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## CARING ENOUGH: SEX ROLES, WORK AND TAXING WOMEN\*

AMY L. WAX\*\*

*The general opinion of men is supposed to be, that the natural vocation of a woman is that of a wife and mother. I say, is supposed to be, because . . . one might infer that their opinion was the direct contrary. They might be supposed to think that the alleged natural vocation of women was of all things the most repugnant to their nature; insomuch that if they are free to do anything else . . . there will not be enough of them who will be willing to accept the condition said to be natural to them. . . . I should like to hear somebody openly enunciating the doctrine (it is already implied in much that is written on the subject)—‘It is necessary to society that women should marry and produce children. They will not do so unless they are compelled. Therefore it is necessary to compel them.’ The merits of the case would then be clearly defined.<sup>1</sup>*

## I. INTRODUCTION

AS John Stuart Mill noted more than 100 years ago, a defense of traditional sex roles for women, and men, often rests on the assertion that those roles are “natural” to each sex. Upholding the sexual status quo, however, is curiously at odds with an appeal to nature. If we mean by “what comes naturally” the spontaneous exercise of personal inclination under conditions free from deliberate outside interference, force or pressure, then historical practice provides little empirical support for the view that some social roles belong to women by nature. As Mill suggests, societies have not dared to test the proposition that women were born for domesticity, lest that proposition prove untrue. Rather, societies have, until very recent times, proceeded as though offering women the range of choices open to men might produce too few women “willing to accept the condition said to be natural to them.”

To be on the safe side, societies have attempted through various ploys to persuade women to do “what comes naturally.” They have done so through the application of custom, law or force to, in effect, close off choices entirely or alter the background conditions against which choices are made. The ultimate purpose of the application of these devices is to exact steeper tradeoffs from women as the price for choosing to live certain lives. Indeed, it is impossible to deny that the vast majority of societies

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1. JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 144 (Stefan Collini ed., 1989).

and cultures have invested a great deal of "cultural capital" in defining and maintaining a division of roles for men and women. The myriad norms, practices, conventions and institutions that have historically determined women's place and drastically restricted their options attest to this outlook—"better safe than sorry."

This Article seeks to explore the implications of these observations for various issues Professor Edward McCaffery addresses in his book *Taxing Women*.<sup>2</sup> To be sure, the connection between these insights and the questions that preoccupy Professor McCaffery is not immediately obvious. The aim of this Article is to make the links more transparent in ways that will hopefully prompt a serious rethinking of some of Professor McCaffery's recommendations and cast a new light on his conclusions.

Ultimately, this Article's objective is to create a useful framework for thinking about the role of private and governmental initiatives in securing the well-being of individuals within families, in influencing those individuals' conduct in socially beneficial directions, and in balancing their sometimes competing interests. This Article is but a piece of a larger project, now currently underway.<sup>3</sup> First, the groundwork for this analysis is established. Then, Professor McCaffery's proposal for reforming our current regime for taxing women is critically assessed.

## II. SOCIAL NORMS, SEX ROLES AND THE LABOR MARKET

The triumph of the modern feminist movement in Western society over the past thirty odd years is unprecedented in human history. Although feminism has had many important effects on a range of social practices, the story of its march is, at its core, the story of large numbers of women for the first time being permitted to engage in activities and occupy social roles formerly reserved to men. This change postdates, but itself completely coincides, with a development associated with modernity—the creation of modern labor markets. In the wake of feminism, those markets have seen the steady demise of practices that prevented women from offering, or employers from accepting, women's and men's labor on the same terms.<sup>4</sup>

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2. See generally EDWARD J. MCCAFFERY, *TAXING WOMEN* (1997). For a discussion of the issues addressed by Professor McCaffery, see *infra* notes 79-99 and accompanying text.

3. See Amy L. Wax, *Rearing the Next Generation: A View from the Economics of Public Finance* [hereinafter Wax, *Next Generation*] (unpublished manuscript, on file with author). For further discussion of the issues addressed here, see Amy L. Wax, *Is There a Caring Crisis?* [hereinafter Wax, *Caring Crisis*] (reviewing SHIRLEY P. BURGRAF, *THE FEMININE ECONOMY AND ECONOMIC MAN: REVIVING THE ROLE OF THE FAMILY IN THE POSTINDUSTRIAL AGE* (1997)) (forthcoming, manuscript on file with the YALE J. ON REG.).

4. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, in *FEMINIST JURISPRUDENCE* 65 (Patricia Smith ed., 1993) (discussing "wide variety of reforms aimed at improving the lives of women").

Men had peddled their efforts on a market in which a given quantity of labor was rewarded at a particular price or wage largely determined by that labor's economic value.<sup>5</sup> The economic value was a function of demand, but also of the quality and quantity of work performed, which was in turn determined by the worker's education, training, experience and other elements affecting productivity.<sup>6</sup> Other factors, such as nepotism, ethnic solidarity, limited mobility and class prejudice affected opportunities and modulated the returns to talent and effort.<sup>7</sup> The market for labor has never been a market in perfect equilibrium nor one that responds only to productive capacity. Nonetheless, the market for men's labor was for a very long time considerably more "free" and more economically rational than the market for women's. Even if the market for men's labor always deviated from a perfectly competitive market in many important ways, the fact remains that the market for women's labor was always, comparatively, far less free.

Indeed, until very recently, no society has come close to releasing women onto the labor market to compete alongside men by selling labor to the highest bidder on approximately equal terms. Even in premodern societies, where options were in large part circumscribed by accidents of birth, class and station, many roles occupied by men were almost entirely closed off to women, or were hedged with formidable barriers to entry and penalties attached to occupancy. It perhaps belabors the obvious to note that, before about 1970, equal employment opportunity by sex was roundly and uniformly rejected, in theory and practice, by every society worldwide.<sup>8</sup>

The strategies traditionally employed to circumscribe the range of women's economic choices were mixed and various, legal and extralegal, for-

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5. *See id.* at 66-67 (noting nature of marketplace and rewards given to men for their efforts).

6. *See id.* at 67 (discussing factors affecting economic results of labor); *see also, e.g.,* DAVID CARD & ALAN KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE 9-10, 16 & chp. 12 (1995) (describing standard neoclassical labor market models in which wages are determined by marginal product in competitive markets and reviewing empirical data suggesting that the model describes real labor markets imperfectly); Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 91-93, 131-38 (1998) (describing neoclassical labor market models and critiques of models based on real-world deviations).

7. *See, e.g.,* Bruce E. Kaufman, *Expanding the Behavioral Foundations of Labor Economics*, 52 INDUS. & LAB. REL. REV. 361 (1999) (examining, critiquing and suggesting modifications to psychological assumptions of rational choice model of human agent that underlies theoretical work in modern neoclassical labor markets); Lester, *supra* note 6 (noting failure of market to match workers with jobs that fully exploit human capital and preferences as superior explanation of labor market problems).

8. *See, e.g.,* CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 112-17, 200-08 (1990) (describing history of discrimination against women in labor markets).

mal and informal, and dependent on era, location and culture.<sup>9</sup> In modern times, the most important devices have been informal customs that either make some work unavailable to women or make performing the work less economically rewarding for them.<sup>10</sup> It was simply understood that some jobs belonged to, or suited, men; thus, women should not be hired to perform those jobs. Married women were barred from employment even in traditionally female jobs.<sup>11</sup> Men would not permit their wives to work after marriage; a working wife was considered a source of shame. For a man to work under a female boss was considered unthinkable degrading. Women were routinely paid less than men for the same work.<sup>12</sup> All these conventions were widely accepted and rarely questioned or defied.

How were these customs enforced, and why did all the protagonists go along? The question has bite for economists because, as discussed more fully below, discrimination against women and dual labor markets should by rights be inefficient and expensive, not just for women, but for their potential trading partners (*i.e.*, employers) and dependants as well.<sup>13</sup> Because women represented an untapped source of labor that could profitably be put to work in forbidden sectors or induced to work harder by better compensation, the temptation to defect from the conventions was always present. So why did those who could potentially benefit from flouting these norms go along?

Clearly some employers acted from the conviction that the order of things was just, right and the best for society. That is, employers were effectively socialized to accept prevailing practices. Put another way, many

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9. See Mary Anne Case, *Of Richard Epstein and Other Radical Feminists*, 18 HARV. J.L. & PUB. POL'Y 369, 370-73 (1995) (discussing effect on female roles of what is deemed "natural").

10. See generally Olsen, *supra* note 4, at 74 (discussing role of women in labor market).

11. See generally FRANCINE D. BLAU & MARIANNE A. FERBER, *THE ECONOMICS OF WOMEN, MEN AND WORK* 32-33 (1986) ("Not only were relatively few women, particularly married women employed, but they were also largely concentrated in a very few occupations"); STEVEN D. McLAUGHLIN ET AL., *THE CHANGING LIVES OF AMERICAN WOMEN* 96 (1988) (noting that in early Twentieth Century women only worked before marriage and motherhood).

12. See generally B. Tobias Isbell, *Gender Inequality and Wage Differentials Between the Sexes: Is it Inevitable or is There an Answer?*, 50 WASH. U.J. URB. & CONTEMP. L. 369 (1996) (noting disparity in compensation); Robert F. Seibel, *Do Deans Discriminate?: An Examination of Lower Salaries Paid to Woman Clinical Teachers*, 6 UCLA WOMEN'S L.J. 541 (1996) (finding salary differential based on gender); Kathryn Branch, Note, *Are Women Worth as Much as Men?: Employment Inequities, Gender Rules, and Public Policy*, 1 DUKE J. GENDER L. & POL'Y 119 (1994) (discussing gender inequities in employment across variety of contexts).

13. See Olsen, *supra* note 4, at 75 (noting that "[anti-discrimination laws] can be viewed as efforts to make the market more like the free market ideal"); see also GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 2-4 (1957) (discussing economic effects of discrimination).

employers clearly internalized the norms.<sup>14</sup> They incorporated them into their own preference structure. One could say that by acting in accordance with these norms, they merely acted to maximize their own utility.<sup>15</sup> Likewise, many women were effectively socialized to these norms as well; they agreed that dual labor markets were wise and socially beneficial or they simply lacked personal desires or ambitions inconsistent with prevailing conventions. Individuals who internalize norms put those norms under very little pressure to change, because they do not advance their own perceived interests by entering into deals that circumvent the socially sanctioned practices.<sup>16</sup> By following convention, these persons do “what comes naturally.”

Customs and practices that supported dual labor markets, however, did not rely entirely on perfect internalization. Rather, a variety of methods were brought to bear to enforce conformity in the event of incomplete socialization. On the supply side, for example, women who insisted upon leading unconventional lives—“career women”—incurred socially mandated penalties.<sup>17</sup> Women were barred from marrying if they continued to work; no man who wished to remain respectable would marry a working

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14. See Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1551 (1998) (discussing utility and disutility and how they affect decision-making process); Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1315 (1989) (theorizing on expectations of female roles in labor market and effects on employers).

Not all would go along with the view that an individual's acceptance of a general precept of social conduct can be reduced to the status of a mere personal preference, the satisfaction of which enhances personal utility in much the same way as the satisfaction of any other desire. Typical of a dissenting view is Alasdair McIntyre, who stated:

[I]n most of my dealings with others of a cooperative kind, questions of benevolence or altruism simply do not arise, any more than questions of self-interest do. . . . It is not even that I have two separate motives, . . . a desire to live in a certain way, which cannot be characterized as a desire for my good rather than that of others. For the good that I recognize and pursue is not mine particularly, except in the sense that I recognize and pursue it.

ALASDAIR MCINTYRE, *Egoism and Altruism*, in THE ENCYCLOPEDIA OF PHILOSOPHY 466 (Paul Edwards ed., 1967).

15. See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 661 (1998) (analyzing effects of norms on regulation of behavior); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1000 (1995) (discussing internalization of social norms that cause people to act in accordance with societal expectations); see also Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 376-82 (discussing enforcement of norms through internalization—as a “form of preference change”—as well as through external constraints); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1129-30 (1986) (analyzing impact of norms on socialization).

16. For a further discussion of norms, see *infra* notes 31-35 and accompanying text.

17. See Olsen, *supra* note 4, at 74-75 (setting forth examples of discrimination against women who entered work force).

woman.<sup>18</sup> Their opportunities for occupational advancement were severely limited by attitudes that dictated that men must be in charge.<sup>19</sup> On the demand side, employers risked ridicule, ostracism, employee or customer rebellion, and economic ruin if they placed women in men's jobs or paid them a male wage.<sup>20</sup> Even if a man might prefer to have his wife work or was personally indifferent to working for women supervisors, he would risk social disapproval or perhaps palpable loss from indulging those preferences. These taboos were effectively imposed on individual dissenters by methods of concerted enforcement.<sup>21</sup> In this respect, the conventions and practices surrounding sex role distinctions on the labor market have much in common with other social norms. Norms can be viewed as a means by which groups or social collectives engage in forms of concerted action to change the background conditions against which individuals make social choices.<sup>22</sup> Norms can have the effect of narrowing the choice set available to certain persons, or they can alter the costs and benefits attached to certain options.<sup>23</sup> The goal is to influence or circumscribe the conduct of individuals in conformity with the norms. In other words, the goal is to create the proper incentives for people to do what society wants them to do.

The generic methods for enforcing norms are ostracism, exclusion, shunning, refusal to deal, shaming and various expressions of disapprobation or disapproval.<sup>24</sup> In the case of sex role norms, for example, manipulating desirability to the opposite sex and access to marriage is a powerful tool for sanctioning or influencing female behavior.<sup>25</sup> With respect to em-

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18. See *id.* at 67 (noting "market/family dichotomy" and its effects on women in both spheres).

19. See Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 GEO. L.J. 89, 92 (1993) (discussing reasons women are not promoted in workplace).

20. See *id.* at 91 (analyzing demand-side preferences and their impact on women's wage gap); see also BECKER, *supra* note 13, at 3-4 (discussing economic consequences of employing individuals from groups traditionally discriminated against in work place). The theory of gender preferences posits that "women are paid less because, independent of their productivity or skill, those who pay for their services find contact with women taxing, offensive, or otherwise more costly than contact with men." Hadfield, *supra* note 19, at 91. Therefore, women are paid less because of a decreased demand for their services.

21. See LINDA M. BLUM, BETWEEN FEMINISM AND LABOR 131-32 (1991) (discussing belief held by some that restrictions on females in job market were result of active resistance by employers and working men).

22. See generally ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (describing effect of norms in context of cattle farmers); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1713-19 (1996) (discussing how various norms affect people's social choices).

23. See Posner, *supra* note 22, at 1699 (noting law-like limitations that norms place on people's ability to make choices).

24. See *id.* at 1728-29 (discussing how "village gossips" could alter farmer's behavior by verbally hounding farmers for acting against norm).

25. This type of influence takes the form of depicting women who break sex role norms as "masculine," and thus less attractive to men.

ployment, the customary refusal of employers to hire or promote women into certain jobs operated as an even more powerful restriction because some choices were effectively unavailable at any price.

The operation of sex role norms in labor markets is complicated, however, by the fact that women do not exercise their options in isolation. Many social norms must regulate behavior by limiting *interactions* among individuals or groups of individuals to those forms deemed socially acceptable. Norms accomplish this objective by placing some deals off limits or by altering the conditions under which deals are made. This reduces the players' expected utilities from disfavored deals, making those transactions less attractive and thus less likely to go through.

If transactions, exchanges or contracts are mutually beneficial (or Pareto-superior to a baseline) people will ordinarily enter into them voluntarily.<sup>26</sup> By altering the effective costs and benefits from trade—specifically, by reducing the profitability from certain transactions—norms seek to influence parties' "voluntary" willingness to deal. In the labor market context specifically, norms that seek to discourage transactions accomplish their goal by making unavailable or artificially depressing potential gains from trade that might otherwise be realized absent the restrictive practices.<sup>27</sup> If employing a woman for a particular job were not taboo, an employer might be able to find a female who was marginally better qualified for a job than the best male candidate available. The woman, for her part, would gain the benefits of putting her talents to work in a position that would reward them at market rates. Both parties would gain from a mutually beneficial transaction. But because the hiring taboo makes the transaction much more costly, neither party realizes those potential gains.

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26. See Paul H. Rubin, *Unenforceable Contracts: Penalty Clauses and Specific Performance*, 10 J. LEGAL STUD. 237, 241 (1981) ("Economists generally believe that any voluntary contract between two parties is efficient, for parties do not enter into agreements which do not benefit them."). On a larger scale, this is how neoclassical, or marginalist, economics views the market as a whole. See BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE* 130 (1998) ("[T]he market [will] automatically allocate resources so as to maximize the satisfaction of [consumers'] preferences—in more familiar contemporary terminology, that [it will] achieve Pareto optimality.").

27. The gains are only realized if the norms are not internalized by one or both parties to the transaction. If an employer finds it repugnant to hire a woman into a particular job, or otherwise holds attitudes that effectively lower his psychic gain from the transaction, the deal may fail to be Pareto-superior. But that is not because the parties, by defying convention, would open themselves up to external sanctions that undermine their gains. Rather, it is because the internalized norms alter the utilities from the transaction. Even under these circumstances, however, the transaction would nonetheless be *wealth-maximizing*. This insight underwrites the source of the view that a "taste for discrimination" is economically inefficient and should be spontaneously driven from the market by competitive forces. See, e.g., Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 758-59 (1991). See generally Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 SOC. PHIL. & POL. 22 (1986).

This discussion suggests that sex role norms or customs, by tinkering with the payoffs from private transactions, effectively create a form of "market failure." For neoclassical economics, deviations from perfectly competitive markets are presumptively inefficient; certain preferences will go unsatisfied and certain exchanges will fail to go through, so utility gains will be forgone. Thus, the overall amount of utility created in a normatively regulated society would appear to be smaller than if people were free to find trading partners unimpeded by traditional limitations. To be sure, in the idealized, individualistic free market, not every preference can be satisfied and not every choice made available. I may wish to work as a corporate manager, but there must be a person willing to hire me. Actual exchanges (and the utilities generated by those exchanges) are subject to spontaneous supply and demand, which are fixed by the aggregate of exogenous preferences. A market without normative impediments to dealmaking and the terms of dealmaking, all else being equal, however, will presumably generate more utility overall and more for some individuals than a market hedged with artificial restrictions.<sup>28</sup>

This discussion sets the stage for considering the relationship between traditionalists' support of conventional sex roles and the traditional appeal to "nature."<sup>29</sup> When it comes to social roles for men and women, norms often stand in opposition to nature, if what is meant by nature is the free play of preferences and tastes absent deliberate or concerted efforts to regulate private interactions. Of course, there is no such thing as a choice made, or a preference revealed, in complete isolation from socially conditioned expectations, pressures or consequences. In that sense, no choice or transaction between individuals is truly "free."<sup>30</sup> But the point here is only a comparative one; although preferences are revealed by choices, and all choices are made under market conditions that are "socially constructed," the proposition that domesticity comes "naturally" to women can only really be tested where women can choose from the same

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28. For discussion of the potential economic inefficiency of norms, see Posner, *supra* note 22, at 1730-33. Some commentators believe that norms increase utility and efficiency. For example, in his seminal work in the field, Ellickson argues that, on the whole, norms are consistently utilitarian. See ELICKSON, *supra* note 22, at 167-83. Ellickson sets forth a theory based on the idea that by following societal norms, people make choices that generally "produce the maximum aggregate objective payoff." *Id.* at 167.

As previously noted, some norms become internalized or adopted as preferences or "prejudice" by individuals. That creates analytical problems for deciding whether such prejudices should be taken into account in deciding whether a free market is really operating. When collective constraints or values are brought to bear to "distort" choices that would otherwise be made by individuals dealing with each other in the absence of such constraints, however, the market on which they operate can confidently be said to deviate from a "free" one.

29. For further discussion of this view, see *infra* notes 36-38 and accompanying text.

30. For an interesting discussion of the concepts of coercion and freedom as applied to choices circumscribed by private markets, see generally FRIED, *supra* note 26.

options and on the same terms as men. Choices women make under externally rigged conditions—that is, under conditions in which norms alter the costs only of women's choices—reveal very little about “natural” differences between men and women.

To the extent that some norms seek to prevent individuals from acting in certain ways—regardless of the cooperation of others—normative conventions can be socially costly.<sup>31</sup> Norms require constant maintenance precisely because some people constantly threaten to defy them. As already stated, individuals may effectively internalize some norms, transforming those norms from external constraints into internal tastes or personal utility functions.<sup>32</sup> In addition, sex role norms may serve the pre-existing interests of some members of society. There will be losers as well as winners. Wholly apart from whether norms increase or decrease net social utility, the burden they place on exchanges and transactions may have important distributional effects. Potential winners, if their wins are big enough, may happily expend resources to uphold norms against others.<sup>33</sup> Potential losers will be looking for ways to defy, undermine and

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31. See CYNTHIA FUCHS EPSTEIN, *WOMAN'S PLACE* 50-85 (1970) (discussing socialization process and its consequences, including role that sex role norms play in restricting choices available to women); Posner, *supra* note 22, at 1697-725 (arguing that norms cause inefficiency by attaching costs to certain types of cooperation).

32. See Robert D. Cooter, *Decentralized Law For a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1661-62 (1996) (discussing internalization of norms). Cooter characterizes the internalization process as the product of both a rational “acceptance of a new reason for acting,” and an irrational process that “ingrains new impulses . . .” *Id.* at 1662; see GARY S. BECKER, *ACCOUNTING FOR TASTES* 225 (1996) (“Norms are those common values of a group which influence an individual's behavior through being internalized as preferences.”); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 45-47 (1989) (discussing internalization of norms). See generally Hadfield, *supra* note 19, at 93-94 (setting forth supply-side preference theory of lower wages for women and women's chosen specialization in household work).

33. As Richard McAdams points out, however, it is not clear why even those who believe that norms are generally beneficial will expend valuable resources enforcing those norms against third parties. See McAdams, *supra* note 15, at 352. As McAdams notes, “even when the norm benefits the group, a second-order collective action problem remains.” *Id.* The temptation is to free ride on others' enforcement efforts, because “if others enforce the norm, the individual can gain the norm's benefits without bearing enforcement costs.” *Id.* McAdams theorizes that norms are enforced and followed because they are directly linked to an individual's desire for the esteem of others. See *id.* at 355-67 (suggesting that desire to be held in high regard creates “secondary” norms that encourage enforcement of “primary” norms). Some commentators believe that the internalization of norms significantly reduces the costs associated with enforcement of these norms. See, e.g., Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 588-89 (1998) (discussing internalization of norms and effect internalization has on enforcement costs).

circumvent norms.<sup>34</sup> The latter individuals put norms under constant pressure from the threat of rebellion. It is against these potential losers that norms must be most vigilantly enforced.

These observations bring us around to an important question; why have societies so uniformly evolved and enforced norms that sharply separate the roles of men and women in general, and that severely restrict the sale of women's labor in particular? As argued, the evidence does not support the assertion that the behaviors mandated by these norms are natural in that they spontaneously result from the expression of individual preferences in an "unregulated" environment. Instead, preferences play themselves out under conditions fixed by social forces larger than the universe of individual deal-makers. The forces that establish the norms result from collective action; they are collectively engineered and maintained. Their maintenance would appear to require prodigious coordination and investment. This begs the question of why societies make such potentially expensive investments in sex role enforcement.

Although there are several possible answers to this question, the rest of this Article is devoted to arguing for a particular view; sex role restrictions function as a solution to a set of collective action problems that produce pervasive "market failure." This failure distorts the allocation of labor, particularly female, among various socially vital functions. One socially vital function is bringing up children. One important form that investment in the next generation must take, if certainly not the only one, is the provision of traditionally feminine "hands-on" nurture or care in the rearing of children.<sup>35</sup> A form of market failure threatens an undersupply of nurture in every society. Every society must act in some way to correct that imperfection.

Restrictive sex-based customs, and especially sharp limitations on women's participation in the paid labor market, potentially provide such a corrective. Such normative restrictions carry costs that include not only the expenditure of cultural capital on norm maintenance, but also the inefficiencies that result from placing certain "free market" deals off limits. The speculation is, however, that these drawbacks are worth it—the norms produce a payoff that more than compensates for the costs. The next section explores the sources of the market failures that sex role restrictions may be said to correct and explains how familiar sex-restrictive customs might go some distance towards compensating for these defects.

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34. Some husbands or children were net losers from the taboo against working wives. Additionally, some employers lost from restrictions on the free market in labor, although others gained from the custom of paying women less than men.

35. For further discussion of the relationship between the investment in "hands-on" nurturing and the market, see *infra* notes 57-78 and accompanying text. For a more extensive discussion of the range of public and private forms of social investment in children and childrearing, including forms specific to men and social customs designed to regulate male investments in these areas, see generally Wax, *Caring Crisis*, *supra* note 3.

## III. THEORIES OF SEX ROLE SPECIALIZATION: THE NEOCLASSICAL VISION

What is the explanation for the complex of institutions and practices that have traditionally "kept women in their place" in every society? For traditionalists, sex role distinctions are no mystery precisely because they are ordained by nature; they are inevitable.<sup>36</sup> Traditionalists are reluctant, as Mill recognized, to acknowledge any coercive element in sex role conventions or any suggestion that they operate against women's will or interests.<sup>37</sup> Such an acknowledgment would require not only putting forward some justification for restricting liberty and choice but also for engineering selective sacrifice by one sex. Traditionalists insist that, even if restrictions would appear to operate against some women's short-term desires or interests, the norms benefit women in the long run, both individually and collectively.<sup>38</sup>

For feminists, on the other hand, sex role restrictions are the product of a patriarchal plot that benefits men selectively.<sup>39</sup> Feminists are loathe to entertain the possibility that patriarchal practices might produce a net social benefit, even if women garner little or none of the benefit, or lose overall.<sup>40</sup> They favor a tale of inefficient "rent-seeking" pure and simple.

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36. See, e.g., MICHAEL LEVIN, *FEMINISM & FREEDOM* 70-92 (1987) (describing role that biology plays in gender roles). Levin bases his theories primarily on the role that hormones play in the development of personalities. See *id.* at 70-88 (discussing various physical differences between sexes as explanation for different roles). In fact, Levin concludes that the reason society treats males and females differently is *because* they are biologically different. See *id.* at 73-74 (countering concept that society creates roles by claiming that society is merely reacting to natural differences); see also Midge Decter, *The Madness of the American Family*, *POL'Y REV.* Sept.-Oct. 1998, at 33 (arguing that distortion of role of women as mothers is cause of collapse of American families); F. Carolyn Graglia, *Feminism Isn't Antisex; It's Only Antifamily*, *WALL ST. J.*, Aug. 6, 1998, at A14 (criticizing view that women should not be housewives and blaming feminism for many problems women face today).

37. See MILL, *supra* note 1, at 13 ("But was there ever any domination which did not appear natural to those who possessed it?").

38. See Decter, *supra* note 36, at 33 (claiming that women in careers and military suffer, as do their children); Graglia, *supra* note 36, at A14 (arguing that women are just as fulfilled, if not more fulfilled, as mothers than in professional world). This type of argument is common among recent conservative critics of feminism.

39. See CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 218-19 (1989) (claiming that all differences between men and women are learned and not biological); BARBARA RYAN, *FEMINISM AND THE WOMEN'S MOVEMENT: DYNAMICS OF CHANGE IN SOCIAL MOVEMENT IDEOLOGY, AND ACTIVISM* 83-88 (1992) (chronicling views of several feminists regarding patriarchal system and oppression of women); Jane English, *Introduction*, in *FEMINISM AND PHILOSOPHY* 39-43 (Mary Vetterling-Braggin et al. eds., 1977) [hereinafter *FEMINISM AND PHILOSOPHY*] (describing view that women are held back by male actions); Ann Ferguson, *Androgyny as an Ideal for Human Development*, in *FEMINISM AND PHILOSOPHY*, *supra*, at 45, 47-51 (criticizing view that nature or biology plays part in development of sex roles by presenting statistical evidence to contrary).

40. But see *FEMINISM AND PHILOSOPHY*, *supra* note 39, at 40 (discussing view that loss of efficiency caused by women leaving role of housewife cannot take pre-

Although it is not surprising that men would as a group choose to conspire to maintain traditional arrangements on these terms, this explanation still presents the puzzle of how patriarchal practices got started in the first place, and why, until recently, they have maintained such vigor.<sup>41</sup>

As already suggested, for free market economists, sex-based impediments to the full range of interpersonal transactions present a conundrum. Neoclassical economists argue that, in the absence of restraints on trade or other extrinsic or artificial barriers to exchange, free markets lure resources to their highest and best use by pricing those resources at their "true" worth to those seeking goods and services.<sup>42</sup> In a well-functioning market for labor, individuals would sell their labor on the open market for the price it would command—a price dictated by the individual seller's developed human capital, the overall demand for that capital, and the general level of supply.<sup>43</sup> The labor market will be efficient overall and will create the net maximization of overall well-being or utility in society as a whole, but only if the market is perfectly competitive. The price—in this case wages—that emerges for a commodity on a competitive market will ensure that the amount traded optimizes the utility gains from trade as between supplier and consumer. Suppliers will offer neither too little nor too much of a particular commodity, and employers will employ the most efficient number of workers at the optimizing wage.

On this account, customary constraints on the free market in women's labor stand in need of explanation because they would appear to be socially inefficient. Traditional sex role conventions are wasteful because they create dual labor markets that distort the price offered for women's labor.<sup>44</sup> This price distortion depresses the labor supply below optimal

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cedence over liberty gained in allowing women free choice of careers). Cf. Jana Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2434-37 (1994) (discussing importance of using efficiency theory in divorce laws).

41. See RYAN, *supra* note 39, at 103 (describing with dismay continuation of sex role norms to present day); S. A. Lloyd, *Toward a Liberal Theory of Sexual Equality*, 9 J. CONTEMP. LEGAL ISS. 203, 203-11 (1998) (speculating on rise and persistence of male-dominated arrangements, including restrictions on women's opportunities).

42. See FRIED, *supra* note 26, at 125-27 (discussing neoclassical doctrines in economics that began in late Nineteenth Century). The neoclassical economic theory is based on the principle that any product, including labor, will sell for whatever that product is truly worth to the marginal consumer in the market. See *id.* at 125-26 (setting forth theories advanced independently by William Jevons, Carl von Menger and Leon Walras). See BLAU & FERBER, *supra* note 11, at 22 (discussing neoclassical model of family specialization and exchange). The basic tenet of neoclassical exchange is that individuals are rational wealth maximizers. See *id.* But see generally Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985) (criticizing basic assumptions underlying neoclassical model of specialization).

43. See FRIED, *supra* note 26, at 127 ("[f]inal goods would automatically be priced proportional to their marginal utility.").

44. See Deborah L. Rhode, *Occupational Inequality*, 1998 DUKE L.J. 1207, 1222 (1998) (discussing dual markets and impact of gender bias).

levels and interferes with the cost-effective development of female human capital.<sup>45</sup> Thus, sex role norms can be viewed as a form of restraint on trade, and under that description are presumptively inefficient. For the economist, unencumbered and voluntary exchanges, including those that would take place between workers and employers on a free market for labor, represent utility enhancing transactions.<sup>46</sup> To block or "distort" the conditions under which those transactions go forward will, by definition, produce an inefficient result by reducing the overall size of the utility pie.

For true believers in *laissez faire*, these social norms, as impediments to the maximization of social utility, are not natural at all, but require justification.<sup>47</sup> That societies would adopt a regime with such built-in inefficiencies needs to be explained. Thus, the proper question for the economist can be refined as follows—why, despite their apparent inefficiencies, do sex role norms persist?

One explanation some economists favor looks to the benefits of specialization of function.<sup>48</sup> This story takes its cue from pre-modern conditions. When many economically useful roles required brawn and infant mortality was high, the best fault line for role specialization may well have been sex.<sup>49</sup> Basic reproductive work was all-consuming. The centrality of breast-feeding meant that only women could effectively care for small children. Group living required that physical strength be consistently applied to hunt down food and to ward off predators, both human and animal.

45. See Daniel Shapiro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal subsidy Policy*, 64 U. CHI. L. REV. 405, 440-42 (1997) (noting relationship between labor supply and employment).

46. See generally Martha T. McCluskey, *The Illusion of Efficiency in Workers Compensation "Reform"*, 50 RUTGERS L. REV. 657, 672-77 (discussing free market principles).

47. For a general discussion of neoclassical free market principles, see McCaffery, *supra* note 2, at 3-5, 271-74.

48. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 140 (1992) (discussing ability of sex-role specialization in families to maximize efficiency). Posner notes:

[T]he family facilitates the division of labor, yielding gains from specialization. In the traditional family the husband specializes in some market employment (for example, engineering) that yields income that can be used to purchase the market commodities needed as inputs into the final production of the household, while the wife devotes her time to processing market commodities (for example, groceries) into household output (for example, dinner).

*Id.* Further, Posner opines that the husband's specialization "maximizes the family's money income with which to buy the market commodities that the family needs" and the wife's specialization "maximizes the value of her time as an input into the production of the household's output." *Id.* Therefore, the division of labor as a whole, "operates to maximize the total real income of the household by enabling husband and wife to specialize in complementary activities." *Id.*; see GARY S. BECKER, *A TREATISE ON THE FAMILY* 3-4 (1991) (discussing maximization of family unit through specialized functions).

49. See Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 13 (1998) (discussing historical genesis of sex-role specialization).

Under those conditions, sharp sex role divisions may well have maximized overall social welfare.<sup>50</sup>

In modern times, however, the claim that rigid sex-based role divisions result in the largest economic pie becomes more problematic.<sup>51</sup> Nonetheless, the dominant economists' story remains essentially the same; some divisions of function along the lines of sex maximize gains "to the unit," both at the level of the individual household and for society overall.<sup>52</sup> For this account to make sense on its own "free market" terms, however, sex role specialization both in the labor market and at home must arise spontaneously. That is, it must result from exchanges voluntarily undertaken by individuals against social and legal rules that form the generic backdrop for all transactions. The specialization story rests on a dynamic that neither requires, nor has any place for, norms or customs that selectively distort the conditions under which persons, including women, offer their services either at home or on the paid labor market. It is a radically individualistic story that sees each person as striking his or her own deal with others in a fundamentally *laissez faire* environment. It fails to explain the existence of collectively enforced social customs that regulate male and female roles in every society.

Not only does the "specialization" or "comparative advantage" account make no place for sex role norms and taboos, but it also slights distributive issues and the incentive effects generated by the range of possible allocations of gains from trade between the sexes. The dilemma is posed as follows: suppose that sex specialization, although maximizing the size of the household and economic pie, nonetheless produces direct payoffs to economic players that are, in effect, lopsided; although the social pie is larger, some participants, say most women and some men, receive a smaller piece of the pie, not only relative to others but also, more importantly, relative to what they could potentially have enjoyed under some other less specialized alternative arrangement. Why would these "losers" agree to go along with strict specialization?

Some economic models simply fail to confront this possibility at all, or solve it by positing "altruism."<sup>53</sup> Wholly apart from altruism, however, it

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50. *See id.* at 13-14 (stating that historical gender roles are justified by scientific, technological and financial circumstances of period).

51. If justified solely by the biological exigencies of pregnancy and childbirth, strict divisions of labor by sex begin to look like an inefficient vestige from a bygone era. Specialization of function may still be a good idea, but why always specialization by sex? Given the diversity of tasks to be performed in modern economies and the range of capacities across individuals of both sexes—and even if women have a comparative advantage in childrearing and domestic pursuits—why erect barriers to a woman's occupying other roles if she would *choose* to occupy them and can persuade others to employ her?

52. *See generally* GARY S. BECKER, *COMPARATIVE ADVANTAGE AND SPECIALIZATION: A TREATISE ON FAMILY* (1981) (discussing use of sex-specialization to maximize gains to family unit and society).

53. *See id.* at 277 (suggesting model that focuses on behavior of family as unit rather than as collection of individuals). Becker's "altruistic head of the house-

would appear to be rational for those who reap the largest benefits from any supposedly utility maximizing strict specialization simply to share some of those benefits with the losers. Women would be bribed to remain at their domestic or traditional labor market stations by side-payments large enough to make it worth their while to stay put. Economists would predict that these payments will be made spontaneously and voluntarily—by virtue of these transfers, Kaldor-Hicks efficiency will be transformed into Pareto-superiority and everyone will be better off.<sup>54</sup> The neoclassical theory thus suggests that society should rely exclusively on the “carrot” (*i.e.*, side-payments, higher wages and other payoffs) rather than the “stick” (*i.e.*, market restrictions, price-fixing and barriers to entry) to enforce efficient sex role divisions of labor.<sup>55</sup> If routinely paid off in this way, women would rarely stray outside their specialized fold and market-based restrictions, such as sex assignment of jobs and marriage bars, would be wholly unnecessary.

To the extent that neoclassical economics adopts the assumption that the necessary carrots will be offered, Mill’s observations suggest that it is wrong. Societies have not entrusted the sexual division of labor exclusively to economic inducements spontaneously generated on a free market of individual transactions.<sup>56</sup> Rather, they have evolved towards heavy reliance on the stick of collectively generated and maintained barriers to trade. Neoclassical economics of the family offers no ready explanation for these observed patterns.

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hold” theoretically will transfer resources to family members in a manner that maximizes utility. Thus, this “altruistic” transfer of resources compensates the “losers” in the family structure and ensures that they maintain their respective, specialized posts. For a critique of the Becker model, see EDWARD P. LAZEAR & ROBERT T. MICHAEL, ALLOCATION OF INCOME WITHIN THE HOUSEHOLD 12 (1988); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 571-72 (1998) (discussing altruistic head theory).

54. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 13 (1986) (discussing how compensating “losers” in transactions serves to make exchange Pareto-superior). Under Kaldor-Hicks efficiency, the net gains of an exchange exceed the net losses. A transaction is Pareto-superior when, as a consequence of the act, no person is worse off and at least one person is better off. See *id.*

55. See Herbert Hovenkamp, *Distributive Justice and the Anti-Trust Laws*, 51 GEO. WASH. L. REV. 1, 9-16 (1982) (explaining theory that side-payments will occur spontaneously and without artificial coercion because it is assumed that two people will not make exchange unless each person’s welfare improves); see also FRIED, *supra* note 26, at 130 (same). This is not to say that a sharp division of labor, although perhaps worthwhile for everyone relative to less specialization, will benefit men and women equally. There are many forces that conspire to allocate the lion’s share of the benefits to men. See Wax, *supra* note 53, at 509. Although women may gain less than men, a wholly voluntary system at least guarantees that they will not be net losers, as they could well be under a system of norms that selectively restricts market entry or rewards.

56. See MILL, *supra* note 1, at 19.

## IV. WOMEN'S WORK AND EXTERNALITIES

Because the story told above does not fully account for social reality, it is necessary to develop alternative explanations for what is really going on. Two possibilities present themselves.

The first begins with the observation that, within the neoclassical models for sex-based divisions in productive function both at home and in the wage sector, markets are assumed to function competitively. The markets produce both efficient output and spontaneous specialization of production by sex. Both efficiency and specialization are the product of demand and supply on the market. Internalized values or beliefs about gender, to the extent that they exist, assimilate to preferences or utility functions.<sup>57</sup> Apart from that, there is no room for external social structures or practices that have the purpose or effect of distorting the free play of market forces.

On this account, specialized workers in a free market must be paid what they are worth or they will not work. Even if women are better at childrearing, nursing or teaching, they must be still paid enough to make it worth their while to work in these areas; if not, women will choose to do something else. Where some benefits are generated "in kind" or in non-monetized forms—as with direct intrafamilial exchanges and the creation of consumption value within households—then any party reaping the net gains from specialization must transfer resources to a net loser (if any) to induce her to perform her specialized tasks.<sup>58</sup>

Even if rigid sex-role specialization is potentially socially efficient, however, it is possible to achieve that specialization by a route other than paying everyone what they are worth. Collectively maintained social customs that "artificially" alter market conditions and distort individual choices will also work. Such constraining norms can effectively take the place of compensation and side-payments. Losses incurred by one party to a potentially utility-maximizing transaction need not be made up by "bribing" that party to remain at her socially optimal tasks. Rather, those losses can be turned into subjective gains by altering the opportunity costs of performing the assigned work. Thus, instead of paying female nurses wages that are dictated by the market—which reflects demand for and the social value of nursing services—societies might artificially reduce the number and type of alternative transactions (*i.e.*, jobs) available to women on the labor market or reduce the economic rewards available from taking advantage of those alternatives. From an economic point of view, this contraction on the demand side should have the effect of lowering the price

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57. See BECKER, *supra* note 32, at 225 (discussing internalization of beliefs about gender); RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992) (discussing role of personal "tastes" in maintaining efficient workplace).

58. For a discussion of "side-payments" as applied within the marital relationship, see Wax, *supra* note 53, at 654-65.

at which women are willing to work at the "permitted" occupations by lowering the opportunity costs of pursuing the socially desired role. A woman would voluntarily "choose" to work as a nurse, but in an artificially constrained market.

The end result, specialization by sex, is, by hypothesis, socially efficient. It would appear, however, to be more desirable to try to achieve this outcome through the operation of a free market rather than through the use of constraining social norms. Market constraints carry costs—they prevent certain voluntary, utility-maximizing transactions from occurring, thus lowering the amount of social benefit overall. Sex-specific norms thus impose a social cost by operating as a tax on certain transactions, with distorting consequences similar to a selective tax on income. Those social costs must be balanced against the overall utility gains from sex-specialization.

Thus, even if it is accepted that sex-based specialization is more efficient than its absence, it is hard to explain why restrictive norms are a better ploy for achieving this specialization than the free market. One possible explanation looks to who wins and who loses from norms. Norms relieve those who benefit from women's traditional efforts from having to pay full price for the performance of certain traditionally female tasks. The winners from norms-enforced specialization may be perfectly happy with a less efficient, or even a net inefficient outcome, if their share puts them ahead of where they would be in a free market.

The foregoing story is a variation of the standard "rent-seeking" account of women as an exploited caste, robbed of their due by a self-regarding cartel that diverts resources for its own benefit at women's, and perhaps society's, expense. The defect in this account, as already suggested, is that it posits the long-term stability of societies run along less efficient lines for the benefit of a dominant cartel. But the persistence of a less than optimal (although perhaps still efficiently specialized) equilibrium is a challenge for both evolutionary and economic theory. Both paradigms predict that competitive forces (within and among societies) would tend to drive out these arrangements in favor of those that maximize wealth or utility overall.

There is an alternative fuller account that, although not denying women's exploitation or the general flow of benefits away from women to other social actors, requires fewer implausible assumptions and seems truer to reality. Although this account does not rule out some selected benefits from specialization by sex, it is not wedded to the superiority of rigid specialization. This account thus abandons the assumption that the traditional allocation of productive roles as between men and women always maximizes social welfare. It also relaxes the assumption of a perfectly competitive market for labor. Indeed, central to the story is the idea of market failure, or imperfect markets, for the allocation of women's labor within society as a whole.

Less than perfectly competitive markets can result when activities generate externalities.<sup>59</sup> Public finance theory predicts that, when activities or transactions impose costs on strangers to a transaction, the market will generate too much of a commodity or service at the price fixed by the market.<sup>60</sup> Only if the true costs of the activity are internalized to the transaction will the parties generate the optimal amount.

Likewise, when an activity generates positive externalities and creates benefits for strangers to the transaction, the market will spontaneously generate too little of the commodity or service.<sup>61</sup> The theory predicts that productive labor that creates positive externalities will be undersupplied relative to some socially optimal amount.<sup>62</sup> In more practical terms, workers whose labor generates positive externalities will tend to reduce the amount of labor offered spontaneously on the market because the wage paid, or the compensation forthcoming, will not reflect all the social benefits from their effort.<sup>63</sup> Strangers will obtain some of those benefits gratis and will “free ride” on the transaction. The returns to the worker will be artificially depressed relative to what a perfectly competitive market would generate.

The problem of externalities is relevant here because certain types of services traditionally supplied by women—most notably the direct care of children—arguably generate significant positive externalities.<sup>64</sup> The existence of those externalities creates a potential problem in the “pricing” of women’s labor in an otherwise unregulated economy. Externalities systematically distort the demand for women’s labor on the market and at home, and alter the balance between the two sectors. The uncompensated benefit from women’s caring work artificially depresses effective demand for those services. The reduction in demand diminishes the rewards to those performing such tasks and hence reduces the supply of

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59. See PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 751 (1989) (defining externalities as “activities that affect others for better or worse, without those others paying or being compensated for the activity”). Third parties are thrust into either enjoying a benefit at no cost or absorbing a cost without compensation. See *id.*; see also RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE THEORY AND PRACTICE* 55 (1980) (stating that externalities exist where economic activity results in social costs that need not be paid by producer or consumer).

60. See Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Biases in the Code*, 40 *UCLA L. REV.* 983, 1048 (1993) (discussing effects of externalities upon consumption).

61. See *id.* (discussing effects of externalities upon supply).

62. See SAMUELSON & NORDHAUS, *supra* note 59, at 48-49 (noting predictions of public finance theory).

63. See *id.* at 48-49 (theorizing on problem of externalities).

64. See, e.g., FRANCISCO CABRILLO, *THE ECONOMICS OF THE FAMILY AND FAMILY POLICY* 146-51 (1999) (discussing basis for idea that “the production of children generates positive externality”); ERIC RAKOWSKI, *EQUAL JUSTICE* 153 (1991) (discussing consequences of accepting that “additional persons will in time benefit people other than their parents”).

those willing to perform the services. This shifts the overall balance of effort away from "nurturing" and towards other kinds of work.

A number of theorists have noted that unpaid, "off-market" childrearing work potentially creates positive externalities of various kinds.<sup>65</sup> Some of these benefits can take the form of public goods. Public goods are a common source of uncompensated benefits because beneficiaries cannot easily be excluded and free-riding is hard to eliminate. Uncompensated public benefits would appear to create the potential for suboptimal level of child-nurturing work in an otherwise free and competitive market for women's labor.

What are the external benefits of the largely feminine work of bearing and nurturing children? These are not easy to define or quantify. Our intuition is that everyone gains when children grow up to be industrious, law-abiding, sober, moral, conscientious, creative, educated and skilled citizens. That claim is perhaps strongest in Western industrial societies that have in place public old-age pension systems such as Social Security. Such systems depend on the sustained effort and productivity of working-age citizens. But those citizens do not come out of nowhere. Rather, they represent the product of parental investments in reproduction and childrearing. Because the old age pension system protects persons regardless of whether they have children or whether their children are productive, those programs create the opportunity to free ride on the parental efforts of others. Under these circumstances, public finance theory predicts that the level of parental investment would stabilize at less than optimal levels.<sup>66</sup>

Whether governmentally mandated programs of redistribution exert a significant influence on actual parental investments is an unsettled question.<sup>67</sup> Likewise, there is necessarily great uncertainty surrounding the broader question of whether, apart from the old-age pension system, the benefits of parental efforts are otherwise externalized enough to exert a significant influence on women's allocation of their time between unpaid

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65. See, e.g., Adrienne Rich, *Of Woman Born: Motherhood as Experience and Institution*, in FEMINIST JURISPRUDENCE, 563-65 (Mary Becker et al. eds., 1994) (describing benefits of female child rearing); see also SHIRLEY P. BURGGRAF, THE FEMININE ECONOMY AND ECONOMIC MAN: REVIVING THE ROLE OF FAMILY IN THE POST-INDUSTRIAL AGE 25 (1997) (discussing factors that interfere with "return on investment" in parenting, but without specifically discussing the theory of economic externalities). For a summary of this topic, see generally CABRILLO, *supra* note 64, at 146-51; RONALD LEE & TIMOTHY MILLER, POPULATION POLICY AND EXTERNALITIES TO CHILDBEARING, ANNALS-AAPSS (1990); Rolf George, *Who Should Bear the Cost of Children*, 1 PUB. AFF. Q. 1-42 (1987); Shirley P. Burggraf, *How Should the Costs of Child Rearing Be Distributed*, CHALLENGE, Sept.-Oct. 1993, at 48-55.

66. See, e.g., SHIRLEY P. BURGGRAF, THE FEMININE ECONOMY AND ECONOMIC MAN; Erlich & Lui, *Social Security, The Family, and Economic Growth*, 36 ECON. INQUIRY 390, 404 (1998).

67. See, e.g., Wax, *Caring Crisis*, *supra* note 3 (casting doubt on conclusion that Social Security system as currently structured, exerts a significant influence on parents' decisions regarding type and level of investment in children).

and paid work. It might be argued that parents' consumption value in children—that is, the present and future satisfaction from having and rearing children—dwarfs the benefits generated for third parties. Moreover, any attempt to assess effects on female labor supply from uncompensated external benefits of childrearing is complicated by the fact that childcare services are often provided “off-market” within a bilateral monopolistic relationship in which women must bargain for whatever rewards they enjoy. Women's relatively weak bargaining position may operate to make the gains from paid work more attractive relative to domestic activity, provided women can feasibly “shirk” their domestic responsibilities.<sup>68</sup>

There is a second type of potential externality from childrearing, however, that may also contribute to distortions in the allocation of women's labor. In rearing children, parents create human capital that redounds not only to the collective benefit of society as a whole, but also to children themselves. Once they become adults, children reap the benefits of their parents' efforts as a gift without charge. The benefits take the form of earnings on the market as well as “consumption” value from enjoyment of talents and capacities developed through parental attention to offsprings' education and development.

Once again, most parents also enjoy a good deal of “consumption value” from conferring these benefits on their children. But even if parents clearly get quite a lot of vicarious pleasure from their children's happiness and success, there is still less than a complete coincidence of interests as between parents and children. Some portion of the returns to parental investments, which are enjoyed by children as returns on their developed human capital, must represent pure altruism on the part of parents. Parents, however, are not pure altruists. Many traditional societies have addressed this problem by establishing strong norms for “returns” on parental investment. Parents' investments in children are paid off when the investments mature—that is, when children grow up—through children's services to elderly parents.

Those norms can be viewed as doing service in lieu of formal enforceable contracts in which children promise to compensate their parents in the future for their present effort and sacrifice. The viability of such contracts would have to rest on the existence of an intergenerational capital market. For various good reasons, such a market has never developed. The traditional intergenerational norms that made parenting worthwhile have eroded considerably and have been replaced by cultural institutions and practices that send resources in the opposite direction. What remains is a systematic form of “market failure” that stems from parents' structural inability to contract for fair returns on their investments in their children.

The point here is to posit a relationship between the existence of market imperfections in the supply of caring work due to positive externalities and the devices that societies have historically evolved to deal with them.

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68. For a discussion of this topic see Wax, *supra* note 53.

As noted, the theory of externalities predicts that hands-on nurturing of children will be undersupplied relative to some socially optimal level overall. But that undersupply will only occur in a market that, apart from the noted defect, is otherwise fairly competitive—that is, women’s labor on behalf of children must compete with other potentially valuable uses of women’s time and effort. One way to cut down on undersupply is to reduce the level of competition for women’s time and effort by reducing the returns to alternative allocations of labor. The methods for doing this are familiar from the forgoing discussion; create “dual labor markets” in which women are artificially confined, by custom and practice, to a limited number of occupations. Ordain “price discrimination” in the form of lower wages for women, regardless of productivity. Create a marriage bar, which drastically raises the price (marriage forgone) of staying in the paid labor market at all. Create a taboo that views a working wife as a badge of shame. The effect of these devices will be to depress the demand for women’s paid labor overall. The effect of shifting the demand curve will be to lower the price, or wage, for women’s labor performed for pay, and thus the returns to women workers from market work. Because all allocative choices made by the supplier of a commodity, including labor, are comparative, traditional domestic activities will appear relatively more lucrative. Women will shift their efforts from paid work to work at home.<sup>69</sup> But that is precisely the effect that is needed to counter the artificially depressed returns to labor within the domestic sphere that are the product of the positive externalities from hands-on caring work. To paraphrase Mill, only then will the right number of women at last “be willing to accept the condition said to be natural to them.”<sup>70</sup> To the economically unsophisticated, and even to some of the sophisticated, it will look for all the world like women are “freely” choosing to do what “is natural to them.”<sup>71</sup>

If this story is accepted, it is now possible to see why labor market discrimination against women and all the norms and customs that impeded a free market for women’s work retained such vitality for so long. Once again, the “efficiency” of specialization within the household can not be the whole story, because it fails to account for the felt need for constraint and the cultural development of categorical conventions that were heedless of personal tastes and voluntary transactions. Rather, the key to the story is not specialization, but externalities.

Such customs were well-designed to respond to the potentially pernicious effects of an unregulated market for labor that generates positive

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69. See CABRILLO, *supra* note 64, at 140 (discussing how restricting women’s access to labor market produces “rise in the opportunity cost of obtaining income in the labor market” which should result in “a progressive decrease in involvement in the market and greater specialization in childrearing”).

70. See MILL, *supra* note 1, at 119, 144.

71. See EPSTEIN, *supra* note 31, at 271 (arguing that women freely choose to stay home and raise children, and that anti-discrimination laws do not respect that choice).

externalities. Although a free market for labor would appear to be “efficient”—in the sense of utility-optimizing for society overall—this account views that appearance as illusory; uncompensated benefits to third parties potentially interfere with efficient allocations of labor on an unregulated market. Mill stated the dilemma quite well, although he meant to ridicule it; in such a market, if women “are free to do anything” other than domestic labor, “there will not be enough of them” to do that work. The market will outbid the caring sector, not because the varieties of market work are necessarily more socially valuable than work done in the home, but because unregulated markets do not pay women enough to keep them working at home.<sup>72</sup>

In sum, the thesis of this Article is that Mill’s traditionalists may have been on to something; freedom for women, especially freedom to sell their labor to the highest bidder, might prove harmful to society. Perhaps the traditionalists did not express their fears in so many words because they did not quite understand the social and economic basis for their insights. Perhaps the best face that can be put on traditional sex role restrictions is to view them as an evolved response to recalcitrant forms of market failure generated by externalized benefits to free-riding third parties. The chosen counterstrategy was to create a cartel to artificially fix the price of women’s labor and alter its supply on the market. The ultimate objective was to ensure that something closer to the optimal amount of nurturing work would be supplied and society as a whole would be better off.

To be sure, this “solution” is not without costs. Those costs include distributional consequences that exact disproportionate sacrifices from some individuals in favor of others. There are also countervailing inefficiencies. As already discussed, restriction on women’s access to labor markets are inherently wasteful in impeding a close match of individual ability and productive activity. Some women will produce more social value working at home than in the paid labor market, and others will not. The costs entailed by shifting the compensation curve to draw more women out of the labor market vary over the population, because not all women are alike in the ratio of value they add by specializing in various forms of market work rather than in domestic endeavors. Customs that generalize by sex are a blunt instrument. Those customs sacrifice the gains from putting the most productive women to their “best and highest” use for the sake of putting all women to work at one task for which they may not all be well-suited.<sup>73</sup>

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72. See ELAINE SORESENSEN, EXPLORING REASONS BEHIND THE NARROWING GENDER GAP IN EARNINGS 129-35 (1991) (suggesting that as hiring discrimination against women has decreased, more women have been lured away from domestic life by promise of better paying jobs).

73. For a similar point about the pronatalist effects of labor market restrictions on women, see CABRILLO, *supra* note 64, at 138 (“[D]iscriminatory legislation creates an equal incentive to produce children for people with very different comparative advantages, which is very inefficient.”).

As already suggested, principal losers from impediments to unfettered transactions on labor markets are the parties who would, in the absence of normative restrictions, otherwise conclude the forbidden or devalued transactions; that is, employers who could benefit from a larger pool of well-trained labor, and the women who would willingly be employed by them. Not all women sacrifice equally; the most productive women stand to lose the most (which may explain why educated women were most active in agitating for feminist occupational reforms).<sup>74</sup> But the important point about restrictive labor market customs as a solution to the undersupply of domestic labor is that those practices generally have the effect of shunting resources away from many individual women.<sup>75</sup> Although the positive externality theory suggests that this deflection of resources could well be socially efficient (in that, despite some costs, net social welfare is increased overall), enlargement of the social pie is achieved only by exacting a substantial sacrifice from one segment of the population—namely, women who can command a substantial market wage.

Not all “efficient” social norms necessarily operate to benefit everyone within a society or group or to benefit each member to the same degree. Some can operate to create net winners and losers, or to exact selective sacrifice from certain groups.<sup>76</sup> Labor market customs that operated to exclude women from jobs or reduce rewards from labor are an example of social practices that, although potentially “efficient,” achieve their effects by immiserating a segment of the population. The redistribution effected by labor market gender norms cannot be fairly described as naked patriarchal confiscation, or simple “rent-seeking” by men at women’s expense. Rather, these customs generated a complex pattern of intra and intergenerational transfers, which shunted resources from selective persons of both sexes to others and, most importantly, to children. Indeed, the primary effect of traditional sex role norms may have been to increase the well-being of children at the expense of women as a group. But, as noted, the effects on individual women can be expected to vary considerably, with some standing to lose a lot and others very little compared to a less regu-

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74. *See id.* at 138 (noting that “[f]or some women, whose human capital for the purpose of market activities would not have allowed them to opt for [lucrative] jobs, the effect of [sex] discrimination is relatively unimportant, but for others who could have aspired to such positions, the cost is much greater”).

75. *See id.* at 140 (attempting to show that restricting women’s labor market access or rewards as way to drive women towards domesticity decreases women’s well-being relative to, for example, subsidizing motherhood through transfer payments).

76. *See, e.g.,* NANCY FOLBRE, *WHO PAYS FOR THE KIDS?* 73 (1994) (noting that “[g]roups may develop ways of imposing sacrifices on their weaker members”).

lated baseline.<sup>77</sup> Some men—*e.g.*, husbands of potentially high-earning women or men who would employ those women—may lose out as well.<sup>78</sup>

On this view, men's efforts to arrogate the lion's share of the benefits of female labor to themselves is only part of a more nuanced story. And women's strict advantage in domesticity is an unnecessary postulate. Rather, the full account is a variant on Mill's theme—if society is to continue, it is necessary that *someone* nurture and care for children. Although "natural" limitations do not dictate that the someone be only or exclusively women, women will do very well.

#### V. POSITIVE EXTERNALITIES, MARKET FAILURE AND TAXING WOMEN

Explaining the connection between this tale and Professor McCaffery's work requires bringing the story up to date by noting the fate of traditional social practices that have limited women's labor market potential. Without giving a full account of how and why these changes occurred, it is sufficient to say that traditional sex role norms have suffered grievously in recent years. Although powerful conventions and expectations still underwrite pronounced occupational segregation in partial disregard of talent or preference, the range of jobs open to women has dramatically expanded. Men and women are now closer to occupying a unitary labor market than ever before, with the consequence that competition for women's labor is keener than in the past. Women's pay is rising and approaching parity with that of similarly qualified men.<sup>79</sup> As a result, the opportunity costs of alternative allocations of time and effort in the unpaid domestic sphere have never been greater.<sup>80</sup> For well-educated women, the payoffs forgone by choosing to work at home are large. Because the returns from a life of domesticity during the same period have, if anything, declined,<sup>81</sup> the *relatively* greater value of nondomestic uses of women's time has produced the expected result—more women are in the

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77. See CABRILLO, *supra* note 64, at 139-41 (demonstrating how labor market restrictions can be expected to affect women with different social status and level of education).

78. *But see generally* Wax, *Caring Crisis*, *supra* note 3 (suggesting that social mores that regulate monogamy and sexual conduct to foster family stability for benefit of children may exact steep price from men as well as women by restricting sexual opportunity).

79. See BLAU & FERBER, *supra* note 11, at 217 ("Beginning in the late 1970s or [early] 1980s, there were some signs that the ratio of female to male earnings was beginning to turn up."). See *generally* DIANA FURCHTGOTT-ROTH & CHRISTINE STOLBA, *WOMEN'S FIGURES: THE ECONOMIC PROGRESS OF AMERICAN WOMEN* (1997) (documenting progress towards gender parity in pay).

80. See BLAU & FERBER, *supra* note 11, at 89-92 (discussing "substitution effect" of increased wage rate on cost of time spent in nonmarket activities).

81. See *id.* at 100-01 (describing how declining birth rates, increasing divorce rates, and changing tastes and consumption have decreased benefits of allocating time to domestic activities); Wax, *supra* note 63, at 631 (discussing marital instability and divorce).

paid workforce than ever before.<sup>82</sup> A recent letter to the editor of *The American Enterprise* magazine sums up the situation: “[t]he workplace is bidding for and acquiring time once pledged to children, and the children have no way to make a reasonable counter offer.”<sup>83</sup>

There would be little cause for concern if the unpaid, “off-market” domestic sector were competing with the paid sector in an unrigged game. The theory of market failures and externalities suggests, however, that the tug-of-war may well be skewed. Although the domestic sector is off-market and unpriced, it could still presumably equilibrate effectively with the paid sector if domesticity generated accurate returns to women for services rendered.<sup>84</sup> That would occur if women’s compensation from domestic labor, including consumption value, share of family income, and other recompense, reflected the full social value of a full-time wife and mother. Built-in imperfections that undermine the full internalization of investments in children mean that hands-on caring work is under-rewarded.<sup>85</sup> If women get fairly accurate returns on investment in the paid labor market, but are undercompensated in the domestic sphere, the domestic sphere will lose. As the paid sector moves ever closer to the ideal of a unitary, free, competitive labor market in which rewards reflect not prejudice or accident of birth, but real economic productivity, the pull of domesticity will weaken by comparison and caring work will suffer more.

In view of these insights, Professor McCaffery’s proposals for the reform of the system for taxing dual earner families can be seen in a new light. Professor McCaffery bemoans a system that taxes secondary earners (usually women) more heavily than primary earners (usually men).<sup>86</sup> Both men’s role as primary earner and women’s secondary position, however, are a reflection of their respective elasticities on the labor market. Men are relatively inelastic or unresponsive to shifts in the effective level of compensation for labor, including those induced by taxes. In contrast,

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82. See ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND* 6 (1997) (stating that in 1994, 69% of married mothers worked for pay compared to 12.6% in 1950).

83. Thomas J. Wiswell, *The Mail*, *THE AMERICAN ENTERPRISE*, July/Aug. 1998, at 94.

84. See generally Wax, *supra* note 53, at 509 (discussing off-market labor in domestic sphere and its interaction with labor market for both men and women).

85. See *id.* at 575-91 (noting child rearing is viewed as lower contribution to marriage than wage earning and describing why women within marriage are undercompensated for direct services to families). Women’s bargaining weakness within marriage adds to the effect of positive externalities generated by traditional women’s work. See *id.* at 587-88 (noting effect of women’s perceptions of household contributions on bargaining process). When women perceive their contributions to be “worth less,” they bargain less aggressively for a share of the marital surplus. See *id.* at 587.

86. See McCAFFERY, *supra* note 2, at 277 (“We should tax married men more, and married women less.”).

women are quite responsive, or "elastic," in their supply of labor in response to variations in returns to effort.<sup>87</sup>

The theory of optimal taxation asserts that the goal of a tax system should be to minimize any departure from choices that would otherwise be made on a well-functioning market. Applying the theory of optimal taxation developed for consumer goods to the analysis of labor supply, Professor McCaffery asserts that shifting the burden of tax from elastic to inelastic workers produces fewer "distortions" in the supply of labor because it leaves the patterns of work and effort relatively undisturbed.<sup>88</sup> Assuming a well-functioning market for labor, the untaxed pattern will be an efficient one, because it will result in an equilibrium price for labor that maximizes the social utility generated by the balance of supply and demand.

Professor McCaffery is on firm ground in predicting the likely effects of shifting the burden of tax towards inelastic male workers and away from elastic female workers: women will engage in more paid work and will be (somewhat) better off for it.<sup>89</sup> But McCaffery's account rests on a critical assumption—that the untaxed world of men's and women's labor, as it spontaneously allocates effort as between wage work and unpaid work at home, is one that maximizes social welfare. That is precisely the proposition that this paper seeks to question.

It is critical to the validity of McCaffery's argument that the baseline or untaxed market in labor be unmarred by any serious, systematic deviations from an efficient equilibrium. To be sure, McCaffery does bemoan certain types of market imperfections, which he claims lead to a paucity of attractive part-time jobs.<sup>90</sup> In that respect, he does not posit perfectly functioning markets that always "clear." Apart from those defects, McCaffery appears to assume—and indeed has to assume—that labor markets work fairly well.<sup>91</sup> Only then can he be confident that a tax that depresses the supply of paid female labor moves society *away* from efficiency. If the paid labor market were the sole focus of attention, the assumption of opti-

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87. *See id.* at 180-81 (noting "striking" variance between men's and women's elasticities). McCaffery posits that statistical data "indicate that women are conflicted about work outside the home and are quite sensitive to the wage level." *Id.* at 181.

88. *See id.* at 245 (citing several economists advocating "taxing married men twice as much as married women, in the interest of minimizing the distortions of tax").

89. *See id.* at 179 (noting that high tax on women's paid work results in women staying home; therefore, lower taxes have opposite effect).

90. *See generally id.* at 142-44 (criticizing fringe-benefit and tax law features that result in stagnant part-time labor market).

91. *See id.* at 240-49 (discussing market failures). McCaffery discusses five market failures: imperfect contracts, imperfect information leading to statistical discrimination, taxes, incomplete markets and collective action problems. *See id.* McCaffery appears, however, to view these as deviations from an otherwise "perfectly free market[.]" *Id.* at 240. It thus appears that McCaffery would view perfectly free labor markets as working well.

mal allocation on an unregulated, untaxed market might be a sound one. The possibility that the off-market caring sector might generate significant and stubborn positive externalities reveals, however, how this bedrock assumption might fail. The existence of such externalities would mean that an untaxed and otherwise unregulated allocation of women's labor might fall short of maximizing social welfare by failing to supply the optimal amount of certain valuable types of services.

As we have suggested, one way to attempt to correct for an undersupply in the quantity and quality of care for children is to impede women's entry onto the labor market. The differentially high marginal tax on women's labor that is built into the tax system as we know it can thus be viewed as just one more device in the venerable arsenal of social practices designed to interfere with women's sale of her efforts to the highest bidder. In this sense, the observed structure is in keeping with the traditionalist project of the "Contract with America," which McCaffery discusses in the final chapter of *Taxing Women*.<sup>92</sup> Although the Contract's authors, like Mill's traditionalists, claim to be freeing families from the burdens that prevent women from "doing what comes naturally" (*i.e.*, staying home), what the Contract actually seeks to do is counter the threat that too many women, if "free to do anything else," will not choose to stay home at all.<sup>93</sup> The discussion in this Article shows how the Contract's program, by leaving high marginal taxes on women's work intact, might end up advancing the goal of maximizing social utility overall.<sup>94</sup> Paradoxically, it shows how getting rid of high taxes on women's paid labor might undermine that goal.

As noted, McCaffery proposes taxing women or secondary earners less and men or primary earners more.<sup>95</sup> If elasticities are exogenous in being largely independent of the tax system or of any other easily manipulable parameters, it becomes apparent that McCaffery's proposal does not solve the putative undersupply dilemma described in this article. As McCaffery acknowledges, lowering the tax on women's paid labor will generally cause women to engage in more paid work—that is what it means to be elastic. But taxing men more will not cause them to engage in less paid work—that is what it means to be inelastic. The end result will be even less hands-on caring than under the present tax regime.

Perhaps we should not assume that this inelasticity is a fixed feature of the landscape. Even if men's work rigidity loosens in response to higher

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92. See generally *id.* at 267-83 (criticizing Congress' "Contract with America" as deeply conservative proposal detrimental to women's interest).

93. See *id.* at 281 (lamenting authors of "Contract with America" for "turn[ing] back the clock to the 1950s" by using taxation to discourage women from working outside of home).

94. See *id.* at 245 (discussing "social engineering" agenda of some politicians to have women stay home and care for their children instead of entering labor market).

95. See *id.* at 277 (stating that "[w]e should tax primary earners more, and secondary earners less.").

taxes and changing social conditions in the wake of McCaffery's reforms, men's reduction in market effort will not likely offset women's increase. In addition, there is no guarantee that men will devote time freed up from working less to caring for children; evidence suggests that they will not. Finally, recent data suggest that at least some women's response to shifts in labor market rewards has begun to converge with men's.<sup>96</sup> The shift towards greater inelasticity for women will, if anything, simply make any undersupply worse by rendering women less responsive to efforts to lower the opportunity costs of domesticity, whether by taxing away the benefits of work or through other normative legal or extralegal devices.

If there is indeed a "market failure" that produces less than optimal allocation of investments in future generations, social customs that restrict women's labor market access, and high taxes on women's labor, represent two possible regulatory "cures" for that disease. But, if it takes a market failure to cure a market failure, eliminating the cure will do nothing to root out the disease. If we assume that children need more care than they would get in an unregulated market, undistorted by cartel-like norms or taxation, then freeing up the market will not bring us to the optimal place we would like to be. McCaffery's proposal will no doubt be more fair to women and will make many women, and also men and children, better off; it will result in women voluntarily entering into more labor market transactions that are utility-maximizing for *them* and their employers. It does not follow, however, that the *overall* size of the pie will be larger, or that society will be better off collectively if McCaffery's reforms are adopted. If increasing social investment in children by boosting the supply of domestic labor is our goal, there are more or less efficient (or fair) ways to do this. And some ways may be so inefficient, or so lopsided in their distributive consequences, that the resulting losses may even outweigh the gains from luring women out of the labor force and into the home.<sup>97</sup> But the issue of effects on net social welfare—and on children's well-being—must be squarely faced whenever a change in the status quo is contemplated in this area. Although it may be quite difficult to discern all the ramifications for efficiency and equity of any proposed reform, those effects should not be assessed so narrowly as to leave out consideration of the most vulnerable players.

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96. See generally Anne Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001 (1996) (discussing range of women's labor market elasticity).

97. See McCaffery, *supra* note 2, at 201. McCaffery does acknowledge that the taxation changes will result in children not "being cared for at home" because women will enter the workforce. *Id.* McCaffery counters the argument by calling for a change in the "fixity of men's role." *Id.* In other words, increased paternal involvement at home will offset women's absence.

## VI. CONCLUSION

If McCaffery's reforms are not the entire answer, then what is? This question is for another day, but some general observations are in order. It is necessary to recognize that a heavy dose of hands-on caring and other "women's work" is vital to a good society and that such work is potentially in short supply in a free one. It is also important to understand the potential economic sources of this dilemma in order to think clearly about solutions. Finally, it is necessary to think about ways to increase the supply of care for others, preferably within the context of the tried-and-true organic settings such as the family which, despite all shortcomings, have worked well in the past. For reasons of both efficiency and justice, the ideal approach would abandon devices, such as nonoptimal taxation and restrictive social customs, that disproportionately immiserate women and impose significant social inefficiencies to boot. So far so good for McCaffery's proposal. Removing the heavy tax on elastic secondary earners represents one attempt to remedy a restraint on trade that makes women pay for benefits enjoyed largely by others.<sup>98</sup> But we cannot rest with this reform.

Instead of burdening certain transactions that might benefit women, policies should be directed at using positive inducements to lure women and men into allocating their labor in the most socially effective ways. We need to move away from the stick and towards the carrot.<sup>99</sup> The goal is to find the mix of policies and strategies, formal and informal, that returns to caregivers the rewards they would enjoy if beneficiaries of their efforts really paid their own way. This is a large task, and many obstacles—practical, political, psychological and economic—lie in the way of accomplishing it. I believe we have no choice but to direct our best efforts to meeting this challenge.

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98. *Cf. id.* (questioning why "should it always and only be the *wife* who has the incentive" to stay at home, increasing social welfare through childrearing at home).

99. For a discussion of the stick and the carrot, see *supra* notes 55-56 and accompanying text.

