

BOOK REVIEW

TAX AND THE MARRIED WOMAN

LAWRENCE ZELENAK*

Taxing Women, by Edward J. McCaffery.¹ Chicago: University of Chicago Press. 1997. Pp. xi, 301. \$29.95.

I. INTRODUCTION

Professor Edward McCaffery has combined feminism, tax accounting, political and intellectual history, and sophisticated economics to create a book that is accessible—even inviting—to the general reader, and from which tax experts will learn much. The thesis of *Taxing Women* is that the “tax system in context is deeply biased against working wives and mothers” in a number of ways, some intended by Congress and some not.²

McCaffery begins his analysis with joint tax returns for married couples, which has been a feature of the income tax since 1948.³ He explains how this seemingly benign provision creates a stacking effect that taxes the earnings of wives more heavily than those of husbands. This effect occurs because wives are typically secondary earners. It is assumed that the

* Reef C. Ivey Research Professor of Law, University of North Carolina. B.A., 1976, Santa Clara University; J.D., 1979, Harvard Law School.

1. Professor of Law, University of Southern California and California Institute of Technology.

2. EDWARD J. MCCAFFERY, *TAXING WOMEN* 268 (1997) [hereinafter *TAXING WOMEN*]. The book is an expansion and popularization of two law review articles: Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 *UCLA L. REV.* 983 (1993) [hereinafter McCaffery, *Gender Bias*]; Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 *YALE L.J.* 595 (1993) [hereinafter McCaffery, *Slouching*].

3. See *TAXING WOMEN*, *supra* note 2, at 11-48. The joint return system was introduced by the Revenue Act of 1948, Pub. L. No. 80-741, tit. III, pt. I, 62 Stat. 110, 114-16.

husband will have a full-time job, but whether the wife will work outside the home is an open question.⁴ The husband's earnings absorb the zero bracket (i.e., the tax exemption provided by the standard deduction and personal exemptions) and the lower tax brackets. When the wife is deciding whether to take a job, she views her earnings as stacked on top of her husband's for tax purposes, so that even her first dollars of income are taxed at high marginal rates. Discouraged by those high rates, the wife may decide to stay home.

McCaffery also makes a crucial distinction—not understood by the general public and sometimes missed even by tax experts—between the stacking effect and marriage penalties and bonuses.⁵ Both phenomena result from joint returns, but they are not the same thing. A marriage penalty or bonus is the increase or decrease in tax liability that a married couple experiences under joint returns compared to the combined tax they would pay as singles. A joint return system could be designed so that it involved only marriage bonuses, but even then the wife's income would be stacked on top of the husband's, and she would be discouraged from paid labor.

After this explanation of the stacking effect, McCaffery describes the political and intellectual history of how the United States arrived at joint filing in 1948 and has stayed with it ever since despite its gendered effects.⁶ Next, McCaffery provides briefer discussions of other ways the tax system burdens working wives. He argues that most working wives receive little or no benefit in return for the social security taxes they pay;⁷ the tax allowances for child care and other work-related expenses of wives and mothers are strikingly ungenerous;⁸ the value of the services of homemaking wives (imputed income) is not taxed;⁹ and the system of tax-favored fringe benefits is based on the assumption that a working husband will provide health insurance and retirement savings for his entire family, so that fringe benefits from a wife's job are not much valued.¹⁰

McCaffery then offers compelling examples of how these rules affect taxpayers at lower, middle, and upper income levels. At lower income levels, the need for cash income is so great and the marriage penalties are

4. See TAXING WOMEN, *supra* note 2, at 21.

5. See *id.* at 16-20.

6. See *id.* at 29-85. My disagreement with McCaffery's interpretation of that history is discussed *infra* Part III.A.

7. See *id.* at 89-105.

8. See *id.* at 106-20.

9. See *id.* at 120-26.

10. See *id.* at 126-31.

so severe¹¹ that the most likely effect of the tax rules is not that wives stay home but that marriages fall apart.¹² For middle income couples, the tax rules push wives into an all-or-nothing choice: either stay home, or take a full-time job.¹³ In fact the economics of part-time jobs for middle-class wives are so bad that “[i]t is easy to imagine such an option losing money.”¹⁴ Even upper income wives do not escape. They face a severe stacking effect, which greatly discourages them from working outside the home.¹⁵

Perhaps the most ambitious part of the book is McCaffery’s attempt to explain the economic theory of optimal taxation and to demonstrate how taxing wives more heavily than husbands is perverse in optimal tax terms.¹⁶ This is very complex material, and McCaffery is entirely credible when he reports his editor was not enthusiastic about including it.¹⁷ But he is stunningly successful in making the material both understandable and central to his argument, without undue simplification. In its most basic form, optimal tax theory says the inefficiency caused by taxation will be minimized if activities are taxed in inverse relation to their elasticities.¹⁸ Since the labor force participation of wives is more elastic than that of husbands, optimal tax calls for taxing the earnings of wives *less* than those of husbands; yet current law gets it exactly backwards.¹⁹

11. The marriage penalties are severe in both absolute and relative terms at lower income levels because of the phaseout of the earned income tax credit (“EITC”). For a discussion of the EITC see *infra* text accompanying notes 101-109.

12. See *TAXING WOMEN*, *supra* note 2, 138-42, 145-50. McCaffery does not mention an important limitation to his otherwise persuasive analysis. If the tax system contributes to the breakup of two-parent households among the working poor, it does so only indirectly. The system gives lower income couples tax incentive not to be married, but it gives them no tax incentive to live in separate households. Perhaps, however, couples who become or stay unmarried for tax reasons have more fragile relationships because of the absence of a marriage certificate.

13. See *id.* at 150-54.

14. *Id.* at 152.

15. See *id.* at 154-59. McCaffery has some trouble explaining why, given the severity of the stacking effect at this income level, many wives of high-income husbands *do* have jobs. He speculates that it may be because high family income makes it possible for the wife to work for nonmonetary reasons, but he claims this does not undermine the reality of the stacking effect. See *id.* at 159. He neglects another explanation, however, which does undermine the reality of the stacking effect in some cases. The stacking effect operates only if the couple *already* considers the wife the secondary (marginal) earner. If they do not think of the wife’s job as on the margin, then they will not view the husband’s job as having first claim on the lower brackets and there will be no stacking effect. This is certainly the case for many high-income dual earner couples. This point is discussed *infra* Part II.A.

16. See *id.* at 163-201.

17. See *id.* at 170.

18. See *id.* at 170-77.

19. See *id.* at 177.

McCaffery follows his discussion of optimal tax with a brilliant dissection of the family-related provisions of the House Republicans' *Contract with America* ("the *Contract*").²⁰ At the core of the *Contract*'s family tax proposals is a \$500-per-child tax credit, available without regard to actual child-related expenditures.²¹ Giving the authors of the *Contract* perhaps too much credit, McCaffery explains how this is a clever conservative move in terms of tax economics. Taxation of earned income has two effects on labor supply, which push in opposite directions. The *substitution effect* decreases labor supply: faced with a tax on earned income, people will tend to replace it with untaxed imputed income or leisure. But the *income effect* increases labor supply: understanding that their take-home pay has been reduced by taxes, people will supply more labor than before to replace the lost income. The genius of the *Contract* proposal is that it manipulates both the income and the substitution effects to keep wives at home. The child tax credit has an income effect in the opposite direction from taxation; increased income from the credit discourages paid labor. At the same time, the *Contract* leaves in place the substitution effect ("all the distortions against secondary earners that have been present for decades").²² Whether the authors of the *Contract* fully realized what they were doing, McCaffery's unmasking of its effects is as convincing as it is ingenious.

McCaffery concludes by outlining the direction feminist tax reform should take. His major practical suggestions are abandoning joint returns in favor of separate filing by spouses, providing more generous child care allowances for working wives, and instituting an earnings-sharing or secondary-earner exemption under social security.²³ Advocating specific reforms is not, however, the major point of the book. Rather, McCaffery seeks to awaken feminists to the gender issues hidden within tax.²⁴ At this he succeeds completely. Given the difficulty of making tax accounting and optimal tax theory comprehensible and interesting to a general audience, his accomplishment borders on astounding. It may also, as he clearly hopes, have important consequences in the real world.

As much as I admire the book, I do have a few areas of significant disagreement with McCaffery. First, although McCaffery makes a com-

20. See *id.* at 202-25 (discussing *CONTRACT WITH AMERICA* (Ed Gillespie & Bob Schellhas eds., 1994)).

21. See *TAXING WOMEN*, *supra* note 2, at 205.

22. *Id.* at 213.

23. See *id.* at 277-79.

24. McCaffery expresses the hope that his book will "serve as a bit of a wake-up call to those interested in gender justice in America to pay more attention to tax." *Id.* at 277.

elling case that wives are taxed more than husbands in an important sense, he does not prove that his suggested cure—taxing women less and men more—will improve the well-being of married women. Second, I am less convinced than McCaffery that the current state of affairs is the result of a nefarious plot against women. The introduction of joint returns in 1948 was *not* motivated by an understanding of the stacking effect, and even a Congress with the best of feminist intentions would find it difficult to fix some of the tax biases McCaffery identifies. Finally, I suggest an alternative method of tax policy analysis to McCaffery's approach. The alternative is informed by feminist concerns, but is not exclusively feminist. On the question of joint filing versus separate returns, the alternative has better prospects for influencing legislation.

II. WILL TAXING WOMEN LESS REALLY HELP WIVES?

McCaffery believes that wives are harmed by the tax laws and that they would be helped by reforms that taxed wives less and husbands more, especially by shifting to separate returns. Is he right? I consider two aspects of the question below: whether the separate filing will result in more wives entering the labor force and whether a wife who enters the labor force because of the reform will be better off.

A. DOES THE BEHAVIORAL EFFECT REALLY EXIST?

McCaffery “care[s] about women who are not working just because it is not economically viable” as a result of the tax bias against secondary earners.²⁵ But how many of these women exist? McCaffery has difficulty proving that the tax laws have the effects he claims: discouraging some wives from working outside the home at all and forcing others to choose full-time work rather than the part-time work they would prefer. To suggest the plausibility of these effects, he relies on anecdotes from newspapers and magazines,²⁶ number-crunching accounting exercises,²⁷ and labor supply elasticity studies.²⁸ The stories, the accounting, and the elasticity estimates are suggestive, but they are not proof.

25. *Id.* at 109-10.

26. *See id.* at 11.

27. *See id.* at 150-58 (providing examples involving middle income and upper income couples).

28. *See id.* at 179-84. For a critique of the reliability of labor supply elasticity studies, see Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2017-21 (1996). Alstott concludes that the “high degree of uncertainty in estimates of married women’s labor supply compels caution and even skepticism.” *Id.* at 2020.

Despite McCaffery's evidence, there is reason to question whether many decisions between paid work and housework are controlled by the tax laws. McCaffery's analysis assumes wives really are on the margin between the two spheres of work. But many wives—perhaps most—are clearly not on the margin. Some wives are committed to homemaking no matter how the tax numbers may crunch, while others are firmly committed to the paid labor force. With respect to a wife in the latter group, the point is not merely that she will work even if McCaffery's marginal analysis shows she nets little or nothing from her job. The point is more fundamental: she does not view herself as *being* on the margin, so she will not perform McCaffery's marginal analysis. There is nothing in the Internal Revenue Code which says the husband's income gets the advantage of the lower brackets and the wife's income is then stacked on top. The stacking effect exists only if the wife thinks it does. A wife firmly committed to the labor force does not believe in the stacking effect, and so for her it does not exist. Finally, even where the stacking effect exists, it is not clear that the tax bias against working wives is strong enough to keep many wives at home. Even in McCaffery's examples, the working wife in most cases does not actually *lose* money compared with staying home, she just nets surprisingly little.²⁹

In the nature of things, unfortunately, no real proof can be had. Such proof would require a controlled experiment in which comparable couples were faced with different tax regimes, and no such experiment is possible. There are two sources of information worth considering, however, in addition to those McCaffery discusses. The first is the history of labor force participation by married Canadian women. Because Canada has always taxed married couples on a separate return basis³⁰ and because of the cultural similarities between Canada and the United States, Canada provides a natural experiment. Of course, the experiment is not well-controlled. The cultures may be similar, but they are not identical, nor are tax and other relevant laws in the two countries identical except for filing unit rules. Thus the Canadian data, like McCaffery's anecdotes, are merely suggestive. In 1960, long enough after 1948 to expect any behavioral change from the switch to joint returns to have appeared, the labor force participation rate of married women in the United States was 31.7%, compared

29. See TAXING WOMEN, *supra* note 2, at 150-58. The exception is the story of Elizabeth. See *id.* at 11.

30. See Oliver Oldman & Ralph Temple, *Comparative Analysis of the Taxation of Married Persons*, 12 STAN. L. REV. 585, 591-92 (1960).

with a Canadian rate of only 19.1%.³¹ Unfortunately, the Canadian data go back only to 1959, so it is not possible to establish a pre-1948 baseline for each country. Nevertheless, the 1960 statistics argue against joint returns as a major deterrent to labor force participation by wives. Since 1960, however, labor force participation rates for married women have grown faster in Canada than in the United States. In 1981 the Canadian rate edged ahead of the United States rate, 50.6% to 50.5%, and by 1988 the Canadian rate was meaningfully higher, 59.1% to 56.7%.³² Perhaps this faster rate of increase in Canada is related to separate returns, although many other explanations are possible. In short, the results of the Canadian-American natural experiment are inconclusive, although a focus on the rate of increase in the participation rates (rather than on the rates themselves) lends some support to McCaffery's thesis.

The second source of information is *Women: The New Providers*,³³ which presents the results of a Louis Harris and Associates survey of women's views on family and work. Among many other things, the survey asked American women, "If you had enough money to live as comfortably as you'd like, would you prefer to work full time, work part time, do volunteer type work, or work at home caring for the family?"³⁴ Among full-time homemakers (not necessarily married), 6% replied that they would work full time, and 17% that they would work part time.³⁵ This is rather striking support for McCaffery's thesis. It suggests that nearly one-quarter of all full-time homemakers want a job but cannot afford one! However, two caveats are in order. Since this group is not limited to married women, it may include single mothers on welfare. It may also include married women who simply have more valuable homemaking skills than labor force skills. Still, it is likely that many of the 23% of homemakers who cannot afford a job are precisely those wives who have been pushed into homemaking by the tax laws described by McCaffery.

Full-time homemakers constituted 15.4% of the women included in the survey, and 23% of that 15.4% is 3.5%. Thus, even if all the home-

31. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1962, at 225 tbl.294 (83rd ed. 1962); STATISTICS CANADA, HISTORICAL STATISTICS OF CANADA, at series D432 (F.H. Leacy ed., 2d ed. 1983).

32. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1995, at 402 tbl.632 (115th ed. 1995); STATISTICS CANADA, WOMEN IN CANADA 79 (2d ed. 1990).

33. FAMILIES AND WORK INSTITUTE, WOMEN: THE NEW PROVIDERS (1995) [hereinafter NEW PROVIDERS]. The study was commissioned by the Whirlpool Foundation.

34. *Id.* at 30.

35. *See id.*

makers who cannot afford a job are victims of the forces McCaffery describes, they amount to a small portion of all women. On the other hand, they also constitute several million people—certainly a large enough number to be concerned about.

New Providers supports McCaffery's analysis in an additional respect. McCaffery claims that many middle-class wives would prefer part-time jobs, but are pushed by the tax system into all-or-nothing choices.³⁶ If he is right, many full-time workers should express a preference for part-time work. According to *New Providers*, they do. Of the full-time workers surveyed, only 19% said they would work full time if money were not an issue. Twice as many full-time workers, 38%, said their preference was part-time work.³⁷

B. IF WIVES DO CHANGE THEIR BEHAVIOR, WILL THEY BE BETTER OFF?

When McCaffery claims that women are taxed more than men, and that ending the greater taxation of women would improve women's well-being, he slides over a crucial distinction. The *earnings* of wives may be taxed more than those of husbands (if couples view the wife as the secondary earner), but it does not necessarily follow that the *welfare* of wives suffers because of this difference in tax burdens on earnings. That depends on marital sharing patterns, a topic on which McCaffery has very little to say.

Consider a simple example. Husband ("H") is firmly committed to a job paying \$30,000 a year, and Wife ("W") must decide between a \$30,000 job and staying home to perform domestic labor worth \$20,000. Suppose a joint return system is in place. This system taxes the first \$30,000 of spousal income at 20% and income above \$30,000 at 40%. W compares \$20,000 of tax-free imputed income with \$18,000 after-tax wages from the job and decides to stay home. Now suppose Congress, persuaded by Professor McCaffery, decides to tax W less and H more by switching to a separate return system. The new system taxes the first \$30,000 of income of each spouse at 30%, decreasing the marginal rate on W's earnings from 40% under the joint return system and increasing the marginal rate on H's earnings from 20%. W now compares \$20,000 tax-free imputed income

36. See TAXING WOMEN, *supra* note 2, at 142-44.

37. See NEW PROVIDERS, *supra* note 33, at 30 tbl.7 (noting that 21% preferred volunteer work and 21% preferred full-time homemaking).

from staying home with \$21,000 after-tax income from the job and decides to take the job.

W has changed her behavior in response to the change in her incentives, but has she been helped? The answer depends, in part, on whether *W* and *H* pool their incomes. Under the joint return system, with *W* staying home, their combined after-tax income was \$44,000 (\$24,000 after-tax from *H*'s job, and \$20,000 tax-free imputed income from *W*). Under the separate return system with *W* taking the job, their combined after-tax income is only \$42,000 (\$21,000 after-tax from each job), and they are \$2,000 worse off than before.³⁸ If *H* and *W* pool all their resources and share fifty-fifty, then *W* has lost \$1,000 from the reform designed to help her.³⁹ At the other extreme, if there is no spousal sharing—if the rule is, “you eat what you kill”—then *W* has gained \$1,000 from the reform (from \$20,000 before to \$21,000 after). The empirical question of how spouses share resources thus becomes crucial to whether McCaffery-inspired reform will have the intended effect. Although some commentators have considered the question of spousal pooling crucial to the choice between joint and separate returns,⁴⁰ McCaffery questions its relevance: “Even if couples do pool their income, there are gendered effects to a system of joint filing.”⁴¹ He thus sees no reason to review the evidence on spousal pooling.⁴² McCaffery dismisses the relevance of the pooling question too

38. The separate return system increases the tax burden on *H* by \$3,000. It may seem that there is an exactly offsetting decrease in the tax burden on *W*, from \$12,000 to \$9,000, but under joint returns *W* avoided \$2,000 of tax burden by choosing \$20,000 tax-free imputed income rather than \$18,000 after-tax wages. The first \$2,000 of the apparent tax decrease on *W* merely equalizes the after-tax result from the job with the imputed income from staying home; only the last \$1,000 of the tax decrease is a real gain. The net result of the \$3,000 burden on *H* and the \$1,000 benefit to *W* is a \$2,000 burden on the couple.

39. Careful readers may have noticed this example is slightly unfair to McCaffery in one respect. Taxing men more and women less should result in a net increase in national taxable income. Labor supply elasticity estimates indicate that women's taxable income would increase more than men's would decrease. See TAXING WOMEN, *supra* note 2, at 179-84. If that is right, then the revenue-neutral new rate in the example would be somewhat lower than 30%. If it were enough lower, *W* would fare better under separate returns after all. In the example, the separate return rate would have to be below 26.67%. While it is possible that the revenue-neutral rate would be low enough to leave *W* better off, there is no particular reason to think that it would. If McCaffery were to defend separate returns on this basis, he would have to offer evidence that the revenue-neutral rate would be low enough to improve *W*'s economic position.

40. See, e.g., Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 84-91 (1993) (opposing joint returns because of belief that pooling is not the norm); Michael J. McIntyre & Oliver Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573, 1590 (1977) (favoring joint returns because of belief that pooling is the norm).

41. TAXING WOMEN, *supra* note 2, at 55.

quickly. He is right that the choice of filing unit has behavioral effects that do not depend on the presence or absence of pooling, but he misses the point that wives will benefit from behavioral changes in response to separate returns only if there is little or no pooling. In a previous article I reviewed the literature on spousal pooling.⁴³ I concluded that although this is an area in which evidence is hard to obtain and even harder to interpret, “whether the focus is on attitudes, reported behavior, or income and expenditure patterns, the evidence of pooled marital income consumption is quite strong.”⁴⁴ If that conclusion is correct, then a switch to separate returns may actually *harm* the homemaker who becomes a wage earner.

C. WOMEN’S GAINS FROM A WIDER PERSPECTIVE

McCaffery might respond that a focus on dollars of after-tax income in a single year is simplistic and that the homemaker who becomes a wage earner will gain in some broader sense—for example, by increasing her human capital, which will give her greater economic self-sufficiency in case of divorce.⁴⁵ Anne Alstott makes the important point, however, that years of experience in most low-paying, low-skilled jobs do *not* increase one’s earning power.⁴⁶ Thus the mere fact that a wife takes a job does not mean she is building human capital.⁴⁷

42. McCaffery does note, in passing, that the assumption of spousal pooling has “come under fierce attack by the likes of Marjorie Kornhauser, who actually troubled to survey couples on how they in fact pooled their income.” *Id.* at 76. Actually, as I have explained elsewhere, Kornhauser gives a tortured interpretation to her own data. Fairly read, her data strongly suggest that most spouses do pool their resources. See Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 350-51 (1994).

43. See Zelenak, *supra* note 42, at 348-54.

44. *Id.* at 353.

45. McCaffery mentions this in passing. See TAXING WOMEN, *supra* note 2, at 152 (explaining that “such work may generate lifetime gains, the long-term money benefits of staying in the paid workforce outweighing the short-term costs of losing money during early child-rearing years”).

46. See Alstott, *supra* note 28, at 2024-25.

47. To the extent she is building human capital, however, there is an interesting tax effect which McCaffery does not mention. Increase in value of human capital is treated as unrealized appreciation, and so is not taxed until it is converted into earnings. This tax deferral on human capital favors working wives over full-time homemakers and to some extent counteracts the various tax biases against working wives identified by McCaffery. See Zelenak, *supra* note 42, at 376-77. McCaffery might defend not mentioning this effect on the grounds that it is not peculiar to working wives: All working persons benefit from tax deferral on human capital accumulation. But McCaffery convincingly refutes Boris Bittker’s claim that the nondeductibility of mixed business-personal expenses is not a women’s issue, because all workers incur such costs. McCaffery demonstrates that nondeductibility has a disparate impact on women because it is women who are on the margin. See TAXING WOMEN, *supra* note 2, at 72-73, 108, 120. For the same reason, the favorable tax treatment of human capital has a disparate favorable impact on working wives.

McCaffery might also respond by explaining that separate returns are a step towards his long-term utopian vision of a society in which husband and wife both have good part-time jobs and share equally in the care of home and children.⁴⁸ In this society working wives would not have the burden they now have of full-time paid labor *and* an exhausting “second shift” at home (often with little or no help from husbands).⁴⁹ Although McCaffery implies tax reform will move us toward that utopia, he does not offer a convincing explanation of how it will happen. In the book he offers virtually no explanation. In an earlier article, he suggests that higher after-tax wages for wives “might . . . remove some of the supply-side impediments—many aggravated by the tax system—to forming more vibrant part- and flexible-time work arrangements.”⁵⁰ In other words, middle-class wives, who now resist part-time work because it yields so little net gain, will be more interested in such work if it yields greater gain because it is taxed less. In the book he also expresses hope that taxing men more will encourage men to replace some of their taxable income with tax-free imputed income from homemaking.⁵¹

The effects he describes may occur to some extent, but he offers no reason to think the effects will be significant. The best that can be said is that separate returns may help a little in the development of quality part-time labor markets.⁵² The more obvious way to address the paucity of

48. See *TAXING WOMEN*, *supra* note 2, at 233-36, 255. McCaffery also laments the absence of quality part-time jobs in McCaffery, *Slouching*, *supra* note 2, at 619-22, 651-54.

Of course, what makes a job full-time versus part-time is a social construct, not a fact of nature. A “full-time” 40-hour workweek leaves 128 hours for everything else. At the turn of the 20th century the average American workweek was almost 60 hours, and 20 years later it was still almost 50 hours. See BENJAMIN KLINE HUNNICUTT, *WORK WITHOUT END: ABANDONING SHORTER HOURS FOR THE RIGHT TO WORK 1* (1988). From the point of view of an early 20th century worker, we have already achieved part-time work for everyone. One can imagine a future reformer, writing in 2097, complaining that there is no quality part-time work; in the typical marriage both spouses must work a full thirty-two-hour week.

49. McCaffery remarks that working wives must “work like men [i.e., full time], [and] continue to bear primary responsibility around the home, [while there is] no pressure on men to change *their* ways.” *TAXING WOMEN*, *supra* note 2, at 238.

50. McCaffery, *Slouching*, *supra* note 2, at 665. McCaffery also notes these supply-side impediments to part-time work in the book. See *TAXING WOMEN*, *supra* note 2, at 153. Much of the disincentive to part-time work relates to economies of scale in costs. McCaffery speculates (rather conservatively) that working half time might involve 60% of the costs of working full time. See *id.* at 152.

51. See *TAXING WOMEN*, *supra* note 2, at 200-01.

52. In an article McCaffery advocates combining his tax reform proposals with the repeal of the federal legislation prohibiting sex discrimination in pay, so that firms could “justify, on exclusively rational grounds, lower pay for women.” McCaffery, *Slouching*, *supra* note 2, at 656. He does not repeat this deregulatory reform proposal in the book. In a detailed critique of *Slouching*, Anne Alstott concedes McCaffery’s proposal *might* result in greater labor market flexibility, but concludes that the

quality part-time jobs would be by direct regulation—such as legislating a thirty-two-hour workweek as the norm,⁵³ or by mandating health care, retirement contributions, and perhaps child care for part-time workers.⁵⁴ McCaffery notes in passing that “such centrally mandated regulations suffer from some well-noted problems,”⁵⁵ but he does not attempt a serious comparison of the tax and regulatory approaches.

Even if tax reform magically resulted in a world where everyone’s job was only thirty-two hours a week, it is unclear how significant a victory that would be for wives. There is evidence that husbands increase their domestic labor very little when their wives work outside the home.⁵⁶ McCaffery himself made this point in an earlier article: “[T]he ‘new’ two-earner family seems largely to have added extra workplace responsibilities to the wife’s burdens, while holding most of the husband’s activities and the wife’s nonmarket production constant.”⁵⁷ In the book he states that women who have full-time jobs “continue to bear primary responsibility around the home”⁵⁸ and that fathers of young children are “overwhelm-

risk of adverse consequences is unacceptably high. See Alstott, *supra* note 28, at 2033-42. Alstott’s criticism of the risk of the proposal relates to the repeal of equal pay legislation. There is nothing particularly high risk, in my opinion, about a move to separate filing.

53. Juliet B. Schor has proposed a number of related amendments to the Fair Labor Standards Act (“FLSA”), with the goal of reducing the workweek for all workers. Juliet B. Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 CHI.-KENT L. REV. 157, 167-71 (1994). Her proposals include: making 32 hours the standard workweek, replacing premium pay for overtime with compensatory time off, giving employees the option to forgo annual raises in favor of fewer hours of work, covering salaried workers (as well as wage workers) under FLSA, and legislating a four-week paid vacation.

54. Conversely, it might be more effective to end current requirements or incentives for fringe benefits for full-time workers. As McCaffery explains, when only full-time workers are entitled to fringe benefits, the work force tends to separate into long-workweek full-time workers with benefits, and short-workweek part-time workers with no benefits. See TAXING WOMEN, *supra* note 2, at 130-31.

55. *Id.* at 248.

56. The classic work on this subject, the title of which has passed into common usage, is ARLIE HOCHSCHILD, *THE SECOND SHIFT* (1989). Although the book consists primarily of case studies of eight two-earner couples, Hochschild also reports some statistical results. She found that, “on average, women report doing about 75% of the housework tasks.” *Id.* at 276. In 18% of the couples studied, the spouses shared the second shift equally; in 21% the husband did 30 to 41% of the work; and in 61% the husband did 30% or less. See *id.* In no case did the husband do the majority of the housework. See *id.* Another study found that when a wife moves from being a full-time homemaker to being a full-time wage earner, the husband typically increases his domestic labor by only 116 hours annually (a little over two hours a week). See Schor, *supra* note 53, at 159. On the other hand, Schor also found that total annual working hours—paid and unpaid—were almost identical for wife (3,279 hours) and husband (3,209 hours) in the typical two-earner couple. For a survey of the literature in this field, see Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 8-17 (1996).

57. McCaffery, *Gender Bias*, *supra* note 2, at 985.

58. TAXING WOMEN, *supra* note 2, at 238.

ingly unlikely to be home helping out—now, then, or ever.”⁵⁹ If most men simply refuse to do substantial housework, no matter what,⁶⁰ it is not clear that wives would benefit by being enticed into the labor force by lower taxes on their earnings. The housewife lured into market labor by tax reform and left with all her previous housework as well is more stressed than before, even if the job is only thirty-two weekly hours.⁶¹ She will be even worse off if good part-time work does not emerge and she finds herself with a forty-hour job and all the housework. On the other hand, if good thirty-two-hour jobs do emerge, wives who are currently faced with forty-hour jobs and the second shift at home will gain.

The basic point is simple: The government can do little to make husbands take on more family labor. If husbands refuse to take on more family labor, McCaffery’s utopia is unattainable, even in the unlikely case that his reforms do result in a profusion of good part-time jobs.

D. TWO WAYS OF LOOKING AT THE STACKING EFFECT

Despite my doubts about McCaffery’s assumption that wives will benefit from separate filing, I still favor separate returns, partly for reasons unrelated to the stacking effect⁶² and partly because of an objection to the stacking effect that does not depend on proof that women will be better off under separate filing. The stacking effect violates neutrality in two ways. First, it is not neutral between men and women because it taxes wives (if they are secondary earners) more heavily than husbands. Second, it is not neutral between different models of marriage because it discourages wives from taking jobs. This creates a bias in favor of the one-earner model over the two-earner model. McCaffery explains both nonneutralities.⁶³ As the book goes on, however, he emphasizes the heavier tax burden on women.⁶⁴

59. *Id.* at 266.

60. McCaffery expresses a hope that an increased tax on the earnings of husbands will cause them to reconsider their aversion to imputed income, but it is just a hope. *See id.* at 200-01.

61. Anne Alstott makes a similar point. *See Alstott, supra* note 28, at 2023 (questioning “[w]hether individual filing accomplishes gender role change in the more fundamental sense of changing the division of family labor”).

62. Separate returns would eliminate marriage penalties and bonuses—an issue of considerable importance to many people, even if the behavioral effects are small. *See Zelenak, supra* note 42, at 358-63. This argument for separate returns is discussed *infra* text accompanying notes 122-134.

63. *See TAXING WOMEN, supra* note 2, at 184 (“[S]ociety shouldn’t be taxing wives *more* than husbands. But that’s just what we are doing, as a matter of fact.”); *id.* at 12 (“The basic push of tax is toward traditional single-earner families.”).

64. McCaffery devotes two chapters in the latter part of the book to optimal tax, and it is the heavier taxation of wives that is so perverse under optimal tax theory. *See id.* at 163-201.

The problem with the first argument for separate filing—which criticizes the joint-filing system because it taxes the earnings of wives more heavily than those of husbands—is its consequentialist nature. The argument is convincing only if it can be demonstrated that wives will be better off when the tax burden on their earnings is decreased, and that is very difficult to prove. By contrast, the argument based on nonneutrality between the one-earner and two-earner models of marriage is not consequentialist. It is inappropriate for the tax system to favor one model of marriage over the other.⁶⁵ But the stacking effect of joint filing does exactly that by subjecting the very first dollars earned by a wife to high marginal rates. Separate filing would move the tax system toward neutrality between the two models.⁶⁶ A major attraction of this argument for separate filing is that it does not depend on predictions. The argument is simply that the tax system should be as neutral as practical between the two models of marriage and that separate filing is a practical way of making the system more nearly neutral. The argument does *not* require a demonstration that women will be better off under separate filing.

III. HOW ANTI-FEMINIST HAS CONGRESS REALLY BEEN?

A. THE QUESTION OF DISCRIMINATORY INTENT AND THE 1948 SWITCH TO JOINT RETURNS

McCaffery claims throughout the book that the tax system was *designed* to keep wives in their traditional homemaker role.⁶⁷ This is a plausible reading of the history of social security spousal benefits⁶⁸ and perhaps of the history of fringe benefits taxation,⁶⁹ but it is not a reasonable

65. See Zelenak, *supra* note 42, at 371.

66. Although separate filing would move the system in the direction of neutrality between the one- and two-earner models, complete neutrality would require not taxing the earned income of wives at all, or taxing homemakers' imputed income, or allowing a deduction for all costs incurred by two-earner couples to replace imputed income. All three ways of achieving complete neutrality are politically unrealistic (and probably deservedly so), although I agree with McCaffery that "expanded child-care deductions are a perfectly sensible response to imputed income." *TAXING WOMEN*, *supra* note 2, at 123.

67. See, e.g., *id.* at 26, 229, 248.

68. See *id.* at 98-101. There is no question that the spousal benefits structure was intended to help traditional couples; whether that necessarily constitutes hostility to two-earner couples is debatable.

69. See *id.* at 126-31. Actually, I am not convinced that fringe benefits taxation has major gendered effects, let alone that gendered effects were intended. McCaffery argues that the provision of tax-favored fringe benefits for the entire family based on the husband's job means that the wife is discouraged from going to work to earn duplicative fringe benefits: "Once the family has medical insurance and adequate retirement security, it will not value these benefits when they are also part of the

reading of the switch to joint returns in 1948. Far from being intended, the stacking effect of joint returns—the imposition of high marginal tax rates on the wife as the marginal earner—was not even recognized in 1948. Yet McCaffery makes statements that leave the reader with the impression that the stacking effect was understood in 1948 and that the joint return was designed to keep wives at home.⁷⁰ The historical record does not support this interpretation. McCaffery knows this; at one point he correctly states that “no one saw the secondary earner bias [in 1948] because there were so few secondary earners.”⁷¹ McCaffery’s attempt to have it both ways on

secondary-earning wife’s pay package.” *Id.* at 129. With respect to health insurance, this is true only if the husband’s job provides full family coverage for free, that is, with no reduction in the husband’s cash compensation. But the trend is strongly away from such generous health insurance packages. Between 1979 and 1993, the percentage of employees of medium and large private establishments who received wholly employer-financed family health insurance fell from 54% to 21%. And between 1983 and 1993, the average family monthly contribution to contributory plans rose from \$32.51 to \$107.42. See CELIA SILVERMAN, MICHAEL ANZICK, SARAH BOYCE, SHARON CAMPBELL, KEN MCDONNELL, ANN MARIE REILLY & SARAH SNIDER, EBRI DATABOOK ON EMPLOYEE BENEFITS 306-07 tbls.9.9, 9.10 (Carolyn Pemberton & Deborah Holmes eds., 3d ed. 1995). In any event, the tax laws do not encourage employer-paid full family health insurance coverage over contributory plans; contributory plans are eligible for the same tax-favored status as employer-paid plans. See I.R.C. §§ 106, 125 (1994). As for pensions, it is far from obvious that the typical husband’s pension is so generous that the family has no interest in additional retirement savings. If that were the case, it would have made no sense for the *Contract* to have included expanded individual retirement accounts for homemakers. See TAXING WOMEN, *supra* note 2, at 218-19. McCaffery’s claim that women workers do not value fringe benefits is also contradicted by the survey results in NEW PROVIDERS, *supra* note 33, at 61, 62 tbl.24. Women were asked how much they worried about several workplace issues. Of 11 issues, a majority of women (56%) worried “a great deal” about only one: employers providing fewer benefits. See *id.* By comparison, the women’s issue that most concerns McCaffery, balancing work and family life, was a major worry of only 46%. See *id.*

70. “Taxing equal-earning couples equally . . . [w]as in important regards designed . . . to place a large burden on women . . .” TAXING WOMEN, *supra* note 2, at 26. “All along, conscious choices were made to tax married women’s paid work, to keep them at home, and to set up a system meant to reward and entrench the dominant traditional model of family life.” *Id.* at 229. “[T]he tax laws were set up to reward and entrench this primary [male] breadwinning role, as we saw most clearly in the social security and fringe benefit aspects of the tale.” *Id.* at 248. He also claims, incorrectly, that Stanley Surrey’s contemporaneous understanding of the effect of the 1948 legislation was that wives would go back to homemaking. See *id.* at 57. Surrey is discussed *infra* text accompanying notes 76-81.

McCaffery has repeated this claim in a CNN interview about his book: After World War II, in 1948, there was a decision to have joint filing in the United States. That decision really had the effect of penalizing two-worker families. At that time, we knew about that. The bias was certainly known and Congress thought it was a good thing. It was a good thing because it might encourage married women to go back into the homes that they had left at least briefly during World War II.

CNN Today (CNN television broadcast, Mar. 17, 1997), available in LEXIS, Nexis Library, CURNWS File.

71. *Id.* at 58.

this question is likely to confuse many readers.⁷² What follows is an attempt to clear up the confusion.

As McCaffery's own telling of the story demonstrates,⁷³ the adoption of joint returns was a response to two Supreme Court opinions⁷⁴ which had given one-earner couples in community property states a tax advantage over one-earner couples in separate property states. The motivation for the 1948 legislation had everything to do with state marital property regimes and nothing to do with working wives. There is a reasonable but not overwhelming case to be made that the change was motivated by hostility toward increased property rights for nonworking wives,⁷⁵ but there is no evidence that the change was motivated by a desire to enlist the stacking effect to keep wives at home.

The only evidence McCaffery cites in support of the intentionality of the stacking effect is Stanley Surrey's comment, following the 1948 legislation: "[W]ives need not continue to master the details of the retail drug business, electrical equipment business, or construction business, but may turn from their partnership 'duties' to the pursuit of homemaking."⁷⁶ Read in context, the point of Surrey's remark is clear. The next sentence, which McCaffery does not quote, reads, "Their tax advisers can proceed to unravel the tax and other snarls created by tax-avoidance family partnerships."⁷⁷ Surrey's point is that joint returns would put an end to tax-motivated family partnerships. Husbands in separate property states who owned their own businesses had attempted self-help income splitting by making their wives partners in the family business. Many of these partnerships lacked economic substance, and Surrey viewed them as threats to

72. It has already confused reviewers of *Taxing Women*, who report that the secondary-earner bias of joint returns was intended in 1948. See Harris Collingwood, *The Mommy Tax*, WORKING WOMEN, Feb. 1997, at 35; Ellen Goodman, *How Tax Laws Limit Married Women's Choices About Work and Family*, BOSTON GLOBE, April 13, 1997, at D7.

73. See *id.* at 29-57.

74. See *Lucas v. Earl*, 281 U.S. 111 (1930); *Poe v. Seaborn*, 282 U.S. 101 (1930).

75. The case is made most thoroughly by Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 L. & HIST. REV. 259 (1988). McCaffery also presents evidence in support of this interpretation. See TAXING WOMEN, *supra* note 2, at 46-54. An alternative interpretation, offered by Boris Bittker, is that Congress believed that spousal income splitting was inevitable—if not by joint return legislation, then by a state-by-state adoption of community property. Given that inevitability, Congress wanted to claim the credit for the tax reduction rather than let state legislatures take the credit. Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1413-14 (1975).

76. Stanley S. Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1111 (1948), *quoted in* TAXING WOMEN, *supra* note 2, at 57.

77. See *id.*

"the integrity of our tax structure."⁷⁸ McCaffery calls Surrey's examples "bizarre."⁷⁹ They would be bizarre if they were aimed at working wives generally, but they are not bizarre when properly understood as limited to the family partnership phenomenon. Surrey's facetious reference to "duties," to which McCaffery objects,⁸⁰ is motivated not by hostility to working wives but by hostility to sham family partnerships in which wives had no real duties.

It is true that Surrey assumes that a wife's real duties are in the home, but it does not follow that Surrey applauded the stacking effect, or even noticed it. Surrey and others associated with the 1948 legislation were so secure in their view of wives as naturally and inevitably homemakers that it never occurred to them that special tax disadvantages were needed to keep wives home. They did not see the stacking effect because in their minds wives were *not* on the margin between housework and paid work; wives were committed to the home and would stay there regardless of the tax rules.⁸¹

In fact, McCaffery does not cite—and I am not aware of—any description in the law review literature of how the stacking effect discourages wives from working prior to Grace Blumberg's pathbreaking 1972 article.⁸² Even then, it took the insight of a feminist—rather than the cunning of a sexist male—to notice the effect. A classic example of men *not* understanding the stacking effect is the 1960 *Stanford Law Review* article by Oliver Oldman and Ralph Temple.⁸³ Oldman and Temple strongly favor joint returns because they believe that "the economic lives of a hus-

78. *Id.*

79. TAXING WOMEN, *supra* note 2, at 57.

80. *See id.*

81. McCaffery himself makes this point in the chapter following his discussion of the 1948 legislation. *See id.* at 58. The increase in the labor force participation of wives during World War II appeared to Surrey and his fellows as an aberration, not the beginning of a trend. The labor force participation of wives had risen from 16.7% in 1940 to 25.6% in 1944, but it fell to 21.4% by 1947. *See* BUREAU OF THE CENSUS, *supra* note 31, at 225 tbl.294.

82. *See* Grace Ganz Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49, 52-54 (1972). Blumberg notes that the stacking effect was understood and explained in 1966 by Canada's Royal Commission on Taxation. *See id.* at 53 n.23 (citing 3 REPORT OF THE ROYAL COMMISSION OF TAXATION: TAXATION OF INCOME 189 (1966)). She also notes a brief favorable allusion to the stacking effect in Eugene J. Brenner, *An Inquiry Into the Possibility of Lowering the Tax Rates by Increasing the Tax Base Through Elimination of Income Splitting*, in 1 COMPENDIUM OF PAPERS ON BROADENING THE TAX BASE 487, 491-92 (Ways and Means Comm. Print 1959). *See* Blumberg, *supra*, at 92.

83. *See generally* Oldman & Temple, *supra* note 30. McCaffery discusses this article briefly, but does not comment on the strange aspect of the article described here. *See* TAXING WOMEN, *supra* note 2, at 27.

band and wife are inseparable.”⁸⁴ They can find only one “plausible justification” for separate returns, which has nothing to do with the stacking effect.⁸⁵ In a bizarre paragraph—bizarre to anyone who understands the stacking effect—they discuss the arguments of “[t]hose who oppose taxation of the married couple as a unit.”⁸⁶ They note that a country might find it desirable for wives to be full-time homemakers, but they reject the idea that the tax system should push wives in that direction: “[A] deliberate design to discourage [the working wife] from earning money would be discriminatory and unjust.”⁸⁷ Not only do they not understand that the stacking effect of joint returns discourages wives from working outside the home, they seem to think (for some unexplained reason) that *separate* returns reflect hostility toward working wives.

McCaffery’s suggestions that the 1948 legislation was aimed at working wives are based on guilt by association. There is some evidence that *other* aspects of the tax system are based on hostility toward working wives—the best case relates to social security—and McCaffery writes as if this makes all congressional actions concerning the taxation of marriage part of a conspiracy against women: “[T]he tax laws were set up to reward and entrench this primary breadwinning role, as we saw *most clearly* in the social security and fringe benefit aspects of the tale.”⁸⁸ But we do not just see it *most clearly* in those aspects, we see it (if we see it at all) *only* in those aspects. Of all the ways in which the tax system disadvantages wives, McCaffery is clearly most interested in the stacking effect. He calls separate income tax returns his most important reform proposal.⁸⁹ His discussion of the stacking effect precedes his discussion of social security and fringe benefits and is three times as long as the other two discussions combined.⁹⁰ He would have a more dramatic story to tell if he could prove that the stacking effect was not an accident. But all he can do is read too much into a passage from Stanley Surrey and hint that the evidence of discriminatory intent with respect to other legislation somehow transfers to 1948. His interpretation is not convincing.

84. Oldman & Temple, *supra* note 30, at 597.

85. This plausible justification relates to “the difficult problems of burden allocation,” by which Oldman and Temple mean the range of issues usually discussed under the heading of marriage penalties and bonuses. *Id.* at 603.

86. *Id.* at 601.

87. *Id.* at 602.

88. TAXING WOMEN, *supra* note 2, at 248 (emphasis added).

89. *See id.* at 278.

90. *See id.* at 15-85 (discussing joint returns), 89-105 (discussing social security), 126-31 (discussing fringe benefits).

McCaffery is right about the existence of the stacking effect, even if his suggestions that Congress intended the effect in 1948 are wrong. Isn't that all that matters? I believe getting the intent right does matter, if only for the sake of the historical record. In addition, however, McCaffery makes a tactical mistake in pointing to evil intent where it does not exist. McCaffery and I share the goal of convincing Congress to abandon the joint return system. Congress is not likely to respond favorably to an argument that puts it on the defensive by accusing it of having enacted a sexist system designed to keep wives out of the workplace. The prospects are much better for an appeal based on the inadvertence of the stacking effect; the stacking effect was a mistake made by well-intentioned legislators of good will that should now be corrected by better-informed legislators.

B. CAN CONGRESS EVER DO THE RIGHT THING?

Much of the attraction of *Taxing Women* lies in the way McCaffery combines careful technical analysis with a passionate concern about the welfare of women. In some instances, however, McCaffery's anger about the way the tax laws have treated women leads him to criticize *any* action of Congress as hostile to women. Sometimes these criticisms border on logical inconsistencies. For example, after having devoted many pages to a feminist critique of income tax *joint* returns, he complains that the *separate* taxation of spouses under social security "tears spouses asunder."⁹¹ Similarly, McCaffery gives Congress little credit for the introduction of the secondary-earner deduction in 1981.⁹² Yet McCaffery expresses indignation over the 1986 repeal of the deduction.⁹³ And McCaffery criticizes the antifeminist effect of proposals for increased dependency exemptions,⁹⁴ but never mentions that Congress has allowed the value of dependency exemptions to erode significantly since 1948, with profeminist consequences.⁹⁵

91. *Id.* at 91.

92. "One may . . . think that it marks a deviation from the basic story of policymakers having little concern for secondary earners But we should pause. . . . [T]his option was the least expensive and therefore—to the Traditionals [one-earner couples]—the most favorable of the three under consideration." *Id.* at 75.

93. *See id.* at 78-81.

94. *See id.* at 221-24. The problem is that under a joint filing system the benefit of increased exemptions goes to the primary earner.

95. If the dependency exemption had kept pace with inflation and real income growth between 1946 and 1993, it would have been \$8650 in 1993 (instead of the actual \$2350). *See* Eugene Steuerle, *Decline in the Value of the Dependent Exemption*, 62 TAX NOTES 109 (1994).

Closely related to McCaffery's readiness to assign blame to Congress is his cursory examination of the difficulties in correcting the tax biases he describes.⁹⁶ He briefly proposes separate returns for spouses, a more generous child-care deduction, and either earnings sharing or a secondary-earner exemption level under Social Security.⁹⁷ But he does not discuss technical issues in designing these provisions, or whether they would have unintended antiwomen effects of their own. I appreciate his goal—which he achieves most impressively—of keeping the book interesting and accessible to the general reader, and I understand how detailed reform proposals could interfere with that goal. Nevertheless, some examination of the details of reform proposals is needed. If the reforms are not technically feasible, or if they raise feminist problems of their own, then it becomes harder to attribute current law to the “forces of patriarchy.”⁹⁸

I discuss technical issues in separate return design elsewhere⁹⁹ and conclude that, although separate returns do raise some difficult design problems, there are satisfactory solutions to most of these problems.¹⁰⁰ The one exception is the problem of the Earned Income Tax Credit (“EITC”). I agree with McCaffery that at low incomes the problem with the taxation of marriage is not the secondary-earner bias, but the marriage penalty, which is due primarily to the phaseout of the EITC.¹⁰¹ McCaffery also states (and who could disagree?) that “at least we shouldn’t be *penalizing* marriage among the poor, as we clearly are.”¹⁰² But how do we get there from here? McCaffery never says, unless his recommendation for separate returns is intended to include ignoring marriage for purposes of calculating the EITC.

There are only three ways to eliminate the marriage penalty caused by the phaseout of the EITC if one starts from the standard assumption that the credit must be phased out to avoid subsidies for the nonpoor.¹⁰³ One is

96. “I never intended this book to be a specific, practical program for change.” *TAXING WOMEN*, *supra* note 2, at 277.

97. *See id.* at 278.

98. *Id.* at 268.

99. *See Zelenak*, *supra* note 42, at 381-401.

100. It would not be easy, however, to eliminate all vestiges of the stacking effect. For example, most of the possible rules for allocation of income from property between the spouses would create a stacking effect in some marriages. *See id.* at 388.

101. *See TAXING WOMEN*, *supra* note 2, at 83-84, 194.

102. *Id.* at 194.

103. *See Anne L. Alstott, The Earned Income Credit and the Limitations of Tax-Based Welfare Reform*, 108 *HARV. L. REV.* 533, 551-52 (1995); *TAXING WOMEN*, *supra* note 2, at 83 (conceding “the phaseout of the earned-income credit makes some sense”).

to repeal the EITC itself. McCaffery recoils from this in horror,¹⁰⁴ and I agree. The fact that the EITC marriage penalty is a side effect of an anti-poverty program which does considerable good (at considerable expense) might cause McCaffery to cool his rhetoric, but it does not: "Poor families . . . join the ranks of victims of male-oriented tax policymakers."¹⁰⁵

The second solution, which may be implicit in McCaffery's call for separate returns, is to ignore marriage for purposes of the EITC. Under that approach, a wife who earns \$10,000 from a part-time job would be eligible for a substantial credit, even if her husband's income were in the six-figure range.¹⁰⁶ Perhaps McCaffery would be willing to accept this result to avoid EITC marriage penalties; if so, he should mention that this controversial result is implicit in his proposal.

The third possibility is to redesign the EITC in a way analogous to the 1948 joint return system, so that it has only marriage bonuses. In technical terms this would mean that, compared to single taxpayers, married couples would have twice the "earned income amount,"¹⁰⁷ twice the maximum credit amount, and their phaseout would begin and end at twice the income levels. Of the three solutions, this may be the least objectionable, but even it has serious problems. First, any system which produces only marriage bonuses necessarily produces substantial penalties for singles. If it is inappropriate to penalize marriage among the poor, it may also be inappropriate to penalize low income single parents, who are, if anything, under more stress than low income couples. Second, some married couples would be eligible for the credit, despite not being obvious candidates for membership in the working poor. If, for example, the EITC rules applicable to couples were derived by doubling the 1996 dollar amounts applicable to singles,¹⁰⁸ the phaseout would not be complete for a married couple until their adjusted gross income ("AGI") reached \$56,990.¹⁰⁹ Maybe McCaffery is open to the prospect of earned income credits for couples with AGIs over \$50,000. But, again, if that is inherent in his proposed solution he should say so and explain why he considers that result acceptable.

104. *See id.* at 84.

105. *Id.*

106. *See Zelenak, supra* note 42, at 398.

107. I.R.C. § 32(a)(1) (1994). In other words, the maximum earned income eligible for the credit would be twice as high for couples as for singles.

108. *See Rev. Proc. 95-53, 1995-2 C.B. 445, 447.*

109. This number would be smaller if it were based on doubling a smaller completed phaseout amount applicable to single taxpayers. But that would mean making low income singles worse off than they are now in order to make the elimination of the marriage penalty palatable.

Daniel Shaviro has recently challenged the assumption that the EITC must be phased out.¹¹⁰ His basic insight is that the credit should be viewed as part of an integrated tax-and-transfer system, rather than as a free-standing program.¹¹¹ Consider, for example, a system in which the first \$10,000 of wages is eligible for a twenty percent EITC, and wages in excess of \$10,000 are simply taxed at a flat rate of twenty-five percent, with no explicit phaseout of the credit. Even without an explicit phaseout, when wages reach \$18,000, the \$2000 credit will have been fully offset by \$2000 of tax. Those earning less than \$18,000 receive a net transfer, and those earning more pay a net tax. It is true that even a taxpayer who earns \$110,000 (for example) is still entitled to calculate a \$2000 credit on his first \$10,000 of wages, but there is nothing wrong with that as long as his net tax burden of \$23,000 is deemed appropriate.

Shaviro's analysis is persuasive, and at first glance it suggests the simplest of solutions to the problem of marriage penalties created by the phaseout of the EITC: Do not have a phaseout. Upon reflection, however, things are not quite so simple. Suppose the system described above—a twenty percent credit followed by a twenty-five percent tax, with no explicit credit phaseout—is implemented on a strict separate return basis. A wife earning \$10,000 from a part-time job, married to a husband making \$100,000, will be entitled to a \$2000 transfer from the government. Perhaps that result is unobjectionable—after all, the *couple* is still a substantial net taxpayer—but my intuition is that the result would not be politically acceptable. It would not be easy to convince Congress or the public that the government should pay this wife \$2000 to take a part-time job, and nothing to stay home.

If it is not acceptable for this wife to receive a credit, then there is a need for a credit phaseout, after all. The required phaseout is not of the husband's credit, but of the wife's based on her husband's income. With that phaseout, marriage penalties return.

Even with Shaviro's insight, then, there is no simple solution to the problem of EITC marriage penalties. Perhaps the best compromise would be to begin the phaseout of the wife's credit only when the husband's income is sufficient to put the couple solidly within the middle class. That would avoid imposing a marriage penalty on the poor, while also avoiding subsidizing part-time jobs for wives of high-income husbands. My point is

110. Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 408-09, 462-66 (1997).

111. *See id.* at 462.

not that nothing can be done to improve the design of the EITC, but rather that improvement is considerably more complicated than just declaring, as McCaffery does, that “at least we shouldn’t be *penalizing* marriage among the poor.”¹¹²

Making Social Security friendlier to working wives is also more complicated than McCaffery explains in his “surprisingly easy answers.”¹¹³ He writes approvingly of two possible reforms. One is “earnings sharing.”¹¹⁴ Under this plan, all earnings of a married couple would be allocated equally to each spouse for purposes of determining the level of Social Security benefits to which each is entitled. From McCaffery’s point of view, however, earnings sharing would represent only a modest improvement over current law. Recall his complaint about current law. The first dollars of Social Security tax paid by a secondary-earning spouse are pure tax. Those dollars confer no benefit because the secondary-earning spouse is already entitled to spousal benefits based on her spouse’s earnings.¹¹⁵ This tax-without-benefit is a substantial deterrent to wives considering working outside the home.

But earnings sharing will have a similar, although less extreme, effect because of the highly progressive nature of the Social Security benefits program. Benefits are based on an individual’s “average indexed monthly earnings” (“AIME”) over her earning years. For eligibility year 1996, for example, monthly Social Security benefits were 90% of the first \$437 of AIME, 32% of AIME above \$437 to \$2635, and 15% of AIME above \$2635.¹¹⁶ Under earnings sharing, there is a stacking effect on the benefits side. The wife’s half share of her own earnings is stacked on top of her half share of her husband’s earnings, thus producing little benefit for the wife from her own earnings. Her half share of her husband’s earnings may have absorbed the 90% benefits bracket and perhaps the 32% bracket as well. She must pay the full payroll tax rate on her earnings, but because of the stacking effect they may be replaced at only 32% or 15%, or not replaced at all if her share of her husband’s earnings already puts her at the maximum benefit level. The irony is that earnings sharing has been advo-

112. TAXING WOMEN, *supra* note 2, at 194.

113. *Id.* at 102.

114. *Id.* at 102-03.

115. *See id.* at 95. McCaffery slightly overstates his case. The wife derives benefit from the tax on even her first dollars of earnings in the sense that Social Security based on her own earnings is not at risk in case of divorce. *See* 42 U.S.C. § 416(d)(1)-(2) (1994) (divorced homemaker entitled to old-age benefits based on the earnings of her exhusband only if they were married for at least 10 years).

116. *See* 42 U.S.C. § 415(a)(1) (1994); 1996 Cost of Living Increases and Other Determinations, 60 Fed. Reg. 54,751, 54,754 (1995).

cated by feminists as a better means than current law of protecting homemakers,¹¹⁷ yet it turns out that earnings sharing is subject to the same feminist critique McCaffery makes of current law: It discourages wives from working outside the home. Even with the best of intentions it is difficult to design laws consistent with both the feminist goal of protecting women in traditional gender roles and the goal of encouraging changes in gender roles.¹¹⁸

The other Social Security change McCaffery suggests is not taxing a secondary worker's earnings until they are at a level where they produce a marginal benefit (relative to the spousal benefits to which she is already entitled).¹¹⁹ The effect of this proposal would be to extend the special favorable treatment that is now available only to one-earner couples—basically, benefits for two based on taxing only one¹²⁰—to two-earner couples as well. This largesse must be financed by someone, but McCaffery says only that it should be “by someone besides working wives and mothers.”¹²¹ If the plan is to benefit all married couples and if Social Security benefits are to remain financed by Social Security taxes, increased benefits for married persons can be funded only by increased taxes (or decreased benefits) for singles. The proposal would achieve McCaffery's goal of alleviating the secondary-earner bias, but at the expense of unmarried workers. McCaffery complains that under the current system secondary earners subsidize stay-at-home spouses; however, it is not more fair to subsidize married people by increasing taxes on single people.

There is another possibility, however. The extension of special benefits to all married primary earners could be financed by a Social Security tax increase on all married primary earners. Not only would this be more fair than financing by singles, it would also further McCaffery's goal of taxing husbands more.¹²² In this case, fleshing out McCaffery's sug-

117. See TAXING WOMEN, *supra* note 2, at 103; Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein, and Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264 (1989); Grace Ganz Blumberg, *Adult Derivative Benefits in Social Security*, 32 STAN. L. REV. 233 (1980).

118. This is a theme that pervades Alstott, *supra* note 28.

119. See TAXING WOMEN, *supra* note 2, at 102.

120. Specifically, the special benefits are 150% of normal benefits while both spouses are alive and benefits that extend beyond the earner's death as long as the non-earning spouse is alive. See 42 U.S.C. § 402(b)(2), (e)(2)(A) (1994).

121. TAXING WOMEN, *supra* note 2, at 102.

122. McCaffery notes with approval that the secondary-earner exemption would be consistent with the optimal tax directive of taxing wives less, but he does not mention that increasing the tax on

gestion indicates that the proposal could work and could be even more attractive than McCaffery indicates. Fleshing out both Social Security reform proposals also indicates that McCaffery should be much more enthusiastic about a secondary-earner exemption than about earnings sharing. On the other hand, the closer look at the secondary-earner exemption also reveals serious political problems. Any increased tax on primary earners will be fiercely resisted by the primary earners themselves¹²³ and perhaps by their employers as well.¹²⁴

IV. FEMINIST-MOTIVATED QUESTIONS AND TAX-MOTIVATED QUESTIONS

McCaffery's argument for separate returns is based entirely on feminist values. As he emphasizes, he is "interested only in gender justice, in achieving equal concern and respect for women."¹²⁵ In an important recent article, Anne Alstott examines the choice between joint and separate returns, also solely from a feminist perspective.¹²⁶ Alstott is more doubtful of the value of separate returns than is McCaffery, but that is because her account of feminism values the choice to be a full-time homemaker more than does McCaffery's.¹²⁷ Furthermore, Alstott assumes the burden of proof is on those who would change the status quo, while McCaffery seems almost to value change for its own sake.¹²⁸ They agree, however, on the basic approach of resolving the issue of marriage and income tax filing units solely from a feminist perspective. Both are asking a feminist-motivated question about the tax system.

husbands to pay for the secondary-earner exemption would also meet with optimal tax approval. *See id.* at 278.

123. Perhaps primary earners in two-earner couples will be mollified by the corresponding decrease in their spouses' Social Security tax, but earners in one-earner couples will resist having to pay for benefits they now receive for free.

124. Even if employers believe the increased tax burden will fall entirely on employees, they will not be happy about the complication of different tax rates for different classes of workers.

125. *Id.* at 184.

126. *See Alstott, supra* note 28, at 2009-33.

127. Alstott considers supporting women who choose caregiving roles to be a major feminist goal, and she notes that full-time homemakers fare better under a joint return system. *See id.* at 2003, 2014-15.

128. In one of the articles out of which the book grew, McCaffery writes that "doing nothing, after years, even centuries, in which rational individuals have responded to market failures, is not an especially compelling policy." McCaffery, *Slouching, supra* note 2, at 650. Later in the same article, he justifies his reform proposals partly on the basis of "aesthetic predilection" and "pure hunch." *Id.* at 669. In the book he is even more blunt about his bias in favor of action: "Most important, though, we ought to firm up our resolve to do *something*." *TAXING WOMEN, supra* note 2, at 280.

In an earlier article advocating separate returns, I grabbed the other end of the stick.¹²⁹ I started by asking what I thought of as a pure tax question. Once the decision has been made to have an income tax with progressive marginal rates, it is necessary to have rules defining tax filing units. The question is: All things considered, what effect, if any, should marriage have on the definition of filing units? If one is designing a progressive income tax (or even a flat tax with an exemption level), one must ask that question, even if one has no particular social policy in mind.

Although it was not a social policy agenda that led me to ask the question, I considered the behavioral effects of the various options relevant in choosing between them, as I also considered relevant ease of administration¹³⁰ and perceptions of fairness.¹³¹ I did make what might be considered a feminist argument for separate returns, based on the claim that the stacking effect of joint returns inappropriately takes sides in the great social debate between the one-earner and two-earner models of marriage.¹³² But two points are worth emphasizing. First, I purposely chose a weak form of feminism—so weak that others have differed over whether my argument is feminist at all¹³³—because I thought only a call for tax neutrality in the social debate could achieve widespread acceptance. Second, the feminist argument for separate returns has no particular pride of place in my analysis. In fact, I consider the capacity of separate returns to eliminate marriage penalties and bonuses the most important argument for separate returns, not because marriage penalties and bonuses raise important feminist issues and not because they have major behavioral effects, but because they deeply offend many people.¹³⁴

Thus there are two fundamentally different approaches to tax policy analysis of social issues. One approach (McCaffery's and Alstott's) starts with some nontax goal and asks how the tax system might be used to further that goal. The other approach (mine) starts with the tax system and asks how the tax system should be designed, keeping in mind (among other things) the social policy effects of tax system design. Both approaches are legitimate; neither is inherently superior to the other. They are simply attempts to answer different questions. From a purely political view of this particular issue, however, my approach is more likely to suc-

129. See Zelenak, *supra* note 42.

130. See *id.* at 381-401.

131. See *id.* at 358-63.

132. See *id.* at 365-72.

133. See Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1590 (1996) (feminist); Alstott, *supra* note 28, at 2011 & n.39 (not feminist).

134. See Zelenak, *supra* note 42, at 358-63.

ceed in effecting change. When McCaffery argues solely from a feminist perspective, he can succeed only if most lawmakers support his version of feminist goals. And when McCaffery puts aside issues of marriage penalties and bonuses because they are not feminist issues,¹³⁵ he throws away perhaps the most politically powerful argument for the separate return system he wants so much.

There is some evidence, however, that McCaffery is becoming more of a political realist. His decision to write a book explaining tax and gender issues to a general audience reveals a hope that his ideas will have consequences. Moreover, his policy recommendations in the book are more realistic than in his earlier work. In a previous article, McCaffery pushed strongly for a system which would—consistent with both optimal tax theory and his views of social justice—tax wives much *less* heavily than husbands: “[A] strong theoretical case exists for altering the basic rate structure to provide significantly lower, even negative rates for secondary earners, financed by higher rates on primary earners.”¹³⁶ Although McCaffery restates this theoretical case in the book,¹³⁷ he recognizes that it has no political prospects and that it “may not even be a good idea to enact it.”¹³⁸ He explicitly “back[s] off from [the] ideal change” of “[i]nstituting a thoroughly optimal tax plan”¹³⁹ and is content to call for separate filing.¹⁴⁰ The next step in his growing political realism is to incorporate the nonfeminist (but not antifeminist) arguments for separate returns.¹⁴¹

135. “[T]he marriage penalty is *not* a major part of the story of taxing women generally. . . . The major effect I want to emphasize—and it is important at all income levels—is the *secondary-earner bias*.” TAXING WOMEN, *supra* note 2, at 19.

136. McCaffery, *Gender Bias*, *supra* note 2, at 1060.

137. See TAXING WOMEN, *supra* note 2, at 192-93.

138. *Id.* at 278.

139. *Id.* at 280.

140. See *id.* at 278.

141. This is not to say that there is never political justification for making extreme arguments. When McCaffery demonstrates the theoretical case for subsidizing—rather than taxing—working wives, he helps redefine the political spectrum on this issue. Rather than being at an one end of the spectrum, separate filing becomes a natural compromise solution. In fact, McCaffery has had this effect on my own thinking:

By contrast with both current law and the McCaffery approach [of tax favoritism for working wives] a system based on the simple principle of individual taxation would be perceived by both sides of the great social debate as having neither the purpose nor the effect of taking sides in the debate and so would be acceptable to both.

Zelenak, *supra* note 42, at 371.

V. CONCLUSION

Two qualities of this book are rare. One is McCaffery's ability to make even the most difficult concepts clear to the general reader. The other is the way he combines careful technical tax accounting and economic analysis with a passionate concern for gender justice. Although that passion sometimes causes McCaffery to overstate his case—especially in terms of the amount of hostility to women he ascribes to Congress—it also gives the book much of its intellectual excitement.

In one sense, McCaffery is preaching to the choir. He assumes his readers share his views of gender justice and makes no attempt to defend his version of feminism. A social conservative who favored the traditional one-earner model of marriage would come away from the book with *increased* affection for current law. But McCaffery is telling the choir something it does not know: The tax laws implicate important feminist issues in hidden ways. That insight has the potential to change the tax laws. At one point McCaffery criticizes former Representative Patricia Schroeder, perhaps the leading feminist in Congress until her recent retirement, for supporting increased tax exemption levels in the mistaken belief they served a feminist agenda.¹⁴² McCaffery explains how increased exemptions, in the context of joint returns, have antifeminist effects. Despite having been taken to task, Schroeder has supplied a glowing dust jacket endorsement of *Taxing Women*, calling it a "must-have primer for any woman who wants to understand how our current tax system affects her family's economic condition."¹⁴³ Armed with *Taxing Women*, Schroeder's feminist successors in Congress should not repeat her mistake.

142. See *TAXING WOMEN*, *supra* note 2, at 221-24.

143. *Id.* (quoting back of dust jacket).