Gender Discrimination in Employment of Attorneys: Feminists Sharpen The Issues

By G.S. Swan*

I. Introduction

Recently published survey data1 summons fresh attention to the plight of women in the legal profession. Evidence, reassessed in the following pages, of female lawyer earnings markedly lower than those of male attorneys indicates the necessity for a more intensive causal investigation of this factual matter. This need is the more pressing in light of the widespread, policy-oriented report that a woman in the United States generally can earn only 59 cents for every dollar earned by a man.2 These figures were, for example, cited against the 1982 closings of women’s counseling centers in the wake of federal budget cuts.

This article will focus on additional evidence implying that marriage is a more significant factor than gender in determining income, at least in several contexts. This evidence may be partially explicable in view of the sociological phenomena of hypergamy and homogamy.3 Too, the division of labor in the home by gender suggests that marriage is a strong income-determining factor.

The realities that woman attorneys are less likely to be married than are male lawyers, and that woman attorneys are far more likely to have lawyer spouses than are male lawyers likely to have attorney spouses will be reviewed. It will be seen as well that female lawyers much more frequently than male attorneys have spouses in the labor market.

The material overviewed in the following discussion has implications which generate the conclusion that a specific further re-

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3. “Hypergamy” is a term which describes a woman’s marriage into an equal or higher caste or social group. “Homogamy” refers to a marriage of equal status partners. See WEBSTER’S DICTIONARY pp. 1112, 1084 (3rd ed. 1965).
search inquiry is called for. The nature of the inquiry will be identified as careful calculation of female/male lawyer incomes further broken down by (at a minimum) the spouse-present married and the never-married, and the governmentally-employed and privately-employed.

II. The Marriage Variable in Income

Feminist (and nonfeminist) lawyers interested in identifying the scope of employment discrimination against women in the profession must be sensitive to the potentially significant role in employment and income of the marriage variable. As George F. Gilder, author of a 1981 book often deemed the Bible of the Reagan administration, long since has argued:

Although it may be hard to believe, in view of the feminist outcry, single men earn about the same as single women of the same age and qualifications. Between the ages of thirty and forty-four, according to a Labor Department study, both earn about the same hourly wages. Under age fifty-five, the single men work more hours than single women and earn a little more. After age fifty-five, the average incomes of single women edge above those of single men. Single college graduates over age twenty-five earn about the same amount, whether male or female. Both earned a median income of approximately 9,500 dollars in 1972.

The 1966 hourly earnings of men and women between thirty and forty-four showed, as Gilder indicates, that single women earned more than comparable single men, and 86 percent as much as (the possibly more highly pressured) comparable married men. This suggested but did not prove that discrimination on the basis of sex per se was trifling and that the marriage variable is significant.

The 1970 average hourly earnings of never-married women


6. Id. at 165-66 n.9.
was $3.07. That of never-married men was $3.53. (This advantage to men of only some 14 percent imaginably might be hypothesized as small enough to be attributable to the greater male physical strength.) Moreover, the 1970 average hourly earnings of spouse-present women slumps slightly to $2.98; those of spouse-present men (possibly more highly pressured to earn than bachelors) soars dramatically to $4.79. This too suggested but did not prove that discrimination on the basis of sex per se was minimal, while the marriage variable is critical.

It was recorded in 1973 that nationwide single women's incomes ranged from 93 percent of single men's incomes at ages 25 to 34, rather as Gilder had indicated, to 106 percent at ages 55 to 64, i.e., "after the danger of marriage and children are substantially past." This also suggested but did not prove that the impact of discrimination on the basis of gender per se was de minimis, while the marriage variable is crucial.

University of Nantes sociologist Francois de Singly recently published a study based on surveys dating from 1970 and encompassing 37,843 French workers from every income level and every type of job; he analyzed data for executive achievement in the 35 to 52 age bracket. His research found that among all men and women with a minimum of two years of university or professional training, 43 percent of married men reach the executive level versus only 6 percent of married women. But single men and women cluster together at 29 percent and 21 percent reaching the executive level respectively. These singles’ two achievement proportions approach one another more nearly than either approaches the marrieds' achievement level of either sex. This implied that in France discrimination on the ground of gender is slight while the marriage variable is, in de Singly’s words, "an important variable.”

8. Id.
10. A Rousing Oui For Married Men, TIME 75 (May 31, 1982). De Singly’s study was Marriage, Education and Social Position, I.N.S.E.E. Rev. (Institut National de la Statistique et des Etudes Economiques: March 1982).
11. A Rousing Oui For Married Men, supra note 10, at 75.
12. Id.
To be sure, it is at more advanced levels of education in France that employees would be the more closely comparable to American lawyers. De Singly's study disclosed that among single persons with three or more years at a university, single women have a better chance of attaining the executive level than have single men.\(^\text{13}\)

Nor are the United States and France the only economies providing evidence of the potentially significant role in income of the marriage variable. A nation so similar to the United States and France as Canada presented a 1982 publication of data (about 29-plus year olds) substantiating the significant role in income of the marriage variable.

Canada's Fraser Institute Senior Economist Dr. Walter Block in 1982 reported:

Never-married females in Canada earned $4,169.72 in 1971, while their male counterparts registered earnings of $4,201.24. The differential by sex for those who have never been married amounted to only $31.52 for an entire year; this translates into a female/male earnings ratio of 99.2 percent!

We can see, too, that the poor earnings of all females compared to all males (a ratio of 37.4 percent) is almost entirely a function of “ever married” status (a ratio of 33.2 percent). As of 1971, at least, Canadian women who have never been married have indeed “come a long way, baby” toward earnings equality with men. We will have to wait several years for the results of the 1981 census to see whether or not this tendency persists.\(^\text{14}\)

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13. Id.

Not only does marriage have asymmetric effects on earnings by sex, but it is reasonable to believe that so does “living together,” or “cohabitation” - and for similar reasons. Moreover, this category has become more statistically significant in recent years, though actual data is lacking . . . . If cohabitation as well as ever married status could be controlled for, one would thus expect the female/male ratio to be higher than .992. There is also, however, a reason for believing that .992 may be somewhat of an overestimate of the “true” female/male earnings ratio: never married females are older than never married males (46.2 years versus 43.7 years old), have more schooling (10.9 versus 9.3 years), work more weeks (45.6 versus 42.3 weeks), and work on a part-time basis to a lesser degree (10.6 percent versus 11.8
Interestingly, well after publication of the Fraser Institute's report the federal government's Statistics Canada still would declare that the "average income received by women in 1980 was less than half that received by men."

The most recent relevant data may be the March 1982 Bureau of the Census report concerning 1981 total money income of Americans between the ages of 25 and 64 (i.e., the prime decades of legal practice). The mean income of spouse-present men was $22,279, while that of spouse-present women was only $7,393. But the mean income of never-married women ($11,656) clustered comparatively near that of never-married men ($14,348).

The median income of spouse-present men was $20,154, while that of spouse-present women was just $5,631. Yet the median income of never-married women ($10,599) clustered comparatively near that of never-married men ($12,199). Marriage in 1981 America seemed an important variable as to income.

III. Hypergamy and Homogamy

Assuredly, broad and crude data for an economy overall may not be comparable to the realities of the U.S. legal employment market confronted by women and men; current and more nearly attorney-level employment data should be utilized to suggest whether the marriage variable could be crucial in legal profession employment and remuneration. Sociologists Gerald Maxwell, Rachel Rosenfeld and Seymour Spilerman of the University of Wisconsin, Columbia, and McGill respectively, disclosed in a 1979 study of women's careers in academia that "a considerable part of the disparity between men and women in academic status and

percent).

Id. at 248 n. 23 (Block's emphases).


17. Id.

18. Id.

19. Id.
earnings” derives not from sex discrimination “but from the disadvantages that marriage imposes on women.”

These social scientists find that academic women are more constrained than are academic men in exploiting strategic job opportunities via geographic moves. This largely is due to the custom in our society of marriage hypergamy, the tendency for females to wed males of a higher (or at any rate not lower) status than their own.

Virtually all married women in academia have husbands likewise committed to professional careers. Relative to geographic mobility, membership in a two-career marriage handicaps career development in two ways: one spouse may reject a geographically remote job offer because the partner’s career cannot develop there, and one spouse may have to sacrifice a good position for an inferior one in a location where the partner finds work. Under hypergamy the woman both wins and loses. She wins the equal or higher status mate, but loses some erstwhile advantage in career enhancement.

Insofar as a lawyer’s marriage is hypergamous it probably tends to favor the husband’s not the wife’s career, because the already-lower social status spouse (the female) tends for her own benefit to invest her energies to sustain the already-higher social status spouse’s career. Many male (not female) lawyers may be in hypergamous marriages, giving these attorney husbands a career advantage over other lawyers.

But it will be seen hereinafter (Section VI) that very many of

20. Maxwell, Rosenfeld & Spilerman, Geographic Constraints on Women’s Careers in Academia, 205 Sci. 1225 (September 1979).
21. Id.
22. Id. at 1226.
23. Id.

Much of the literature on women in the labor market denies that “all” women, “most” women, or the “typical” woman represent special problems of attrition, absenteeism and other characteristics reflecting the special demands of home on women. For example, the “typical woman economist” has not given up her job to move because of her husband’s move, but 30 percent of the women economists do, while only 5 percent of male economists accommodate their wives in this way.

Sowell, supra note 9, at 26, citing Reagan, Two Supply Curves for Economists? Implications of Mobility and Career Attachment of Women, 65 AM. ECON. REV. 101-03 (May 1975).
the married female (not male) lawyers are in homogamous marriages.24 In homogamy, like marries like.25 Female lawyers choosing homogamous marriages may thereby assume a career disadvantage against other lawyers, because the female attorney must accommodate her career plans to those of an already-equal social status, career-oriented husband.

But the immediately foregoing is rather abstract. Does any statistical data substantiate the Maxwell, Rosenfeld and Spilerman hypergamy report?

A Roper Organization survey of roughly 1,500 respondents26 for Virginia Slims taken almost simultaneously (October 1979) with the Maxwell, Rosenfeld and Spilerman report (September 1979) focused on spouse-employee mobility when both spouses hold good and interesting jobs—jobs imaginably resembling academe or law. Roper asked: “Suppose both a husband and wife work at good and interesting jobs, and the husband is offered a very good job in another city. Assuming they have no children, which one of these solutions do you think they should seriously consider?”27 Fully 76 percent of men chose “The wife should quit her job, relocate with her husband and try to get another job in the new place;” substantially more women (85 percent) agreed. Only 20 percent of men chose “The husband should turn down the job and stay where they are so the wife can continue with her job;” substantially fewer women (11 percent) agreed.

A scant 4 percent of each sex chose “The husband should take the new job and move there, the wife should keep her job and stay where she is, and they should get together whenever they can on weekends, holidays and vacations.”28 This data was published under the heading “Women More Sexist.”29

These results simply reinforced an August-September 1977 Gallup Organization poll for Redbook magazine of 760 married women ages 18-35 employed outside the home, positing: “If it were essential to my husband’s career I would give up my career and relocate. If it were essential to my career that we move, my hus-

25. Id.
27. Id. at 32.
28. Id.
29. Id.
band would give up his job and look for another."^{30} Each of 90 percent of wives replied that she would give up her career for her husband’s; only 10 percent disagreed. Yet each of a mere 22 percent of wives replied that her husband would give up his career for his wife’s; 78 percent disagreed that he would.^{31}

Gallup’s September 1977 results seem trustworthy given the October 23-26, 1977, CBS News/New York Times survey asking: “Let’s say that both a husband and a wife work—and the wife is offered a promotion in a different part of the country. Should they move to the city where the wife has the job, or stay where they are?”^{32} No less than 66 percent of respondents replied “Stay” versus just 12 percent answering “Move to wife’s job.” (Only 15 percent responded “Depends on better job,” with 7 percent “Other.”)^{33} All of these three polls’ results help underpin the Maxwell, Rosenfeld and Spilerman 1979 academic hypergamy report; the wife, typically not of a higher social class than the husband, invests in the career of her husband.

This 1979 report already has been commented on in the non-specialist literature as affording an alternative explanation to sexism for overall female/male academic employment differences.^{34} It will be seen in an examination of the marriage characteristics of female and male lawyers that the marriage variable possibly might be of pressing importance in women’s legal profession employment.

30. PUBLIC OPINION 25 (December-January 1980).
31. Id.
32. PUBLIC OPINION 37 (January-February 1979).
33. Id.

A major European female fecundity study now provides statistical data showing a decrease in female fecundity “significant after 30 years of age and marked after 35 years.” Schwartz & Mayaux, Female Fecundity as a Function of Age, NEW ENG. J. MED. 404, 406 (February 18, 1982). An accompanying editorial by Yale Medical School doctors alludes to the implications for the “future progress in the professional advancement of women,” proposing: “Perhaps the third decade should be devoted to childbearing and the fourth to career development, rather than the converse, which is true for many women today.” DeCherney & Berkowitz, Female Fecundity and Age, NEW ENG. J. MED. 424, 425 (February 18, 1982).

A still greater third than fourth decade female devotion to childbearing could exaggerate the impact of hypergamy. Not only will the husband probably be of a higher social class to begin with than the wife, but will have the more certain career headstart over hers.
IV. The Sexual Division of Labor in the Household

Hypergamy, homogamy, and sexual division of labor in the household have, in all events implicitly, been proposed as why the professional employment status of women today (expressly including their academic employment) is not more superior to that of fifty to sixty years ago. There then were approximately 11,000 female dentists and physicians;\textsuperscript{35} by 1929, over 27 percent of the academic staffs of universities were comprised of women.\textsuperscript{36} Hoover Institution economist Dr. Thomas Sowell affirms in light of such facts:

Women were a higher percentage of doctors, academics, the professions generally, and persons in Who's Who in earlier eras. The decline of women in such positions coincided almost exactly with a declining age of marriage among educated women and a rising number of children per marriage. When these demographic trends began to reverse in the 1960s, so did the occupational trends.\textsuperscript{37}

Marriage Sowell truly sees as the key variable in relation to the professional employment status of women:

Most of the male-female differences in earnings are in fact differences between married women and all other persons. Even before affirmative action, women in their thirties who had worked continuously since high school earned slightly more than men in their thirties who had worked continuously since high school. Single women who received their Ph.Ds in the 1930s had by the 1950s become full professors to a slightly greater extent than male Ph.Ds of the same vintage. Why, then, the great male-female differences which are being constantly documented with gross statistics? Married women do much worse than the single individuals of either sex (and married women with children even worse than that) in incomes, occupational promotion, et cetera. Married men do much better than singles of either sex, for reasons that are obvious to anyone familiar with the many ways in which wives make it possible for their husbands to put more time into their careers. In short, married men do so much better than single individu-

\textsuperscript{36} Id.
\textsuperscript{37} Sowell, \textit{Landmark or Curiosity?} \textit{Regulation} 30, 33 (September-October 1978).
als of either sex for the same reasons that married women do so much worse.38

Economists such as Gary Becker,39 Gordon Tullock and Richard M. McKenzie40 have, like Sowell,41 looked to a sexual division of labor in the household as a significant variable in the differing but not necessarily unequal effort commitments and product outputs of women and men. Noted political scientist Andrew Hacker, consistently therewith, pointed out during 1982 that one must not exaggerate the extent or impact of contemporary married women’s employment overall since one is counted in the “labor force”42 if: doing any hired work at all in a given week; if one is unemployed and looking for a new job; if one has been laid off and awaits recall; or if one has not been working at all but announces one is searching even for a part-time job.43 “So it was under this generous definition that 50.3 percent of all wives were said to be in the labor


Although barely 50 and practically unknown to the general public, Gary Becker is classed among the greatest living American economists. He is a prolific writer, the author of several classic books and articles: Human Capital (1964), Economic Theory (1971), The Economic Approach to Human Behavior (1976, a collection of his articles), and A Treatise on the Family (1981). Endowed with a formidable power of conceptualization, he has been pivotal in developing the new approach to economics that is only now beginning to gain a name outside the discipline. The considerable influence he has exerted for some twenty years on American economic thought deserves to be better known, even by those unspecialized in economic analysis, for his interpretations shed new light on many contemporary problems: the structure of the labor market, the influence of advertising on consumer behavior, the creation and development of human “needs,” sources of inequalities, and social interactions.


42. “The reader should recognize that the concept of the labor force, as defined by the Department of Labor, does not include housework.” McKenzie & Tullock, supra note 40, at 74.

force as of March of 1980.”

Hacker plainly reads the hard numbers to demonstrate intrafamilial sexual division of labor as a major variable of differing commitments and outputs of women and men:

Among married couples where the husband was employed (thus excluding unemployed men and men who are retired), 35.9 percent of the wives did not work at all; another 27.9 percent had year-round full-time employment; and the remaining 36.2 percent had part-time jobs or worked for only part of the year. Thus while one can say that 64.1 percent of these wives put in some work, only 43.6 percent of them did so on a steady basis. And many of those were wives in marriages that did not yet include children.

Hacker during 1983 reiterated the 1982 suggestion of an intrafamilial sexual division of labor as a major variable of differing commitments and outputs of women and men:

Indeed, in only 9.5 million of the two-job marriages—36.2 percent of the total—did both partners have full-time year-round work.

... Moreover, the majority of these households are ones where the couple have no children or where all of the children are grown.

While we hear a lot about working mothers, in fact among married women with youngsters under six, only 15 percent work the entire year in full-time jobs.

Of course, Hacker’s statistical data is extremely inclusive; it hence may prove unrepresentative of the sexual division of labor in the nineteen-eighties of persons who, like attorneys, have been educated at the graduate level.

A random sampling of 2,000 respondents from a universe of 32,588 respondents who completed and returned a June 1982 mag-

44. Id.
45. Id. Hacker avers: “My statistics were triple-checked prior to publication, and all of them are accurate.” Hacker, Letter to the Editor, New York Review of Books, May 27, 1982, at 56, 57. His data can be used “with complete confidence.” Id. He repeatedly defends his article. New York Review of Books October 21, 1982, at 52.
47. Id. at 29.
azine questionnaire “How Is Work Affecting American Families?” in turn elicited fully 438 responses from respondents who had engaged in graduate work. The sexual balance of this subuniverse could have been good inasmuch as of the sampling universe 43 percent of the women and 48 percent of the men had graduated from college or had engaged in graduate work.

To the question “In your household, who is responsible for the following: Child care,” 55 percent of respondents who had graduate backgrounds replied “Woman of house.” Only 17 percent of respondents who had graduate backgrounds answered “Man of house.”

To the query “In your household, who is responsible for the following: Attending school meetings, etc.,” 52 percent of respondents with graduate backgrounds answered “Woman of the house.” Only 27 percent answered “Man of house.”

To the question “In your household, who is responsible for the following: Getting child(ren) to doctors, dentists, etc., appointments,” 60 percent of respondents who had graduate backgrounds replied “Woman of house.” Only 18 percent of respondents who had graduate backgrounds answered “Man of house.” A thoroughgoing sexual division of labor in the household obtains in these nineteen-eighties homes of Americans educated at the graduate level. (France’s de Singly, too, hearkened to the intrafamilial sexual division of labor.)

V. The Sex Difference in Lawyer Incomes

An October 1965 survey by Professor James J. White of 1,298

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49. Id. at 82.
50. Id. at 65. 88 percent of sampling questionnaires were completed by women, either alone or with the man of the house. Id.
51. Id. at 51.
52. Id.
53. Id. at 52.
54. Says de Singly:

The family provides a kind of support system for the husband, pushing him up the job-advancement ladder. That doesn't happen for a single man or woman, and certainly not for a married woman, who is charged with performing domestic tasks.

Supra note 10 (emphasis added).
female and 1,329 male questionnaire respondents who had graduated from 108 law schools from 1956 to 1965 inclusive disclosed that the sex difference in present income was approximately $1,500 for those in their initial year after graduation. With the passage of each year the men increased their lead over the women until passing off White's graph at the class of 1956 with a lead of $17,300 to $9,000 and no substantial appearance of any slackening in their gain rate.

An April 1970 study of questionnaire responses from 165 female and 400 male graduates of Harvard Law School matched contacted women with men of the same academic class who had approximately the same grade average. Less than 12 percent of the females were making more than $20,000 versus 57 percent of the males; only 21 percent of the men were making less than $15,000, but 57 percent of the women were.

A study published in 1981 of responses of 162 of the female graduates of the University of Illinois College of Law, matched with 164 responses from randomly selected alumni, demonstrated a mean female income for pre-1971 graduates of $29,000, but a pre-1971 male mean of $40,980. The mean female income for 1971-1975 graduates was $24,480, but that of males was $35,290. The mean female income for 1976-1978 graduates was $19,380, but that of males was $19,615.

These sex differences in law school graduates' incomes can have been heavily influenced by the marriage variable only if very many respondents were (or at any rate, had been) married. Were they? Yes, and in sharply different proportions for the sexes, ratios almost unvarying over the years and as between law schools.

56. Id. at 1057.
57. Id.
59. Id. at 27.
60. Id. at 28.
61. Simon & Gardner, supra note 1, at 19.
62. Id. at 22.
63. Id.
64. Id.
VI. Lawyers and Marriage

In 1970, only 7.9 percent of male lawyers and judges were single versus 31.4 percent of females.\textsuperscript{66} Fully 86.5 percent of the male lawyers and judges were spouse-present married versus only 41.1 percent of the females.\textsuperscript{66}

Just 69 percent of the women in the White study were or had been married at the time of White’s study versus fully 83.3 percent of the men.\textsuperscript{67} Just 66 percent of the women in the Harvard sample reportedly “are married”\textsuperscript{68} versus 81 percent of the men.\textsuperscript{69} Only 62 percent of the Illinois women ever had married versus fully 84 percent of the men.\textsuperscript{70} The senior of the two Illinois researchers\textsuperscript{71} pointed out that the differences between female and male lawyers resemble those between female and male Ph.D.s.\textsuperscript{72} This observation is of interest inasmuch as it was female academics whom Maxwell, Rosenfeld and Spilerman utilized to identify the hypergamy variable.

Remembering the hypergamy two-career explanation of sex differentials in professional incomes, and also recalling the economic theory of the sexual division of labor in the household, note that of Harvard’s married women 63 percent were married to lawyers while only 2 percent of Harvard’s married men had lawyer wives.\textsuperscript{73} Of Illinois’ married women, 41 percent are married to attorneys, while of Illinois’ married men only 6 percent have attorney wives.\textsuperscript{74}

Not only does this pattern obtain across the social class spectrum from Harvard to the University of Illinois, but over the many generations as well. In 1890 approximately 66-67 percent of female attorneys were unmarried;\textsuperscript{75} of the married remainder, approxi-

\textsuperscript{65} Epstein, supra note 24, at 331.
\textsuperscript{66} Id.
\textsuperscript{67} White, supra note 55, at 1065.
\textsuperscript{68} Glancy, supra note 58, at 24.
\textsuperscript{69} Id.
\textsuperscript{70} Simon & Gardner, supra note 1, at 25.
\textsuperscript{71} Rita J. Simon.
\textsuperscript{72} Simon & Gardner, supra note 1, at 25, citing Simon, Clark & Galway, The Woman Ph.D.: A Recent Profile, 15 Soc. Probs. 221-36 (Fall 1967).
\textsuperscript{73} Glancy, supra note 58, at 24.
\textsuperscript{74} Simon & Gardner, supra note 1 at 26.
\textsuperscript{75} Kanter, Reflections on Women and the Legal Profession: A Sociological Perspective, 1 Harv. Women’s L.J. 1, 5 (1978).
mately 50 percent had lawyer husbands.\textsuperscript{76}

The wives of Harvard lawyers by an overwhelming majority (78 percent) are not employed,\textsuperscript{77} which suggests they are dedicated to facilitating their Harvard lawyer-husbands’ careers. But the husbands of Harvard lawyers almost without exception (98 percent) are employed,\textsuperscript{78} which suggests they are dedicated to furthering their own careers (being mostly law careers).

The wives of Illinois lawyers in substantial degree (44 percent) seem not fulltime-employed (“housewives”),\textsuperscript{79} which suggests they are dedicated to facilitating their Illinois lawyer-husbands’ careers. But the husbands of Illinois lawyers almost to a man are employed (41 percent attorneys, 35 percent other professions, 10 percent academics and 14 percent businessmen),\textsuperscript{80} which suggests they are dedicated to furthering their own careers.

VII. Conclusion

A. The Point Tentatively Proffered

It has been seen from the foregoing that a powerful prima facie case can be put forward that marriage is a critical income and employment variable tending to override the sex per se variable, at least relative to hourly-wage income and to academic employment. Homogamy and hypergamy can help explain why married persons (or in all events married females) may be handicapped in employment market competition.

An extremely pronounced sexual division of labor in the household has been evidenced hereinabove among households (with children) of members achieving graduate-level higher education. This sexual division of labor in the household, it has been demonstrated, is consistent with the widely-heralded, recent-decades entry of the great bulk of married American women into the generously defined “labor force.”

A highly pronounced female-male gap in the earnings of lawyers has been established from survey data published over the past sixteen years. These surveys encompass the graduates of many U.S. law schools. This gap has coincided with a range of only 62-69

\textsuperscript{76} Id. \\
\textsuperscript{77} Glancy, supra note 58, at 29. \\
\textsuperscript{78} Id. \\
\textsuperscript{79} Simon & Gardner, supra note 1, at 26. \\
\textsuperscript{80} Id.
percent of the women attorneys being married in contrast to a range of 81-84 percent of the male attorneys being married. The preceding discussion has demonstrated that the lawyer-males' spouses often or usually are not employed, whereas the lawyer-females' spouses with near-unanimity are employed. Women lawyers very often are married to lawyers; male attorneys very seldom are.

This presentation is of value because it suggests that the sharp female-male lawyer income difference may not stem in more than minimal degree from gender discrimination, but may hinge upon the marriage variable; the marriage variable can encompass a female-male division of labor within the spouses' home. The marriage status, unlike the gender status, is one voluntarily contracted for between—rough overall income data for single people of both sexes implies—income equals:

If we assume that what is happening in marriage is that women are in effect contributing towards jointly earned income (even if only the husband's name appears on the paycheck), then much of the internal breakdown we see makes much sense. That is, given that a married man has someone helping him earn his wages, if only by freeing up great amounts of time to devote to his profession by virtue of his wife's homemaking and other efforts, then we would expect married men to be making more than single men, other things equal. We would expect married women to be making less than single women because they are contributing towards men's earnings. We would expect to find single men and single women earning about the same.81

If marriage, rather than gender per se, is the potent factor in play, then energies devoted to assailing sex discrimination in itself are being inefficiently invested.

B. Why the Proffer is Tentative

The picture as delineated is nonetheless incomplete and inconclusive. It is inconclusive inasmuch as it is premised upon a limited amount of circumstantial evidence. It is incomplete because it omits a salient piece of evidence hinting that marriage for women lawyers emphatically need not be income-diminishing. That piece of evidence is White's:

81. Sowell, Status versus Behavior, supra note 38, at 185.
One might expect married women to earn less money than their unmarried female colleagues for two reasons: married women presumably need less money because they are married to men who are expected to support them; and a married woman's devotion to the job and resulting productivity may be less than that of a man or an unmarried woman, since both of the latter presumably seek their primary satisfaction from job success. However, the data contradict these expectations. The full-time employed married women in the classes of 1956 through 1960 earned significantly more money in 1964 than did the unmarried women in the corresponding classes.\(^{82}\)

White provides the following 1964 income breakdown by class for full-time employed married and unmarried women lawyers respectively:

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White's data are ambiguous. The classes of 1956 through 1960 without fail afford married women with incomes higher than unmarried, while the classes of 1961 through 1963 without fail constitute married women with incomes lower than unmarried. The classes of 1964 and 1965, wherein the married/unmarried woman lawyer relation again reverses itself, were of less interest in October 1965 because these graduates had been out of law school for so brief a period. (Cynthia Fuchs Epstein in 1981 likewise found married female lawyers more successful than unmarried females.\(^{84}\))

Why are the income results as they are for the classes of 1956 through 1960? Here is White:

One can make a variety of interesting speculations about this finding. It might be explained by the fact that some married women practice with their husbands and are able to make more advantageous monetary agreements than if they were dealing with other males. On the other hand, it may simply reflect a relationship between the emotional qualities which lead a woman to take a mate and those which make her acceptable to clients and colleagues. Unfortunately, the data do not give any satisfactory explanation for the higher earnings of

\(^{82}\) White, supra note 55, at 1067.

\(^{83}\) Id. at 1067 n.27.

\(^{84}\) Epstein, supra note 24, at 341-42.
married women.\textsuperscript{86}

C. How to Ascertain the Point

When half of White's data (classes 1961 through 1963) sustains the "marriage variable" hypothesis, but another half (classes 1956 through 1960) contradicts an hypothesis fitting rather neatly with other evidence, deeper investigation on-point is requisite. Surveys with six-way lawyer income breakdowns divided by sex, by the spouse-present married and the never-married\textsuperscript{86} and by governmentally-employed and privately-employed lawyers are sorely needed.

Why in this context add the governmental/private employer variable, myriad attorneys being employed by government? Here is Sowell:

We need to separate different kinds of decision makers - some of whom operate in a competitive, economic market; some of whom operate in a highly insulated market such as in the public utilities or the government itself. Insofar as we deal with people who operate in an economic market, we deal with people whose errors in judgment on women's capabilities create costs that they themselves have to bear. It may well be that there are general illusions among certain classes of employers about women, but it is very unlikely that millions of human beings will have the same illusions in exactly the same degree. A decisive competitive advantage would be gained by whatever employer who—by either intelligence or dumb luck—happened to have picked a belief that coincided more closely with the facts. There is no such force at work in government. There is no reason why a government agency cannot be wrong for fifty consecutive years. One could, in fact, put together an impres-

\textsuperscript{85.} White, supra note 55, at 1067-68.
\textsuperscript{86.} . . . much of the difference between men and women that appears in the gross statistics is, in fact, a difference between married women and all other persons. Sometimes this is concealed in the data because they define single women in such a way as to include women who are widowed, divorced, or separated; that is, women who have had a part of their work lives interrupted by marriage and childbearing. When we restrict it to women who were never married, an entirely different picture emerges.

sive list of agencies that fit this description.\textsuperscript{87}

This data will help clarify whether the marriage or the gender per se variable is more influential as to female/male attorney incomes.\textsuperscript{88} Until feminist lawyers can highly accurately diagnose a problem,\textsuperscript{89} we cannot with a great degree of confidence prescribe the correct medicine.\textsuperscript{90}

\textbf{D. The Broader Implications}

Evidence obtains to suggest that it is not only the income con-

\begin{quote}

The government, as an employer, is in a nonprofitmaking situation. This means, among other things, that racial discrimination is free, except for political repercussions. It is not surprising, therefore, that government employment has tended to follow a pattern very similar to that found in profit-regulated public utilities and in nonprofit organizations. The government as an employer was far more discriminatory than private industry, until this became politically impossible, at which point it made extremely rapid increases in minority employment, leading eventually to a higher proportion of minority employment than in private industry.


88. The Illinois study released during 1981 did not retain the income statistics collected with married/never-married sex breakdowns. Correspondence with R. Simon (April 13, 1982).

89. The instant discussion assesses the prospect that gender per se discrimination against women in the employment of attorneys may be de minimis; sex differences in incomes instead deriving from the marriage variable due to hypergamy and to the sexual division of labor in the household; hypergamy and the household division of labor are voluntarily embraced by the spouses. (Singles enter the marriage "market" as income near-equals.) By this hypothesis, gender differences in lawyer incomes trace to the functions neutrally applied as between the sexes of a strictly objective employment market.

Hence, the instant line of speculation is not to be confused with the familiar employment discrimination law theory of "sex-plus" (employment burdens imposed upon one sex only, premised not on gender alone but on sex plus a second variable such as school-age children). Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); B. Schlei & P. Grossman, \textit{Employment Discrimination Law} 337-60 (1976); B. Schlei & P. Grossman, \textit{Employment Discrimination Law} 98-100 (Supp. 1979).

\end{quote}
text in which the marriage could override the gender variable, but even in such other contexts of broad social concern as electoral performance. November 1982 election exit polling by CBS News and the New York Times revealed that single men and women voted for Democratic Congressional candidates by a massive 26 percent margin, but married people voted Democratic by only a slim 4 percent margin.91

Surveyed November 1982 married voters endorsed President Ronald Reagan's job performance by a 13 percent margin, yet single voters by a 9 percent margin disapproved his official performance.92 Married voters in a Presidential election then would have chosen President Reagan over former Vice-President Walter F. Mondale by a wide 16 percent margin; single voters actually preferred Mondale.93

Finds the principal analyst of the CBS News/New York Times poll, CBS News political director Martin Plissner:

What some of the early studies of the gender gap largely overlooked is that Reagan's and the Republicans' problems are only to a limited degree with women as such. The biggest problem is single women. And the next biggest problem is single men. Single women voted Democratic in the last election by twenty-nine points, disapproved of Reagan's performance in office by twenty points, and preferred Mondale by thirteen points. But married women voted Democratic by only eight points (well below the average of twelve for all voters), approved Reagan's handling of his job by eight and chose him over Mondale by ten.

On each of these measures, married women were more favorable to Reagan or the Republicans than were single men.94

The marriage variable could override the gender variable concerning so crucial an outcome as determining who governs our

92. Id.
93. Id.
94. Id.
Future investigations of the type suggested herein could help clarify more generally the relative impacts of the gender variable and of the marriage variable. This might help inform potential public policy options. Society can encourage (or discourage) marriages, can encourage (or discourage) early marriage or late marriage, and can encourage (or discourage) divorce. Biology decrees that for this century the gender variable will be far less manipulable than is the marriage variable.

95. “Nearly half of those who call themselves Democrats are single. Only a third of the Republicans are single.” Id.

96. But a considerable amount of evidence suggesting a very weighty impact of the gender variable in employment of attorneys is concisely reviewed in Swan, Until Men Become Active Feminists, the Legal Profession Will Remain Sullied, 1 STUD. LAW. 10 (January 1973).