain circumstances. Id. See infra notes 67-89 and accompanying text for a discussion of Craig.
50. See supra notes 9-15 and accompanying text.
51. 487 U.S. 1012.
52. Id.
53. Iowa Code § 910A.14(1) (Supp. 1987) (In 1989, subsection (1) was struck from the statute.).
54. Coy, 487 U.S. at 1015.
55. Id. at 1015-16 ("'It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.'") (quoting Acts 25:16).
56. The word "confront" is derived from the prefix "con-" (from "contra"), meaning against, and the noun "frons," meaning forehead. Id. at 1016.
fair trial in a criminal prosecution.” While the Court had recognized certain exceptions to the right of confrontation in the past, the Coy majority explained that “[w]e have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.”

The difference between the previous exceptions to the right of confrontation found constitutional by the Court and the right to a face-to-face encounter between the defendant and his or her accusers is that the latter is explicitly guaranteed by the sixth amendment. Unlike the admission of out-of-court statements or restrictions on cross-examination, face-to-face confrontation represents the “irreducible literal meaning of the [Confrontation] Clause.” While both cross-examination and face-to-face confrontation “ensur[e] the integrity of the fact-finding process,” the Court held that the right to cross-examination is more easily outweighed by other interests because it is merely implicitly included in the sixth amendment. Thus, the Court declared the statute at issue in Coy unconstitutional because the statute relied on a generalized finding that testifying in the presence of the accused can be traumatic for a child victim of sexual abuse, instead of requiring a particularized finding that the individual witness was in need of the protection offered by a screen.

The Court recognized the possible traumatic effect of forcing a child to testify in front of the person accused of sexually abusing him or her and concluded:

[Face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs. However, the majority was unwilling to determine just how great those costs must be—they “left for another day . . . the question whether any exceptions exist.” Any exception, however, “would surely be allowed only when necessary to further an important public policy.”

Justice O’Connor’s concurring opinion was less cryptic. It emphasized the problem of child abuse and the need to protect child victims from
suffering additional trauma in the courtroom.\textsuperscript{66} She then rejected any implication by the majority that the right to face-to-face confrontation is absolute,\textsuperscript{67} reiterating the idea that the confrontation clause "reflects a preference for face-to-face confrontation at trial" that can be "overcome in a particular case if close examination of 'competing interests' so warrants."\textsuperscript{68} Agreeing with the majority's suggestion that the proper standard for any exception would be whether it is "necessary to further [sic] an important public policy,"\textsuperscript{69} Justice O'Connor continued: "The protection of child witnesses is, in my view and in the view of a substantial number of the States, just such a policy."\textsuperscript{70} The procedure used in \textit{Coy} failed to make an individualized showing of necessity, but a similar statute that did require such a showing could, in Justice O'Connor's view, pass constitutional muster.\textsuperscript{71}

\textbf{B. Maryland v. Craig}

Thus the stage was set for \textit{Maryland v. Craig}.\textsuperscript{72} \textit{Craig} involved a Maryland statute that permitted child victims to testify over closed-circuit television, outside of the courtroom and out of the defendant's physical presence, if "[t]he judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate."\textsuperscript{73} The defendant in \textit{Craig} was con-

\textsuperscript{66} Id. at 1022 (O'Connor, J., concurring).
\textsuperscript{67} Id. at 1022-24 (O'Connor, J., concurring).
\textsuperscript{68} Id. at 1024 (O'Connor, J., concurring) (emphasis in original) (quoting Ohio v. Roberts, 448 U.S. 56, 63-64 (1980)).
\textsuperscript{69} Id. at 1025 (O'Connor, J., concurring); see supra note 65 and accompanying text.
\textsuperscript{70} Id. (O'Connor, J., concurring).
\textsuperscript{71} Id. (O'Connor, J., concurring) ("[I]f a court makes a case-specific finding of necessity, as is required by a number of state statutes . . . our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses.").
\textsuperscript{72} 110 S. Ct. 3157.

(a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a closed-circuit television if:
(i) The testimony is taken during the proceeding; and
(ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.
(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.
(3) The operators of the closed-circuit television shall make every effort to be unobtrusive.
(b)(1) Only the following persons may be in the room with the child when the
victed of sexually abusing a six-year-old child who had testified at trial using the procedure prescribed in the statute. The child and both attorneys left the courtroom during the child's testimony, which was then displayed live to the defendant, judge, and jury over a video monitor; the defendant was able to communicate with her attorney by electronic means at all times. The use of this procedure was permitted only after the court heard expert testimony that the child would suffer emotional distress and "have some or considerable difficulty in testifying in Craig's presence."

The Supreme Court, with Justice O'Connor writing for the majority, began its analysis from the premise that the confrontation clause does not "guarante[e] criminal defendants the absolute right to a face-to-face meeting with the witnesses against them at trial." Rather, the purpose of the confrontation clause is to "ensur[e] that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." Each element of confrontation—including the physical presence of the witness, the taking of an oath by the witness, cross-examination, and the opportunity for the trier of fact to observe the demeanor of the witness—contributes to this goal of reliability. Thus, any proposed exception to one of these elements must be analyzed "in a manner sensitive to [the clause's] purposes and sensitive to the necessities of trial and the adversary process."

The Court then analyzed the Maryland statute in terms of the purpose of the confrontation clause. Noting that the statute provides for each element of confrontation except face-to-face confrontation, the Court concluded

child testifies by closed-circuit television:
(i) The prosecuting attorney;
(ii) The attorney for the defendant;
(iii) The operators of the closed-circuit television equipment; and
(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.
(2) During the child's testimony by closed-circuit television, the judge and the defendant shall be in the courtroom.
(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.
(c) The provisions of this section do not apply if the defendant is an attorney pro se.
(d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

74. Craig, 110 S. Ct. at 3160-62.
75. Id. at 3161.
76. Id. (quoting Craig v. State, 316 Md. 551, 568-69, 560 A.2d 1120, 1128-29 (1989)).
77. Id. at 3163 (emphasis in original).
78. Id.
79. Id.
80. Id. at 3165.
that the use of one-way closed-circuit television "adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." 81 The Court was even more supportive of the procedure in dicta, noting that, to the extent that the child would be unable to testify in front of the defendant, the use of closed-circuit television "may well aid a defendant in eliciting favorable testimony from the child witness." 82

The Court then applied the standard Justice O'Connor had suggested in her concurring opinion in Coy—whether the procedure was necessary to further an important state interest—to determine the constitutionality of the statute. 83 As Justice O'Connor had predicted in Coy, 84 the Court found the state's interest in protecting child abuse victims from the emotional distress of testifying to be an important one. 85 Thus, if the state could show that allowing a child victim to testify over one-way closed-circuit television was necessary to protect that child's emotional well-being, the state's interest in protecting the child would outweigh the defendant's right to face-to-face confrontation. 86

The Maryland Court of Appeals, relying on its reading of Coy, had held that expert testimony regarding the possibility of serious emotional distress was not sufficient to establish that use of one-way closed-circuit television was "necessary." 87 Instead, the court of appeals required that the child's inability to testify in the presence of the defendant be shown by attempting to question the child with the defendant present. 88 If that proved unsuccessful, the judge would then be required to determine that the child would be similarly unable to testify by means of two-way closed-circuit television, which, by allowing the witness to see the defendant, would more closely approximate face-to-face confrontation than the one-way method used in Craig. 89

The Supreme Court declined to interpret Coy as requiring such a strict showing of necessity. Instead it established three criteria for showing necessity: (1) the trial court must determine that the procedure is necessary to protect each particular child who seeks to use it; (2) there must be evidence that the child would suffer emotional distress specifically from testifying in

81. Id. at 3166.
82. Id. at 3167.
83. Id.
84. See supra notes 66-71 for a discussion of this concurring opinion.
85. Craig, 110 S. Ct. at 3168-69. "[W]e will not second guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying." Id. at 3169.
86. Id. at 3169.
87. See id. at 3161-62 (quoting Craig, 316 Md. at 556, 560 A.2d at 1127).
88. Id. at 3170 (citation omitted).
89. Id. (citation omitted).
the presence of the defendant, not merely from testifying in the courtroom; and (3) the trauma involved must be more than *de minimis*. The trial court may rely on expert testimony alone to make these findings; subjecting the child to trauma in order to determine that the child needs protection from trauma is not necessary. The Court declined to determine the minimum showing of emotional distress required because the standard of the Maryland statute, "serious emotional distress such that the child cannot reasonably communicate," "clearly suffices to meet constitutional standards." The Court remanded the case, however, because the court of appeals improperly held that expert testimony alone could not be used to establish that the children would suffer serious emotional distress from testifying in the presence of the defendant.

III. ALLOWING ADULT RAPE VICTIMS TO TESTIFY BY MEANS OF CLOSED-CIRCUIT TELEVISION

In *Maryland v. Craig*, the Supreme Court explicitly held that the right to face-to-face confrontation is not absolute and thus testimony by means of closed-circuit television may be constitutionally admitted in a criminal trial when necessary to promote an important public policy. The question of whether an adult rape victim who would be emotionally traumatized by testifying in the presence of her alleged rapist can be afforded the same protection as *Craig* gives to child victims must, therefore, ultimately depend on whether protecting adult rape victims is an important public policy.

That rape is a serious problem in the United States is indisputable. According to official FBI statistics, there were an estimated 102,555 reported rapes in the United States in 1990. A recent Senate Judiciary Committee report found that one out of every five American women will be raped during her lifetime. This translates into a woman being raped every six minutes in the United States. In addition, the number of rapes actually reported to police each year has steadily increased in the past ten years:

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90. Id. at 3169.
91. Id. at 3171.
93. Craig, 110 S. Ct. at 3169.
94. Id. at 3171.
96. See supra notes 72-94 and accompanying text.
97. For an in-depth discussion of the problems of rape and the law, see Estrich, Rape, 95 YALE L.J. 1087 (1986).
98. 1990 FBI UNIF. CRIME REPS. 15.
100. Id.
there were twenty-four percent more reported rapes in 1990 than there were in 1981.\textsuperscript{101}

The official statistics only tell part of the story, however. Some studies indicate that rape is one of the most underreported crimes in the United States.\textsuperscript{102} It is estimated that the actual number of rapes is four times the reported number.\textsuperscript{103} Of those reported, only one-sixth ultimately lead to a rape conviction.\textsuperscript{104} Although the occurrence of rapes has increased, the conviction rate of alleged rapists has decreased—in fact, it has fallen thirty percent since the mid-1960s.\textsuperscript{105}

\textbf{A. The Rape Victim and the Legal System}

One reason women decide not to report rape is fear of the legal system.\textsuperscript{106} This fear is linked to the psychological distress experienced by rape victims. One commentator has stated that "rape is without question one of the most terrifying crimes in which the victim survives. . . . [I]t consequences remain with the victim for many years or perhaps a lifetime, accounting for deep psychological problems."\textsuperscript{107} In fact, a recent survey found that rape victims are five times more likely to attempt suicide than nonvictims.\textsuperscript{108} The medical community and the legal system are beginning to recognize that rape victims often suffer from Rape Trauma Syndrome, a series of psychological reactions to the experience of being raped that affect the victim's entire life-

\begin{enumerate}
\item[101.] 1990 FBI UNIF. CRIME Reps. 16. In addition to an increased number of rapes, the rate of reported rapes has risen steadily according to FBI statistics. \textit{Id.} But see a recent Bureau of Justice Statistics report, "Female Victims of Violent Crime," which indicated that a study of both reported and unreported rapes found a significant decrease in the rate of attempted rapes between 1973 and 1987—from 1.3 per 1000 women and girls to .7 per 1000. The study also found that the rate of completed rapes remained unchanged at .6 per 1000 during the same time period. \textit{Rate of Attempted Rape Decreases, Study Says}, Chicago Tribune, Jan. 14, 1991, at 2 (LEXIS; Nexis library, Currnt file).
\item[102.] Estrich, supra note 97, at 1163.
\item[103.] \textit{Id.} (citation omitted) (based on a 1965 study containing 15 rapes as its basis of prediction). Others estimate even higher—up to ten unreported rapes for every one reported. C. HOROS, RAPE 24 (1974).
\item[105.] Biden Statement, supra note 99, at S16,091.
\item[106.] See A. McEvoy & J. BROOKINGS, IF SHE IS RAPED: A BOOK FOR HUSBANDS, FATHERS AND MALE FRIENDS 43 (1984); \textit{see also} S. KATZ & M. MAZUR, UNDERSTANDING THE RAPE VICTIM 198 (1979) ("Most victims are frightened and confused about appearing in Court . . . .").
\item[107.] Sagarin, \\textit{Forcible Rape and the Problem of the Rights of the Accused}, in FORCIBLE RAPE 142 (1977); \textit{see also} J. BARKAS, VICTIMS 98 (1978) ("Except for murder, the crime of rape is the ultimate invasion, the one with the most severe physical and psychological consequences for its victim.").
\item[108.] Frazier & Borgida, RAPE Trauma Syndrome Evidence in Court, 40 AM. PSYCHOLOGIST 984, 990 (1985).
\end{enumerate}
style.109 These reactions can include extreme fear, humiliation, anger, and general anxiety and can continue in varying degrees for several years.110

Rape victims fear the legal system because a rape trial forces the victim, who may already be suffering from acute psychological trauma, to relive the terrifying experience of the attack. For the victim, the criminal justice system can be "torturous, vexing, embarrassing and uncertain."111 The experience of publicly testifying about the rape and facing the rapist in court can add to the already devastating emotional effect of the attack.112 In addition, rape trials tend to focus on the victim rather than on the defendant or the offense.113 Because there are often no witnesses to corroborate the rape victim's testimony, many rape trials consist primarily of the victim's word against that of the defendant, leading the defense attorney to attempt to destroy the victim's credibility by showing that she actually consented to having sex with the defendant.114 This is often accomplished through a "brutal cross-examination" of the victim, including detailed questions about what actually occurred during the alleged rape115 and the suggestion that the victim really "asked for it." The use of this tactic makes the trial process even more devastating for rape victims and contributes to the nonreporting of rape.116

Prior to the early 1970s, defense attorneys had an additional tool: the ability to conduct a detailed, and often cruel, cross-examination concerning the victim's sexual history and practices.117 This tactic was permitted by a

109. Massaro, Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony, 69 MINN. L. REV. 395, 425-26 (1985). Rape Trauma Syndrome is defined as "the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape." Id. at 425 n.127 (citation omitted).
110. Id. at 425-26.
111. S. KATZ & M. MAZUR, supra note 106, at 198 (citation omitted).
112. See A. McEvoy & J. Brookings, supra note 106, at 58. But see id. at 57 (For some rape victims, testifying at trial can be therapeutic.).
114. Id. at 160-61.
115. Luban, Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann, 90 COLUM. L. REV. 1004, 1028 (1990). In the course of this "brutal cross-examination" concerning the rape itself the lawyer must play to the jurors' deeply rooted cultural fantasies about feminine sexual voracity and vengefulness . . . [W]ithout seeming like a bully, the advocate must humiliate and browbeat the prosecutrix, knowing that if she blows up she will seem less sympathetic, while if she pulls inside herself emotionally she loses credibility as a victim.
116. Id. Luban argues that the use of such cross-examination is morally wrong and unnecessary to fulfill the advocate's role of "the protection of individuals [including both defendants and victims] against institutions that pose chronic threats to their wellbeing." Id. at 1029.
rape exception to the common law rule that excluded character evidence because its potential for prejudice outweighed its probative value. This exception was based on three commonly-held, yet generally unsupported, beliefs: that an "unchaste" woman, one who had previously participated in extramarital sexual activity, was more likely to have given consent to her alleged rapist; that committing the immoral act of extramarital sex impeached the complaining witness; and that rape charges were frequently fabricated and difficult to defend, necessitating rules to help the innocent defendant with his defense. The admission of such evidence caused a great deal of humiliation for many rape victims who testified at trial, contributing to their reluctance to report and testify about rape.

**B. Protecting the Rape Victim: Rape Shield Laws**

In response to the unfounded bases for the rule allowing evidence of the past sexual practices of rape victims, demands for the protection of rape victims from unnecessary humiliation during rape trials, and the desire to encourage rape victims to report the crime, legislatures began to pass rape shield laws. The federal version of the rape shield law, Federal Rule of Evidence 412, was passed in 1978. Like the typical rape shield law, it does not merely eliminate the common law exception to the character evidence rule. Instead, it gives rape victims protection in addition to that given other witnesses by allowing evidence of a rape victim's sexual history to be admitted only when required by due process.

118. Id. at 953-54.
119. Tanford & Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U. PA. L. REV. 544, 546 (1980). Dean Wigmore, among other commentators, has asserted that false accusations of rape are more likely than false accusations of other crimes because of various psychological derangements that lead women to "cry rape." Massaro, supra note 109, at 418 (citation omitted). Thus, the argument goes, defendants accused of rape must be afforded special protection against wrongful convictions. Id. There is little evidence to support such a belief, and, in fact, there is ample evidence that suggests that, because of the difficulty of winning a rape case, prosecutors "rarely go to trial unless their case is airtight," making it less likely for a rape defendant to be falsely tried and convicted than those accused of other violent crimes. R. TONG, WOMEN, SEX, AND THE LAW 101 (1984); see also Massaro, supra note 109, at 422 ("[R]ape victims are the least successful among all victims of violent crimes in proving their claims."); Morris, supra note 113, at 160 (citation omitted) ("[T]he conviction rates indicate that rape is the easiest accusation of violent crime to disprove.").
120. Winters, supra note 117, at 957.
121. See supra note 119.
122. FED. R. EVID. 412.
123. Tanford & Bocchino, supra note 119, at 545.
124. Id.
125. Rule 412 prohibits the admission of all opinion and reputation evidence concerning a rape victim's prior sexual behavior and allows evidence (other than by reputation or opinion) of the victim's sexual history only under certain circumstances. FED. R. EVID. 412(a). The evidence can be admitted if it is constitutionally required, if it is offered to show that someone other than the defendant was the source of semen or injury, or if it involves past sexual activity with the defendant offered to show consent. Id. 412(b). In addition, there are strict procedural rules concerning how such evidence must be offered and how the determination of its admissibility must be made. Id. 412(c).
Prohibiting criminal defendants accused of rape from introducing evidence available to defendants on trial for any other crime clearly implicates the confrontation clause. However, rape shield laws have withstood constitutional scrutiny. This can most readily be attributed to the fact that the purpose of these laws—to protect the rape victim from “embarrassment . . . and unwarranted public intrusion into her private life”—is a sufficiently important public policy to outweigh the sixth amendment rights that may be violated by excluding evidence under such a law. Protecting these victims from serious emotional distress caused by testifying in the presence of their alleged rapists must, then, also be an important public policy.

C. Using Closed-Circuit Television to Protect the Adult Witness

Rape victims, like child sexual abuse victims, may have special needs while they are involved with the criminal justice system, and states have an interest in meeting these needs. The use of one-way closed-circuit television to allow the victims to testify outside of the presence of the defendant is one way in which states can protect victims from the emotional distress of testifying. Therefore, when an individual rape victim would suffer “serious emotional distress such that [she could not] reasonably communicate” if required to testify in the presence of her alleged rapist, she should be permitted to testify over closed-circuit television because that measure would be necessary to further the important public interest of protecting rape victims testifying at trial. The use of this procedure in such

126. Tanford & Bocchino, supra note 119, at 545 (arguing that rape shield laws that single out rape victims for special protection violate the sixth amendment).
129. The Supreme Court in Craig based its finding that protecting child abuse victims who testify at trial is an important public policy largely on the fact that a “significant majority” of states had statutes to protect child witnesses, the need for which was supported by a “growing body of academic literature” on the matter. 110 S. Ct. at 3167-68. At least 45 states, as well as the federal government, have enacted rape shield laws to protect rape victims who testify at trial. Tanford & Bocchino, supra note 119, at 551. In addition, the academic literature on the psychological needs of rape victims is overwhelming. For bibliographies including such literature, see S. Katz & M. Mazur, supra note 106, at 317-30; J. MacDonald, RAPE OFFENDERS AND THEIR VICTIMS 325-30 (1971); A. McEvoy & J. Brookings, supra note 106, at 129-31; Fogarty, A Selective Bibliography, in FORCIBLE RAPE, supra note 107, at 373-78.
130. The child victim's special need, obviously, comes from his or her age. The rape victim's special need comes from the nature of the crime of rape. See supra notes 107-10 and accompanying text.
131. That is, the level of emotional trauma required by the statute upheld in Craig. Md. CTS. & JUD. PROC. CODE ANN. § 9-102. For the text of this statute, see supra note 73.
cases would also further the public interest of effectively prosecuting rapists who may otherwise not be tried because of the victim's inability to testify.\textsuperscript{132} Thus, a statute patterned after the one upheld in \textit{Craig}, but designed to protect adult rape victims as well as child sexual abuse victims, would meet the standard for constitutionality established in \textit{Craig}.

While closed-circuit television testimony by child witnesses is generally governed by statute, in the absence of such an explicit statute, this procedure would also be allowed under the unavailability exception to the hearsay rule. If it is shown that the witness "will be traumatized by testifying at trial or will offer useless testimony, then the witness is effectively unavailable."\textsuperscript{133} Therefore, a rape victim who meets the standard of emotional distress upheld in \textit{Craig}—being effectively unable to testify in the presence of the defendant—would be considered an unavailable witness, and the use of closed-circuit television testimony could be admitted under the former testimony exception to the hearsay rule.\textsuperscript{134} Because this exception is a "firmly rooted" hearsay exception, under \textit{Ohio v. Roberts} the reliability of evidence admitted under it is presumed.\textsuperscript{135}

The former testimony exception allows the admission of the testimony of a witness who is unable to appear at trial when the testimony admitted was subject to cross-examination by the person against whom the testimony is offered (here, the defendant).\textsuperscript{136} The defendant, through his attorney, is able to fully cross-examine a witness testifying by closed-circuit television, thus meeting this requirement. The Advisory Committee's Note to Federal Rule 804(b)(1) states that former testimony is arguably "the strongest hearsay" because "[t]he only missing one of the ideal conditions for the giving of testimony is the presence of trier and opponent ('demeanor evidence')."\textsuperscript{137} Closed-circuit television testimony provides such "demeanor evidence," making it even more ideal than testimony traditionally admitted under the rule. In fact, the reliability of testimony by means of closed-circuit television is second only to live testimony:

\textsuperscript{132} This was one of the purposes behind the Maryland statute upheld in \textit{Craig}. \textit{Craig}, 110 S. Ct. at 3168 (citation omitted).


\textsuperscript{134} Fed. R. Evid. 804(b)(1); see supra note 7 for the text of this rule.

\textsuperscript{135} 448 U.S. 56 (1980).

\textsuperscript{136} See supra notes 26-32 and accompanying text for a discussion of \textit{Roberts}.

\textsuperscript{137} Fed. R. Evid. 804(b)(1). The rule also requires that the defendant had similar motive to cross-examine the witness in the former proceeding. This is to avoid admitting testimony that was technically subject to cross-examination but that the defendant did not adequately cross-examine because, as a practical matter, there was no reason to do so at the time. Since closed-circuit television is live and the testimony is thus not repeated from a former proceeding, this danger is not present in such cases.

\textsuperscript{138} Fed. R. Evid. 804(b)(1) advisory committee's note.
the presence of . . . oath, cross-examination, and observation of the witness' demeanor . . . adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. . . . These assurances of reliability and adversariness are far greater than those required for admission of hearsay testimony under the Confrontation Clause.139

Thus, while the former testimony exception is generally used to admit transcripts of testimony given by an unavailable witness in a former proceeding, the reasons behind the exception strongly suggest that closed-circuit television testimony of an unavailable witness be admitted as well.140

However, no matter how reliable the use of closed-circuit television may be, it still implicates the defendant's right to face-to-face confrontation and thus can, and should, be used only when necessary. The confrontation clause is based on the belief that "a face to face challenge influences recollection, veracity, and communication, and that observing this confrontation will assist the trier of fact in determining credibility."141 Another reason for requiring face-to-face confrontation is the belief that requiring witnesses to face the person they are accusing will help reveal lying witnesses.142 Thus, the use of closed-circuit television testimony could increase the possibility of false convictions.143

This type of testimony may also be problematic because the video technique itself may affect the way in which the jury views the testimony of the witness.144 The camera will determine what the jury sees and how it sees it; for example, the witness may appear weaker and more credible than she otherwise would, which would work against the defendant.145 In addition,

139. Craig, 110 S. Ct. at 3166-67.
140. But see Graham, supra note 5, at 91. Professor Graham, writing before the Craig decision, argues—without giving any reason—that the absence of face-to-face confrontation prohibits the use of the former testimony exception to admit closed-circuit television testimony. He instead suggests that it could be admitted under the residual exception, Federal Rule of Evidence 804(b)(5), which requires that the testimony "possess particularized circumstantial guarantees of trustworthiness equivalent to that possessed by hearsay statements that are admissible under the traditional 'firmly rooted' hearsay exceptions." Id.
141. Graham, supra note 5, at 74.
142. See, e.g., supra notes 57, 63 and accompanying text.
143. However, it is possible that this is less likely to happen when rape is involved. See supra note 119.
144. Graham, supra note 5, at 74-75.
145. One court described the problem in the following way:
[There may be significant differences between testimony by closed-circuit television and testimony face-to-face with the jury because of distortion and exclusion of evidence. . . . Also, it is quite conceivable that the credibility of a witness whose testimony is presented via closed-circuit television may be enhanced by the phenomenon called status-conferral; it is recognized that the media bestows prestige and enhances the authority of an individual by legitimizing his status.
there is a risk that juries will view the use of television testimony as evidence of the defendant's guilt, thus affecting the presumption of innocence.\textsuperscript{146} For these reasons, the standard for finding a witness unavailable to testify because of emotional distress must be very high; the trauma the victim is likely to suffer must be "substantially greater than the reaction of the average victim of a rape."\textsuperscript{147} In this way courts can insure that testimony by means of closed-circuit television will be used only in those extraordinary circumstances where testifying in the presence of the defendant would be truly detrimental to the victim, not merely because she will find it difficult to testify or be upset by having to relive the experience of being raped.

**CONCLUSION**

The escalating problem of child sexual abuse in this country has led to the development of ways to meet the special needs of child witnesses. One of these means, the use of closed-circuit television to allow the victim to testify outside the presence of the defendant, can and should also be used under some circumstances to protect rape victims from the trauma of facing their alleged rapists in court. While the use of this procedure provides reliable testimony, it also precludes the defendant's right to face-to-face confrontation. Thus, while the use of this procedure can be very helpful to rape victims, who traditionally find the trial process emotionally traumatizing, it should be used only when truly necessary to protect the victim from serious psychological harm.

Such considerations are of particular importance when, as here, the demeanor and credibility of the witness are crucial to the state's case. Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 786, 208 Cal. Rptr. 273, 278-79 (1984); see also Armstrong, Comment, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 OR. L. Rev. 567, 574-78 (1976).

\textsuperscript{146} "[T]he presentation of a witness' testimony via closed-circuit television may affect the presumption of innocence by creating prejudice in the minds of the jurors towards the defendant similar to that created by the use of physical restraints on a defendant in the jury's presence." *Hochheiser*, 161 Cal. App. 3d at 787, 208 Cal. Rptr. at 279.

\textsuperscript{147} See *Warren v. United States*, 436 A.2d 821, 830 n.18 (D.C. 1981). The Supreme Court in *Craig* declined to decide what the minimum constitutional standard for availability would be, saying only that the standard of the Maryland statute was clearly sufficient and that the emotional distress involved must be more than *de minimis*. See supra notes 90, 92-93 and accompanying text.

In *Warren*, the District of Columbia Court of Appeals suggested the following factors should be considered: "(1) the probability of psychological injury as a result of testifying, (2) the degree of anticipated injury, (3) the expected duration of the injury, and (4) whether the expected psychological injury is substantially greater than the reaction of the average victim of a rape, kidnapping or terrorist act." 436 A.2d at 830 n.18.
Eliminating Sex Discrimination in the Legal Profession: The Key to Widespread Social Reform

Suzanna Bex Wilson*

The purpose of this Note is to begin where other literature has ended. That is, it will begin with a brief description of the origin and continuing impact of sex discrimination and then propose a method for eliminating it and the perceptions that perpetuate it. This Note argues that sex discrimination is rooted in the sexual division of labor and its accompanying gender roles, both of which have become embedded in American society. Discrimination may only be eliminated by fundamentally changing the attitudes created by this division of labor. This process requires the efforts of all of society, not just women. Full participation is appropriate by both sexes because society as a whole will benefit from allowing women and men to abandon their gender-conscious selves and pursue their own interests free of unjust societal expectations.¹

The initial effort to change society must come from the workplace, specifically the legal profession. The “public sphere” is an appropriate starting place for change because both men and women participate in it while women are still the primary participants in the home or “private sphere.” Consequently, involving all of society in the effort to effect change is more likely if that effort begins with the public sphere.

Beginning with the legal profession specifically is appropriate because it is uniquely linked to all the segments constituting the public sphere—the judiciary, the legislatures, and the business sector. The majority of judges are lawyers, as are many legislators, and employers inevitably interact with lawyers at some point in time. Thus, lawyers are capable of influencing all segments of the public. This fact demonstrates why, on a practical level, the legal profession should initiate the battle against discrimination. Ethical considerations also support this proposal: the profession that represents

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1. See generally L. Kanowitz, Equal Rights: The Male Stake (1981) (explaining that men will benefit if women are given equal rights because such rights are human rights that benefit all individuals).

This Note does not address the differences that exist in the treatment of white women and women of color, who suffer double discrimination. This is primarily due to the fact that the literature and studies relied upon here fail to make that differentiation. This void in the literature, as well as the void in understanding between white women and women of color, is one that must be remedied so that equality among women may be achieved. One article discussing the problems confronting African-American female attorneys is Burleigh, Black Women Lawyers: Coping with Dual Discrimination, A.B.A. J., June 1, 1988, at 64.
justice should not be guilty of treating individuals in an unfair and unlawful manner. Ending sex discrimination within the legal profession will benefit the profession by enabling it to truly represent itself as both an advocate and a source of justice.

This Note anticipates the argument that either Congress, the judiciary, or both are empowered to eliminate discrimination, making the placement of such a burden upon the business sector inappropriate. As shall be demonstrated, however, both Congress and the judiciary are limited in ways that prevent them from effectively eliminating discriminatory attitudes prior to any similar effort in the business sector.

This Note is divided into four parts. Part I discusses the origin of the sexual division of labor and the impact of that division upon modern society. Part II discusses the attempts of Congress to combat discrimination and the limitations of that legislation. Part III analyzes the judiciary's approach to discrimination cases and explains why that approach is incapable of effecting widespread change. Finally, Part IV focuses on the business sector as the appropriate vehicle for change and looks to the legal profession to turn the key.

I. THE CREATION AND CONTINUING IMPACT OF PERCEIVED SEX DIFFERENCES

Eliminating sex discrimination requires developing an understanding of its source. This section will discuss the development of the sexual division of labor and its effects, which are primarily visible as gender roles, upon American society. These roles, which fostered the perception of men and women as unequal, are a consequence of the separation of private and public. Although this dichotomy has eroded, notions of sexual inequality persist. The final part of this section will discuss the manner in which gender roles and sex discrimination affect the legal profession.

A. The Development and Current Understanding of the Separation of Spheres

The separation of spheres occurred during the industrial revolution and resulted in the notion that men should work in the public marketplace while women, who remained in the private realm of the family, maintain their homes and raise children. Although this division virtually excluded women from the workplace, the private sphere was touted as being as important

2. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 HARV. L. REV. 1497, 1499 (1983). It should be noted that middle and upper class women remained in the home while lower class women, who were also responsible for maintaining their homes, generally left the home to work.
as the public. Eventually, women were perceived as being naturally suited for support roles. They were considered generous and nurturing and were discouraged from being strong and self-reliant. Men were supposed to be unemotional and completely devoted to their jobs. Any man who devoted unusual amounts of time to their families were considered bizarre.

The "differences" between the sexes became widely accepted by the mid-nineteenth century. In Bradwell v. Illinois, Justice Bradley stated:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. . . .

. . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.

This view persisted through the early twentieth century when, in Muller v. Oregon, the Court upheld protective labor legislation directed toward women despite the fact that it had consistently held the same type of legislation unconstitutional when applied to men. The Court justified this discrepancy by relying upon what it deemed to be the inherent differences between the sexes and their different functions in life.

Soon women began to realize that their sphere was regarded as inferior to that of men. They began to agitate to expand their horizons, eventually leaving their homes to enter the public sector. This transition is best symbolized by women's obtaining the right to vote, which recognized women as full citizens and permitted their access to the public sphere at its most fundamental level—government. Women also entered occupations previously reserved for men, including medicine, academia, and law.

The number of women in the work force increased dramatically during World War II when women were called upon to replace the men who left

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3. Id. at 1500. The ideal role for women was that of the devoted homemaker. K. GERSON, HARD CHOICES 4 (1985).

4. See Powers, Sex Segregation and the Ambivalent Directions of Sex Discrimination Law, 1979 Wis. L. Rev. 55, 95 (discussing the roles of women in terms of their being "surrogates").

5. Olsen, supra note 2, at 1500.

6. See Powers, supra note 4, at 95 (discussing the existence of occupational sanctions against men who allowed "surrogate work" to interfere with their occupational (public) duties).

7. 83 U.S. (16 Wall.) 130 (1872).

8. Id. at 141 (Bradley, J., concurring). The Court upheld the state of Illinois' decision to deny women the right to practice law. Id. at 139.


10. Id. at 423; see also Powers, supra note 4, at 82 (discussing this decision).


12. Muller, 208 U.S. at 421-22.

13. See K. GERSON, supra note 3, at 5.

to fight overseas. After the war, however, the sharp distinction between public and private returned. This was primarily due to the fact that returning veterans needed jobs and the women who had replaced them were perceived as temporary workers. Women were forced out of the jobs they acquired during the war and returned to their homemaking roles.

Fortunately, the 1960s and 1970s heralded a renewed effort to present women with options other than performing their domestic roles. This effort is symbolized by the passage of the Civil Rights Act of 1964, which forbids discrimination against women in employment relations unless such discrimination is a bona fide occupational qualification.

Although the status of women has changed, the public-private distinction has not disappeared. Society continues to view the family as distinct from the marketplace. The institutionalization of perceived sex differences caused by the separation of spheres still "permeates" American society. Gender roles now appear natural and are reinforced through the socialization process. Female socialization emphasizes marriage and family, emotions, charm, compliance, dependence, and deference. Conversely, males are encouraged to be aggressive, egotistic, persistent, and ambitious. During childhood both sexes experience "sex-role conditioning" by receiving messages labelling work as "masculine" or "feminine."

Some are beginning to recognize, however, that the separation of spheres is an ideological construct with no relevance in modern society. Many of what were formerly considered to be biological differences between the sexes are now recognized as being largely socially produced. Studies have dem-

16. See id. at 5. Because this setback occurred after women began to explore options beyond the home and prior to the era of Betty Friedan's The Feminine Mystique (1963), Gerson views the resurgent domesticity of the 1950s as more aberrant than typical. Id.
18. See Olsen, supra note 2, at 1498.
20. See id.
22. Id.
24. S. Okin, supra note 19, at 23; see Powers, supra note 4, at 70 (noting that women's entering the marketplace undermines the rationale—women's alleged physical and emotional inability to participate in that arena—for their prior and continued separate treatment).
25. S. Okin, supra note 19, at 6 (noting that although explanations of the subordination of women range from focusing on biological differences as causal to totally abandoning biological differences as a factor most feminist scholars currently reject biological determinism and emphasize gender as a purely social construct). Those who perceive the qualities approved in women today as women's "nature" refuse to acknowledge that women have been produced and shaped by a society in which males have always been dominant. S. Okin, Women in Western Political Thought 297 (1979). No one will know what women's true nature is like until the sexes are able to develop in a society where they receive equal treatment. Id.
SEX DISCRIMINATION

onstrated that there is no consensus concerning the extent of the "innate" differences between the sexes, the appropriate roles for the sexes, or which family forms and division of labor, if any, are most beneficial for all involved.26 In fact, girls receive ambiguous signals that encourage them to engage in both "masculine" and "feminine" activities.27 This indicates that sex-role socialization is not so confining that women are relegated only to "feminine" tasks.28

Additionally, the social constructs that ordinarily affect women's choices are changing, restructuring the alternatives open to them.29 Women are beginning to actively shape their lives.30 Even if young women aspire to "feminine" work initially, those aspirations are likely to change substantially after they begin working.31 Women's current social environment encourages professional as well as domestic aspirations, and those women who feel ambivalent about motherhood are less likely to ignore their misgivings.32

B. The Impact of the Separation of Spheres on the Business Sector

The roles created by the separation of public and private have influenced the business sector, making women's complete entry into the work force difficult.33 Women are not permitted to ignore their assigned gender roles, creating tension between their personal and public lives.34 Employers have not eliminated this tension for two reasons. First, they do not realize that gender bias affects all aspects of the employment process to such an extent that women, as women, are not allowed to succeed. Second, employers

26. S. OKIN, supra note 19, at 172.
27. Schultz, supra note 23, at 1821.
28. Id.
29. K. GERSON, supra note 3, at 213. Gerson conducted a study of women between the ages of 27 and 37 from a wide variety of working- and middle-class occupations who were also full-time homemakers, working mothers, or childless workers. Id. at 41. The sample included single, divorced, and married women. Id. In her final analysis, Gerson concluded that "notions of 'feminine personality' do not do justice to the complexity and variety of women's orientations toward mothering and work." Id. at 213.
30. See id. (describing women's life decisions as being the product of a negotiation process where they confront and respond to constraints and opportunities).
32. K. GERSON, supra note 3, at 17. Gerson notes that personal independence and commitments outside the home will continue to take on greater significance in women's lives. Id. at 214.
33. See Kaye, Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality, 57 FORDHAM L. REV. 111, 116 (1988) (stating that this lack of advancement is due to societal attitudes and inequalities).
have failed to recognize that women retain primary responsibility for child care and other domestic duties.

1. Gender Bias in the Employment Process

Studies conducted during the past two decades indicate that gender stereotypes in the workplace remain firmly entrenched despite the advances made by women. One group of studies has found that women are perceived as less capable and intelligent than men. Participants in a study conducted in 1974 considered men to be more skillful when performing either masculine or feminine tasks, and male performance was attributed to intelligence while women performing well at the same tasks were credited with luck. These results were true for both female and male observers. Another study found that professional articles were rated higher when attributed to male rather than female authors, and another found that a highly competent woman’s accomplishments must be exceptional for her to be recognized for her work. A 1985 study found that although men in traditionally female occupations received the lowest ratings of male workers they were still rated higher than women in traditionally male occupations. These studies indicate that both sexes perceive women as less intelligent and capable than men.

Gender bias has also been shown to enter hiring and promotion decisions. Studies attempting to simulate the hiring process have found that male applicants for managerial positions are more highly rated and are accepted more frequently than equally qualified females. The research suggests that the perceived sex orientation of the position influenced the hiring decision. Other studies have demonstrated that applicants for any position are evaluated most favorably if the position is considered appropriate for their gender.

One study revealed that men are preferred in discriminatory work environments while the sexes are evaluated equally in egalitarian climates.

36. Id.
37. See Taub, supra note 21, at 353.
39. Taub, supra note 21, at 354.
40. Id.
42. Katz, Sex Discrimination in Hiring: The Influence of Organizational Climate and Need for Approval on Decision Making Behavior, 11 PSYCHOLOGY OF WOMEN Q. 11, 17 (1987). Katz’s subjects were 161 male undergraduate and graduate students in business classes at a northeastern university. Id. at 13. They were told to behave as if they were managers in a
These results suggest that managers attempt to match the attributes of potential employees with what are perceived to be the important attributes of the organization.43

Job performance evaluations are also susceptible to gender bias. In groups of equally qualified women and men, women consistently receive lower ratings.44 Equally qualified women are less likely to be promoted, offered training opportunities, and respected in their evaluations of other employees.45 These findings may be due to the fact that the characteristics of the majority are preferred, so male traits, and consequently males, are favored.46 Managerial positions are still viewed as being reserved for males because they are thought to require "male" traits such as aggressiveness and competitiveness.47 The same male managers adhering to these views have stated, however, that women are as capable as men.48

The bias against women is largely due to their "token" status in high-level positions. Because women in executive positions are a definite minority, they are under much more pressure than men to perform well.49 In such situations the differences between the tokens, women, and the majority, men, tend to be exaggerated by the majority so it will be able to preserve its identity.50 This causes the tokens to be isolated. Because they are viewed as different from, and exceptions to, the corporate culture, women with token status have little hope of changing the corporate culture.51

In a system that rewards individuals based upon their ability to operate well within it, the token status of women makes their advancement difficult.52 Currently, women who are attempting to attain executive positions can only do so by adhering to the current structure, which requires them to imitate men. These women then become part of the majority and, if they succeed in absorbing and mimicking the culture of the majority, are not necessarily

manufacturing company making a personnel decision. Id. at 14. They reviewed one of two versions of three different documents; one version created a discriminatory environment while the other was egalitarian. Id. After reading the materials, which consisted of a memo from a vice president, an article from a company newspaper, and an organizational chart, subjects reviewed the job description and an application that was either from a female or male applicant. Id.

43. Id. at 17-18. This phenomenon is due to the fact that an individual's expectation of future interaction with a group and degree of acceptance within that group affect the subject's willingness to conform to the group's expectations. Id. at 17.

44. See, e.g., Becker, supra note 34, at 942; Katz, supra note 42, at 11; Liefland, Career Patterns of Male and Female Lawyers, 35 BUFF. L. REV. 601, 610 (1986).

45. Taub, supra note 21, at 354.
46. Katz, supra note 42, at 12.
47. Taub, supra note 21, at 356.
48. Id.
50. Id. at 210-11; Taub, supra note 21, at 358.
51. See R. Kanter, supra note 49, at 208-09; Taub, supra note 21, at 359.
52. Powers, supra note 4, at 91.
considered part of the token group. Completely adopting the characteristics of the majority is not necessarily seen as a positive attribute, however. Women who achieve great success may be perceived as "'macho'" or as needing to "'walk more femininely, talk more femininely, dress more femininely.'" Thus, women are placed in a no-win situation. Successful women are pressured to ignore those women who do not succumb to the culture of the majority. Women who are not successful merely reinforce the majority's perception of successful tokens as an exception. Thus, successful women may be used to reinforce the notion that most women are less capable than men and legitimate the current hierarchical structure of the workplace.

The pressure on successful women to ignore those who are unsuccessful prevents them from promoting others like themselves. Consequently, women as a group become stratified. This result will persist unless some form of outside intervention breaks the self-perpetuating cycle of tokenism. Some have argued that, as more women enter the workplace, the mere increase in their numbers will solve the problems created by tokenism. Relying upon a "'strength in numbers'" approach, however, necessarily depends upon women's being promoted into positions where they will be the individuals responsible for hiring and promoting others. Assuming that this will happen simply because women become increasingly visible ignores the fact that those currently making personnel decisions tend to hire and promote those like themselves: a man will hire men. As a 1988 report on women in the legal profession noted, "'The statistics . . . dispel any sense of complacency that the sheer numbers of women entering the profession will eliminate

55. See id. at 241-42.
56. See Powers, supra note 4, at 92.
57. Id.
59. See id. at 238; Olsen, supra note 2, at 1549-50 & n.201; Powers, supra note 4, at 93; Rhode, Perspectives on Professional Women, 40 Stan. L. Rev. 1163, 1207 (1988).
60. A study of the hiring and retention practices of American law schools supports the notion that the presence of women in decision-making positions results in the promotion of more women:

At schools with higher proportions of tenured women, untenured women were denied tenure much less frequently, left at lower rates, and were granted tenure at higher rates than men. At schools with lower proportions of tenured women, the untenured women were denied tenure much more frequently, left at higher rates, and were granted tenure at lower rates than men.

Chused, The Hiring and Retention of Minorities and Women on American Law School Faculties, 137 U. Pa. L. Rev. 537, 552 (1988). The study also found that tenure may be a serious problem for women working at the more prestigious law schools. Id.

61. See Becker, supra note 34, at 945. This fact has made it difficult for women to acquire mentors because those relationships, too, tend to develop between individuals who are similar.

Id.
barriers to their advancement." Despite the number of women entering the legal profession, they are not advancing at rates commensurate with their male colleagues.

These findings indicate that an increase in sheer numbers is not enough alone to eliminate discrimination. Therefore, unless those individuals making personnel decisions are forced to change their gender-biased approach, the current system will continue. Women who are currently in high-level positions must also change their attitudes. They should no longer succumb to pressure to conform to the status quo. Instead, they should forge ahead on their own to develop a more just and less gender-biased approach to management and promotion.

2. The Effect of Private Responsibilities on Women's Public Lives

Women are expected to perform their traditional domestic roles in addition to their newly acquired professional ones. Requiring women to fulfill these often conflicting roles places them at a disadvantage in the business sector, where "success" is equated with total dedication to a career.

For the most part, the business sector has not attempted to resolve this conflict. Employers continue to expect their workers to be as dedicated to their careers as they were in the past. Part-time work is often viewed as indicative of partial commitment and inconsistent with high-quality job performance. Many jobs are still structured as if workers have no family responsibilities. Consequently, women are hampered by two conflicting perceptions: that women are primarily responsible for child rearing and that committed members of the workforce lack such responsibilities.

This conflict places women at a disadvantage when compared to their male colleagues, who generally have fewer or less time-consuming domestic responsibilities than women. Because women have less time to devote to their careers, the workplace is stratified, with women on the bottom.


63. See infra notes 72-76 and accompanying text.

64. See, e.g., Frug, Securing Job Equality for Women: Labor Market Hostility to Working Mothers, 59 B.U.L. Rev. 55, 56 (1979); Liefland, supra note 44, at 614; Olsen, supra note 2, at 1565.

65. See Frug, supra note 64, at 56.

66. Rhode, supra note 59, at 1186.


68. S. OKIN, supra note 19, at 5.

69. Powers, supra note 4, at 105-06.

70. See S. OKIN, supra note 19, at 5.
fact, more than sixty percent of the women in the work force are in low-paying clerical and sales jobs.\textsuperscript{71}

C. Sex Discrimination in the Legal Profession

Like the rest of the workplace, the legal profession is stratified by sex, with women on the bottom. In 1988 the American Bar Association Commission on Women in the Profession issued a report recognizing the existence of this problem within the legal profession:

The statistics demonstrate that women are not rising to "upper" levels of the profession in appropriate numbers . . . Indeed, witnesses observed that women often reach a level above which they seem unable to rise . . .

For the few women who do "make it" beyond the "glass ceiling," the consequences are often a lack of support networks . . . These women partners or judges are not regarded as just partners or judges, but as women partners and judges . . . In addition, . . . women who "made it," often did so at the great expense of not having a spouse and children.\textsuperscript{72}

The conclusions of the ABA report are supported by recent statistics concerning the status of women in the profession. A survey of the nation's 250 largest law firms found that women constituted approximately 40% of the associates hired in 1986 and 1987 and represented nearly one third of the nation's total associates.\textsuperscript{73} Despite these statistics, less than 8% of the nation's partners are women,\textsuperscript{74} a proportion that increases by a mere 1% each year.\textsuperscript{75} Female and male lawyers also differ in their career patterns: more women than men are still found in the least lucrative areas of the law—state and local government, public interest, and nontenured academic

\textsuperscript{71} Saltzman, \textit{Trouble at the Top}, U.S. NEWS & WORLD REP., June 17, 1991, at 40, 42.
\textsuperscript{72} ABA Report, supra note 62, at 7 (emphasis in original). The Commission was established to pursue two principles: (1) women are entitled to full participation in the legal profession; and (2) all lawyers must work to eliminate barriers so women may participate fully. Barnett, \textit{Women Practicing Law: Changes in Attitudes, Changes in Platitudes}, 42 FLA. L. REV. 209, 213 (1990). Most of the Commission's evidence and findings were the result of hearings where practitioners and students testified concerning their personal experiences in the profession.

Women in other professions are also encountering glass ceilings. A Department of Labor survey of nine major corporations concluded that women's advancement in the workplace is blocked by subtle discrimination. Saltzman, \textit{supra} note 71, at 41.


\textsuperscript{74} Id.

\textsuperscript{75} ABA Report, \textit{supra} note 62, at 5. Women's status in the remainder of the workplace is similar: only 3% of the top executives at the largest American companies are women. Saltzman, \textit{supra} note 71, at 41. This figure has changed little in 10 years. \textit{Id}.
positions—and private practice in large firms is the only area that attracts approximately equal proportions of men and women.\textsuperscript{76}

The ABA study found that, although many male attorneys accept women’s integration into the profession and a smaller number are guilty of discrimination, most female attorneys perceive gender discrimination as a serious problem.\textsuperscript{77} Female attorneys have been denied promotions and job opportunities for rejecting sexual advances.\textsuperscript{78} Some clients still insist upon working only with male attorneys, and a few firms still acquiesce in such demands.\textsuperscript{79}

Female lawyers are also discriminated against in terms of salary. The Department of Labor recently found that female lawyers and judges earn, on average, seventy percent of what males earn in the same positions.\textsuperscript{80} This difference may be due to the fact that women have difficulty “rainmaking,” that is, acquiring new clients for their firms.\textsuperscript{81} It may also be caused by the fact that women achieve partner status at lower rates than men.\textsuperscript{82}

\begin{center}

\begin{tabular}{lcc}
 & Females(\%) & Males(\%) \\
Private Firm & 56 & 69 \\
Large Firm & 16.5 & 17.2 \\
Government & 17 & 9 \\
Legal Aid & 5 & 1 \\
\end{tabular}
\end{center}


Women are underrepresented on law school faculties as a whole: a survey of law professors revealed that less than 12\% of the faculty at several top law schools were women. Goldstein, \textit{supra} note 73.

Women may be more likely to work in areas such as government or public interest because those areas combine factors that appeal to many women, such as fulfilling a sense of mission, providing regular work hours, and fostering a more egalitarian office culture due to less competition and hierarchy. C. Epstein, \textit{supra}, at 129. These areas may also provide the structure and predictable work hours essential to mother-lawyers whose spouses do not assume equal responsibility for child care. Holmes, \textit{supra} note 67, at 28.


79. \textit{Id.} at 216.

80. Saltzman, \textit{supra} note 71, at 40. Women in the workplace as a whole earn 72\% of what males earn in similar positions. \textit{Id.} at 42.

81. Barnett, \textit{supra} note 72, at 217; see also Holmes, \textit{supra} note 67, at 23 (stating that lack of “old girls” network makes generating business difficult).

82. Holmes, \textit{supra} note 67, at 19.
The national bar is not the only group to have examined sex discrimination in the profession: state and local bar associations have also been conducting surveys to examine the various forms of sex discrimination. These studies have found that women lawyers are relegated to certain types of work, such as probate and matrimonial law, and receive less favorable work evaluations than men. They must work longer and harder to be able to compete on equal terms with men and have difficulty acquiring mentors. Women are also excluded from the social activities of their firms, made conscious of their appearance, and made to feel isolated.

The lifestyles of male and female attorneys also differ significantly. First, women continue to be primarily responsible for child care and other domestic duties. Second, approximately ninety-three percent of married female attorneys have spouses who work full time, while forty-eight percent of married male attorneys have spouses who do not work outside the home. Female lawyers are more likely to be married to “high status professionals” than are male lawyers. Consequently, female attorneys cannot rely upon their spouses to respond to domestic crises. In contrast, many male lawyers have spouses who are capable of relieving them of domestic responsibilities, giving them more time to devote to their careers. This difference is especially apparent and disadvantageous to women during the years immediately preceding the partnership decision, which are the most demanding professionally and typically coincide with childbearing years.

The preceding discussion suggests that gender bias within the profession exists in two forms: (1) perceptions that female attorneys are different from...
and, therefore, inferior to their male counterparts and (2) the system of gauging success by the number of hours devoted to the profession. Both of these forms of bias require women to adhere to the male model of the profession or be rejected. They also hamper women because women’s continuing domestic responsibilities limit the time they can devote to their professional lives while men are not similarly affected. A simplistic and somewhat short-sighted solution to these problems would be to divide domestic responsibilities between the sexes. Although this approach would remove the responsibility for child care and other private duties from women and divide them between the sexes, requiring both sexes to perform the same balancing act that women are currently attempting is unreasonable. A more acceptable solution would be to change the status quo in terms of both behavior and attitudes. The profession should recognize and accommodate the outside interests of its members by eliminating “time spent” as a definition of success and allowing all attorneys to devote more time to their personal lives. Doing so would erase the distinction between public and private and end the notion that the private is inferior to, and can be sacrificed for the benefit of, the public. Consequently, the notion of “feminine” roles as inferior and “masculine” roles as superior would disappear, to be replaced by “human” responsibilities that are shared by all.92 The remainder of this Note is devoted to discussing the best manner in which to implement these changes.

II. CONGRESS’S LIMITED ABILITY TO ELIMINATE DISCRIMINATION

Some may view Congress as the body best equipped to eliminate discrimination and improve the workplace.93 Congress does indeed have the power to pass laws combatting discrimination and install policies that would provide workers with more personal time. This ability is demonstrated by Congress’s passing Title VII of the Civil Rights Act of 1964,94 the Pregnancy Discrimination Act of 1978,95 and the Fair Labor Standards Act.96 Despite

92. But see Saltzman, supra note 71, at 44 (discussing the neofeminist view that, true equality is achieved only if the differences between men and women are valued equally).
93. See generally Frug, supra note 64, at 61 (suggesting that, because litigation is unlikely to achieve the labor market restructuring necessary to eliminate the disparities between men and women in the work force, new legislation may be necessary to ensure full job equality for working mothers).
these past measures, the ability of Congress to enact similar antidiscrimination legislation is severely limited by the pressure imposed by the business sector and the veto power of the President, as is demonstrated by the history of the Family and Medical Leave Act\textsuperscript{97} and the Civil Rights Act of 1991.\textsuperscript{98} Also, even if Congress were to pass appropriate antidiscrimination legislation, such action would only affect the behavior of individuals, not their attitudes. Because attitudes are what must be changed, legislation is an inappropriate means for attaining that end.

Title VII is an example of the manner in which Congress has the ability to help eliminate discrimination. The provision states:

\begin{quote}
It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .
\end{quote}

A plaintiff may have a cause of action if she is denied employment or a term, condition, or privilege of employment for illegitimate reasons.\textsuperscript{100} Employers may hire employees on the basis of their religion, sex, or national origin if those characteristics are "bona fide occupational qualification[s] reasonably necessary to the normal operation of that particular business or enterprise."\textsuperscript{101} Title VII does not require employers to give preferential treatment to individuals whose race, sex, religion, or national origin is underrepresented in the employer's work force.\textsuperscript{102}

Title VII also created the Equal Employment Opportunity Commission (EEOC), which is responsible for pursuing employment discrimination claims.\textsuperscript{103} The EEOC may bring civil actions against employers who fail to enter into conciliation agreements.\textsuperscript{104} If the EEOC dismisses a charge or fails to file a civil action or enter a conciliation agreement within 180 days from the date the charge is filed, the aggrieved individual may initiate a civil action.\textsuperscript{105} Actions brought under Title VII are under the jurisdiction of the federal courts.\textsuperscript{106} The available remedies include enjoining the employer from engaging in the unlawful employment practice with which it is charged,

\begin{footnotesize}
\begin{enumerate}
\item Pub. L. No. 102-166, 105 Stat 1071.
\item 42 U.S.C. § 2000e-2(e).
\item Id. § 2000e-2(j).
\item Id. § 2000e-4.
\item Id. § 2000e-5(f)(1).
\item Id.
\item Id. § 2000e-5(f)(3).
\end{enumerate}
\end{footnotesize}
ordering the reinstatement or hiring of employees, with or without back pay, and compensatory and punitive damages.

Congress expanded the protection afforded women under Title VII by passing the Pregnancy Discrimination Act (PDA). The Act is a definitional amendment to Title VII that states:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . .

The effect of the PDA is to prohibit both employment deprivation resulting from pregnancy and employment policies adversely affecting pregnant workers. On its face the Act only applies to the period of physical disability accompanying childbirth. It serves to equalize the employment opportunities available to both sexes by ensuring that, in situations where an employer provides disability leave, women do not suffer by virtue of the fact that they alone bear children.

Although the PDA provides women with some protection against discrimination based upon pregnancy, the scope of the Act is limited. The PDA is not the equivalent of a national policy requiring job-protected maternity leave. Instead, it only provides protection in situations where employers already provide general disability leave and does not include leaves that are more related to child rearing than to childbearing. Some have argued that the Act offers no protection to women whose employers allow no disability leave and that women are not guaranteed they will be able to return to

107. Id. § 2000e-5(g).
108. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(b), 105 Stat. 1071 (1991). The amount of compensatory and punitive damages that may be recovered is limited. Id. Punitive damages may only be recovered if any employer engages in discriminatory practices with "malice or with reckless indifference to the federally protected rights of an aggrieved individual." Id.
109. Id. § 2000e(k).
110. Id.
112. Id. at 1033.
113. The United States is the only advanced industrial country without a national pregnancy policy. Z. Eisenstein, The Female Body and the Law 213 (1988). Most industrial nations have paid maternity leaves and health insurance benefits covering a minimum of three months. Id. In 127 countries with national pregnancy legislation, the average length of maternity leave is 12-14 weeks. Id. In addition to paid maternity leaves, most countries also provide unpaid job-protected leaves for one to two years. Id. In Sweden, fathers or mothers are entitled to a 180 day leave at 90% of salary after the birth of a child, and either has the option to remain on leave an additional 180 days. Id. at 214. Sweden is also debating whether to shorten work hours nationally so parents will have more time with their children. Frug, supra note 64, at 100.
114. Jacobson, supra note 111, at 1026.
their jobs after taking any leave beyond that necessary to recover from pregnancy and birth. These potential gaps in the scope of the Act ensure that some inequality between the sexes will continue: "A female employee subject to an inadequate leave policy must choose between exercising a fundamental right and keeping her job. This is a choice that no male employee is forced to make." Women, without being protected from "arbitrary job interruptions and resulting wage loss due to pregnancy] . . . will constantly have less job tenure and be paid lower wages than a man who started in a similar position at the same time." Fortunately, some state legislatures have resolved the ambiguities of the PDA by enacting legislation requiring employers to provide job-protected pregnancy disability leave.

Although the enactment of Title VII and the PDA reveal that Congress can and will act to end discrimination, recent developments demonstrate that Congress's willingness and ability to perform such acts are not infallible. Two different sources impose limitations upon Congress: the veto power of the President and the attitudes of the members of Congress and their business sector constituents. These limitations are best illustrated by recent attempts to enact the Family and Medical Leave Act and the Civil Rights Act of 1991.

The Family and Medical Leave Act would, in part, create a national parental leave policy. The Act is a natural extension of the PDA and state pregnancy disability leave legislation. In the findings supporting the Act, Congress stated:

(2) it is important to the development of the child and to the family unit that fathers and mothers be able to participate in early childrearing . . . ;

(5) due to the nature of women's and men's roles in our society, the primary responsibility for family caretaking often falls on women, and


118. Jacobson, supra note 111, at 1026. See generally Cal. Fed., 479 U.S. 272 (discussing such a statute enacted in California). In Cal. Fed., the Court held that state legislatures could enact such pregnancy disability leave statutes and that such statutes would survive gender discrimination claims brought by males. Id. at 292.


121. Jacobson, supra note 111, at 1043.
such responsibility affects their working lives more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.¹²²

The Act’s purpose is to balance the demands of the workplace with the needs of families and

(4) to accomplish such purposes in a manner which, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.¹²³

As proposed initially, the Act would require businesses with more than fifty employees¹²⁴ to grant workers a total of twelve weeks unpaid leave during any twelve-month period after the birth or adoption of a child.¹²⁵ The worker’s entitlement to the leave terminates one year after the birth or adoption.¹²⁶ Both parents may not take leave at the same time.¹²⁷ Ninety-five percent of the country’s employers and approximately fifty percent of all employees would be excluded from the provision.¹²⁸ A compromise bill, proposed by Senators Christopher S. Bond and Christopher J. Dodd in September, 1991, would allow employers to exempt key employees, meaning the highest paid ten percent of the workforce.¹²⁹ The proposal also reduces the sanctions to be imposed on employers who do not reinstate workers returning from leave.¹³⁰ The bill passed in the Senate by an overwhelming majority.¹³¹ The House also passed similar legislation, but the bill did not receive enough votes to override a Presidential veto.¹³²

Supporters of the Act, which include women’s groups and labor organizations,¹³³ claim that employers will benefit from such a provision because

¹²². H.R. 2, § 2(a).
¹²³. Id. § 2(b).
¹²⁴. Id. § 101(5)(A).
¹²⁵. Id. § 102.
¹²⁶. Id. § 102(2)(A).
¹²⁷. Id.
¹²⁹. Id.
¹³². Id.
their employees will become more productive.\textsuperscript{134} Further, the Act represents a national affirmation of the fact that the family lives of employees are important and must be recognized in the workplace.

Businesses oppose the Act "as an onerous requirement that would force employers to hire expensive replacement workers and expose the employers to potential litigation."\textsuperscript{135} This opposition stems primarily from the perception that the Act would impose unwarranted costs and inflexibility upon the employers involved.\textsuperscript{136} The Bush administration has sided with employers and "believes that leave policies should be negotiated between employers and employees or as part of collective bargaining agreements."\textsuperscript{137} President Bush has vowed to veto "any measure that mandates leave."\textsuperscript{138}

Congress recently enacted the Civil Rights Act of 1991, which is meant to "respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions" and "to strengthen existing protections and remedies available under federal civil rights laws."\textsuperscript{139} The Act accomplishes these purposes by either overruling or modifying some Supreme Court decisions of the past decade.\textsuperscript{140} For example, it reaffirms that relying upon prejudice in any way when making an employment decision violates Title VII.\textsuperscript{141} The Act allows victims of intentional gender discrimination to recover compensatory damages in the same manner as members of minority groups and punitive damages in cases of egregious discrimination; the amounts recoverable as punitive damages for sex discrimination are limited.\textsuperscript{142} Although this measure was once opposed by President Bush,\textsuperscript{143} he signed a compromise version on November 21, 1991.\textsuperscript{144} His change in attitude appears to be an attempt to distance the Republican Party from the politics of former Ku Klux Klan leader David Duke and to gain public support.\textsuperscript{145}

Enacting legislation such as the Civil Rights Act of 1991 and the Family and Medical Leave Act clearly depends upon whether Congress is able to garner enough support to override the President's veto and the political concerns of the President. The fact that Congress has been unable to muster

\begin{itemize}
\item \textsuperscript{134} See Jacobson, \textit{supra} note 111, at 1045.
\item \textsuperscript{135} L.A. Times, \textit{supra} note 130.
\item \textsuperscript{136} Jacobson, \textit{supra} note 111, at 1044.
\item \textsuperscript{137} Gugliotta, \textit{supra} note 131, at A33, col. 1.
\item \textsuperscript{138} Id.
\item \textsuperscript{140} For a discussion of these cases, see \textit{infra} text accompanying notes 167-74.
\item \textsuperscript{141} H.R. 1, 102d Cong., 1st Sess. § 12 (1991) (directed at Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).
\item \textsuperscript{142} Pub. L. No. 102-166, § 102(b).
\item \textsuperscript{143} Saltzman, \textit{supra} note 71, at 41-42.
\item \textsuperscript{145} Id.
\end{itemize}
enough votes in support of the Family and Medical Leave Act to ensure its enactment indicates that Congress, too, lacks sufficient commitment to eradicating gender and racial inequality. It would probably be confronting the same dilemma with the Civil Rights Act if the Republican Party were not attempting to improve its public standing. This lack of total congressional support is probably because the groups opposing the measures, namely the business community, have considerable political influence. Further, members of Congress have been socialized in the same manner as the rest of the nation. They have absorbed the roles assigned to the sexes and have accepted many of them as natural. Thus, relying upon Congress to initiate changes that will culminate in the elimination of sex discrimination and sexist attitudes is unrealistic until members of Congress and their constituents acknowledge that gender roles and their resultant harms are unacceptable. Before Congress will override a presidential veto, it must receive signals that antidiscrimination legislation is supported by the most powerful segment of American society—the business sector.

III. LIMITATIONS OF JUDICIAL REMEDIES

As the nation's arbiter of justice, the judicial system would also appear to be a logical and appropriate participant in the elimination of sex discrimination. The courts possess an important tool—the power granted them by Title VII to adjudicate employment discrimination claims. More important, the courts are not responsible to constituents in the same manner as members of Congress. Indeed, judges are valued for their impartial judgment. They could use these characteristics to combat discrimination by engaging in a type of judicial activism devoted to reading Title VII and other statutory provisions broadly while remaining within the scope of Congressional intent. This ability, however, is counterbalanced by the limitations the Supreme Court has placed upon Title VII. Further, like legislation, any litigation necessarily involves the behavior of individuals. Courts are not capable of issuing decrees ordering people to alter their ideas and perceptions. These restraints, combined with the current composition of the Court, make relying upon litigation as an effective tool in eliminating sex discrimination unrealistic.

146. This assertion is confirmed by the allegations of sexist behavior on Capitol Hill that arose during the confirmation hearings of then Judge Clarence Thomas. See Williams, From Women, an Outpouring of Anger, Wash. Post, Oct. 9, 1991, at A1, col. 1.

147. Title VII provides courts with the power to order employers to change their employment practices. Schultz, supra note 23, at 1758. An employer who is found guilty of discrimination may be forced to alter the composition of its workforce or job classifications. Id. The most important aspect of Title VII adjudications is that individuals not involved in a particular case may still use its outcome as a guide in bargaining with their own employers. Id. at 1757-58. Consequently, Title VII has the potential to effect widespread change within the workplace.
Three Supreme Court decisions of the late 1980s demonstrate the manner in which Title VII litigation could be used as an effective tool to eliminate sex discrimination. In *Hishon v. King & Spalding*, the Court held that partnership decisions in law firms must comply with Title VII. Thus, the Court opened the door for discrimination suits involving partnership and other upper-level management decisions. In *California Federal Savings & Loan Association v. Guerra*, the Court held that Title VII and the PDA were intended to be "floor[s] beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." Thus, Title VII and the PDA do not prohibit states from being more liberal than the federal statutes in enacting antidiscrimination laws.

In *UAW v. Johnson Controls*, the Court held that a company's fetal protection policy violated Title VII and the PDA by barring only women from jobs involving actual or potential lead exposure despite evidence that men could also be adversely affected by similar exposure. The Court stated: "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make." This victory rings a bit hollow because the work conditions in question were harmful to women, men, and fetuses. A more desirable result would have been to require Johnson Controls to install sufficient safety devices to minimize the health hazard for all workers. Whether the Court could have actually done so is questionable, however, because the evidence indicated that Johnson Controls had lowered the lead levels as much as possible.

Despite these triumphs, the Court has made winning Title VII suits more difficult for plaintiffs. Most important, the Court has increased plaintiffs'
burden of proof, which is especially significant in cases alleging covert discrimination, where proving differential treatment has become nearly impossible. Such a development is troublesome because, although the courts have assisted in eliminating formal barriers to the advancement of women, covert discrimination has not been similarly eliminated and is likely to become the norm. This is indicated by the manner in which American society now approaches racial discrimination. Most formal barriers to African-Americans have indeed been eliminated: few employers would state, regardless of what they actually believe, that they refuse to hire minorities; African-Americans may sit wherever they choose on busses and trains; and racially restrictive covenants have been made illegal. Despite the apparent elimination of overt discrimination, however, African-Americans are still experiencing discrimination in a covert form: "no American of African descent, regardless of status of success, is safe from racial aggression ranging from an unthinking insult to a life-threatening attack." This reality indicates that eliminating overt discrimination does not eliminate all discrimination. Because covert discrimination has become and will continue to be prevalent, the ability to challenge it in court successfully is crucial. The current difficulty in proving such behavior, however, renders relying upon the judiciary to eliminate covert discrimination virtually pointless.

In her article examining the Supreme Court's approach to discrimination cases, Schultz argues that the Court's current attitude toward discrimination differs significantly from the attitude of the courts deciding race discrimination cases in the late 1960s and early 1970s. She asserts that, in those cases, the courts viewed "dismantling workplace discrimination" as their period for bringing actions under Title VII involving discriminatory seniority systems begins to run on the date the challenged system is adopted. Id. at 911. This makes bringing such suits difficult for plaintiffs who may not realize the discriminatory effect of a system until they are affected by it, which may well occur long after the Title VII limitations period has expired.

157. Becker, supra note 34, at 999.
158. Schultz, supra note 23, at 1770.
160. A recent decision demonstrates the manner in which the Court is limited in what it sees as discrimination. In City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), the Court held that Richmond's plan requiring prime contractors with city construction contracts to subcontract at least 30% of each contract to Minority Business Enterprises (MBEs) violated the fourteenth amendment's equal protection clause by denying contracts to individuals on the basis of race. Id. at 510-11. To justify the plan, the Court indicated that the city must demonstrate that individual MBEs had "suffered from the effects of past discrimination by the city or prime contractors." Id. at 508. This holding imposes upon plaintiffs the burden of establishing that they are victims of discrimination. It marks a definite departure from earlier race discrimination cases, which did not require plaintiffs to produce individual victims of discrimination. See Schultz, supra note 23, at 1774.
161. See Schultz, supra note 23, at 1770-75.
responsibility. The courts "presumed that continuing patterns of racial segregation were attributable to historical labor market discrimination." Consequently, the judiciary took an active role in attempting to eliminate racial segregation in the workplace. This approach has not been used against sex discrimination, however. Instead, Schultz argues, "to a large extent, the structures of the work world that disempower most working women from ever aspiring to nontraditional work are left unexamined." Unlike their perception that the status of minorities in the workplace is due to historical discrimination, courts have assumed that the status of women is due to choices they make before they even enter the workplace, indicating that judges have absorbed society's attitudes toward women and their role in society. Despite their apparent unwillingness to do so now, the fact that courts were once willing to actively change the structure of the workplace and society as a whole indicates that the judiciary should be capable of engaging in a battle to change society's emphasis on gender roles.

Focusing upon what the courts accomplished over two decades ago as Schultz does is not sufficient, though, because in the intervening years this country has witnessed a return to conservatism in the executive branch and, consequently, in the judiciary. Indeed, the composition and attitudes of the Supreme Court are now radically different from those of the Court deciding the first wave of discrimination cases under Title VII. This change is reflected in the Court's more limited approach to race and sex discrimination cases, making relying upon the Court to revert to its earlier, committed approach to eliminating sex discrimination unrealistic.

For example, in *Price Waterhouse v. Hopkins*, the majority of the Court held that once a plaintiff shows that gender played a motivating part in an employment decision an employer charged with discrimination may avoid liability only by establishing by a preponderance of the evidence that the employment decision alleged to be discriminatory would have been made even in the absence of gender considerations. The significance of *Hopkins* is somewhat reduced by the fact that two of the justices joining in the plurality opinion—Justices Brennan and Marshall—have retired from the Court. Consequently, the dissenting opinion written by Justice Kennedy and joined by Chief Justice Rehnquist and Justice Scalia may be relevant to predicting future attitudes of the Court. That opinion states:

162. *Id.* at 1771.
163. *Id.* at 1770.
164. *Id.*
165. *Id.* at 1756-57.
166. *Id.* at 1771.
167. 490 U.S. 228 (1989).
168. *Id.* at 244-45; Barnett, *supra* note 72, at 227.
SEX DISCRIMINATION

Title VII creates no independent cause of action for sex stereotyping. . . . Our cases do not support the suggestion that failure to "disclaim reliance" on stereotypical comments itself violates Title VII. Neither do they support creation of a "duty to sensitize." . . . [A]cceptance of such theories would turn Title VII "from a prohibition of discriminatory conduct into an engine for rooting out sexist thoughts." 169

A similar sentiment was expressed in a 1987 Sixth Circuit case to which the Court denied certiorari: "Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But . . . Title VII was [not] designed to bring about a magical transformation in the social mores of American workers." 170 These excerpts demonstrate a sentiment in the judiciary that its duties do not include fundamentally altering the views of society.

Recent decisions of the Court also demonstrate that it is no longer willing to participate in a widespread effort to eliminate race discrimination. For example, in Patterson v. McLean Credit Union 171 the Court ruled that section 1981, which prohibits discrimination on the basis of race in the making and enforcement of contracts, does not apply to conduct during the execution of the contract. 172 The Court stated: "Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts." 173 The Court could have interpreted section 1981 as applying to all aspects of contractual relationships. Such an interpretation would not be unwarranted because a plaintiff could argue that the party engaging in the discriminatory conduct intended to behave in a discriminatory fashion when the contract was formed and, hence, made the conduct a term of the contract. This action would seemingly violate section 1981. The Court's interpretation implies, however, that conduct during the contractual relationship has no relevance to the formation of the contract. The narrow construction applied by the Court demonstrates its unwillingness to assume a meaningful role in eliminating race discrimination.

The manner in which the Supreme Court has restricted Title VII, combined with the current composition of the Court, makes relying upon the judiciary to effect widespread social change unrealistic. Congress has attempted to repair the damage wrought by the Court by passing the Civil Rights Act of 1991, which directly addresses the holdings in Price Waterhouse, Patterson, and Wards Cove Packing Co. v. Antonio. 174

169. Hopkins, 490 U.S. at 294 (Kennedy, J., dissenting) (citation omitted).
170. Rabidue v. Osceola Refining Co., 805 F.2d 611, 621 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987); see also Frug, supra note 64, at 94 (discussing the courts' reactions to attempts to change the status quo).
173. Id.
Unlike the judiciary, the vehicle for change must be unflaggingly devoted to the goal of eliminating discrimination. It must not be subject to political pressures or carry with it seemingly unalterable biases. Ironically, the workplace—specifically the legal profession—is the ideal vehicle for accomplishing the task at hand.

IV. **The Legal Profession as the Key to Social Reform**

Using the workplace as the vehicle for eliminating sex discrimination is both sensible and realistic. As has already been discussed, the workplace exerts significant influence over Congress, so once the attitudes of the former change so too should those of the latter. Also, now that the workplace includes both women and men, turning to it is a wise tactical move. This section argues that one segment of the workplace—the legal profession—is ideally suited for initiating the entire sector's battle to eliminate discrimination. This is due to the nature of the profession itself and the fact that the profession is uniquely related to the judiciary and legislatures as well as a powerful segment of the workplace.

This section will first demonstrate why the nature of the legal profession suits it for initiating widespread social change. The remainder of the section suggests both immediate solutions and long-range goals designed to create a workplace that is not stratified by gender. Some of the necessary changes have already begun because the influx of women has moved many employers to adopt new policies and to restructure existing ones. The policies proposed here, however, will go further than those already in place because they will eventually change the attitudes of workers. Therefore, they should also eliminate gender stratification within the home.

A. **The Nature of the Legal Profession**

The very nature of the legal profession is what suits it for initiating an effective battle against discrimination: Lawyers are advocates of justice; when they become judges they administer justice. A logical corollary to this view of the profession is that lawyers and judges should ensure that the laws under which they advocate and which they administer are just. Further, to avoid being hypocritical, lawyers should devote themselves to fostering a just society. Consequently, the legal profession should not tolerate any unjust behavior. Specifically, it should not tolerate laws, behavior, or attitudes that indicate that any member of society is being treated unfairly because he or she belongs to a particular segment of society.

These assertions are not without support. The preamble to the ABA Model Rules of Professional Conduct states, in part:
A lawyer . . . [has] special responsibility for the quality of justice.

A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs. . . . A lawyer should demonstrate respect for the legal system and for those who serve it . . . . [I]t is also a lawyer’s duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice . . . . A lawyer should be mindful of deficiencies in the administration of justice . . . and should help the bar regulate itself in the public interest.

A lawyer should strive to . . . improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.

The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar . . . .

The language of the preamble focuses, to a certain extent, upon the notion of lawyers as members of a public profession. The preamble makes clear the duty of the legal profession to actively seek to improve the legal system and work for the public interest.

The values espoused by the preamble resemble those of the republican tradition that existed at the birth of this country. According to Gordon, this tradition required lawyers to fulfill both negative and positive roles:

Performing their positive functions entails the assumption of a special responsibility beyond that of ordinary citizens. They are to repair defects in the framework of legality, to serve as a policy intelligentsia, recommending improvements in the law to adapt it to changing conditions, and . . . to create and disseminate, both within and without the context of advising clients, a culture of respect for and compliance with the purposes of the laws.

In the nineteenth century, one of the ideals of lawyers was to engage in “political reform activity to purify government and the judiciary.” In modern society, the republican ideal is symbolized by the idea of lawyers as “guardians of individual rights, the defenders of the legal framework, and the balance wheel of society.”

The language used in these two sources of guidance—the Model Rules and the republican tradition—clearly indicate that initiating social reform is not beyond the realm of the profession. In fact, the lawyer’s duty as a protector of individual rights requires the profession to attempt to eliminate

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175. MODEL RULES OF PROFESSIONAL CONDUCT preamble (1990).
177. Id. at 14.
178. Id. at 16.
179. Id. at 19.
discrimination—which represents an unjust denial of individual rights—from all of society.

One member of the judiciary has recently recognized the inherent conflict created by the existence of gender bias in the legal profession. The Chief Justice of the Minnesota Supreme Court stated: "Gender bias affects everything from the way we address women to our judicial philosophy. . . . Gender fairness goes right to the integrity of the entire judicial system."\(^{180}\) This recognition led to the creation, by October 1989, of state task forces on gender bias in the courts in thirty states.\(^{181}\) The studies conducted by these groups have documented the existence of gender bias in the courts and have created an awareness that refusing to tolerate discrimination of any type should be an aspect of the judiciary's professional responsibility.\(^{182}\) This recognition is symbolized by the reforms initiated in response to the studies, some of which are proposals to amend state codes of judicial conduct and professional responsibility to bar gender and other types of bias.\(^{183}\) Similar reforms are being made at the national level: the ABA is considering revisions to the *Model Code of Judicial Conduct* that explicitly state that judges are to "perform judicial duties without bias or prejudice."\(^{184}\)

The history of the legal profession as one in the public service combined with the recognition by the judiciary that eliminating gender bias is an issue of professional responsibility demonstrate that the profession is an appropriate vehicle for initiating the elimination of sex discrimination. The profession as a whole should follow the lead of the judiciary and adopt measures explicitly stating that lawyers should, as part of their duty to the public, fight to eliminate discrimination.

**B. Immediate Solutions: Family-Oriented Policies**

Eliminating sex discrimination requires the immediate adoption of policies that enable workers of both sexes to better combine their work and personal lives. Such policies include providing parental leaves, flexible work schedules, and child care. These are especially important to the legal profession because all too often women lawyers have sacrificed their personal lives in order to

181. Id. at 186; see also ABA Report, supra note 62, at 10 n.10 (stating that 18 court-appointed task forces existed in 1988).
182. See generally Schafran, supra note 180 (discussing reports in Florida, New York, New Jersey, Minnesota, and Rhode Island).
183. See id. at 194-202. According to Schafran, New York, New Jersey, and Rhode Island have adopted such reforms. Id.
184. Id. at 200 n.94 (quoting proposed reforms to *MODEL CODE OF JUDICIAL CONDUCT* Canon 3).
advance within the profession. Both men and women are no longer satisfied with limiting their parenting to the best child care available. Instead, they want to be actively involved with their families. Adopting the measures suggested in this section would help destroy the artificial distinction between public and private spheres by indicating to male and female workers that their personal lives, which encompass the values normally associated with the world of the private, are recognized by and linked to their public roles. Once the public and private are successfully combined, gender roles will disappear and sex discrimination will be eliminated.

These changes should also result in a more humane workplace and happier workers. In the legal profession, one of the causes of dissatisfaction cited by attorneys is the difficulty of combining work with child rearing. Eliminating this source of unrest should relieve some of the stress associated with the profession. Reducing the discontent among attorneys may benefit firms by reducing the number of attorneys transferring to other areas of practice or leaving the profession entirely. Approximately 7.5% to 9% of attorneys make lateral transfers each year, with some large firms losing 50% of their associates. Women are twice as likely as men to expect to leave the profession. These statistics represent economic losses to firms, which have invested time and money in training these individuals. Therefore, attempting to reduce the level of dissatisfaction among attorneys and, consequently, decrease the likelihood of their transferring to other firms or professions, is in the best interest of law firms and the profession as a whole.

1. Parental Leaves and Flexible Work Schedules:
Abandoning the "Mommy Track"

In recent years employers have begun accommodating the needs of working mothers by enacting provisions for maternity leaves and part-time and flexible work schedules. But because these policies are directed primarily toward women, they ensure that women will continue to assume responsibility for child care, perpetuating the very gender roles that must be destroyed by requiring women to continue to assume primary responsibility

185. See supra text accompanying note 72.
186. ABA Report, supra note 62, at 14; Barnett, supra note 72, at 221.
187. Holmes, supra note 67, at 13. The other areas of lawyer dissatisfaction are: overwork; hierarchy, bureaucracy and specialization; and moral conflict. Id.
188. See id. at 24. Attorneys experience higher levels of stress, problem drinking, and suicide than the general population. Id.
189. Id. at 23.
190. Id.
191. Id. at 23-24 (51% among women compared to 21.5% among men).
192. See id. at 23.
for most domestic duties. This, in turn, causes women to be more handi-
capped than men in the business sector.193

Despite the discriminatory effects of current policies, it has been argued
that they will eventually enable men to assume child care responsibilities.
In a well-known article, Felice Schwartz encouraged employers to intention-
ally create stratification among female employees by distinguishing between
"career-and-family" and "career primary" women.194 The former would be
relegated to a track going no higher than middle management positions,
while the latter would have all obstacles impeding their advancement re-
moved.195 Schwartz defended this strategy by asserting that it "will be a
model in the very near future for men—thus women will not be forced to
continue to take primary responsibility for child care."196

Creating a "mommy track," however, is more likely to perpetuate than
destroy the idea that women are the primary care givers in American society.
As Representative Patricia Schroeder stated, the mommy track "reinforces
the idea, which is so strong in our country, that you can either have a
family or a career, but not both, if you're a woman."197

Even before Schwartz's article was published, women lawyers were and
still are battling with the problems created by the emergence of a mommy
track in the legal profession.198 Firms have adopted flexible work policies
that include flexible work arrangements, part-time policies, more compre-
hensive maternity leave, and day care assistance.199 Many women are reluc-

193. Frug, supra note 64, at 57.
194. Schwartz, Management Women and the New Facts of Life, HARV. BUS. REV., Jan.-
195. See id. Schwartz supported her proposition by referring to unnamed studies and "what
we all know." Within the first paragraph of her article, Schwartz refers to a study by "one
multinational corporation" and another by a "large producer of consumer goods." She goes
on to assert that "we know that women also have a greater tendency to plateau or to interrupt
their careers." Id. at 65. Representative Patricia Schroeder challenged these assertions with
some real facts, stating that "the military has 'studied women to death, hoping for a reason
to get rid of them,' but keeps finding 'that the women are motivated and productive, and
that after they have babies they get right back to work.'" Lewin, 'Mommy Career Track' Sets
the article that sparked one of the most significant recent debates over women's status in the
work force was based upon the author's unsupported assertions and speculations.
A27, col. 1.
197. Lewin, supra note 195 (quoting Rep. Schroeder); see also Why Not Many Mommy
Tracks?, N.Y. Times, Mar. 13, 1989, at A18, col. 1; Mommy Track's an Idea Whose Time
Has Gone, N.Y. Times, Apr. 2, 1989, at E30, col. 3; The Mommy Track vs. the Fast Track,
N.Y. Times, May 21, 1989, at F2, col. 2 (excerpts from letters to Harvard Business Review
discussing Schwartz's article).
198. See Kingson, Women in the Law Say Path Is Limited by 'Mommy Track', N.Y. Times,
Aug. 8, 1988, at A1, col. 5 (noting that women are on the bottom of the emerging stratified
9, 1989 (California Law Business), at 3 (emphasizing interest of firms in retaining best talent).
199. Barnett, supra note 72, at 221; see Brill, Labor Pains, AM. LAW., Jan.-Feb. 1986, at
1, 15; McLean, supra note 198. Although some firms have formal policies concerning part-
and flex-time, most confront these issues on an ad hoc basis. Id. at 10.
tant to avail themselves of these policies, however, because they fear doing so will prevent them from being assigned interesting work and, ultimately, advancing to partner. Those attorneys who do take leaves are reluctant to use the additional leave time ordinarily available because they fear that the "extra" time will affect them negatively in terms of partnership, bonuses, and compensation. Although a survey of Atlanta firms found that most of the firms with maternity leave policies permitted three months' leave at full pay and benefits with no impact on career advancement, some firms postpone the partnership decision by at least one year for every fraction of a year that an associate takes as leave. Some law firms also tell associates wishing to work part time that doing so will prevent them from becoming partners.

Policies creating leaves and flexible schedules are especially important in the legal profession where the greatest professional demands occur just before partnership decisions are made and coincide with the age at which many couples begin to have children. Now that there are more two-lawyer families than ever, more lawyers are confronting the conflicting obligations of raising families and continuing their careers. Leaves and part-time work schedules allow workers the time and flexibility needed to fulfill their family duties.

Firms must consider four factors in adopting policies to eliminate sex discrimination and gender roles. First, any policies that will be or have been adopted must be applied without regard to gender. Although current policies are usually phrased in sex-neutral terms, they are not applied neutrally. Rather, workers perceive them as a benefit directed toward women. Like women, most men fear their careers will suffer if they take advantage of paternity leaves and flexible programs. Thus, although thirty percent of all companies offer paternity leave, only one percent of the eligible male workers take advantage of these policies. Men who do choose to use these benefits are perceived as adopting a woman's role. For society to relinquish its notion that women are responsible for child care, employers must realize that men, too, are interested in being involved in child care: "men are starting to evaluate practice settings based on their accommodation to family duties."

201. Barnett, supra note 72, at 224.
202. Id. at 223-24.
203. Holmes, supra note 67, at 19.
204. See Kingson, supra note 198, at A15, col. 3.
205. S. OKIN, supra note 19, at 176; see Holmes, supra note 67, at 18.
207. Saltzman, supra note 71, at 47.
208. Id.
responsibilities. In a 1982 Stanford Law Review study, seventy-five percent of the male law students said they would like to take parenting leave after they started working. Some firms are beginning to reflect these attitudes, referring to leaves and flexible schedules as "parental" rather than "maternal" concerns. This attitude must now become the rule rather than the exception.

Second, all firms should adopt parental leave policies that permit attorneys at least three months' job-protected leave after the birth of a child. These leaves should be available to both men and women on equal terms. In the best of circumstances, the majority of the time taken for parental leave should be paid. Additionally, individuals taking leaves should not be hampered unjustly on the partnership track: a week should count as a week, not a month or a year. A good initial model to follow may be that of the Family and Medical Leave Act, which would provide twelve weeks of unpaid leave during the year after the birth or adoption of a child.

Third, all firms should adopt part- and flex-time policies that are available to all attorneys regardless of their parental status. These policies would symbolize the profession's recognition that attorneys have interests beyond work. Such an approach is not novel: "the profession has always accommodated ... political involvement, military reserve duty and government service." Firms must ensure that those working on flexible schedules are adequately compensated. In some cases, women currently working part time are paid disproportionately less than they should be if their full-time salary is used as a basis of comparison. They receive inadequate fringe benefits and are required to sacrifice reasonable employment expectations, such as achieving partner. Indeed, firms do benefit from current policies because part-time lawyers are billed out at a higher fraction of the average full-time salary than their part-time salary indicates. While both lawyers and firms should benefit from these policies, neither party should take advantage of the other. Part-time workers should comply with the targets they set for

211. Holmes, supra note 67, at 18 (Twenty-three percent of men wanted leaves longer than three months.); see also Brill, supra note 199, at 11 (noting that firms refusing to adopt policies to accommodate women now may still have to do so for men in the future); LaMothe, Endangered Species, STAN. L. REV., Spring/Summer 1989, at 15, 32 (noting that both women and men are attempting to place rational boundaries on their jobs).
212. In a survey of its employees conducted by DuPont, 56% of the males indicated that they were interested in schedules that would allow them more time with their families. Saltzman, supra note 71, at 47. This number had increased by 19 percentage points in five years. Id.
213. See Barnett, supra note 72, at 221.
214. S. OKIN, supra note 19, at 176.
216. ABA Report, supra note 62, at 15.
217. Frug, supra note 64, at 57.
218. See id.
themselves, but they should also be fully compensated for their work: if a part-time lawyer works sixty percent of a full-time lawyer, he or she should receive sixty percent of his or her full-time salary.

Finally, in addition to providing flexible schedules, firms should become more flexible about where work can be completed. Firms should be prepared to permit lawyer-parents to combine their work and family responsibilities at home. Other attorneys, such as those with excessively long commutes, could also benefit from such arrangements. Attorneys could be provided with home-computer terminals, modems, fax machines, and telephones equipped for conference calls. They would then be able to conduct research, draft memoranda, briefs and other documents, and communicate with the office and clients. Providing lawyers with home equipment will benefit firms because lawyers will work at times they may not have otherwise.

2. Child Care

In addition to creating more flexibility, policies must also provide support for child care. The lack of suitable child care alternatives in the United States creates "a significant barrier to successful labor market participation for women," so adopting these policies should improve the status of women.

The workplace must provide long-term support for its workers' child care needs. While parental leaves are normally available immediately after children are born, parents need day-long assistance until their children begin attending school and occasional assistance for older children who are sick or need other attention during the day. Obviously, leaves lasting the first few months of a child's life do not solve this problem. To assist in solving this dilemma, organizations must begin offering or subsidizing child care programs. Some firms have already done so: Skadden, Arps, Slate, Meagher & Flom provides at-home emergency child care for children under thirteen if their usual arrangements are not available. Similarly, Wilmer, Cutler & Pickering "provides care for healthy children who need emergency babysitters." The firm has found that its emergency child care facility improved attorney morale and productivity. Cravath Swaine & Moore has a program similar to that at Wilmer, Cutler & Pickering. Firms have discovered that

219. Barnett, supra note 72, at 222; Kaye, supra note 33, at 124.
220. Barnett, supra note 72, at 222.
221. Frug, supra note 64, at 100.
223. Id. at C12, col. 1.
224. LaMothe, supra note 211, at 31.
225. Id.
the cost of providing these services is worth the benefits derived from reducing attorneys' unexpected absences. Such centers should become more widespread. If parents begin requesting regular on-site day care, firms should seriously consider granting these requests.

C. Long-Range Goals: Changing Current Attitudes in the Workplace

In addition to adopting policies that allow workers to balance their careers and personal lives, the professional world must take steps to change at a more fundamental level. Long-range goals must focus upon educating workers and society as a whole. Notions of gender roles must be abandoned, with a new focus upon individual personalities and interests adopted in their place. Individuals must be permitted to adopt the roles with which they are most comfortable regardless of the "appropriateness" of that behavior. The role of employers in this process should be to recognize the extent to which gender bias permeates their operational structures, develop an understanding of how the environment created by these structures influences the behavior of individuals, and change their operational structures to eliminate that bias.227

To negate the effects of tokenism and the discrimination it fosters, employers must recognize that employees, who are extremely conscious of their work environment, attempt, either consciously or unconsciously, to make decisions conforming to that environment. Although this behavior currently serves to perpetuate discrimination, it could also be used to destroy it. Once employers realize they have created a discriminatory work environment, whether through intentional or unintentional policy decisions, they should take affirmative steps to change it.

A primary objective should be to ensure that women are given fair performance evaluations and are promoted according to their worth, not their sex. To do this, employers must recognize that employees are often judged according to stereotypes associated with groups to which they belong rather than by their individual performance.229 Even if employees are judged individually, stereotypes may cause their performance to be reinterpreted according to the stereotypes.230

All decision makers and employees must learn to respect the work performed by women. They must learn that being too personal or familiar, flirting, and referring to appearance and family plans indicate to women

226. Barnett, supra note 72, at 222.
228. See text accompanying notes 49-63.
229. See Taub, supra note 21, at 353.
230. See id.
that they and their work are not being taken seriously. Basically, employers must recognize that any behavior or comments that bring a worker's gender to the fore are inappropriate and may cause the employee to question her competence. Being so aware of an employee's gender may also cause that employee to be evaluated unfairly.

Some companies have sponsored "diversity training" programs designed to teach employees to understand and value the differences between men and women. These programs are partially in response to the number of women who have been leaving corporations. Employers have realized that they must create supportive work environments rather than focus on policies designed to soothe small parts of the bigger malady. A vice-president at Pepsi-Cola stated that, after undergoing diversity training, he is more likely to hire someone with a point of view different from his own.

Although these programs are a step in the right direction, discussing the differences between the sexes is not sufficient to eliminate gender bias, for some of these "differences" are what must be abandoned. In addition, employees should be educated concerning the qualities attributed to each sex and encouraged to adopt for themselves those qualities they view as positive. This should be done without regard to whether that quality is "appropriate" for the employee's sex. This process should create good people instead of good men or good women. The workplace should benefit from employees who have evaluated themselves and abandoned their gender-specific roles.

Programs designed to educate individuals about the pervasiveness and detrimental effects of gender bias have been adopted by segments of the judiciary. These programs are the result of the gender bias task force movement that was started in order to inform the judiciary about the manner in which gender bias affects judges' decision making and other court behavior. The task forces have resulted in the creation of court handbooks defining and discussing gender bias and have made gender bias a topic of judicial education programs. The changes implemented after New Jersey's task force report are the only ones to have been evaluated, and many areas the task force examined have improved significantly: "[T]he task force has succeeded in 'creating a climate within the court system in

231. Id. at 357-58.
232. See id. at 357.
233. Id.
234. Saltzman, supra note 71, at 44.
235. Id.
236. See id.
237. Id.
238. Schafran, supra note 180, at 183. For further discussion of this movement, see supra notes 180-84 and accompanying text.
239. Id. at 194-202.
which the nature and consequences of judicial gender bias are both acknowledged to exist and understood to be unacceptable . . . ."240 The results of the judicial task force movement demonstrate that educational programs concerning gender bias may be an effective way to address the problem of gender discrimination.

Although instituting educational programs similar to diversity training and the judiciary's gender bias seminars will require time and expense by employers, the programs should prove worthwhile by creating a more humane workplace. Regardless of the time and expense that will be required, eliminating gender bias should no longer be considered optional.

Once employers commit themselves to instituting these programs, they should also acknowledge their responsibility for educating future employees. In the legal profession, this means that attorneys and their firms must work to eliminate discrimination in law schools.241 They must make law students aware of the consequences of engaging in overt and covert discrimination.242 These efforts are necessary because only after discrimination is confronted at all levels will it be condemned and defeated.

V. CONCLUSION

The patterns that have emerged in the legal profession indicate that to truly eliminate sex discrimination employers must become more flexible to all workers and recognize the role they have played in perpetuating gender discrimination. First, employers must abandon the expectation that workers can and will be totally dedicated to their careers while some "other" takes care of their family responsibilities. Employers can no longer require workers to sacrifice all other aspects of their lives to advance in the workplace. They must recognize that all workers have commitments beyond the office, be they to families, lovers, friends, or hobbies, and adopt positive provisions allowing for such obligations. Once these adjustments are made, employers will be prepared to facilitate the equal participation of men and women both in and out of the workplace.243

Immediate solutions require employers to acknowledge the personal lives of employees and to restructure their time demands accordingly.244 They

240. Id. at 198.
241. See id. at 207-08.
242. See Barnett, supra note 72, at 223.
243. See Powers, supra note 4, at 106 (still discussing these changes in terms of public and private). Powers supports the idea of adopting a uniform policy on maximum working hours that would cover both managerial and nonmanagerial employees. Id. at 106-09. Such legislation, however, only creates the artificial impression that individuals want to and are comfortable with spending more time away from work. To accomplish effective and permanent change, such behavior must be freely chosen rather than structurally imposed.
244. S. OKIN, supra note 19, at 176.
should adopt policies allowing leaves and flexible work schedules that incorporate several features. First, leaves and flexible scheduling should be available to workers of both sexes, not just women. Second, any notion of "tracking" must be abandoned. All workers should be expected to have and participate in responsibilities outside the workplace. Therefore, working part time should not hinder an individual's advancement. Third, workers choosing to adhere to flexible schedules should be adequately compensated for their work. Finally, employers should be willing to supply workers with equipment for their homes that will allow them to combine work and family responsibilities or personal interests. Firms must also provide some sort of support for child care, be it through on-site day care centers or subsidies for other forms of child care.

Long-range goals must focus upon changing the attitudes of individuals in the workplace and society as a whole. While the suggested immediate solutions should begin this process, more fundamental changes are needed. Employers must analyze their organizational climates and eliminate any aspects of them that promote discrimination. Creating a more egalitarian work environment should allow women to lose their token status and be accepted as an integral part of the work force. It should also permit both sexes to work and behave in manners that are most comfortable to them rather than require them to assume socially constructed behavior patterns.

While these suggestions are by no means exhaustive, they illustrate the types of modifications necessary to change the work environment. Any new policies that recognize and support the personal lives of workers, regardless of sex, should be satisfactory. Once these modifications are made, society will have started on the road to adopting notions of human rights and equality and eliminating sexual inequality.

Once the legal profession specifically commits itself to eliminating discrimination, it should use its influence with the other segments of the public sector to convince them that they, too, should join in the battle. As counsel to the business sector, lawyers are in a perfect position to exert such influence. Once that sector as a whole has decided to eliminate discrimination, Congress will be influenced by those changes and legislate accordingly. Further, when lawyers who are products of the new legal profession become judges and legislators, the attitudes of those segments of the public sphere will be permanently altered. Changes in the public will influence the private sphere because workers will carry their new attitudes into their homes. The public's recognition and acceptance of the private will erase the sex-based distinction between public and private and eliminate the notion of gender roles. Consequently, society as a whole will be fundamentally altered—in a positive manner.