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McCaffery, Edward J.

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EQUALITY, OF THE RIGHT SORT

Edward J. McCaffery*

We seem, as a society, a remarkably complacent lot. We are forever slow to recognize problems and forever fast to write them off. We like things the way they are, by and large, and we don't like change, certainly not the kind of change sought by some disgruntled faction, asserting claims of right or justice (the kind of change that brings us bigger televisions, faster computers, or fancier cars seems to be all right). The most appealing political programs revolve around getting rid of things — taxes, immigration, crime — or doing nothing at all. This leaves little room for programmatic reform and many obstacles to its attainment. The situation of gender justice in America illustrates these tendencies in spades.

It took us countless centuries to recognize that there was indeed a problem, something amiss about the connection between gender and justice. Seeing the problem in the first instance entailed little more than grasping the twin truths that, on the one hand, women are people too, entitled to equal concern and respect with men, and, on the other, that they are not getting it. Yet these simple insights were painfully slow in coming. It was not until 1920 that American women received the right to vote, not until 1964 that a federal law prevented overt gender discrimination in the workplace. "Marriage bars" by which employers, such as public school districts, refused to hire married women and generally fired those women who married on the job, continued into the 1950s, when a shift in the macroeconomy made them

* Professor of Law, University of Southern California Law School; Visiting Professor of Law, California Institute of Technology. This essay was prepared for a Symposium on Institutional Barriers Facing Women in the Workplace, sponsored by the *UCLA Women's Law Journal*. I thank Bruce Ackerman, Scott Altman, Grace Blumberg, Marjorie Kornhauser, Joel Kupperman, Gillian Lester, Sharon Lloyd, Dan Ortiz, Judith Resnik, Eric Talley, Jim Woodward, and those who participated in a Faculty Workshop at the University of San Diego Law School for helpful comments.

unprofitable.¹ The Equal Rights Amendment, intended to guarantee equality under the law for women, was defeated in 1982; the defeat was fueled by such public attitudes about women and work, manifest in a 1977 nationwide survey, as that "62 percent [of respondents] thought married women should not hold jobs when jobs were scarce and their husbands could support them, and 55 percent thought it more important for a woman to advance her husband's career than to have one of her own."² And so on — patriarchy persists.

Notwithstanding this surprisingly recent history and the corresponding entrenchment of overt patriarchy for all but a minute fraction of our collective history, there are those all about us whispering, and, increasingly, insisting that there is no longer any particular need for a solicitude for women's rights, that equality of the right sort is at hand. Such arguments were heard against the Equal Rights Amendment — namely, that this measure was not needed because women as such already had the fullest rights of citizens³ — but the defeat of the ERA was a noisy affair, whose interpretation is made difficult by the fact that many of its opponents were arguing just the opposite case, namely that the Amendment would be a bad thing precisely because it would evince change, such as requiring unisex toilets in public places or compelling mothers to work in the paid workforce.⁴ We need not go so far back in time. The current political climate features a newer, more aggressive, variant on this old song, one that comes across loud and clear. As I write this, there are bills pending before Congress to cut back on affirmative action, chief among them the strategically named "Equal Opportunity Act of 1995," cosponsored by leading Republican presidential candidate Bob Dole.⁵

1. See CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 160-79 (1990).

2. JANE J. MANSBRIDGE, WHY WE LOST THE ERA 20, 22 (1986).

3. See SHARON WHITNEY, THE EQUAL RIGHTS AMENDMENT: THE HISTORY AND THE MOVEMENT 58-60 (1984) (discussing views of Harvard Law Professor Paul Freund that the Fourteenth Amendment already protected women); ERA: No. Again (editorial), RICHMOND TIMES-DISPATCH, Jan. 27, 1994, at A10 ("The ERA failed not because Americans oppose equal rights for women but because it is inherently flawed legislation. First, the amendment is unnecessary. . . .").

4. WHITNEY, *supra* note 3, at 57-58 (referring *inter alia* to statements of Rex Lee, then Dean of the Brigham Young Law School and later to become Solicitor General under President Reagan).

5. Kevin Merida, *Dole Aims at Affirmative Action: Bill to End Federal Racial, Gender Preferences Goes Beyond Court Ruling*, WASH. POST, July 28, 1995, at A10.

Beginning as recently as 1992 with the publication of Richard Epstein's *Forbidden Grounds: The Case Against Employment Discrimination Laws*,⁶ we can readily make out a serious and principled argument against antidiscrimination and affirmative action programs for women as well as for racial minorities. That argument, which in Epstein's precise case runs for more than five hundred pages, is seductively simple: Whatever might have been the initial case for "special" or "preferential" laws favoring women or other putatively disadvantaged groups, these laws must, in a democracy founded on the dual ideals of liberty and equality, be based on some specific wrong or evidence of unequal treatment, preferably committed by the government itself. Once those wrongs have been rectified, such that all have formally equal rights, the job of the government is at an end, and matters can be left to free individuals acting in free markets. If there is any lingering bias against women — say, in the form of lower wages or less representation in certain employment sectors or at certain levels of hierarchies — it can only be due to the rational actions of market actors acting freely, which are perfectly acceptable phenomena in a liberal democracy.

No one — at least no one in any position of power — ever promised that things would work out the same for everyone. As even most liberals are prepared to concede, equal opportunity does not guarantee equal outcomes. The point of the game is to allow people to make diverse choices and then to respect those choices, whatever they may be. Perhaps there are "tastes for discrimination" that, like other matters of taste, should not be overridden by a central authority. Or perhaps the choices that many women make freely, such as to stay home and raise their young children full-time, affect the rational calculation of market actors. These are "premarket" choices that we ought to respect; what is attractive about liberal markets is their accommodation of varying preferences. The observed variations in specific outcomes are fair game in a democracy; indeed, this is what is supposed to happen.

That simple logic allows for a turning of the tables on advocates of affirmative action. Those who continue to argue for preferential treatment for women in the face of the ostensible

6. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

neutrality of the law become the enemies of democracy itself. As Epstein writes, with manifest scorn:

Some radical feminists have even taken the view that androgyny — the elimination of all sex specific roles — is appropriate not only for the workplace but for the greater society at large. In so doing, they commit the sin of hubris by insisting that they can, through law and coercion, transform the behavior of ordinary women and men.⁷

Feminism is equated with Stalinism; as Communism in the East has fallen, so should feminism in the West.

This conservative, laissez-faire argument against doing anything at all has received a considerable boost from recent, "objective" evidence of the improved fate of women in the labor markets. This factual support is, in some sense, even necessary to complete the case, for we have all become somewhat skeptical of purely formal equality; recall Anatole France's wry observation that the "majestic equality" of the law "prohibits rich and poor alike to sleep under bridges, beg in the streets or steal bread."⁸ Americans generally need to see some flesh on the bones, to get some tangible evidence that what we are talking about is not just words. We believe, that is, not in equality per se, but in equality of the right sort, even if we have to learn — over the course of centuries, sometimes — just what this means.

As it happens, such factual proof of imminent equality seems to be there for all who would look. Two markers of "equality" for women have been especially salient: participation rates and the gender wage gap. Indeed, these statistics have been followed so intently and for so long that we have come to confuse these measures or elements of equality with the thing itself. This major problem in our collective social understanding is just what I am getting at here.

Women are participating in the workforce in increasing numbers and continuing to work after marriage and childbirth. Figure 1 shows the participation rates for married mothers with husbands present and children under the age of six from 1950 to 1990.⁹ This picture graphically demonstrates the dramatic rise in the participation rates in this significant and representative class of married women since the end of World War II: a steady rise of

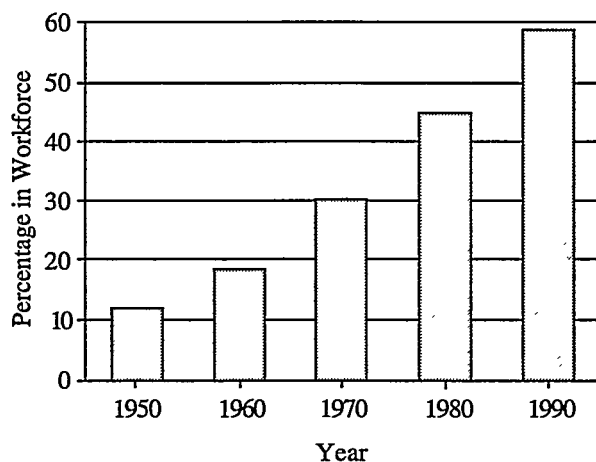
7. *Id.* at 271 (footnotes omitted).

8. ANATOLE FRANCE, *THE RED LILY* 87 (1894).

9. STATISTICAL ABSTRACT OF THE UNITED STATES (114th ed. 1994), tbl. 626 [hereinafter *STATISTICAL ABSTRACT*]; *THE STATISTICAL HISTORY OF THE UNITED STATES, FROM COLONIAL TIMES TO THE PRESENT* (1976), Ser. D 63-74 at 134.

ten percent per decade, or one percent per year, over the ensuing half century. Today, a solid majority of married mothers of young children are in the workforce, a situation wildly unthinkable just a generation or so ago. Economist June O'Neill, writing in the *Wall Street Journal* in 1994, noted that: "Close to 60% of married women with children under the age of six are now in the labor force; in 1960, the proportion was only 19%."¹⁰

FIGURE 1: PARTICIPATION RATES FOR MARRIED MOTHERS OF YOUNG CHILDREN, HUSBAND PRESENT, 1950-1990



Equally dramatic has been the narrowing of the so-called "gender wage gap," the differential between average men's and women's wages. This statistic can be difficult to measure and track, and its "improvement" has not been as smooth or as consistent as that in the labor market participation rates. Nonetheless, as Claudia Goldin in particular has helped to show, it has been narrowing, trending towards elimination, over a span of nearly two centuries.¹¹

Figure 2 shows a segment of this bigger picture, the gender wage gap among white, full-time workers from 1955 to 1993.¹² It

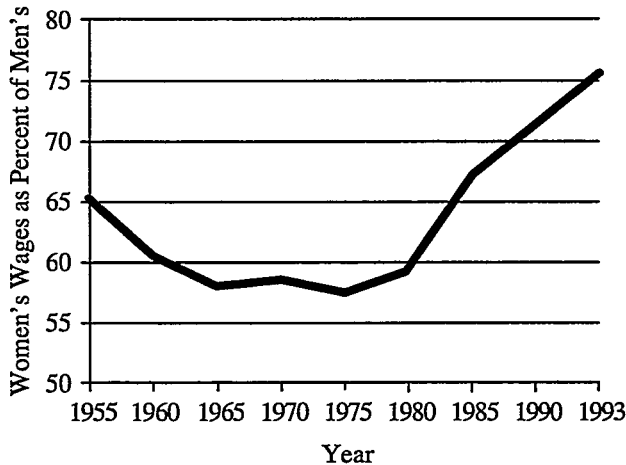
10. June E. O'Neill, *The Shrinking Pay Gap*, WALL ST. J., Oct. 7, 1994, at A10.

11. GOLDIN, *supra* note 1.

12. FRANCINE D. BLAU & MARIANNE A. FERBER, *THE ECONOMICS OF WOMEN, MEN, AND WORK* 137, tbl. 5.9 (2d ed. 1992); *STATISTICAL ABSTRACT*, *supra* note 9, at tbl. 665; *see also* GOLDIN, *supra* note 1, at 58-82. The government has traditionally maintained statistics for the gender wage gap sorted by race and the largest — and most prominent — differential has been among whites. Among Blacks, for example, where the gender wage gap has been smaller, the percentage had reached 89 by 1993.

illustrates a characteristic pattern in the general statistic: periods of stagnation and decline, followed by marked improvement. From 1965 to roughly 1980, the gender wage gap was so stuck that "59 Cents" became a slogan of the campaign for the ratification of the ERA.¹³ Since then, matters have improved significantly. By 1993, full-time, white women workers were earning, on average, more than seventy-five percent of what men were. Among some younger age cohorts, the percentage was well over eighty percent. O'Neill writes that even the 80% figure "overstates the gender gap between men and women with similar skills and training;" she points out that, "at ages 25 to 34, where women's skills have increased the most, the ratio is 87%."¹⁴ A recent salary survey in the popular magazine *Working Woman* found that "in the 28 fields for which salary information was available by gender, women typically earn 85% to 95% of what men in similar jobs take home — far better than the 74 cents-on-the-dollar figure cited by the Bureau of Labor Statistics as the difference between women's and men's wages."¹⁵ Progress in this statistic has been slow and uneven, but we seem to be getting there, at last and at least.

FIGURE 2: GENDER WAGE GAP, FULL-TIME WHITE WORKERS, 1955-1993



13. See MANSBRIDGE, *supra* note 2, at 36-44.

14. O'Neill, *supra* note 10. See also ELAINE SORENSEN, *EXPLORING THE REASONS BEHIND THE NARROWING GENDER GAP* (1991); Sylvia Nasar, *Women's Progress Stalled? Just Not So*, N.Y. TIMES, Oct. 18, 1992, at C1.

15. Diane Harris, *How Does Your Pay Stack Up? Salary Survey 1996*, WORKING WOMAN, Feb. 1996, at 27-28.

These trends in the positive, objective data, considered in the light of the conservative, laissez-faire case against doing anything at all, raise two formidable and related challenges to any feminist critique of the status quo. One, just what is it that women still have to complain about? They are working more than ever, getting paid more than ever — both absolutely and relatively to men — increasingly attending graduate programs and professional schools, serving in high political offices, and so on. Who could rightfully ask for anything more? The would-be critic carries a burden of pointing to something else that women still want, and making this argument in the face of the charge that she, the critic, is engaging in some kind of Stalinist project of “social engineering.” Epstein and others would quickly condemn such “radical feminists” to eternal obscurity, on account of their “sin of hubris.” Many Americans seem to think it is time to stop all of this nonsense and get on with the important political tasks of the day, like lowering taxes and fighting crime.

The would-be critic must do even more than come up with some articulation of what it is that women could still rightfully want. She must also counter the affirmative data of improvement. Don't the numbers tell the story? Women asked for equality in the workplace, and now they are getting it. Any lingering shortfall is due to free choices that reflect, rather than disprove, the attainment of a promised land of equal rights. It isn't fair to change the rules of the game now, and start asking for something else, and more. It is time, as the so-called “angry white males” seem to be asserting, to move on.

Some feminists have responded to these challenges by arguing with the data, pointing to ways in which the glass is still half-empty: Neither participation nor wage levels have reached precise parity with men, for example.¹⁶ But this seems like little more than a quibble to Epstein or like-minded conservatives; the data is confirming the elimination of formal barriers to equality, and what lingering differences persist must be due to something else, like the free choices of free parties under free markets, with which it is no one's business to interfere. Equality never meant that we would, or should, all end up the same.

While some feminists have argued with the data of improvement, others, in the face of the same evidence, have turned

16. See, e.g., SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991); Valerie Reitman, *It's All Relative: The Pay Gap Between Men and Women is Narrowing; Why?*, WALL ST. J., Apr. 13, 1994, at R7.

against "equality" itself.¹⁷ This is certainly understandable: Whatever instantiation of equality seems to be at hand turns out not to be very satisfying at all. If equality means that women are destined to greater levels of stress and unhappiness, in perpetuity, who needs it? But surely equality of some sort — of the right sort — remains an attractive idea, a very deep part of our political and philosophic intuitions. Herein, I believe, lies the rub: We need to think more about what the right sort of equality for gender justice is. Simply being allowed to participate in the previously all-male domain of the paid workforce, and getting paid nearly equal wages for nearly equal work, is not enough (although, to be quite clear, I have no brief *against* these rights, which seem to me to be *elements* of equality of the right sort), because those women who are working in the paid workforce are doing so on the terms and conditions laid down in the prior era of entrenched patriarchy.

That is the main theme I develop in the balance of this essay: We make a dangerous mistake when we look at the statistics of labor market participation rates and gender wage gaps alone as constitutive of equality of the right sort. We also need to look at the terms and conditions on which the critical social structures of work and family are built; the objective statistics show us that women are approaching parity in a certain social game, but how can we be sure that this is the right game to be playing in the first place? A deeper, richer, if necessarily more amorphous, kind of equality would afford women equal concern and respect at the stage of constructing the social space. I mean to get at all of this with a look at the tax system in particular, but first we need to lay to rest the challenges posed by the contemporary conservative attack on doing anything at all.

The current climate of opposition to any form of "special" or "affirmative" "preferences" for women — some words like this are always used to play up the deviance of these laws and the

17. See, e.g., Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CR. REV. 201 (1988) ("To date, we have not discovered any abstract standard of equality (or substitute therefor) with the potential for any real change. Formal equality (with and without limited exceptions when there are biological differences) — the leading contender as the general standard — can effect only limited change."); Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 807 (1990) ("Specifically, I will propose that feminists in law concentrate on alternative legal arguments — that is, arguments not based on equality, but on other concepts that are better-tailored to accomplishment of the feminist goal of self-definition.").

assumed “neutrality” of life without them — offers formidable challenges, to be sure. But the feminist critic has two formidable trumps of her own to play. One is the persistent evidence of the subjective unhappiness and even despair of modern women, especially working wives and mothers. Not everything of importance can be captured in government statistics or handy charts, and we should be wary, here as elsewhere, of having our principles enslaved to numbers.

Many surveys and empathetic portrayals of common experience, reflected in such cultural sources as movies, television shows, weekly magazines, and countless conversations we have all had and heard — if only we have been willing to listen — reveal a striking fact about contemporary society: Many women, especially mothers of young children, are not happy.¹⁸ All about us, the image and reality of working mothers is of individuals under stress. Working mothers are still the primary parent, are often resented and distrusted by coworkers and superiors, and sometimes harbor feelings of guilt in the face of the facts that they are far more likely to be working than their own mothers were and that, even today, with all of the signs of greater participation, more than forty percent of married mothers with young children stay home full-time.¹⁹ Meanwhile, almost all married fathers work full-time, men do less work around the home, and seem, by all measures, to bear less stress over parenting than their wives do. The picture of the working father is a light comic motif; we smile at the oxymoronic image of “Mr. Mom,” never pausing to ask just why, indeed, this is an oxymoron at all.

Many working women are supporting families without a spouse present, and a shockingly large percentage of these female-headed families are poor. In 1992, fully forty-six percent of

18. Representative sources chronicling the stresses of working mothers include: FALUDI, *supra* note 16; FAMILIES AND WORK (Naomi Gerstel & Harriet E. Gross eds., 1987); ARLIE HOCHSCHILD, *THE SECOND SHIFT: WOMEN AND THE REVOLUTION AT HOME* (1989); RHONA MAHONY, *KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER* (1995); Sharon Y. Nickols, *Work/Family Stresses*, in FAMILIES AND CHANGE: COPING WITH STRESSFUL EVENTS 66 (Patrick C. McHenry & Sharon J. Price eds., 1994); FELICE N. SCHWARTZ, *BREAKING WITH TRADITION: WOMEN AND WORK, THE NEW FACTS OF LIFE* (1992); Karen Czapanskiy, *Volunteers and Draffees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991); Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431 (1990).

19. The classic discussion of the psychoanalytic dimensions of mothering is NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978).

all families headed by a single mother fell below the official poverty level; most others were not far above it. This forty-six percent figure has been remarkably constant since at least 1970, when it was forty-five percent, and compares with a rate of six or seven percent for married couples.²⁰ Among mothers with young children and a husband present in the household, women are put to hard choices between working full-time or staying home full-time: Part-time work is generally unattractive, low in pay and prestige.²¹

Many people mistakenly believe that there is somehow a vibrant part-time labor market; they point to statistics suggesting that as many as thirty percent of women who work outside the home do so part-time. But we must look at these numbers with a bit of care. Two decompositions are in order. First, it is important to isolate the class of married mothers. This is difficult to do, given the way the Census Department tracks, or fails to track, the particular situation of part-time maternal employment. Figure 3 shows part-time work among women, broken down into the unfortunately crude age cohorts of 16-19, 20-24, 25-54, and 55 and older.²² This diagram shows that in the prime parenting years, of twenty-five to fifty-four — two-thirds of all births in 1992 were to women twenty-five and older²³ — less than twenty percent of women are working part-time. This is in fact the least likely age cohort in which to find part-time workers, who are far more likely to be teenagers or over fifty-five. Both the overall percentage of women working part-time and the percentage for women in the twenty-five to fifty-four year old age group have fallen since 1980.

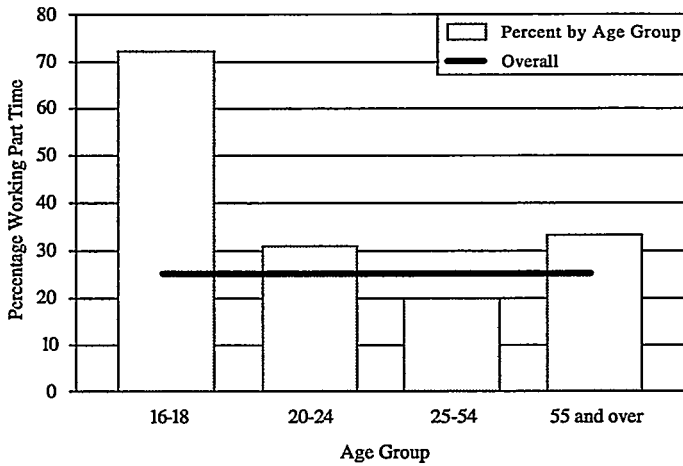
20. STATISTICAL ABSTRACT, *supra* note 9, at tbl. 736. See also Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19 (1995).

21. For some discussion of the state of the part-time labor market and its limitations, especially for women, see CHRIS TILLY, *SHORT HOURS, SHORT SHRIFT: CAUSES AND CONSEQUENCES OF PART-TIME WORK* (1990); CHRIS TILLY, *HALF A JOB: BAD AND GOOD PART-TIME JOBS IN A CHANGING LABOR MARKET* (1996); Martha Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C. L. REV. 709 (1986); Dowd, *supra* note 18. For some comparative notes, see JOHN D. OWEN, *REDUCED WORKING HOURS: CURE FOR UNEMPLOYMENT OR ECONOMIC BURDEN?* (1989).

22. STATISTICAL ABSTRACT, *supra* note 9, at tbl. 632.

23. STATISTICAL ABSTRACT, *supra* note 9, at tbl. 102.

FIGURE 3: PART-TIME WOMEN WORKERS, BY AGE, 1993



A second decomposition in the part-time figures involves breaking out involuntary part-time work, situations where women are working part-time but would prefer to be doing so full-time. This number, too, is hard to ascertain. If we go by what workers tell government officials, something like twenty percent of women who work part-time wish that they could be working full-time.²⁴ We could break things down even more. Among the voluntary part-time workers, a good percentage are stuck in what Chris Tilly, a labor market economist who has studied the part-time labor market, calls “secondary jobs,” ones marked by “low skill, low pay, and few benefits.”²⁵ Even without further refinements, it is striking that just about all of the growth in the part-time labor force since 1970 has occurred in the involuntary sector. In particular, “[w]omen in their primary child-rearing years have actually *decreased* their rate of part-time employment” between 1969 and 1988.²⁶

Where does all of this leave married mothers of young children? Rounding up a bit, roughly sixty percent work outside the home and forty percent stay home full-time. Of those who work in the labor market, less than twenty percent seem to be working

24. TILLY, *SHORT HOURS*, *supra* note 21, at 6. See also Leslie S. Stratton, *Reexamining Involuntary Part-Time Employment*, 20 J. ECON. SOC. MEASUREMENT 95, 112 (1994) (“The results reveal that while the level [claimed for involuntary part-time labor] may be overstated — by perhaps as much as 50% — the trend is not. Involuntary part-time employment, however calculated, is still rising more rapidly than any other sort of employment or unemployment.”).

25. TILLY, *SHORT HOURS*, *supra* note 21, at 7.

26. *Id.* at 1 (emphasis in original).

part-time, and some twenty percent of those who do work part-time are involuntarily doing so. Among all married mothers of young children, at least forty-eight percent work full-time, forty percent stay home full-time, and no more than twelve percent work part-time, many of the latter looking to work more. This hardly fits the image of a diverse and creative workforce, in which part-time work offers a strong option for working mothers to juggle the competing demands on their time.

Meanwhile, well over ninety-five percent of married fathers seem to be working, yet fewer than five percent of all working men between the ages of twenty-five and fifty-four work part-time.²⁷ There are almost no families in America that feature two part-time workers. In 1987, the last year for which I could track this statistic, of the 43,450,000 married couple families in America, only 637,000 — less than 1.5% — fit the two part-time model, and this presumably included many elderly couples without children.²⁸ Bearing in mind that the government defines part-time work as anything less than thirty-five hours a week, it is clear that there are not many families using part-time work in a creative, modern, flexible, work-family dynamic.

Children in America seem overwhelmingly likely to be raised in one of three kinds of families: female-headed, single-parent ones; traditional ones, where the man works full-time outside the home and the woman stays home full-time; or dual-earner ones, where both spouses work full-time outside the home. In 1993, there were sixty-five million American children under the age of eighteen. Of these children, twenty-four percent lived with their mother alone (compared with 3.5% with their fathers alone); forty percent in households where both parents work (given the above, mostly with both parents working full-time); and twenty-three percent in dual-parent, single-earner families (mostly with the father working — men are more than four times more likely to be the single earner in one-earner families and presumably even more so in households with young children).²⁹

The typical mother thus faces a decision to stay home, or work outside the home, full-time. These are not happy choices. Staying home involves possible long-term sacrifices in human capital and wage-earning capacities, as well as the loss of inde-

27. STATISTICAL ABSTRACT, *supra* note 9, at tbl. 632.

28. STATISTICAL ABSTRACT, *supra* note 9, at tbl. 738.

29. STATISTICAL ABSTRACT, *supra* note 9, at tbls. 81, 724.

pendence, variety, and the stimulation of work and the workplace.³⁰ Working full-time outside the home as a mother is typically a massive struggle, with financial and logistical barriers to child care, among other stresses, and little social help in any arena. To add injury to injury, working married mothers also do the bulk of the work at home; when their work day is over, they take to the "second shift," as Arlie Hochschild has put it.³¹ It is no wonder that surveys and popular culture often suggest that a very large proportion of all mothers, in any job setting, are unhappy: Full-time working mothers often say that they would like to work less and more flexibly, to be able to spend more time with their children; part-time workers often say that they would like to be able to work full-time, in order to get better paying and otherwise more rewarding jobs; stay-at-home mothers often say that they would like to be able to spend some more time working outside the home, and that they wish their husbands would help out more at home. Where are such women to turn? What are the "choices" that these women can "freely" make?

The second feminist trump against the conservative onslaught is that all of this talk of "improvement," of the impending equality of the right sort, with a concomitant ability to dismantle affirmative action programs and so forth, has come with suspiciously hastened speed, especially compared to the eons of overt patriarchy that preceded it. How could we think that centuries of male domination over social, legal, and economic systems could be wiped clean with a single generation of nominal, formal equality? How could we think that the data, in the form of participation rates and wage levels, could make everything all right? How could we think that money alone, in the form of nearly equal wages for nearly equal work, would give women all that they want, need, and deserve? Whose "sin of hubris" is *that*?

We need to think more about the social structures of work and family and how these are shaped and limited by other social structures. We need more dynamism and flexibility, more scope for individuals to make diverse choices in pursuing their life's plans and projects. In the case of women in the workforce, a

30. Joyce Jacobsen & Lawrence Levin, *The Effect of Intermittent Labor Force Attachments on Female Earnings*, 118 MONTHLY LAB. REV. 14 (1995); compare Leslie S. Stratton, *The Effect Interruptions in Workplace Have On Wages*, 61 S. ECON. J. 955 (1995) (finding diminished, but still noticeable effect on wage profiles as a result of interruptions in work experience).

31. HOCHSCHILD, *supra* note 18; see also SUSAN HANSON & GERALDINE PRATT, GENDER, WORK, AND SPACE 120-56 (1995); Czapanский, *supra* note 18.

reading of the present situation that is properly sensitive to the demands of gender justice reveals that something is wrong. As the gender gap is narrowing and participation rates for women are increasing, the models of work and family remain surprisingly and suspiciously rigid. This means that the women who do work are, by and large, working as men traditionally have: full-time, and with full commitment. Meanwhile, men in the aggregate have hardly changed one wit to accommodate the changing times. We are not seeing the emergence of a vibrant part- or flexible-time labor market, nor more creative work-family balances. The period in which women have been marching towards "equality," as captured in participation rates and relative wage levels, has been marked by dramatic changes in the behavior of women — and almost none among men or in the institutional structure of the workforce.

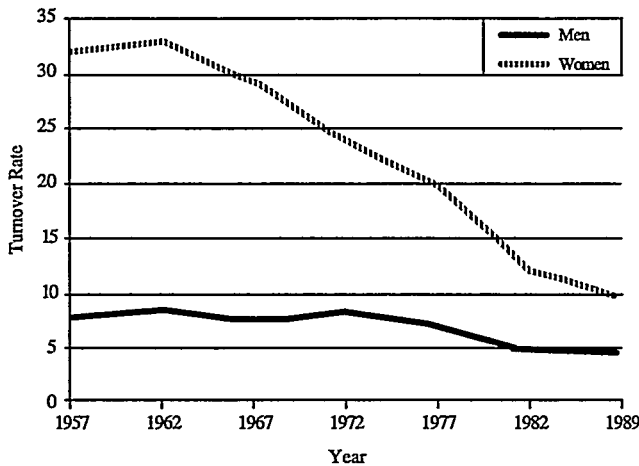
As the gender wage gap has been narrowing, women have been marrying later; having fewer children and having them later in life; educating themselves more; and remaining in the workforce in general, and on the same job in particular, longer. June O'Neill, in the article quoted above, writes that: "Through delayed marriage, low fertility, and an increasing tendency for mothers of young children to work, women have acquired many more years of continuous work experience than was true in the past."³² But, on closer inspection, these facts are not grounds for unmitigated joy. Should we be celebrating the fact that women, and women alone, have been changing their behavior dramatically? All of this means that we have "allowed" women to participate in the workforce and to be paid close to what men are paid — as long as they change *their* behavior and act like men traditionally have at work. Is this the equality women are fighting for?

Things were all pretty clear at the onset of World War II. Men dominated the workforce. The dominant model of work was full-time, and with full commitment. Men worked long hours, and stayed put on their jobs, while married women stayed home. The dominant model of the family was the traditional, single-earner one, with the man as "breadwinner" outside the home and the woman as housekeeper within it. As women began to enter the workforce by the millions, as Figure 1 reminds us, one would have thought that something had to give: Either

32. O'Neill, *supra* note 10.

the traditional, single-earner family would persist, but now sometimes it would be the man who stayed home, or more flexible and dynamic work arrangements would have to arise. Neither trend has transpired. Instead, what “gave” in this revolutionary period was the behavior of women. Figure 4 depicts a statistic that economists Francine Blau and Marianne Ferber call the “labor force turnover” rate, which measures the difference between average participation rates at any one point in the year and participation throughout the year, as a percentage of the latter. For example, if forty percent of a group was in the workforce at some point in the year, but only thirty percent were in any given week, the turnover would be thirty-three percent (forty minus thirty divided by thirty). This measure reflects the degree to which a group moves in and out of the labor force. Figure 4, which looks at labor force turnover over the period from 1957 to 1989, captures the general theme: Women’s behavior has changed dramatically and men’s has not.³³ The turnover rate for women has plummeted from over thirty percent to under ten percent, while that of men has remained remarkably stable, in the five to eight percent range. Men are staying put, while women are learning to do so.

FIGURE 4: LABOR FORCE TURNOVER RATES OF MEN AND WOMEN, 1957-1989



This all gets more and more complicated. I do not mean to be “essentializing” patterns of work: Full-time work is not

33. FRANCINE D. BLAU & MARIANNE A. FERBER, *THE ECONOMICS OF WOMEN, MEN, AND WORK* (2d ed. 1992).

“male” any more than housework is “female.” Some women are obviously happy working in full-time jobs with full commitment; some (few) men are indeed happy staying home and raising their children full-time. What I am pointing out is the erstwhile promise, or hope, that the structures of work and family would change as women entered the workforce in large numbers. This hasn't happened. Some families have fallen apart, leaving the woman as mother and market earner to do it all; other families have kept up the traditional way of life; and still others have simply engrafted full-time work outside the home onto the wife's duties inside it. This is not dynamic, and women, as a group, seem to be unhappy about their lack of options. In a bit, when I turn to the idea of optimal tax, I shall invoke a large body of empirical evidence for the claim that women are more conflicted about their roles than men are. But we shouldn't need statistics to make out this case; all we need to do is to look around with empathetic eyes and ears.

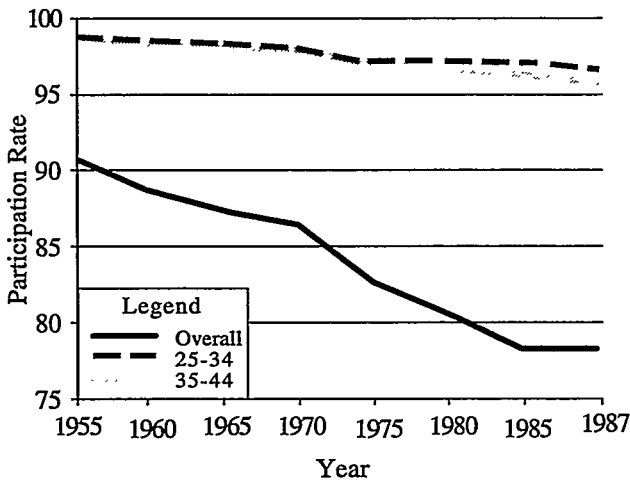
Many other statistics back up the same basic story: Women are changing their behaviors, but men and the workforce are not changing theirs. Participation rates for married mothers of young children went from just over ten percent in 1950 to nearly sixty percent today. What of married fathers of young children? It is a bit hard to pin this number down — again because government statistics do not routinely track the situations of fathers — but it would seem that well over ninety-five percent of married fathers are working, and almost all of them are working full-time.³⁴ These statistics have not changed significantly over the three- or four-decade period in which women have been slouching to that “equality” which we are now prepared to say is the end of the road. Figure 5 depicts the labor force participation rates for married men from 1955 to 1987.³⁵ The solid line shows the aggregate statistic, which has declined somewhat, from just over ninety percent in 1955 to under eighty percent thirty-two years later. This overall trend is sometimes pointed to as evidence that men are changing, too, as “women's liberation” takes hold. A closer look, however, raises suspicions. Breaking the statistic down into age cohorts reveals a different story: Among the prime parenting year groups, married men between the ages of twenty-five and thirty-four and thirty-five to forty-four, well

34. Howard V. Hayghe & S. E. Haugen, *A Profile of Husbands in Today's Labor Market*, 110 MONTHLY LAB. REV. 12 (1987).

35. *Id.*

over ninety-five percent have worked, constantly, over the thirty year period. Virtually the entire effect of the aggregate line comes from older men. Some forty-four percent of men over sixty-five had worked in 1955, compared to just seventeen percent in 1987. Men are living longer, older men are becoming a larger portion of the population, and men are retiring earlier. But all of this has little to do with the stresses facing married women with young children. Once the kids have left, home becomes a pleasant place to be.

FIGURE 5: LABOR FORCE PARTICIPATION OF HUSBANDS, 1957-1989



On reflection, none of this should surprise us. The conservative claim that equality is at hand, that the particular problems of women are over, always seemed to ring hollow. How could such little time bring such complete and utter change? The depth of historical patriarchy, combined with the many indicia of women's unhappiness, should lead us to turn a critical eye at the abstentionist, do-nothing arguments of the conservative crowd. Maybe there is something limited, incomplete about the statistics at which we are looking. Maybe there is something more that women want, need, and deserve, to obtain a deep equality, one of equal concern and respect, with men. Maybe money isn't everything and, at least sometimes, blinds us to things that do matter. We should look at not just the fact that the gender wage gap is narrowing, but *how* it is; our questions should be accompanied by a healthy degree of skepticism towards the "promised land"

crowd and a healthy respect for the voices of women crying out for something else, and more.

I take it that all of the above has something to do with this particular symposium, with why a group of scholars from diverse fields have gotten together to discuss "Institutional Barriers to Women in the Workplace." There seems to be a subtext, an implicit assumption that many barriers have been removed. There is something contrarian about meeting now, at a time when the forces of retrenchment are ascendant: An idea of this gathering, I surmise, is that we need to be a little more clever to rummage about and find something still worth discussing in the face of the conservative advance noted above. What's there left to do?

As my comments have already indicated, I believe that there is a good deal left to do, beginning with thinking more clearly about what it is we should be doing and why. Far from having already reached the promised land and attaining equality of the right sort, a strong case can be made that we, as a society, have only taken the easiest and most visible first steps on what will be a long road towards purging patriarchy. My scholarly work in the field of tax has been important in opening up my mind to this insight. When one examines tax from the perspective of gender and justice — as Grace Blumberg began to do a quarter of a century ago³⁶ — it is hard not to be struck by the depth and breadth of gender bias.

I am not going to say very much specifically about taxes, in part because of limited time and space here, and in part because I and others, all following in Blumberg's impressive and path-breaking footsteps, have done so elsewhere.³⁷ But another reason is that this occasion affords an opportunity to emphasize a critical aspect of the work in tax that often gets lost in our tendency to compartmentalize knowledge: What is important about the gender biases in the tax system has little to do with "tax" per se. It is true that the tax system is deeply biased against working wives and mothers. Working wives in upper-middle income households sacrifice, on average, two-thirds of their salaries to

36. Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 *BUFF. L. REV.* 49 (1971-72).

37. Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 *UCLA L. REV.* 983 (1993); *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 *YALE L.J.* 595 (1993); see also Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 *TEX. L. REV.* 1 (1980); Nancy Staudt, *Taxing Household*, *GEO. L. J.* (forthcoming 1996).

tax- and work-related expenses.³⁸ This is indeed a problem for distributive justice, a traditional domain for tax analysis. These biases are most important, however, not because they result in some improper orderings of tax burdens among otherwise similarly situated families, or some such hollow, static formulation of a distributive norm, but because they impact behaviors and play a large role in shaping our various life plans and projects. The biases of tax make it hard to be a working wife, and discourage many from the attempt. This plays into social attitudes and stereotypes and the rational planning of market actors, and so is multiplied across the social space. The same forces push men to work more and serve to entrench the dominant model of full-time, full-commitment work. Women who want to work are given limited models of how to do so. None of this has much to do, directly, with who pays what amount of tax; it has everything to do with patterns of social behavior. It is time to get this message out to "nontax" people, which means the overwhelming majority of Americans.

When I got the call to participate in this Symposium, I was rather feverishly at work on a book, tentatively titled *Taxing Women*.³⁹ In this project, I am trying to pull together my prior thoughts on the subject and make them available to a wider audience than the limited club that reads law review articles. I have also become interested in, on the one hand, the social, political, and intellectual histories of gender bias in tax and, on the other hand, the implications of the deep gender bias of tax to both labor markets and social theory more generally. In other words, I am precisely pursuing the topic of the tax system, writ large, as a major and continuing "institutional barrier facing women in the workplace." I'll just quickly sketch out here the gender biases of tax, mention a principal finding from the theory of "optimal tax," and then leave the narrow contours of tax to discuss how a deep gender bias in tax plays out in labor markets and social life more generally.

38. Sandra Hanson & Theodora Ooms, *The Economic Costs and Rewards of Two-Earner, Two Parent Families*, 53 J. MARRIAGE & FAM. 622 (1991); see also CONTRACT WITH THE AMERICAN FAMILY: A BOLD PLAN BY THE CHRISTIAN COALITION TO STRENGTHEN THE FAMILY AND RESTORE COMMON-SENSE VALUES 54 (1995) ("In fact, approximately two-thirds of a working mother's income is consumed solely by the family's federal tax liability."); Sharon Y. Nickols & Karen D. Fox, *Buying Time and Saving Time: Strategies for Managing Household Production*, 10 J. CONSUMER RES. 197 (1983).

39. EDWARD J. McCAFFERY, *TAXING WOMEN* (forthcoming 1997).

Taxing Women begins with the long and interesting history of the movement towards the system of joint filing under the income tax, which became a fixed feature of the American system in 1948. Joint filing, which most democratic countries have since moved away from, creates a problem known as the "secondary earner bias." Because husband and wife are treated as one in the tax system, there is a push for spouses to think of one earner as "primary" and the other as "secondary," so that a burden is placed on the secondary earner, who will almost always be the lesser earning wife. The bias is created because this spouse enters the workforce at a marginal tax rate dictated by the primary earner's salary. Under current tax rates, for example, if a husband earns \$25,000, his wife faces an income tax rate of 15% on her first dollar of earned income; if the husband earns \$60,000, the wife enters at a 28% rate. Social security and state and local taxes add considerably to the total burden.

There are many interesting things to say about joint filing and the secondary earner bias, both before and after the pivotal 1948 year, but I'll pass over that subject here. (Actually, Carolyn Jones has written wonderful legal history about just this topic.)⁴⁰ One point is worth noting, however: The secondary earner bias has *no* necessary connection to the so-called "marriage penalty." This penalty refers to the fact that some couples see their federal income taxes increase when they marry because the rate structure for married persons is less favorable than double the individual structure. Under the joint filing system put in place in 1948, which persisted until 1969, there were no marriage penalties but a potentially severe secondary earner bias. A rate change in 1969, designed to appease single taxpayers, created the marriage penalty, which has generated increasing attention recently. For those couples who face a penalty — about a third — it falls, strictly by definition, in equal numbers on men and women. The secondary earner bias is far more narrowly the wife's problem. Yet we have paid almost no attention to the secondary earner bias, either politically or intellectually. This is another example of a pattern of limited social cognition of gender-based problems. The tax laws were designed to foster and reward traditional, single-earner families, where the man as breadwinner worked

40. Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 *LAW & HIST. REV.* 259 (1988); see also Carolyn C. Jones, *Dollars and Selves: Women's Tax Criticism and Resistance in the 1870s*, 1994 *U. ILL. L. REV.* 265 (1994).

outside the home and the woman as homemaker worked inside it.⁴¹ This bias towards single-earner families has had remarkable salience and persistence, right down to the present age. The contemporary *Contract with America*, for example, is heavily centered around a tax reform proposal to entrench traditional families.⁴²

Taxing Women also considers five other tax-related factors, in addition to joint filing, that are heavily biased against working wives or modern two-earner families. Social security turns out to be a larger tax for most Americans, and even more gendered — and consciously so — than the income tax.⁴³ Bias is also evident in the failure to tax the “imputed” income from self-supplied services, such as child care; the inadequacy of the law’s provision for child care and other work-related expenses of working parents; the fringe benefit system; and state and local taxes. All of these factors compound the bias in favor of traditional, single-earner families. When all of this is added up, it adds up indeed. In a wide range of circumstances, wives simply and flatly lose money, in a cash flow sense, by working. The bias is especially severe at the upper and lower economic classes, in the latter case because the loss of benefits as families move from lower- to middle-class status operates like a tax and has a devastating impact on two-earner families. Everywhere, it is hard to make much money at part-time work. There are strong incentives for wives simply to stay home, where their household services are not taxed, rather than to struggle to pay child care and other work-related expenses out of a salary cut in half, or more, by taxes.

Looking closely at tax gives a good look at the intersection between gender and class, and the way that social choices have

41. This is the general theme of Part I of *TAXING WOMEN*. See McCAFFERY, *supra* note 39.

42. The proposal is for a per child, not child care, credit; the effect is to transfer resources to all middle and upper income families with children (because the credit is not refundable, roughly forty-four percent of American children will not benefit fully from it because their families are too low income), while maintaining the biases in place against working wives. See *CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION* (Ed Gillespie & Bob Schellhas eds., 1994). I discuss this at some length in Chapter Nine of *TAXING WOMEN*, *supra* note 39.

43. See Alice Kessler-Harris, *Designing Women and Old Fools: The Construction of the Social Security Amendments of 1939*, in *U.S. HISTORY AS WOMEN’S HISTORY: NEW FEMINIST ESSAYS* 87 (Linda K. Kerber et al. eds., 1995); see also Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone*, Seidman, Sunstein & Tushnet’s *Constitutional Law*, 89 *COLUM. L. REV.* 264 (1989). This is the subject of Chapter Four in *TAXING WOMEN*. See McCAFFERY, *supra* note 39.

shaped the intersecting space. A basic theme is that a bias against two-earner families cuts differently at different income levels. It is a bias against families themselves among the poor, where a strong need for money income often compels both parents to work. But, ironically and cruelly, working wives among the *lowest* income classes often face tax rates in excess of fifty and sometimes one hundred percent, because the family is being taxed by losing welfare benefits, like the earned income tax credit.⁴⁴ The very same general bias — in favor of single-earner families — is a push against working wives among the wealthiest classes, who can indeed afford to have one spouse stay home. Among the richest Americans, potentially working wives also face tax rates well over fifty percent, at a level where more money, alone, may not be all that much needed. Women in the vast middle are put to hard and stressful choices, between trying to work outside the home full-time as well as doing a good deal of work in it, or staying home full-time and sacrificing workplace skills, as well as possibly greater autonomy, independence, and variety.

These biases map up with the picture of households sketched above: twenty-four percent of American children live in households headed by their mothers and almost half of these families are below the poverty level; forty percent of American children live with two working parents, typically both working full-time; twenty-three percent live in single-earner, dual-parent households, many of them wealthy. A recent study of top executives at large American corporations, for example, revealed that some eighty percent were men with stay-at-home wives.⁴⁵

44. Gene Steuerle, *The True Tax Structure*, 69 TAX NOTES 371 (1995); *Combined Tax Rates and AFDC Recipients*, 69 TAX NOTES 501 (1995); *Giving Jobs to Welfare Recipients: The Tax Rates They Face*, 69 TAX NOTES 641 (1995).

45. Charlene Marmer Solomon, *Work/family's Failing Grade: Why Today's Initiatives Aren't Enough*, 73 PERSONNEL J. 72 (1994) (referring to Representative Pat Schroeder's view that a problem facing child care initiatives is that "most CEOs and decision makers still have traditional families"); Michael W. Trapp et. al., *Characteristics of Chief Financial Officers*, CORP. GROWTH REP. (Jan. 1991):

CFOs are more likely to be married than individuals in the population at large. Of 270 respondents to this question, 253 individuals were married. . . . CFOs and their spouses also seem to have more children than the general population. Over 90% of respondents had two or more children. CFOs and their spouses may have larger families since most spouses do not work outside the home. Almost 80% of the spouses of CEOs do not work outside the home.

All of this has disconcerting effects across the income ranges, as lower class women are left in unstable family structures, middle-class women are placed under tremendous stress, and upper class women stay home. Poor women struggle to enter the middle class; in the middle class, women juggle the competing demands of work and family; and if they reach the upper classes, women are pushed back into the home. The problems of lower- and middle-income women are quite serious, indeed — and the tax system compounds these — but tax also gives a good look at what is happening among the upper classes and why this should matter to issues of gender justice. Feminists often neglect the problems of rich women, because they are rich, but this might be a mistake, insofar as they are women. The loss of prestigious positions at the top of the income ranges deprives all women of power and symbolically important roles. Women are being both taxed and deprived of the positions of wealth and power that we think of as going along with the price, however unwanted, of being taxed. Meanwhile, women see their ranks broken up by class, as women in every income range struggle with different problems and issues that point them in different directions; it is as if the forces of patriarchy had pursued a clever “divide and conquer” strategy.

Taxing Women also develops what I take to be a large and important part of the story, the theory of “optimal tax.” I won’t get too technical here, choosing instead to just set out the basic insight of this longstanding public finance theory. In order to maximize utility (or, sometimes, wealth), optimal tax theory recommends that we tax actors in inverse proportion to their “elasticity” or degree of commitment to an activity.⁴⁶ The idea is rather common-sensical. If Dick just loves candy, so that he would buy it at any price, his candy habit is a good object of taxation; if Jane is close to being indifferent about soda, there is little point taxing her soda consumption, because she’ll just quit. Analogously, if Jack is going to work just as hard no matter how much we tax him, we might as well do so; if Jill is going to call it

46. Optimal tax theory more or less originated with F. P. Ramsey, *A Contribution to the Theory of Taxation*, 3 *ECON. J.* 47 (1927); the pioneer in optimal income tax theory was James Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 *REV. ECON. STUD.* 175 (1971). See generally Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 *CAL. L. REV.* 1905 (1987). For applications to gender issues, see McCaffery, *Taxation and the Family*, *supra* note 37, at 1035-46, and McCaffery, *Slouching*, *supra* note 37, at 657-64.

quits and leave the paid workforce if we tax her too heavily, we should be wary of doing so.

There are, of course, many questions about the social theoretic implications of optimal tax theory, and many reasons to believe that we should not turn over fundamental questions of public policy to utility-maximizing social scientists, which I explore at some length in the book. But the main reason I am drawn to optimal tax theory in the tax context is that it has a precise recommendation for taxing married men and women: We should tax married men more, much more, than married women. Michael Boskin, a rather conservative economist who became chairperson of President Bush's Council of Economic Advisors, published a paper with Eytan Sheshinski in 1983, suggesting that married men should be taxed twice as much as married women.⁴⁷ I find this very interesting material, for what we do in practice is completely, purposely, and perversely the *opposite*: We tax married women more — much more — than married men. There's plenty of evidence that we like things that way. But I am interested mostly, and exclusively here, in other aspects of the story.

Optimal tax theory also tells us that we are burdening the behavior of married women far more than married men. Married women, by many statistical measures, are conflicted about their roles, while married men are not.⁴⁸ Given this, we should lessen the burden on women. We can put all of this high theory in the form of a simple example. Imagine a married woman who has recently given birth to her first child, sitting around the kitchen table with the family accountant. The woman is conflicted about just what to do; she feels some pull to stay home with her new baby, but also some desire to stay in the paid workforce, partly because she knows that the family could use money to save for things like the child's education. It is a close call and she's on the margin, unsure of what to do.

47. Michael J. Boskin & Eytan Sheshinski, *Optimal Tax Treatment of the Family: Married Couples*, 20 J. PUB. ECON. 281, 291 (1983); see also Daniel R. Feenberg & Harvey S. Rosen, *Alternative Tax Treatments of the Family: Simulation Methodology and Results*, in BEHAVIORAL SIMULATION METHODS IN TAX POLICY ANALYSIS (Martin Feldstein ed., 1983); Gann, *supra* note 37; McCaffery, *Slouching*, *supra* note 37, and sources cited therein.

48. See, e.g., GOLDIN, *supra* note 1; Janet C. Hunt et. al., *Taxation and Women's Labor Force Participation*, 34 INDUS. & LAB. REL. REV. 426 (1981); Jane H. Leuthold, *Income Splitting and the Wife's Use of Time*, 38 INDUS. & LAB. REL. REV. 98, 103-04 (1984); Robert K. Triest, *The Effect of Income Taxation on Labor Supply in the United States*, 25 J. HUM. RESOURCES 491, 506-13 (1990).

Now the accountant informs our exemplary new mother that, were she to go back to work, income, social security, and state and local taxes would eat up about one-half of her salary; the family would have to pay for child care and get only limited tax relief for this; and there are many other, somewhat hidden, costs of working — two-earner families spend more money on restaurant meals, dry cleaning, and commuting costs, for example. The average working wife in a middle- to upper-income family sacrifices two-thirds of her pay to taxes and these extra costs. Many women sacrifice still more, and no one has yet figured out a reliable way to calculate how many married mothers of young children stay home full-time with their children because of this financial calculus. What is apparent is that a close and difficult call under any circumstances gets a strong shove from the tax system.

Meanwhile, what is the husband to do, except apply himself all the more, hoping to get a raise, or put in overtime, or take on a second job to help out with both the new costs of child rearing and the loss of the wife's labor market earnings? Primary-earning men enter the workforce at a zero percent income tax rate; their social security contributions, unlike their wives', add to the family's well being; their work, alone, does not occasion child care costs, nor do their extra hours at work add to commuting expenses. For example, a primary-earning husband can add as much to the family's bottom line, take-home pay by earning four-thousand dollars as his wife could by taking a job paying thirty-thousand dollars: Seven and one-half times the pretax salary yields the same amount after taxes.⁴⁹ Tax is no small matter. This story also helps to show how men, too, are shaped and constrained by the tax system. The push to keep women at home is also a push for men to stay away from it.

Recall that Richard Epstein castigated the "radical feminists" who "commit the sin of hubris by insisting that they can, through law and coercion, transform the behavior and preferences of ordinary women and men."⁵⁰ But the history of the evolution of the tax system, combined with the economic and utilitarian insights of optimal tax theory, show that it was a patriarchic society that committed the original sin: It set up a tax system with the implicit and, surprisingly frequently, explicit goal

49. The example comes from Chapter Six of *TAXING WOMEN*. See McCaffery, *supra* note 39.

50. EPSTEIN, *supra* note 6, at 271.

of keeping women at home and preserving the traditional, single-earner family as the model. Optimal tax theory now shows us, precisely and exactly, that the tax system is distorting and coercive vis à vis women's preferences. If we truly want a minimally burdensome government, optimal tax theory shows us how to set up the tax system. That is exactly the mission of optimal tax: to minimize the distortions and coercion of tax. Optimal tax tells us to tax married men much more than married women. We do the opposite, and current conservative political proposals, like the *Contract with America*, would make it all worse.

To tie this into our above discussions, what is going on in optimal tax theory and its connection to gender is nothing other than a quasi-scientific confirmation of what we would all know, if only we took the time and trouble to notice. Women, as a group, do not want to stay home, full-time, all the time, but neither do they particularly want to work along the models of work created in a prior era of entrenched patriarchy. The high elasticity of women shows that they are conflicted and uncertain about their roles in a changing world. Men, meanwhile, show little of this conflict or doubt: Men are committed to working full-time, as they typically have done; this is why they are so inelastic. If we want a real and rich equality — one of the right sort — things are going to have to start changing and not just the behavior of women. Men must re-examine their seemingly undying commitment to the traditional model of work, and the workplace will have to change to accommodate diverse, creative, dynamic, and flexible work-family arrangements. It is simply too hard to play out a modern script on an ancient stage.

A good many feminists have gotten to one of these two places — looking to men or the workplace to change — but they have then argued for mandated, “top-down” plans to get the institutional workplace to reshape itself or engaged in exhortatory rhetoric to get men to do so. Life and common sense, however, give us plenty of reason to suspect the efficacy of either avenue. Regulations often do not work, as social experiments such as rent control demonstrate. Preaching has also had a bad track record throughout civilized history.

Optimal tax theory gives us a third way. It suggests that we tax men more, precisely on account of their insistence on working as they always have and precisely until their behavior, in the aggregate, becomes as variable and susceptible to social and other pressures as women's behavior is. We will compel men to

look for choices. Meanwhile, optimal tax suggests that we should lessen the burdens on married women because life has burdened them enough already. This will enable them to choose more freely.

There are ways to make the generally impractical recommendations of optimal tax practical and sensible. We should move to the system of separate filing that most Western democracies have now adopted. We should reform the social security system and rethink fringe benefits. We should give more generous child care and secondary earner relief. All of these proposals have been advocated by feminists for a long time, and most of them would be rather easy to implement. It is high time to pay them heed.

This brief excursion into tax sets the stage for my remaining points, which I develop at much greater length in *Taxing Women*. I noted above that what is important about the gender biases of tax has little to do with tax per se, as a detached, autonomous sphere of distributive concerns. Part of the appeal of tax is simply illustrative; a sustained look at tax shows us a very large socio-economic system, shaped by patriarchic forces and exerting far-reaching influences today. There are no doubt many other such systems, and they persist in the face of growing participation rates and narrowing gender gaps for women. But tax is also a big deal in and of itself, and a factor in a complex dynamic involving labor markets and social attitudes generally. Tax takes up about a third of our national economy, and it is deeply biased against working wives and a more modern, flexible image of the two-career family; these biases reinforce and are reinforced by market actions. The pressures do not disappear just because many women — through heroic efforts — have overcome them. Instead, the biases linger and help to break up poor families, add stress to middle-income wives, and push rich ones back into the home.

For all of that bleak news, tax also affords us some way to address the paradox that has objective evidence of “improvement” accompanied by subjective evidence of unhappiness. We can begin to change the tax system and thus redistribute some of the burdens of contemporary society from women to men. In doing so, we can afford to sit back a bit and see what develops. We don’t have to predict everything that will happen or call all of the shots. Rather than defining in advance what we mean by “equality,” we can take steps to equalize the benefits and bur-

dens facing free actors; we can try to make freedom of choice more meaningful and more equal.

We have been confused over much of this because we are not looking in the right places, in the right way. Much of the focus on gender discrimination — both coming from conservative skeptics and liberal activists — has focused on the firm, or demand-side, of labor markets. Conservatives like Epstein rest their case for doing nothing on the rationality of firm action and the absence of obvious market failures, such as monopoly power. Many liberals remain convinced that something must be wrong with firms, and so they would mandate top-down, demand-side solutions: better part-time work, more generous maternity leave, or antidiscrimination laws. But there is good reason to believe that many of such policies, when they fly in the face of economic rationality, will be of limited and possibly even counterproductive effect.

The focus on the demand or firm side is no doubt due to an understandable fear of looking to the individual or supply-side. The would-be reformer seems to face a Scylla and Charybdis, paired fatal dangers. On the one hand, accepting private preferences seems to cede the game to the do-nothing crowd. Epstein and others repeatedly point to free “choices” as being responsible for whatever observed inequalities we see. How can we make men and women change if they don't seem to want to? Mere exhortation, while often therapeutic, seems to be of little avail. On the other hand, if the reformer ignores private preferences — perhaps writing off avowed desires to “false consciousness” — and insists on some specific vision of the good life, of what the workforce should look like, she runs the risk of being accused of “social engineering,” of “the sin of hubris,” in Epstein's damnation. Disenchanted with these choices, reformers turn to the other side of the coin and look at firms. But as demand-side discrimination gets harder and harder to see and prove, the persuasive power of the appeal to do nothing gets stronger and stronger; the table is set for the conservative call to stop doing anything at all.

Tax gives a perfect and precise way out of this bind. First, optimal tax is indeed based on private preferences, and these in fact reveal a greater elasticity among married women. This also means, again quite precisely, that tax shapes and affects women's behavior more than men's behavior; something is wrong — is unfair and unequal — on the supply-side. Since we play the

whole game out on a wide canvas, dynamic effects are set in motion: Tax pushes men to work more and many women to work less, and this pattern perpetuates social stereotypes and rational firm calculations. Optimal tax theory affords a mechanism of empowering women by *lessening or removing* coercive, paternalistic constraints — presumably, what many libertarians and other conservatives want. We can do more than mandate top-down policies or engage in exhortatory rhetoric. We can change the institutional structures in which individual preferences are formed, in the direction of removing a lingering burden from an historically burdened group and placing some of it on the historically oppressing group. It all sounds fair and just. Optimal tax theory also tells us that it is *efficient* — that is, that we could increase national wealth and productivity, those endlessly chanted mantras of the supply-side crowd, by taxing women less. All of this, of course, leaves us with the puzzle of why no one is advocating this particular progrowth policy, but I'll leave that for another day.

Equality is too attractive, too important an ideal to abandon when some more or less mechanical instantiation of it has left us disappointed and yearning for more. So it is with the gender wage gap and labor market participation rates for women. These are important numbers, to be sure, and they represent important goals for women, perfectly appropriate elements of equality of the right sort. There is also no reason to go back and criticize the past. When these numbers looked far worse than they do today, the situation was indeed even worse for women, and it may well have been the case that getting more equal pay and higher participation rates were the fitting and proper *first* steps on the road to equality. Actually, of course, they were, at the time, simply the next steps: The quest for gender justice stretches back many centuries, with matters such as getting the right to vote important milestones along the way. This has always been one of the cruelly ironic features of social movements seeking greater equality for oppressed groups: Many groups, like women, have been so oppressed, for so long, that tactical disputes about where to go next sometimes fatally fragment individuals unequivocally sharing common goals.⁵¹ My central point is that, at least in hind-

51. This is one of the insights I take from Reva Siegel's fine work. See Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights To Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103

sight, the gender gap and participation rates look like simply the easiest first steps on a road that has many miles yet to go.

How could it be otherwise? Men dominated the terms and conditions of society for countless centuries, shaping far-reaching corners of the social space. During this time, women's voices were typically silenced, and women were accorded little equality of concern or respect in constructing social institutions. What would our collective life look like if women had been in on its social construction, as full, free, and equal partners and participants from the outset?

We will never be able to answer that question. But we should at least see that it is going to take some time to get even close to the kind of world whose institutions are fair, in the sense of distributing benefits and burdens of social life without regard to gender and affording equal opportunities to pursue diverse life plans and projects. The way will not be easy or clear in advance. It has become something of a standard political philosophic project of late to try to give more and better content to the concept of "equality." Amartya Sen, roughly operating in a framework laid down by John Rawls, has been especially prominent in this "equality of what" debate.⁵² We can leave that project, with all

YALE L.J. 1073 (1994). Seigel shows that women in the 19th and early 20th centuries faced a dilemma between advocating separate property rights for women and equal shares of a communal whole. This same debate plays out today, in a slightly different form, with questions over the appropriate rules at divorce: Rules that give divorced women a share of the man's greater earnings power might perpetuate dependence on men; rules that do not do this leave many divorced women poor.

52. AMARTYA K. SEN, *INEQUALITY REEXAMINED* (1992); see also JOHN RAWLS, *A THEORY OF JUSTICE* 90-95 (1971); G.A. Cohen, *Equality of What? On Welfare, Goods, and Capabilities*, in *THE QUALITY OF LIFE* 9 (Martha Nussbaum & Amartya Sen eds., 1993); Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 *PHIL. & PUB. AFF.* 185 (1981); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 *PHIL. & PUB. AFF.* 283 (1981); John Rawls, *Social Unity and the Primary Goods*, in *UTILITARIANISM AND BEYOND* 159 (Amartya K. Sen & Bernard Williams eds., 1982).

A Rawlsian view of gender issues is nicely set out in S.A. Lloyd, *Family Justice and Social Justice*, 75 *PAC. PHIL. Q.* 353 (1994). Lloyd crisply puts forth a Rawlsian position and defends it against the criticisms of Susan Moller Okin (largely in *Review of Political Liberalism*, *AM. POL. SCI. REV.*, Dec. 1993, 1011, but also reaching to some of the criticisms of Rawls's *A THEORY OF JUSTICE* contained in Okin's *JUSTICE, GENDER, AND THE FAMILY* (1989)). Lloyd argues that the "nature of families" is part of the "basic structure" for Rawls and that families are constrained by this basic structure in certain fundamental ways (e.g., families must be set up to allow free exit and provide for lesser earning spouses on divorce; perhaps paychecks should even be split between spouses). Families also constrain the basic structure, in an interesting development that Lloyd advances. But, Lloyd argues, the internal workings of families, insofar as these reflect reasonable comprehensive doctrines,

of its nuances, to the philosophers. But we have to do something, to think somewhat about what equality means and what it doesn't, for the very pressing reason that "equality" is a word with tremendous operative force in American rhetoric and politics, as witnessed by the perceived need of its enemies to appropriate it in public debate. We can also at least offer a cautionary note: Experience gives us good reason to be wary of any too-specific definition of "equality," any one that turns too much on a specification of concrete, material goods or resources, like wealth or wage levels. There can be little doubt that such items are necessary elements of equality, but they are not sufficient. Money isn't everything.

Letting women work like men have always worked and paying them equal wages for doing so is not going to do the whole trick. Equality of the right sort is deeper than that, more complicated, and less easy to define: It turns always, as it must, on an equality of concern and respect, on a recognition of our mutual statuses as free and equal citizens and participants in society, which can never be too specific or numeric. Perhaps the most definite and optimistic thing that can be said about what equality of the right sort for gender justice means is that, while we have no extant models of it to point to or to learn from, we'll know it

are off limits to the coercive power of the State. It is inappropriate, for example, for the State to prevent traditional, single-earner families. This abstentionism from the internal management of families follows from *Political Liberalism's* basic mission to work out a system for a "stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines." JOHN RAWLS, *POLITICAL LIBERALISM* xxxv (1993). Lloyd persuasively argues that Rawls would *not* reject a religious or moral doctrine as "unreasonable" strictly on account of its view that women should stay home and raise children full-time.

In part because I take my own work to be in the political liberal tradition of Rawls and others, (see Edward J. McCaffery, *The Political Liberal Case Against the Estate Tax*, 23 PHIL. & PUB. AFF. 281 (1994)), I want to clarify that, in this essay and in *TAXING WOMEN*, I have no brief against the Rawlsian, abstentionist position as Lloyd lays it out. I am not arguing that the State should *encourage* more modern, flexible work-family arrangements (although that is indeed an interesting claim that might follow from a certain liberal commitment to autonomy enhancement); rather, I am arguing, largely as a matter of non-ideal theory, that the State is presently using its coercive power *against* such modern families. Part I of *TAXING WOMEN*, which contains an extended historical discussion, can easily and accurately be read as an account of how one group — favoring traditional, single-earner families — did indeed "impose the long arm of the law to impose the conception of familial justice internal to its comprehensive doctrine on [others]." Lloyd, *supra*, at 357. Nonideal political theory is quite a different thing than ideal theory; the former often involves rooting out the kinds of influences classified as illegitimate by the latter.

when we see it. Our children, or our children's children, should be so lucky.