Eliminating Sex Discrimination in the Legal Profession: The Key to Widespread Social Reform

Suzannah Bex Wilson
Indiana University School of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Civil Rights and Discrimination Commons, and the Legal Profession Commons

Recommended Citation
Available at: http://www.repository.law.indiana.edu/ilj/vol67/iss3/8

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
Eliminating Sex Discrimination in the Legal Profession: The Key to Widespread Social Reform

SUZANNAH 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


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 men 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 unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.

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

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.\textsuperscript{15} 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.\textsuperscript{16} 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.\textsuperscript{17}

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.\textsuperscript{18} The institutionalization of perceived sex differences caused by the separation of spheres still "permeates" American society.\textsuperscript{19} Gender roles now appear natural and are reinforced through the socialization process.\textsuperscript{20} Female socialization emphasizes marriage and family, emotions, charm, compliance, dependence, and deference.\textsuperscript{21} Conversely, males are encouraged to be aggressive, egotistic, persistent, and ambitious.\textsuperscript{22} During childhood both sexes experience "sex-role conditioning" by receiving messages labelling work as "masculine" or "feminine."\textsuperscript{23}

Some are beginning to recognize, however, that the separation of spheres is an ideological construct with no relevance in modern society.\textsuperscript{24} Many of what were formerly considered to be biological differences between the sexes are now recognized as being largely socially produced.\textsuperscript{25} Studies have dem-

\begin{footnotesize}

16. See \textit{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 \textit{The Feminine Mystique} (1963), Gerson views the resurgent domesticity of the 1950s as more aberrant than typical. \textit{Id.}


18. See Olsen, \textit{supra} note 2, at 1498.


20. See \textit{id.}


22. \textit{Id.}


24. S. Okin, \textit{supra} note 19, at 23; see Powers, \textit{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, \textit{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, \textit{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. \textit{Id.}
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. In fact, girls receive ambiguous signals that encourage them to engage in both "masculine" and "feminine" activities. This indicates that sex-role socialization is not so confining that women are relegated only to "feminine" tasks.

Additionally, the social constructs that ordinarily affect women's choices are changing, restructuring the alternatives open to them. Women are beginning to actively shape their lives. Even if young women aspire to "feminine" work initially, those aspirations are likely to change substantially after they begin working. 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.

**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 workforce difficult. Women are not permitted to ignore their assigned gender roles, creating tension between their personal and public lives. 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.35 These results were true for both female and male observers.36 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.37 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.38 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.39 The research suggests that the perceived sex orientation of the position influenced the hiring decision.40 Other studies have demonstrated that applicants for any position are evaluated most favorably if the position is considered appropriate for their gender.41

One study revealed that men are preferred in discriminatory work environments while the sexes are evaluated equally in egalitarian climates.42


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 legitimize 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. 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." 62 Despite the number of women entering the legal profession, they are not advancing at rates commensurate with their male colleagues. 63

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. 64 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. 65 Part-time work is often viewed as indicative of partial commitment and inconsistent with high-quality job performance. 66 Many jobs are still structured as if workers have no family responsibilities. 67 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. 68

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. 69 Because women have less time to devote to their careers, the workplace is stratified, with women on the bottom. 70

---


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}

\textbf{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{72} \textit{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} \textit{ABA Report}, 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. Id.
positions—and private practice in large firms is the only area that attracts approximately equal proportions of men and women.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.77 Female attorneys have been denied promotions and job opportunities for rejecting sexual advances.78 Some clients still insist upon working only with male attorneys, and a few firms still acquiesce in such demands.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.80 This difference may be due to the fact that women have difficulty "rainmaking," that is, acquiring new clients for their firms.81 It may also be caused by the fact that women achieve partner status at lower rates than men.82

---

76. ABA Report, supra note 62, at 5; Holmes, supra note 67, at 11. Areas of concentration within the profession by sex are as follows:

<table>
<thead>
<tr>
<th></th>
<th>Females(%)</th>
<th>Males(%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private Firm</td>
<td>56</td>
<td>69</td>
</tr>
<tr>
<td>Large Firm</td>
<td>16.5</td>
<td>17.2</td>
</tr>
<tr>
<td>Government</td>
<td>17</td>
<td>9</td>
</tr>
<tr>
<td>Legal Aid</td>
<td>5</td>
<td>1</td>
</tr>
</tbody>
</table>


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, 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, 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, supra note 67, at 28.

77. Barnett, supra note 72, at 215.

78. Id. at 214 (discussing Broderick v. Ruder, 685 F. Supp. 1269 (D.D.C. 1988)). Such conduct usually goes unreported, making victims unaware of the pervasiveness of the problem. Id.

79. Id. at 216.

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

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

82. Holmes, 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. By adhering to a system that uses time devoted to work as the definition of success, the profession ensures that men will advance faster than women, thereby perpetuating gender inequality.

The preceding discussion suggests that gender bias within the profession exists in two forms: (1) perceptions that female attorneys are different from

83. Frank, Law Firm Sex Bias, A.B.A. J., July, 1985, at 25 (discussing studies in Los Angeles, Hawaii, Michigan, Maryland, and Minnesota); see Gellis, Great Expectations: Women in the Legal Profession, A Commentary on State Studies, 66 IND. L.J. 941 (1991) (reporting results of a recent study in Indiana). These studies started in reaction to the Supreme Court's decision in Hishon v. King & Spalding, 467 U.S. 69 (1984), and consist primarily of surveys sent to both male and female members of state and local bar associations. For further explanation of Hishon, see infra notes 148-49 and accompanying text.
84. C. Epstein, supra note 76, at 110.
85. Liefland, supra note 44, at 609.
86. Jack & Jack, supra note 76, at 267; Liefland, supra note 44, at 609; see Barnett, supra note 72, at 216.
87. Liefland, supra note 44, at 611.
89. Holmes, supra note 67, at 21 (discussing findings of 1983 ABA survey).
90. Liefland, supra note 44, at 614.
91. See Rhode, supra note 59, at 1186 (noting that the partnership decision is made at a time when women's domestic demands are most intense); see also Kaye, supra note 33, at 122 (noting that this problem is not unique to the legal profession). The average attorney works at least one workday per week more than the average American worker. Holmes, supra note 67, at 14.
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. 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. 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, the Pregnancy Discrimination Act of 1978, and the Fair Labor Standards Act. 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 antidiscrimi-
nation 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:

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 indivi-
dual’s race, color, religion, sex, or national origin . . . .\textsuperscript{99}

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,

\textsuperscript{98} Pub. L. No. 102-166, 105 Stat 1071.
\textsuperscript{100} Hishon v. King & Spalding, 467 U.S. 69, 78 (1984).
\textsuperscript{101} Id. § 2000e-2(e).
\textsuperscript{102} Id. § 2000e-2(j).
\textsuperscript{103} Id. § 2000e-4.
\textsuperscript{104} Id. § 2000e-5(f)(1).
\textsuperscript{105} Id.
\textsuperscript{106} Id. § 2000e-5(f)(3).
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.
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 employees 124 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

\textsuperscript{134} See Jacobson, \textit{supra} note 111, at 1045.
\textsuperscript{135} L.A. Times, \textit{supra} note 130.
\textsuperscript{136} Jacobson, \textit{supra} note 111, at 1044.
\textsuperscript{137} Gugliotta, \textit{supra} note 131, at A33, col. 1.
\textsuperscript{138} \textit{Id.}
\textsuperscript{140} For a discussion of these cases, see \textit{infra} text accompanying notes 167-74.
\textsuperscript{141} H.R. 1, 102d Cong., 1st Sess. § 12 (1991) (directed at Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).
\textsuperscript{142} Pub. L. No. 102-166, § 102(b).
\textsuperscript{143} Saltzman, \textit{supra} note 71, at 41-42.
\textsuperscript{145} \textit{Id.}
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.\(^\text{146}\) 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.\(^\text{147}\) 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.

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

\(\text{147. Title VII provides courts with the power to order employers to change their employment practices. Schultz, supra note 23, at 1758. An employer who is found guilty of discrimination may be forced to alter the composition of its workforce or job classifications. Id. The most important aspect of Title VII adjudications is that individuals not involved in a particular case may still use its outcome as a guide in bargaining with their own employers. Id. at 1757-58. Consequently, Title VII has the potential to effect widespread change within the workplace.}\)
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*,\(^\text{148}\) the Court held that partnership decisions in law firms must comply with Title VII.\(^\text{149}\) 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*,\(^\text{150}\) 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.”\(^\text{151}\) Thus, Title VII and the PDA do not prohibit states from being more liberal than the federal statutes in enacting antidiscrimination laws.\(^\text{152}\)

In *UAW v. Johnson Controls*,\(^\text{153}\) 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.\(^\text{154}\) 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.”\(^\text{155}\) 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.\(^\text{156}\) Most important, the Court has increased plaintiffs’

\(\text{148. } 467 \text{ U.S. } 69 \text{ (1984).}\)
\(\text{149. } \text{Id. at 77.}\)
\(\text{150. } 479 \text{ U.S. } 272 \text{ (1987).}\)
\(\text{151. } \text{Id. at 285.}\)
\(\text{152. } \text{Jacobson, supra note 111, at } 1020.\)
\(\text{153. } 111 \text{ S. Ct. } 1196 \text{ (1991).}\)
\(\text{154. } \text{Id. at } 1203, \text{ 1209-10 (policy prevented women capable of bearing children from working in battery manufacturing operation that would expose them to high concentrations of lead).}\)
\(\text{155. } \text{Id. at } 1210.\)
\(\text{156. } \text{In Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), the Court held that, in a case alleging discrimination caused by disparate impact, a plaintiff must demonstrate that the employer’s applying “specific or particular” employment practices has caused the disparate impact. Id. at 657. Showing a disproportionately low percentage of members of the protected class in the positions in question is not sufficient to establish a prima facie case of discrimination. Id. Instead, plaintiffs must show that each challenged employment practice has a significantly disparate impact on employment opportunities for protected and unprotected groups. Id. Thus, Wards Cove imposes a “specific causation” requirement upon Title VII plaintiffs. See id.}\)

In *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989), the Court ruled that the limitations
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 “dismantl[ing] 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.

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.
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, "[t]o 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.
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." . . . Acceptance 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

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." The recognition led to the creation, by October 1989, of state task forces on gender bias in the courts in thirty states. 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.

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. 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."

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

---

180. Schafran, Gender and Justice, 42 Fla. L. Rev. 181, 195 (1990) (quoting Chief Justice Popovich's comments at the release of the report of the Minnesota gender bias task force).
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.\textsuperscript{185} Both men and women are no longer satisfied with limiting their parenting to the best child care available.\textsuperscript{186} 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.\textsuperscript{187} Eliminating this source of unrest should relieve some of the stress associated with the profession.\textsuperscript{188} 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,\textsuperscript{189} with some large firms losing 50\% of their associates.\textsuperscript{190} Women are twice as likely as men to expect to leave the profession.\textsuperscript{191} These statistics represent economic losses to firms, which have invested time and money in training these individuals.\textsuperscript{192} 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

\textsuperscript{185} See supra text accompanying note 72.
\textsuperscript{186} ABA Report, supra note 62, at 14; Barnett, supra note 72, at 221.
\textsuperscript{187} Holmes, supra note 67, at 13. The other areas of lawyer dissatisfaction are: overwork; hierarchy, bureaucracy and specialization; and moral conflict. \textit{Id.}
\textsuperscript{188} See \textit{id.} at 24. Attorneys experience higher levels of stress, problem drinking, and suicide than the general population. \textit{Id.}
\textsuperscript{189} \textit{Id.} at 23.
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Id.} at 23-24 (51\% among women compared to 21.5\% among men).
\textsuperscript{192} See \textit{id.} at 23.
for most domestic duties. This, in turn, causes women to be more handicapped 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 intentionally 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 removed.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 caregivers 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 comprehensive maternity leave, and day care assistance.199 Many women are reluc-

193. Frug, supra note 64, at 57.
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 Off a Furor, N.Y. Times, Mar. 8, 1989, at A18, col. 1 (quoting Rep. Schroeder). Amazingly, 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.
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

201. Barnett, supra note 72, at 224.
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. Law., Spring/Summer 1989, at 15, 32 (noting that both women and men are attempting to place rational boundaries on their jobs).

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.
212. See Barnett, supra note 72, at 221.
213. S. Okin, supra note 19, at 176.
216. Frug, supra note 64, at 57.
217. See id.
218. Brill, supra note 199, at 11.
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.\textsuperscript{226} 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.\textsuperscript{227}

To negate the effects of tokenism and the discrimination it fosters,\textsuperscript{228} 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.\textsuperscript{229} Even if employees are judged individually, stereotypes may cause their performance to be reinterpreted according to the stereotypes.\textsuperscript{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

\textsuperscript{226} Barnett, \textit{supra} note 72, at 222.
\textsuperscript{227} See R. Kant\textit{er}, \textit{Men and Women of the Corporation} 264 (1977).
\textsuperscript{228} See text accompanying notes 49-63.
\textsuperscript{229} See Taub, \textit{supra} note 21, at 353.
\textsuperscript{230} See id.
that they and their work are not being taken seriously.\textsuperscript{231} 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.\textsuperscript{232} Being so aware of an employee's gender may also cause that employee to be evaluated unfairly.\textsuperscript{233}

Some companies have sponsored "diversity training" programs designed to teach employees to understand and value the differences between men and women.\textsuperscript{234} These programs are partially in response to the number of women who have been leaving corporations.\textsuperscript{235} Employers have realized that they must create supportive work environments rather than focus on policies designed to soothe small parts of the bigger malady.\textsuperscript{236} 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.\textsuperscript{237}

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 \textit{people} instead of good \textit{men} or good \textit{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.\textsuperscript{238} 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.\textsuperscript{239} 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

\begin{itemize}
\item[\textsuperscript{231} Id. at 357-58.]
\item[\textsuperscript{232} See \textit{id.} at 357.]
\item[\textsuperscript{233} Id.]
\item[\textsuperscript{234} Saltzman, \textit{supra} note 71, at 44.]
\item[\textsuperscript{235} Id.]
\item[\textsuperscript{236} See \textit{id.}]
\item[\textsuperscript{237} Id.]
\item[\textsuperscript{238} Schafran, \textit{supra} note 180, at 183. For further discussion of this movement, see \textit{supra} notes 180-84 and accompanying text.]
\item[\textsuperscript{239} Id. at 194-202.]
\end{itemize}
which the nature and consequences of judicial gender bias are both acknowledged to exist and understood to be unacceptable...\textsuperscript{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.\textsuperscript{241} They must make law students aware of the consequences of engaging in overt and covert discrimination.\textsuperscript{242} These efforts are necessary because only after discrimination is confronted at all levels will it be condemned and defeated.

\section*{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.\textsuperscript{243}

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

\textsuperscript{240} Id. at 198.
\textsuperscript{241} See id. at 207-08.
\textsuperscript{242} See Barnett, supra note 72, at 223.
\textsuperscript{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.
\textsuperscript{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.