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Feminism and Libertarianism: 
A Response to Richard Epstein

Andrew Koppelman†

In Liberty, Patriarchy, and Feminism, Professor Richard Epstein alleges that feminism has betrayed its original commitments, and now has become a threat to liberty.¹ Because men and women, in the aggregate, differ in both abilities and preferences, “a system of equal opportunities to participate in business and political arrangements will yield differences in occupational choices and political beliefs.”² Contemporary feminism’s unwillingness to accept these differences, he argues, reveals its refusal to respect women’s own free choices.

I reject this analysis, and will shortly explain why. But I would also like to emphasize at the outset how much we agree about. Like Epstein, I think that political and social institutions should be judged by the standard of human freedom. Like him, I think that it is important that people be at liberty to shape their own lives.³

If I have never subscribed to his minimal-state vision, it is not because I do not value freedom, but rather because I have never seen any reason to accept his assumption that the state is

² Id at 105.
³ The state may, however, sometimes appropriately infringe on freedom where this is necessary to promote other aspects of well-being. See Andrew Koppelman, Antidiscrimination Law and Social Equality 205–16 (Yale 1996).

This may be an appropriate place to take note of another partial agreement. A different libertarian critique of sex discrimination law is developed elsewhere in this volume by David Bernstein. See David Bernstein, Sex Discrimination Laws Versus Civil Liberties, 1999 U Chi Legal F 133. I agree with Bernstein that the law ought not to sacrifice the “right of association . . . for slightly quicker social change and the suppression of a few outliers,” at least where a principled distinction of some sort can be drawn between those outliers and the general population of potential discriminators. Id at 184. But the force of this point depends on the fact that these people are idiosyncratic outliers, and it is sometimes the compliance of the rest of the world with the discrimination laws that makes these people outliers. This point cannot, then, be an appropriate basis for a general attack on the scope of antidiscrimination laws.
the only threat to freedom that matters. As Gerald MacCallum pointed out long ago, the term “freedom” necessarily denotes a triadic relation between three terms: freedom is always “of something (an agent or agents), from something, to do, not do, become, or not become something.” Minimal-state libertarianism focuses on one set of constraints, those emanating from the state, while ignoring all other constraints and paying no attention to the range of actions that persons are actually free to perform. Thus, it would declare a person “free” who has no power to direct her own life — for example, someone who is starving to death amid a prosperous society.

I also agree with Epstein that it would be inappropriate and tyrannical for the law to attempt to erase all gender distinctions in society — that, as he has put it elsewhere, “the effort to confine the influence of sex differences to narrow areas of human behavior is a mistake.” There may well be, at least in the aggregate (for as he concedes, the bell curves overlap), profound differences between the sexes in physical strength, temperament, desires, interests, and even abilities. Perhaps innate differences are the reason for different patterns of life choices, so that “in large populations, systematic differences between men and women will occur.” It is unsurprising that men and women are not equally distributed across all job categories. I disagree, however, with his claim that nothing invidious can be inferred from the distributional patterns that actually exist. Epstein also appears to me to misconceive the feminist project. I am aware of no major contemporary feminist theorist whose aim is to erase all differences be-

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5. Some of the inferences that Epstein draws from these facts do not seem to follow, however. Even if it were true that an egalitarian division of labor in marriage is inefficient because it reduces the gains from marriage (which is hardly clear, given the long-term damage to a woman's career that tends to follow her total withdrawal from the labor market for a period of years), it is not clear how this could explain the fact that "most people still use the word 'house-husband' with a tinge of bemused disdain." Epstein, 1999 U Chi Legal F at 109 (cited in note 1).
6. This claim is made most starkly in Epstein, Gender is for Nouns, 41 DePaul L Rev at 998 (cited in note 5).
between men and women. The project, rather, is to eliminate the unjust hierarchy of men over women.¹⁰

The argument of Epstein’s Article appears to be that, because the differences in outcomes in the employment market could have been the result of free choice, we should conclude that they are the result of free choice. As I have just stated it, the argument is an obvious non sequitur, but this sort of fallacy appears frequently in prominent places, notably in opinions of the United States Supreme Court.

For instance, in Richmond v J.A. Croson Co,¹¹ the Court invalidated a minority set-aside program for awarding municipal contracts and cast grave doubt on the constitutionality of any state program that includes racial preferences. The Court has generally been hostile to set-asides that are not responses to past discrimination by the agency adopting the set-aside.¹² The Croson Court was unpersuaded by a statistical argument that the city had made on behalf of its program: that past discrimination was demonstrated by the fact that the city’s black population was more than 50 percent, but only 0.67 percent of recent prime construction contracts had been awarded to blacks.¹³ Justice O’Connor’s majority opinion argued that this difference might be the product, not only of discrimination, but also of “both black and white career and entrepreneurial choices.”¹⁴ The trouble with this reasoning is twofold: it ignores the notorious history of dis-

¹⁰ My colleague at Northwestern University, the anthropologist Micaela di Leonardo, has in her teaching defined feminism as consisting of four propositions. This four-part definition, she writes,

is useful as a beginning, just as physics and chemistry still teach outdated models of the atom to beginning students. In other words, we will establish feminism with this definition, and then deconstruct the definition in the process of learning about feminism’s histories and contemporary realities.

First, an intellectual account: across time and space, we can observe that women have lower social status and less social power than men. This differential may be glaring or very slight, but it is an empirical fact.

Second, in reviewing the historical and contemporary rationales (biological destiny, God’s will, functionalist, etc.) for this state of affairs, we come to the conclusion that no such argument is intellectually defensible.

Third, a moral contention on the basis of this intellectual evaluation: this state of affairs is simply wrong.

Fourth, a political determination flowing from 1, 2, 3: This state of affairs must change. People should work for women’s social equality. I should do so. I will do so.

Personal communication with Micaela di Leonardo (Oct 18, 1998).

¹² See, for example, Adarand Constructors, Inc v Peña, 518 US 200 (1995).
¹⁴ Id at 503.
criterion in Richmond — the capital of the Confederacy — and it also assumes, implausibly, that almost no qualified blacks desire lucrative construction jobs. (Are they perhaps just happier being janitors, maids, and cooks?\textsuperscript{15})

Justice Scalia makes a similar argument, one practically identical to Epstein’s, in his dissent in Johnson v Transportation Agency,\textsuperscript{16} which involved a constitutional challenge to an affirmative action plan promoting women to positions previously held only by men. No woman had ever held any of the 238 skilled craft positions in the agency involved in the case.\textsuperscript{17} This time Justice O’Connor, concurring, thought that past discrimination had been conclusively shown by this “inexorable zero.”\textsuperscript{18} Justice Scalia was nonetheless unpersuaded that there was any past discrimination to remedy, and he declared it “absurd to think that the nationwide failure of road maintenance crews [to include substantial numbers of women] is attributable primarily, if even substantially, to systematic exclusion of women eager to shoulder pick and shovel.”\textsuperscript{19} On the contrary, women have been excluded from this job category only “in the sense that, because of longstanding social attitudes, it has not been regarded by women themselves as desirable work.”\textsuperscript{20} Scalia was unsurprised by the fact that no woman ever held one of these jobs: “even an absolute zero is not ‘inexorable,” particularly “given the nature of the jobs we are talking about.”\textsuperscript{21} For him, the bell curves didn’t even overlap.

Epstein has made two claims in his Article that I will challenge here. One of them is overt, the other implicit. The overt claim is that sex differences in occupation are the result of choice — by which he implicitly means choice made under just conditions.\textsuperscript{22} The second, implicit claim is that the patterns that

\textsuperscript{15} For further critique of Croson, see Koppelman, Antidiscrimination Law and Social Equality at 51–55 (cited in note 3).

\textsuperscript{16} 480 US 616 (1987).

\textsuperscript{17} Id at 636.

\textsuperscript{18} Id at 657 (O’Connor concurring), quoting Teamsters v United States, 431 US 324, 342 n 23 (1977).

\textsuperscript{19} Id at 668 (Scalia dissenting).

\textsuperscript{20} Id.

\textsuperscript{21} Id at 666 n 4.

\textsuperscript{22} Epstein, 1999 U Chi Legal F at 109–11 (cited in note 1). In another of his writings, he relaxes this claim, emphasizing only how little we know about what causes market outcomes:

It is easy to put forward a wide range of alternative hypotheses about the wage differential [between men and women], 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
emerge from these choices do not themselves illegitimately constrain the later choices of other people — that an unregulated market does not produce a situation in which liberty is restricted.

His condemnation of existing law is broad and sweeping. Here I will be less ambitious. I have neither the ability nor the inclination to defend every detail of the sex discrimination law that is now on the books. My task is merely to refute the two claims I have just described.

I. HAPPY THOUGHTS

Epstein is certainly correct that statistics alone do not prove discrimination, because there may be many benign explanations for a difference in outcomes. Epstein urges us to think "happy thoughts." He believes that the benign explanations are the best explanations. In reaching this conclusion, he has acknowledged that his analysis "engages in a form of reverse engineering, and postulates that what is the case has to be the case as well."

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.

Richard A. Epstein, Some Reflections on the Gender Gap in Employment, 82 Georgetown L J 75, 88 (1993). In the discussion that follows, I will argue that we are not as ignorant as Epstein here suggests about the reasons women earn less than men.

Quite the contrary. See Koppelman, Antidiscrimination Law and Social Equality at 115–76 (cited in note 3).

See, for example, Epstein, 1999 U Chi Legal F at 106–08 (cited in note 1).

Id at 96.


Richard A. Epstein, The Varieties of Self-Interest, 8 Soc Phil & Pol 102, 107 (Autumn 1990). Mary Anne Case has pointed out that, when Epstein uses this method to predict the division of labor between the sexes in nature, "[t]he behavior Epstein posits as offering the greatest gains from trade between the sexes — the division of labor between a female who specializes in reproduction and the nurturing of the young and a male who protects and provisions her and her offspring — is simply not found among any non-human primates or other animals." Mary Anne Case, Of Richard Epstein and Other Radical Feminists, 18 Harv J L & Pub Pol 369, 390 (1995).
Now, it is not inappropriate for a scholar to reason out the way the world must be and then look for evidence showing that it is that way; it is hard to imagine how else one can devise hypotheses and thus advance knowledge. Sooner or later, though, one needs to test those hypotheses against evidence. None of Epstein's critiques of sex discrimination law have done that.

I will focus here on the absence of women from blue-collar professions. Describing this as the benign expression of women's own job preferences, as Epstein and Scalia do, takes no account of the environment in which those preferences are formed.

Consider the story of Diane Joyce, who was the beneficiary of the affirmative action program in *Johnson v Transportation Agency*[^28] that Scalia would have invalidated. Joyce, a widow with four children, first took a job with the county transportation department because it paid $50 a month more than the job she had previously held. Her encounter with what Scalia blandly calls "longstanding social attitudes" began immediately:

"You know, we wanted a man," the interviewer told her as soon as she walked through the door. But the account clerk jobs had all taken a pay cut recently, and sixteen women and no men had applied for the job. So he sent her on to the second interview. "This guy was a little politer," Joyce recalls. "First, he said, 'Nice day, isn't it?' before he tells me, 'You know, we wanted a man.' I wanted to say, 'Yeah, and where's my man? I am the man in my house.' But I'm sitting there with four kids to feed and all I can see is dollar signs, so I kept my mouth shut."

She got the job. Three months later, Joyce saw a posting for a "road maintenance man." An eighth-grade education and one year's work experience was all that was required, and the pay was $723 a month. Her current job required a high-school education, bookkeeping skills, and four years' experience—and paid $150 less a month. "I saw that flier and I said, 'Oh wow, I can do that.' Everyone in the office laughed. They thought it was a riot. . . . I let it drop."

But later that same year, every county worker got a 2 to 5 percent raise except for the 70 female account clerks. "Oh now, what do you girls need a raise for?" the director of personnel told Joyce and some other women who went

before the board of supervisors to object. "All you'd do is spend the money on trips to Europe." Joyce was shocked. "Every account clerk I knew was supporting a family through death or divorce. I'd never seen Mexico, let alone Europe." Joyce decided to apply for the next better-paying "male" job that opened.

In 1974, a road dispatcher retired, and both Joyce and a man named Paul Johnson, a former oil-fields roustabout, applied for the post. The supervisors told Joyce she needed to work on the road crew first and handed back her application. Johnson didn't have any road crew experience either, but his application was accepted. In the end, the job went to another man.

Joyce set out to get road crew experience. As she was filling out her application for the next road crew job that opened, in 1975, her supervisor walked in, asked what she was doing, and turned red. "You're taking a man's job away!" he shouted. Joyce sat silently for a minute, thinking. Then she said, "No, I'm not. Because a man can sit right here where I'm sitting."

In the evenings, she took courses in road maintenance and truck and light equipment operation. She came in third out of 87 applicants on the job test; there were ten openings on the road crew, and she got one of them.

For the next four years, Joyce carried tar pots on her shoulder, pulled trash from the median strip, and maneuvered trucks up the mountains to clear mud slides. "Working outdoors was great," she says. "You know, women pay fifty dollars a month to join a health club, and here I was getting paid to get in shape."

The road men didn't exactly welcome her arrival. When they trained her to drive the bobtail trucks, she says, they kept changing instructions; one gave her driving tips that nearly blew up the engine. Her supervisor wouldn't issue her a pair of coveralls; she had to file a formal grievance to get them. In the yard, the men kept the ladies' room locked, and on the road they wouldn't stop to let her use the bathroom. "You wanted a man's job, you learn to pee like a man," her supervisor told her.

Obscene graffiti about Joyce appeared on the sides of trucks. Men threw darts at union notices she posted on the bulletin board. One day, the stockroom storekeeper, Tony
Laramie, who says later he liked to call her “the piglet,” called a general meeting in the depot’s Ready Room. “I hate the day you came here,” Laramie started screaming at Joyce as the other men looked on, many nodding. “We don’t want you here. You don’t belong here. Why don’t you go the hell away?”

When Joyce applied for a job dispatcher position, she and six male applicants were certified as eligible for promotion after an interview by a two-person board, which scored applicants on their interview performance. To be eligible for promotion, a candidate had to receive a score over seventy. Joyce received a seventy-three; Paul Johnson, who was plaintiff in the Supreme Court case, received a seventy-five.

Three agency supervisors then conducted a second interview. One of these had been Joyce’s supervisor when she began work as a road maintenance worker. He had issued her coveralls, routinely issued to the men, only after she had ruined her clothes on several occasions, complained repeatedly, and finally filed a grievance. Another member of the panel, who had described Joyce as a “rebel-rousing [sic], skirt-wearing person,” had apparently deliberately scheduled the interview to conflict with Joyce’s disaster preparedness class. The panel recommended that Johnson be given the promotion. The director of the agency, after consulting with the Agency’s affirmative action coordinator, promoted Joyce. This decision led to the litigation in which Scalia complained in dissent that Joyce was the undeserving beneficiary of preferential treatment because she was a woman.

Joyce’s story is typical. Vicki Schultz observes that harassment “creates a serious disincentive for women to enter and re-

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52 Id at 623.
53 Id at 623-24.
54 Id at 624 n 5.
55 480 US at 624 n 5.
56 Id.
57 Id.
58 Id at 624.
59 480 US at 624-25.
60 See id at 658-64 (Scalia dissenting).
main in nontraditional jobs." Overtly sexual behavior is only part of a pattern of systematic hostility by male co-workers who resent the presence of women in "their" workplaces — hostility that ranges from hazing and ostracism to discriminatory assignments, denial of proper training, and deliberate sabotage of one's work performance. (In many workplaces, inadequate training or sabotage can endanger a woman's physical safety.) Women who consider moving into blue-collar, male-dominated professions tend to anticipate that they will be harassed if they do so. They are right. Women are far more likely to be harassed in male-dominated occupations, and women in nontraditional jobs quit because of harassment at least twice as often as women in traditional jobs.

Epstein acknowledges that harassment exists but tries, in various ways, to explain it away. In earlier writings, he acknowledged that harassment was a problem but argued that the market would address it:

An employer has all the incentives to set the right standards for each workplace. If the standards are made too stringent, then honest workers, fearing false charges, will shy away from the firm; if they are made too lax, then able women will choose to work elsewhere. There are no externalities in this setting, and no reason to believe that a single dictate imposed by the courts or under Title VII will begin to be serviceable in the many contexts to which it applies.

In another article, he takes a different tack, acknowledging that most women who hold jobs "may like [the laws that penalize harassment] and benefit from the protection they afford." But, he argues, other women may want different rules: "The women who are willing to take the risks of harassment for the gains of em-

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41 Schultz, 103 Harv L Rev at 1832–36 (cited in note 40).
42 Id at 1833, citing Mary Walshok, Blue Collar Women: Pioneers on the Male Frontier 211 (Anchor 1981).
43 Id at 1834 & n 327.
44 Id at 1834 nn 326, 328.
ployment are not allowed to compete by agreeing to work on different terms.”

Epstein’s argument presupposes a marketplace whose tendencies operate in a perfectly unobstructed way, like the idealized frictionless machine. With harassment, as with other barriers to entry that women face, it may be that these barriers would disappear in a perfectly functioning market. But engineers know better than to ignore the existence of friction.

In the world we actually inhabit, people do not respond perfectly to the incentives presented by the market. Employers and supervisors seek competent workers, but their perception of competence is shaped by culture, and specifically by cultural symbols associated with sex. Sometimes, the association of competence with gender leads supervisors to value and reward displays of masculinity that are positively counterproductive, such as disregard for normal safety precautions and unnecessary use of force.

This gendered conception of competence shapes both women’s perceptions of opportunities and employers’ assignment of women to dead-end jobs. And, of course, when harassment occurs, it is rarely in response to incentives that are presented by the market.

Even in a market peopled by perfectly rational actors, discrimination can persist. Because Epstein’s model is a mere hypothesis unsupported by evidence, it seems adequate, in this context, to offer some alternate hypotheses. Perhaps construction companies would avoid discrimination against women if they could, because this would expand the pool of available workers and thus both increase the quality of the work done and decrease wages. Any company that tried this, however, would have to deal with its own workers’ discontentment and other companies’ reluctance to trade with it, reflecting the preferences of those companies’ own (predominantly male) workers.

Few, if any, companies want this kind of trouble. The general tendency of women to lack training in the relevant areas also creates an incentive for employers to discriminate against them; such discrimination is economically rational, although it has the systemic cost of discour-

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47 See Kath Weston, *Production as Means, Production as Metaphor: Women's Struggle to Enter the Trades*, in Faye Ginsburg and Anna Lowenhaupt Tsing, eds, *Uncertain Terms: Negotiating Gender in American Culture* 137, 144–45 (Beacon 1990).
49 And if women should try to start their own construction companies, they may face barriers to entry in the market, such as discrimination in obtaining capital, a paucity of trained female workers, and discrimination by the general contractors on whom they would have to depend for business.
aging women from investing in their own human capital by developing marketable skills. Finally, there is the sour grapes effect: people tend to bring their aspirations into line with what is possible for them to achieve. It is circular to invoke those diminished aspirations as a justification for the status quo. When nontraditional options are genuine options for women, many women pursue those options.

Employers may have an incentive to police harassment. But the incentive is often a fairly weak one, because the workers who do the harassing often include high-level or other long-term employees who are not easily replaced, and in whose human capital the employer is likely to have a substantial investment. It may be costly for the employer to interfere with those employees’ prerogatives. Employers have less of a financial stake in women who are relatively new to those jobs and comprise a small portion of their employees. In short, employers’ behavior is influenced by the fact (when it is a fact) that their workforces are already overwhelmingly male. It is too easy a leap, therefore, to say that when harassment occurs in an unregulated market, this reflects the choices of the victims.

Nonetheless, it is also true that, even if women are pervasively harassed in some workplaces, no one has forced them to take the particular jobs that they hold. Diane Joyce was not compelled to join the road crew. She sought that job, and stayed in it despite being harassed. Does this mean that the (risk of) harassment is one of the terms of the bargain by which she held her job, and so legitimates the situation that confronted her?

Choice is an ambiguous concept, and so is consent. You can find consent in any person’s response to her situation if you look hard enough. “In one sense of the word,” observes Robert Lee Hale, “no labor is ‘involuntary’ — not even that of a slave. It is performed through the voluntary muscular movements of the laborer, who chooses to perform it in order to avoid something worse.” Nat Turner, who was hanged in Virginia in 1831 after leading a bloody slave rebellion, would probably have agreed with Hegel that

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50 These considerations are enumerated in greater detail in Cass R. Sunstein, Why Markets Don’t Stop Discrimination, 8 Soc Phil & Pol 22, 29–32 (Spring 1991).
51 See Schultz, 103 Harv L R at 1827–32 (cited in note 40).
52 See text accompanying note 29.
if a man is a slave, his own will is responsible for his slavery, just as it is its will which is responsible if a people is subjugated. Hence the wrong of slavery lies at the door not simply of enslavers or conquerors but of the slaves and the conquered themselves.\(^5\)

But Hegel did not infer that slavery was therefore legitimate. If the ubiquity of consent in this sense is not to vitiate the ideal of freedom altogether, that ideal must be understood as standing for the proposition that there are certain choices a person should not find herself having to make.\(^5\)

Epstein never questions the ubiquity of workplace harassment. He treats it as a sort of inevitable, morally weightless (if unfortunate) background condition that precedes bargaining, like the scarcity that sometimes produces low wages and long working hours.\(^5\) The market, he thinks, does all that can be done when it determines who will most efficiently bear these costs.\(^5\) He thus ignores the possibility of state action to reduce these costs overall, by reducing the overall incidence of harassment. And he thereby also ignores the possibility that such intervention might actually make people freer, by giving them more choices about how to shape their lives.

II. THE TYRANNY OF SMALL DECISIONS.\(^5\)

The second problem with an unregulated regime is that it may have untoward aggregate effects. G.A. Cohen’s critique of Robert Nozick’s libertarianism is pertinent here. (Epstein cites Nozick with approval.\(^6\)) Nozick is concerned about economic distribution rather than sex equality, but he resembles Epstein in


\(^{56}\) This proposition is accepted in contract law, which holds a contract voidable for duress if a threat left its victim with “no reasonable alternative” but to acquiesce in the contract. E. Allan Farnsworth, *1 Farnsworth on Contracts* § 4.18 at 440 (Little Brown 1990) (emphasis added).

\(^{57}\) See Epstein, 4 Indep Rev at 15 (cited in note 46) (characterizing sexual harassment as “practices that, if anything, look more like personal aggression than a refusal to deal for reasons of sex”).

\(^{58}\) Consider id (arguing that “quid pro quo harassment ... wholly apart from statutory prohibitions, could not survive under contract in the modern workplace”).

\(^{59}\) Epstein uses the phrase “tyranny of small decisions” to indicate how group disparities are the result of freely made choices at the individual level. Epstein, 1999 U Chi Legal F at 111 (cited in note 1).

\(^{60}\) Id at 101–02; Epstein, 8 Soc Phil & Pol at 114 (cited in note 27).
condemning as illiberal any principle that specifies some distribution as desirable, because any such distribution will be upset by the voluntary actions of individuals.

Nozick argues that whatever arises from a just situation by just steps is itself just. Transactions that are fully voluntary on the part of all legitimately concerned persons are free of injustice. It follows, Nozick claims, that whatever arises from a just situation as a result of fully voluntary transactions on the part of all legitimately concerned persons is just. Since, in a free society, concentrations of wealth are likely to ensue from free transactions — in Nozick’s famous example, a million people might each pay Wilt Chamberlain a quarter in order to see him play basketball — it follows that concentrations of wealth may be entirely just.

Now, may be is not the same thing as is. Marx pointed out long ago that the first accumulations of capital were the product, not of free trade, but of rapacious expropriation of subsistence farmers. Balzac’s Voutrin who claimed that “[t]he secret of all great fortunes, when there’s no obvious explanation for them, is always some forgotten crime” was guilty of overstatement rather than falsehood; the distribution of wealth with which every known market has begun has been the product, at least in large part, of massive injustice. This is conspicuously true of the distribution of capital (including human capital) between the sexes. Epstein announces at the start of his Article his sympathy with the nineteenth-century feminists. He thus appears to concede that the baseline that led to the market Diane Joyce entered, in which it was assumed that all the well-paying jobs belonged to men, was not a just one. But even if a just starting point is posited, it is not clear that Nozick’s argument proves that any result a free market produces is a just one.

Cohen’s objection to Nozick is that it is not clear that the Chamberlain transaction is really beneficial to everyone with an

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61 Robert Nozick, Anarchy, State and Utopia 151 (Basic Books 1974).
62 Id at 161–63.
63 Id at 161–62.
64 Karl Marx, 1 Capital 713–74 (International Publishers 1967) (Samuel Moore and Edward Aveling, trans).
65 Honore de Balzac, Pere Goriot 90 (Norton 1994) (Burton Raffel, trans).
66 For example, the Illinois lands on which Northwestern University (where this essay was written) and the University of Chicago (where it was edited) sit were acquired by those universities through legal means of transfer, but these parcels first entered the market when they were forcibly seized from their Native American inhabitants as part of a larger project of conquest and genocide.
67 Epstein, 1999 U Chi Legal F at 97–98 (cited in note 1).
interest in it, because “it threatens to generate a situation in which some have unacceptable amounts of power over others.”

The fans want to see Chamberlain play, but they may not want to create an aristocracy of wealth whose members are able to use their wealth to exert power over the fans and their children.

For, of course, the concentration of wealth may lead to substantial restrictions on the freedom of the non-wealthy, who may find themselves with a choice between working for the wealthy or starving. “It seems reasonable to add to the constraints on just acquisition a provision that no one may so acquire goods that others suffer severe loss of liberty as a result.”

Similarly, even if it were true that men and women have segregated themselves into different professions entirely as a result of their own free choices, the result would be a severe constraint on the ability of future generations of men and women to pursue the occupations that they desire. We have seen the effect of de facto segregation on women. Stories like Joyce’s are likely to persist so long as high-paid blue collar jobs are overwhelmingly male.

The sex segregation of employment produces a vicious circle. The hostile work cultures of nontraditional jobs tend to keep women out, but those cultures will not change until more women are present. Numbers matter because the obstacles to entry that

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9 As he acknowledges, the force of Cohen’s point depends on another aspect of Nozick’s hypothetical, according to which, before any transactions take place, every member of the society has an equal amount of wealth. This aspect is crucial, because it eliminates the status quo effect of the very maldistribution of wealth whose justification is at issue:

How we feel about people like Chamberlain getting a lot of money as things are is a poor index of how people would feel in the imagined situation. Among us the ranks of the rich and powerful exist, and it can be pleasing, given that they do, when a figure like Chamberlain joins them. Who better and more innocently deserves to be among them? But the case before us is a society of equality in danger of corruption. Reflective people would have to consider not only the joy of watching Chamberlain and its immediate money price but also the fact . . . that their society would be set on the road to class division . . . . In presenting the Chamberlain fable Nozick ignores the commitment people may have to living in a society of a particular kind, and the rhetorical power of the illustration depends on that omission.

Id at 217.

70 See id at 224.

71 Id at 225–26.

72 Schultz, 103 Harv L Rev at 1839 (cited in note 40).
this situation creates are subtle ones, of a kind that are not easily perceived or remedied by courts on a case-by-case basis.

Joyce's case shows the limitations of courts in this regard. None of the judges reviewing the case recognized the biases that had contaminated the evaluation process. When the case was tried in the district court, after a two-day trial the court found that the Agency had never discriminated against women in hiring skilled craftsmen (as the workers doubtless were originally called). As Mary Becker has observed, this finding is "incredible," given the complete absence of women from such positions in the past. Even after the 1964 Civil Rights Act was passed, unions and employers continued routinely and overtly to exclude women from skilled positions. The hazing and harassment that Joyce herself had experienced were also evidence of the obstacles that women face in these jobs. Yet none of this was noticed or given any weight by the trial court or either of the reviewing courts. Inasmuch as Joyce, despite the handicaps she faced in the evaluation process, compiled a score within two points of her competitor, it is reasonable to infer that an unbiased decisionmaker would have found her to be the most qualified candidate. The characterization of the case (by all of the Justices, majority and dissenters alike) as one of preferential treatment is revealing. It suggests that the courts cannot recognize discrimination on a case-by-case basis when they see it, and that the only way reliably to police the decisionmaking process is to police its results.

In traditionally all-male jobs, equality of opportunity does not seem possible until those workplaces include enough women to form a common defense against the inhospitable environment that male resistance creates. Many women stay away from such jobs, despite their attractive salaries, because they know what the sole woman in such a workplace is likely to face. The problem that quotas raise in this context is that (as Epstein is right to emphasize) there can be no confidence that the proportion of women in the workforce matches the proportion interested in this job. All that is

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74 Id.
75 Id.
76 Id.
77 Susan Faludi's lengthy journalistic account of Joyce's travails, quoted above, reveals the limits of the Court's perception. Not all of the sexist harassment that Joyce experienced found its way into the Supreme Court's account of the facts.
78 See Johnson, 480 US at 634–35; id at 642, 646 (Stevens concurring); id at 656–57 (O'Connor concurring); id at 658–64 (Scalia dissenting).
certain is that some women would prefer to do this work. A quota should aim not at proportional representation but at an end to the total exclusion of women. The numbers of women in the trades should at least be sufficient to create a "critical mass" that can make those jobs less forbidding to the next woman who thinks about applying for one.

Epstein is willing, in other contexts, to say that the use of public power is appropriate when necessary to assure "the provision of public goods." The gender desegregation of the workplace may be understood as a public good, like police forces and highways, of the kind that state power can appropriately be deployed to secure. Epstein acknowledges this:

My own casual empiricism says that it is quite common for women to champion, and for men to agree, that greater female participation in certain high-status professions and disciplines counts as an unquestioned social good. At the social choice level we can find substantial political support for government programs that push in this direction, hence the carrot of affirmative action programs (many of which go beyond what the law requires) and the stick of antidiscrimination laws (under which judges are too eager to find discrimination when none exists).

In these sentences we see a hint of a different Epstein, one who recognizes the public interest in sex equality. But he does not follow the thought through to its logical conclusion.

What about the feminist effort, which Epstein thinks tyrannical, to reshape our culture? Start by noting that even libertarian advocates of a minimal state must care about culture. Even Nozick cannot be indifferent to widespread prejudice, because the night-watchman state cannot deliver the equal protection from force and fraud that it promises if its agents are so biased that they do not care if these wrongs are done to some citi-

82 Epstein, 1999 U Chi Legal F at 111-12 (cited in note 1).
zens. Epstein, however, has claimed that "the best way to take into account the full range of symbols, good and bad, noble and vain, is for the legal system to ignore them all — mine and yours alike." Sometimes he suggests that this is so because any state other than a minimal one will be a dangerous threat to our liberties. A powerful state is certainly a dangerous thing, but this is not a knock-down argument for a weak one. It is scary that police officers have guns, and sometimes they do misuse their guns in horrifying ways, but it does not follow that we would all be safer if the police were disarmed. In other places Epstein makes the bolder and even less plausible claim that the existing culture is presumptively good precisely because it is not the product of any central agency:

[T]he process of social definition is the cumulation of huge numbers of independent judgments made by actors who have very different purposes and very different standards of evaluation. There is no "it," no "society" out there that imposes "its" classifications on "us." There are people who at some moment assume the role of classifier and at other moments the role of the classified. Any regularities in perception that arise by this indirect and diffuse process are far more reliable, and should be accorded greater weight, than an explicit formal pronouncement of the state or any of its agencies.

This hypothesis does not bear scrutiny when judged against the persistence of racism or sexism, neither of which deserve the respect that Epstein implicitly accords them. No central decision-maker decreed that men should feel entitled to harass their female coworkers, but it hardly follows that this sense of entitlement is reliable or deserving of weight. The example of harassment law should suffice to show that law can sometimes exert pressure on culture in a way that liberates, rather than enslaves, us.

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84 See Koppelman, Antidiscrimination Law and Social Equality at 181-90 (cited in note 3).
87 Epstein, Gender is for Nouns, 41 DePaul L Rev at 984 (cited in note 5). Similarly, in his Article for this Volume, he argues that "outcome differences are a source of social strength and a sign of a free society." Epstein, 1999 U Chi Legal F at 114 (cited in note 1).
88 I stated earlier that the claims of this Article would be modest, but I realize that that is not true of the claim I have just made, that it is legitimate for a liberal state to
CONCLUSION

Law concededly has its limitations. Law alone cannot bring about sex equality. But that is no reason to condemn the valuable work that law alone can do.

seek to reshape culture in the name of equality. I have defended that claim at length in another place. See Koppelman, Antidiscrimination Law and Social Equality (cited in note 3).

What I have said in the past about the project of eliminating racism is equally true of sexism:

The project of eradicating racism and its practices at institutions is so large that, perhaps paradoxically, it entails a limited role for the law. The problem is so pervasive that it cannot be remedied by the state alone without totalitarian control of civil society, and probably not even then. The law's proper role is therefore one of abetting, rather than leading, an egalitarian social movement.

Id at 111 (footnote omitted).

This includes a broad range of interventions that Epstein would surely repudiate. See id at 134–43.