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Richard A. Epstein

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Some Reflections on the Gender Gap in Employment

RICHARD A. EPSTEIN*

My disagreement with Professor Jane Friesen's exhaustive analysis of the gender gap begins with its title: *Alternative Economic Perspectives on the Use of Labor Market Policies to Redress the Gender Gap in Compensation.*[1] That title begs the essential questions that any analyst of the situation, whether economist or lawyer, must confront before the claim of "redress" may be fairly advanced. The idea of redress is closely associated with the corrective justice principle of remedying wrongs committed by one person against another.[2] Corrective justice for its part presupposes that the rights between parties are well defined and is thus parasitic on some larger theory of distributive justice. It then insists that some person has done something to another that has altered the preexisting balance to the wrongdoer's advantage. Redress then is required to correct that grievance. A simple protest that certain events have turned out unfortunate for a claimant may demonstrate personal loss, or it may support an appeal to charity, but in and of itself it does not call for redress as a matter of corrective justice. The person charged with committing a wrongful act must have brought about the claimant's loss by improper means.

The first object of redress under the traditional tort law has always been physical harm. Yet no legal system has ever assumed that the plaintiff's case is made out by the simple and true declaration that she has suffered some form of physical injury, however grievous. Instead, the plaintiff must link that injury with the actions of the defendant—most obviously by showing that the defendant struck the plaintiff a blow that resulted in the harm.[3] Thereafter, the second stage of the inquiry is that of *wrongful* injury, which could be addressed in one of two ways. Either it is possible to identify, in the manner of Ernest Weinrib,[4] the proposition that conduct is

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* James Parker Hall Distinguished Service Professor of Law, University of Chicago. I would like to thank Jay Wright for his usual trenchant comments on Professor Friesen's article and my own.

1. Jane Friesen, *Alternative Economic Perspectives on the Use of Labor Market Policies to Redress the Gender Gap in Compensation,* 82 GEO. L.J. 31 (1993).

2. Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law,* 10 J. LEGAL STUD. 187, 200 (1981) ("[C]orrective justice requires annulling a departure from the preexisting distribution of money or honors in accordance with merit, but only when the departure is the result of *an act of injustice,* causing injury.")

3. For an early discussion of these causal paradigms, see Richard A. Epstein, *A Theory of Strict Liability,* 2 J. LEGAL STUD. 151, 160-89 (1973).

4. *See, e.g.,* Ernest J. Weinrib, *Causation and Wrongdoing,* 63 CHI.-KENT L. REV. 407, 429-32 (1987).

wrongful when it is done with negligence or with an intention to harm; or, in the alternative, one could take the position that I have long championed—that conduct is prima facie wrongful when there is an act that causes physical injury for which no excuse or justification is offered.[5] Ultimately, the scheme of corrective justice has, I believe, to be grounded in some utilitarian set of notions—a point with which others may well disagree.[6] But regardless of how one derives the idea of corrective justice, the question of redress presupposes the identification of some wrong.

So what is the wrong that is found in the gender gap? It is surely not a breach of contract. Nor is it the infliction of any form of physical injury or damage to reputation. Even if some wage differential was observed, it would hardly offer grounds for some form of redress, for these inequalities could stem from all sorts of reasons that give no reason for uneasiness. Skilled workers receive higher wages than unskilled workers. There is a wage gap, but no object for redress. And the same is said for workers with a college education and those without; workers with great experience in the field and those without; workers with technical skills and workers without. But there is no cause for redress, no matter how pronounced the wage gap, unless one class of workers has done something to defeat or diminish the claims and expectations of the other—such as by preventing them by force from entering the market to offer their services.

Professor Friesen sees this point and thus seeks to link the ostensible difference in wages to some failure in the operation of a competitive market. She notes that if women do not observe the same labor market opportunities as men, since the market does not function competitively, its "outcomes . . . can be viewed as inequitable."[7] But even here her claim is not quite complete. Her paper, correctly in my view, does not treat intentional or explicit discrimination against women as an important source of wage inequity. It therefore does not rely on what would be the strongest claim within the corrective justice family—although one that is hardly free

5. This regime is discussed in sequels to my first strict liability paper. *See* Richard A. Epstein, *Pleadings and Presumptions,* 40 U. CHI. L. REV. 556, 561 (1973) ("The plaintiff's prima facie case should erect a presumption that shifts the burden of explanation to the other party . . . ."); *see generally* Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability,* 3 J. LEGAL STUD. 165 (1974); Richard A. Epstein, *Intentional Harms,* 4 J. LEGAL STUD. 391 (1975). Over the years, my defense of this basic regime has changed, but my affection for the paradigm of strict liability with defenses has remained pretty strong. *See* Richard A. Epstein, *Causation—In Context: An Afterword,* 63 CHI.-KENT L. REV. 653, 657-66 (1987). For a modern recasting of the causal system in the language of the cheapest cost-avoider, see Steven G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider,* 78 VA. L. REV. 1291, 1321 (1992) (asserting that the cheapest cost-avoider criterion can explain strict "causal" liability).

6. *See generally* Richard A. Epstein, *The Utilitarian Foundations of Natural Law,* 12 HARV. J.L. & PUB. POL'Y 713 (1989) (highlighting convergence of natural law ideas with utilitarianism).

7. Friesen, *supra* note 1, at 32.

from difficulties.[8] Instead it relies on very complex arguments about the imperfections of certain market mechanisms[9] without considering the possibility that some similar mechanisms could work to the detriment of men. In addition, she does not examine those common deviations from competition that give women advantages over men. Some might easily regard the explicit affirmative action programs as falling into that category. Finally, other deviations from competitive outcomes may not disturb the relative balance in wages between men and women. Thus, a monopolist in a labor market will pay lower wages to both men and women, and employ fewer workers in both categories. It may well be that some antitrust response would be appropriate to deal with this market imperfection, but an antidiscrimination law would be a wholly inappropriate remedy.

Nor does Friesen explain why the observed gap in male and female wages should be regarded as the outgrowth of some wrongful process. Initially, that gap should be regarded as a datum that needs explanation. The tone of Professor Friesen's remarks is captured in her first sentence: "Although recent figures suggest an improvement in the relative earnings of women during the 1980s, women in the United States continue to earn significantly less, on average, than do men."[10] The difficulty with that sentence does not go to its descriptive claim, but to the normative proposition that she smuggles into the sentence, for which she offers no justification: namely, that equal earnings for men and women defines the appropriate initial position, from which any deviation is an injustice that requires, at least presumptively, correction from the legal system.

I. WHY WAGE EQUALITY?

To see the weakness of Friesen's basic analytical framework, it is useful to mention some of the reasons that could account for the wage differential between men and women. It could well be, and indeed often is, the case that women invest greater amounts of their energy in raising children. They thus take more time out from the workplace and reduce the level of investment in certain types of marketable skills to reflect the reduced

8. Even this claim is highly suspect, for intentional discrimination by some employers in competitive markets could well result in market separation but not in wage differentials, an important distinction first raised in GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 57-58 (2d ed. 1971). In addition, the entry of rival employers should raise the wages of women to those of equally productive men. *See* VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 52-56 (1988).

9. *See generally* Friesen, *supra* note 1.

10. Friesen, *supra* note 1, at 31. She then cites the familiar figures that the ratio of female to male wages were at 0.60 until 1980, and since then has risen to 0.71 by 1987. *Id.* at 31 n.1. For a far more upbeat account of the shift, see Sylvia Nasar, *Women's Progress Stalled? Just Not So,* N.Y. TIMES, Oct. 18, 1992, § 3, at 1 (arguing that women, particularly in the area of money earned as compared to men, made great strides in the 1980s).

period of time that they will remain active in the workforce. When this happens, it is quite plausible to believe that the *total* output of women could be equal to, or even greater than, the output of men if we take into account the imputed value of women's household labor. If the household labor of women is greater in value than that of men, it would be odd (not necessarily wrong) if women as a group also commanded equal wages. The assumption of equal productivity of men and women refers to their overall efforts, not solely those that are market-driven. Since women engaged in full-time work spend on average fewer hours on the job than men, it would be odd to see them earn the same total wages, and perhaps odd to see them command the same hourly wage or salary as well, given on aggregate their smaller commitment to the market.[11] The differential between the sexes reflects quite different investment strategies, both of which are appropriate and legitimate.

Second, the recent compression of the wage differential reflects a reduction in the level of men's wages. In some instances, the reduction in men's wages takes place without any correlative increase in the wages of women[12] (as may happen with racial disparities as well).[13] And, overall, it appears that the recent gains by women have been more than offset by the losses to men. During the 1980s, women's wages have risen on average from $18,683 to $20,656, or about ten percent, while men's wages fell eight percent from $31,315 to $28,843,[14] leaving an overall small net decline, given that total dollar losses for men exceed the total gains for women.

In light of these trends, the standard of wage equity that Friesen champions is on a clear collision course with the normal standards of economic efficiency. Applying the usual Pareto assumption, a world in which men earn ten and women earn six is superior to one in which men earn eight and women earn six, even though females earn only sixty percent of male wages in the first scenario and seventy-five percent of male

11. *See* Nasar, *supra* note 10, § 3, at 1 (asserting that women enter lower paying occupations, are less educated, have less experience, and have fewer valuable skills); *see also* FUCHS, *supra* note 8, at 47-48. "Among white married women with eighteen or more years of schooling and at least one child under twelve at home, only *one in ten* works more than 2,250 hours per year. By contrast, *half* of their husbands do, and one-third of the men work more than 2,500 hours." *Id.*

12. *See* Friesen, *supra* note 1, at 57. If the total size of the pie is shrunk because of the allocative inefficiencies of an antidiscrimination law, then *absolute* losses for both men and women are a possible outcome of such statutes.

13. The same point could be made about wage differentials in the race context. On the comparative wage trends, see James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment in Discrimination Law: An Economic Perspective,* 8 YALE L. & POL'Y REV. 276, 281-85 (1990), and my reply in Richard A. Epstein, *The Paradox of Civil Rights,* 8 YALE L. & POL'Y REV. 299, 300-03 (1990); *see also* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 242, 254-59 (1992) [hereinafter EPSTEIN, FORBIDDEN GROUNDS].

14. Nasar, *supra* note 10, § 3, at 1.

wages in the second. Indeed, if push came to shove, I have no doubt that most women would (unless motivated by a destructive form of envy) prefer the first distribution over the second, not only because they are not harmed when others are benefitted, but also because many women will share in the gains achieved by men through the division of take-home income inside marriage, and, indeed, other family arrangements. The goal in all of these cases should be to expand the size of the pie without creating any losers. That desirable social outcome is simply inconsistent with the single-minded vision of wage equality for women.

One can take the argument a step further. If the initial distribution is six for women and ten for men, the question then arises which of two Pareto improvements we should champion. The first increases women's income by one to seven, and leaves men's income at ten; the second leaves women's income at six, and increases men's income to fifteen. If there is any concern with the total size of the gain, given the satisfaction of the Paretian condition, we should in principle prefer the second distribution to the first. The conclusion does not show any concealed favoritism for men. If the choices were a move from six female and ten male to twelve female and ten male (women receive six in gain, men none), or from six female and ten male to six female and eleven male (men receive one unit of gain), the same decision rule commands that women receive all the gain, even though it vaults their wages ahead of those of men.

These hypothetical examples are designed to show the weakness of any egalitarian criterion. As a practical matter, there is always ample reason to suspect the openness of any process in which all the gains are conferred upon a single group of individuals, for the outcome smacks of favoritism and bias, which in turn suggests that we could do better overall if the gains were more evenly divided between the sexes. But we are not here trying to infer the fairness of the process from the distribution of the gains. Instead, we are assuming that the process is fairly constituted, and then asking which alternative outcome we should embrace. In that inquiry one point stands out loud and clear: comparative wages have very little positive correlation with social welfare, and Professor Friesen's essay does nothing to narrow the gap between them.

Third, the standard that Friesen uses is defective because it only considers the relative wages of men and women who survive to find jobs in the workplace. In general, men appear to go to the extremes of both excellence and failure more frequently than women. The percentage of men who die violent deaths or who end up in prisons is far greater than the percentage of women who experience these poor outcomes.[15] A complete

15. To give only the most recent statistic: at the end of 1992, there were 833,134 men in prison and only 50,409 women. *See* UNITED STATES DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN, PRISONERS IN 1992, at 4 tbl. 5 (May 1993).

evaluation of the relative labor picture must take into account not only those men and women who have survived to earn positive wages, but also those who have fallen by the wayside before they could enter the labor market. Consequently, if we take into account that more men are in prison during their earning years and that more men die of violent death in one form or another, then the size of the wage differential becomes misleading because it does not reflect the greater probability that women have of obtaining work. Again, it is difficult to know how to account for men and women with zero work and zero wages, but however the statisticians resolve this issue, the standard wage differentials are likely to be diminished when this factor is taken into account.

Fourth, Professor Friesen's work does not disaggregate the data so that the comparisons are made for men and women in the same occupation. Thus, the overall gender gap reflects in large measure occupational choices men and women make over the years, and continue to do so, albeit in less pronounced form today.[16] The differentials that are observed are, as one might expect, far smaller within the same career line, as Friesen acknowledges.[17] Thus, if one looks at Professor Friesen's own line of work, Ph.D. economists, the wage ratios between men and women are close to one, that is, somewhere between ninety-five to ninety-nine percent.[18] The point seems important for choosing legal policy because it suggests that it is wholly improper to use the larger differential in overall market wages to buttress any claim of discrimination against women workers: it is a truly misleading apples and oranges comparison. The key element in all cases is the choice of career and the willingness to invest in the education and hard work that makes advancement possible. There is no reason to compel women to follow the same career paths as men, although it seems clear that more women have chosen to do so in recent years.

Fifth, Professor Friesen does not consider that there might be any biological explanation to any wage differences that do remain. Many feminists ignore the entire issue, or assume in the alternative that biological differences are confined to narrow reproductive functions, and have no effect whatsoever on the relative fitness of men and women for certain

16. Thus the earlier pattern was for women to concentrate heavily in careers in teaching, social work, and nursing, and although these occupations are still heavily dominated by women, many more women have gone into business and the professions. Nasar, *supra* note 10, § 3, at 10. In 1960, 80% of women who obtained college degrees chose careers in teaching, social work, or nursing. *Id.* The comparable figure for the 1980s is below 30%. *Id.* There have been vast increases in the number of women in law, medicine, and business. *Id.* The percentage of women in engineering has increased as well, but the overall numbers still remain small (7.6% for those currently in the profession and 9.4% for those graduating in 1988). *Id.* In fact, the sex-linked differences are likely to be greater once further disaggregation is done. Although women may account for about 18% of all physicians, *id.*, they are a smaller percentage of surgeons, and a still smaller percentage of neurosurgeons.

17. Friesen, *supra* note 1, at 41 n.34.

18. Nasar, *supra* note 10, § 3, at 1.

jobs.[19] Professor Friesen seems to take this line, for she does not treat these biological differences as a source of earning differentials between men and women.[20] Yet at this point the official position seems to ignore male-female differences, not only for the obvious questions of strength and temperament, but also for other physiological, attitudinal, and behavioral differences.[21] The pressures of natural selection do not work only on physical differences, but also influence psychological and emotional processes as well. It is likely, for example, that more subtle measures, such as the taste and preferences for risk, are correlated with sex differences as well.[22]

As a matter of politics, it is easy to belittle and to ignore these biological differences and the comparative advantages they create. But any systematic study of the problem must treat these issues as ones for scientific debate, not political conviction. It must be remembered, moreover, that any evidence of powerful social influences on occupational choice (which themselves could reflect, in part, biological pressures) is not the same as a denial of biological influences. Even though one can identify powerful social influences on behavior, it does not follow that these influences are exclusive, or that each young person presents a tabula rasa on which parents and other social institutions can write as they please. Both social and biological influences can coexist, and doubtless interact in unsus-

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19. *See, e.g.*, CYNTHIA FUCHS EPSTEIN, DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER (1988). I have critiqued this literature in Richard A. Epstein, *Gender is for Nouns*, 41 DEPAUL L. REV. 981 (1992).

20. Thus, she gives three possible explanations for these differences. First, women are more likely to choose jobs that allow them greater flexibility of time between work and home. Second, women make smaller investments in their jobs because of their need to make greater commitments at home. And third, they select occupations for which planned interruptions are of relatively low cost. Friesen, *supra* note 1, at 37-43.

21. For an exhaustive summary, see generally Kingsley R. Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 SW. L.J. 617 (1984).

22. *See* Richard A. Epstein, *The Varieties of Self-Interest*, SOC. PHIL. & POL'Y, Autumn 1990, at 102. In brief, the argument turns on the different reproductive strategies for males and females, given the numerous sperm and the relatively few eggs. As each female can have only a limited number of offspring, her dominant strategy is to be selective in the males she accepts and not to take risks to become in some sense the dominant female. The efforts to achieve such dominance, however measured, are fraught with risks that promise limited additional returns, given that reproductive capacity is the critical restraint on the number of offspring. There is, therefore, an unfavorable risk-return ratio. For males, the opposite is true. A few males are sufficient to impregnate an entire female population, and competition among males for dominance has a far higher yield than it does for females, as the reproductive payoffs are limited to those males who secure dominant positions. Male-to-male competition therefore has a far more important sorting function between successful and unsuccessful males. These forces are obviously limited by social pressures toward monogamy (an institution that tends to favor stronger females and weaker males). Also, other social institutions clearly intervene. But differential attitudes for risk still survive among other influences and may well account, at least in part, for the extensive differences in occupational choices made by men and women. There is no biological explanation that predicts identical behavior given the importance of male-female differences.

pected ways. A comprehensive theory must engage this issue in a way in which Professor Friesen's paper does not.

II. REASONS WHY WAGE DIFFERENTIALS MIGHT CALL FOR REDRESS

A. RESTRAINT ON ENTRY

The explanations for wage differentials developed in Part II are in a sense cumulative; that is, there is no reason to believe that any single factor fully explains the differential. Nor do these explanations preclude the possibility that some other unidentified factors might shrink the wage differential—or that still others might expand it. If, however, the concern is to identify some practice that might call for redress, what might that practice be? Professor Friesen does not articulate any account of justice that undergirds her condemnation of the current wage pattern. It is quite clear that she makes no claim of injustice under a libertarian theory, for she does not allege that the wage differences are achieved because there are formal barriers to entry by women into certain occupations. However common these barriers were one hundred or even fifty years ago, they have vanished today. Nor is it possible to show that women have been excluded from the market by the private use of force or by fraud, such as employer practices under Jim Crow, or that if these private practices did exist, that they could not be remedied by ordinary tort and contract law without resorting to antidiscrimination or comparable worth statutes.

There is a well-established theory that wage differentials will tend to erode by competition so long as entry is free.[23] That conclusion should lead Professor Friesen to opt for the removal of many forms of protective legislation—even that which is sex-neutral on its face—that as of late have given rise to suspicion among feminists: minimum wage and maximum hours legislation are the two most obvious,[24] but I would add both comparable worth and antidiscrimination legislation. Even if some market segmentation by sex will survive free entry, there is much less theoretical reason to believe that wage differentials by sex will survive, absent some productivity difference between the groups.[25]

23. *See* FUCHS, *supra* note 8, at 35-38.

24. *See, e.g.*, Sylvia A. Law, *Rethinking Sex and the Constitution,* 132 U. PA. L. REV. 955 (1984).

25. *See* BECKER, *supra* note 8, at 57-58 (distinguishing between market segregation and market discrimination). In Forbidden Grounds, I seek to identify the efficiency reasons why we should not anticipate the complete elimination of discriminatory practices (by any group, white or black) in competitive markets. EPSTEIN, FORBIDDEN GROUNDS, *supra* note 13, at 59. The market should tend toward an equilibrium at which differences in wages are correlated with differences in output.

B. CUSTOMER AND COWORKER PREJUDICE

Professor Friesen does revert to the common line that wage differentials between men and women could result from customer or coworker preferences.[26] Yet here the position bristles with irony. It is just these strong social preferences for women that account for the reverse discrimination that exists in so many lines of work, including academic work. Not an issue of the Chronicle of Higher Education goes by without advertisements that strongly encourage women to apply for key faculty or administrative positions. These ads do not represent some idle or ill-considered pattern of behavior. I do not think that there is any university today that does not give at least some covert preference to women in hiring. To be sure, these demands are not "naked preferences"; they rest on the belief that some level of diversity is good for the institution in question. But justification for a practice is not the same as a denial that it exists. There are today strong preferences to hire and promote women in most public and private institutions, often spurred and championed by women—practices that would have to be condemned if any sex-blind standard applied to the workforce. But the literal language and original intent of Title VII is happily violated each and every day. Professor Friesen writes as though these practices never take place.

In light of these systematic institutional preferences, it is no longer possible today to write and act as though the only persons who hold positions of power within the work force are men, or to write and act as though all employer or consumer preferences were dictated by men. To be sure, there are complex cross-currents, given the resentments to affirmative action that circulate and simmer just beneath the surface. But to write and speak as though discrimination cuts in only one direction is to be blind to official policies that exert enormous influence on employment markets. We cannot exclude the possibility that some of the closing of the gender gap is attributable to the rise in new forms of discrimination, not the elimination of old forms. And whatever our views on that subject, we cannot ignore the enormous transformation in the identity of market participants that dates from the last generation.

C. COOPERATION AND BARGAINING

Professor Friesen, then, has not been able to identify any illicit social practice that results in the earnings differentials that she protests.[27] The

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26. Friesen, *supra* note 1, at 33.

27. Friesen also relies on the invisibility thesis propounded by Paul Milgrom and Sharon Oster. Friesen, *supra* note 1, at 36-37 (citing Paul Milgrom & Sharon Oster, *Job Discrimination, Market Forces, and the Invisibility Hypothesis,* 102 Q.J. ECON. 453, 456 (1987) (proposing that "disadvantaged" workers—mainly women and minorities—are kept less visible, affect-

question arises, whether it might be possible to invoke some other theory that explains the persistence of the gender gap. Modern legal and economic analysis devotes an extensive amount of effort to identify and figure out the recurrent patterns of market behavior. One instructive inquiry along that line is found in a recent article by Carol Rose, which invokes modern game theory in order to explain why sex differences might lead to problematic wage (or at least income) differentials.[28] Unlike Friesen's work, Rose attempts to build sex differences into her model and is not hostile to the idea that there may be some biological, or at least psychological, differences that lay behind these perceived sex differences.[29] Her task, then, is to explain why differences in basic attitude might account for the differences in wealth and wages between men and women.

Drawing on the work of Carol Gilligan and others,[30] Rose's key variable is that women are more cooperative than men, or at least have a perceived sense of cooperation that men lack. In her view, this attitudinal difference is deeply grounded and not some fad that comes and goes with the seasons. It is also a taste that is "another of those nonrational attitudinal factors that enable cooperation to begin."[31] But at the same time, the factor is said to place women at a serious comparative disadvantage to men, chiefly in the division of the gains that arise from profitable cooperative activity.[32] In Rose's view, women are willing to take the first risky step in a cooperative venture, even though they might well be left holding the bag if cooperation is not reciprocated. In addition, in the interests of peace and goodwill, women are more likely to accept a smaller fraction of the pie. So women will not be *as much* better off than men.[33] The net effect is that men will receive greater returns for lower risk, and thus profit in a systematic fashion relative to women. There is today a largish literature that asks how to measure fairness in the distribution of cooperative surplus, and if women are regarded as being at a systematic disadvantage in that struggle, then some portion of the wage differential could be attributable to a form of exploitation that merits redress.

There are, however, very serious difficulties with Rose's account of

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ing their potential for advancement and increased wages). I think that this line of argument is misguided for reasons set out in EPSTEIN, FORBIDDEN GROUNDS, *supra* note 13, at 38-40. If there are extra gains from hiring women, new entry should result in wages being bid up.

28. Carol M. Rose, *Women and Property: Gaining and Losing Ground,* 78 VA. L. REV. 421 (1992).

29. *Id.* at 428 (examining the different tastes for cooperation between men and women).

30. CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); Deborah L. Rhode, *The "Woman's Point of View,"* 38 J. LEGAL EDUC. 39, 42-43 (1988); Robin West, *Jurisprudence and Gender,* 55 U. CHI. L. REV. 1, 13-42 (1988).

31. Rose, *supra* note 28, at 426.

32. For a discussion of these issues in the corporate context, see FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 118-24 (1990). I address these issues in RICHARD A. EPSTEIN, BARGAINING WITH THE STATE (1993).

33. Rose, *supra* note 28, at 429-30.

income differentials. The most obvious point is that the difference between men and women surely refers at most to differences in the distributions of talents of each sex taken as a whole. It cannot be the case that all men are more aggressive in their pursuit of the cooperative surplus than all women. So extreme a position is no more sensible with respect to these matters than is a position that says that all men are taller and stronger than all women (age constant and so on). Substantial differences in group behavior does not imply that there is *no overlap* between the distributions of the two groups. And once that fact is recognized, it reduces the likelihood that cooperativeness (or indeed any other single factor) could explain the wage differential. But for the sake of discussion, it is useful, at least initially, to address Rose's model on the starkest version of the proposal, namely, that *all* women exhibit more cooperative characteristics than *all* men.

The first difficulty is whether Rose's account, even if accurate in its most extreme form, calls for any form of social intervention. On this score, her model of exploitation is consistent with the normal postulates of social welfare. There is no assertion that women are left *worse off* by the relevant bargains than they would have been if they had made no bargains at all. Thus, the wrong in question in these situations is not of the same stuff as the usual instances of force and fraud, when the challenged interaction is always a win-lose situation, and when the winner is the practitioner of either coercion or guile. Here, the situation is quite the opposite. There is no desire to stop the bargain from taking place, but only to secure some redistribution of its gains—a task that creates major administrative obstacles of its own, for although the existence of that surplus is easily postulated, after the fact its size and distribution is not easily observed or easily corrected by public action.

In addition, the size of the social surplus is heavily dependent on market structure. In a competitive situation, strong forces will always work to erode the surplus. Rose's problem is likely to be far more insistent when overt government barriers to entry create opportunities for monopoly profits. Ironically, those possibilities are often created by the protective regulation that Friesen endorses,[34] and which should be repealed in order to improve the overall operation of labor markets, regardless of any possible distributional effects. Even if Rose is correct in her prediction of the uneven division of cooperative surplus, it is unlikely that we have struck the mother lode of wage differentials between the sexes.

But the criticisms of Rose's point can be taken further to ask what kind of bargaining differential of cooperative surplus is necessary to account for the observed wage differentials across the sexes. Those financial differences are today in the order of twenty to thirty percent; hence, we can work backwards to ask what division of *surplus* is necessary to account for that

34. *Cf.* Friesen, *supra* note 1, at 66-68.

differential in wages. Thus, if men and women each have reservation prices of 100, and a cooperative venture yields 250, then (as a first approximation) if the man got *all* the surplus, female wages would still be sixty-seven percent (100 to 150) of men's. To be sure, these numbers are picked out of the air, so that it is possible that the reservation wages of the female worker could have been lower and the amount of the surplus higher. But there are numerical limits to the extremes to which these models can be taken. Competitive forces establish the floor on wages, so that cooperative surplus cannot dwarf market wages. The distribution of the surplus must be sharply skewed to account for the observed differential. It is hard to believe that men could consistently do that well in negotiations with women.

The difficulties, however, run deeper, for Rose's cooperative thesis does not take into account the probability of making a deal in the first place. If one party is known to gobble up virtually all the cooperative surplus, then that party will find it difficult to attract deals. People anticipate getting some portion of the gain and will have a tendency to migrate to other individuals and transactions when they do not have to be ever watchful of their fair share of the gain. If women have the characteristics that Rose attributes to them, then they should be able to enter more deals or find jobs more easily than men. At this point it becomes an empirical question: whether the greater frequency of deals (or shorter periods of unemployment) offset the tendency to gain a larger share of the profits on any given transaction.

Here it is difficult to find any hard empirical evidence on the question, but there is some popular folklore that leads me to believe that the aggressive (male) strategy to appropriate surplus is precarious. Everyday moral language is filled with observations of why it is not appropriate to be "greedy" or to take "unfair advantage" of someone else's situation, or to be "a hog," or to "squeeze" a business associate. The implicit assumption in all these popular expressions is *not* that the victim of the unfair practice is left worse off with the deal than without: these charges are not concerned with the brutality of thieves and robbers. Rather, these expressions warn their listener that the winner in the transaction has taken so much of the surplus that people are well advised to avoid the person in future transactions. Success in business depends on the ability to induce people to come back to you for repeat business when they are free to go elsewhere. It is therefore unlikely that the wage or income differentials that Rose posits will come out of this process. Powerful reputational pressures limit the amount of surplus that any party would want to extract from trading partners. Although it is not possible to blithely assume an even division of the surplus across the board, it is even more improbable to assume that one type of player extracts the lion's share of the surplus across the board. As the share of surplus per transaction goes up, the number of transactions goes down.

A third problem compounds the first two. Rose's model presupposes an endless array of two-party contracts between one man and one woman. It does not ask whether the difference in propensities, assuming that these exist, would lead to a different sorting of trading partners. Thus, we would have to consider what division of the gains should be found when persons are free to pick their trading partners. What happens when (pursuant to the old boys' network) men trade with men, or women with women. Now like does business with like. The working assumption therefore should be that both groups have a bell-shaped distribution of surplus with the peak of each bell at its median point. Nonetheless, in principle we should observe two differences. First, the *variance* in the distribution of surplus is likely to be greater in the relatively high risk male-male games than it is in the low risk female-female games. Second, we should expect bargaining breakdown to occur at a higher rate in the male-male games, and the costs of reaching an agreement to be higher as well. Therefore, with market sorting, Rose's model seems to imply that women should have a higher income than men.

The point can be generalized. Within a competitive world, cooperative strategies within the firm yield competitive advantages outside the firm. More than one coach has told his players "there is no I in TEAM." More than one coach recognizes that cooperation within the team is an essential prerequisite for competitive power against rival teams. The critical virtue is to know who the competition is, and how to excel in an environment that allows you to bring out the best of those on your side. Therefore, to look at athletics or the market as hopelessly adversarial is to miss the genuine duality of sporting or business activity. There are good reasons why both the military and the corporate worlds like to have men and women who have participated in sports. Such people are able to cooperate and compete at the same time. It follows that Rose's effort to link major differences in income to differential attitudes towards surplus is doomed to failure. The more obvious explanations set out above in Part I seem to be far more persuasive, if only because they do not assume that men or women work at any serious systematic disadvantage with the other. Rather, the best view of the situation seems to be that there are important variations *within* the class of men and women and certain important variations *across* the class of men and women. The way in which these differences play out in a market place are likely to be beneficial, for individuals in markets seek to exploit their comparative advantage in voluntary exchange, which is as it ought to be.

It does not follow, however, that we cannot modify Rose's thesis ever so slightly to explain some of the differences in male-female earnings. Thus, as noted earlier, there is good biological reason to believe that men and women adopt different responses towards risk and uncertainty. Women tend to be more risk averse as a group than men. If that is the case, then there is some reason to expect that when situations present major ambiguity and uncertainty, men on average will be better able to handle the pressure associated with risk than women. That assumption does not mean that men will necessarily try to take the lion's share of the surplus in any given transaction. Quite the opposite, it could mean that men might have a better sense as to when they are overreaching in a risky transaction and as to when they should back off before the whole deal comes falling down. Or, it may mean that men are psychologically able to withstand the pounding of the great uncertainty that comes, for example, with playing the futures market. It could well be that this attitude toward risk is most pronounced only as one moves to the top jobs in the firm, where men continue to be represented in very large numbers.[35] More generally, if one element of successful management is recognizing how to shift from the cooperative to competitive modes, making careful assessments of the risks and uncertainties in both environments, there could be a male advantage operative at the top that is not tied to extraction of surplus.

But again, we must be careful not to get too far ahead of ourselves, for there are certain jobs for which other attributes might hold the keys to success. Agents for writers and artists may have to have a great deal of loyalty to their principals, and women agents may have some advantages in some contexts over men, given Rose's cooperative assumptions. But it is risky business to speculate how these various characteristics interact and offset each other. It is riskier still to posit that the resulting behaviors will be neatly arrayed by sex. And perhaps that is the point about Rose's work and Friesen's, as well as my own.[36] It is easy to put forward a wide range of alternative hypotheses about the wage differential, but hard to establish which one is true. But it does not follow from that note of methodological caution that we are left without guidance on how to proceed on matters of wage regulation. We know that markets are sensitive to local knowledge and local variations. We know that individual entrepreneurs are sensitive both to background information (the so-called stereotype) and individual information. We know that employers are right to ask how new employees will "fit in" with the firm. We know that these parties seek to find the best labor for the lowest price. We also know how rich is the array of relevant factors and how little we know about their relative magnitude and importance in individual cases. We know, in short, too little to intervene with an antidiscrimination or a comparable worth regulation. We know enough to mind our own business and to stay the hand of government regulation.

35. Today about 3% of the top executives in business are women. *See* Nasar, *supra* note 10, § 3, at 10.

36. *See* Epstein, *supra* note 22, at 113, where I defend the defensive use of biological information, but think it is too complex and uncertain to make it the basis of any government regulation.