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> Seeking out a more balanced life is not a women's issue; balance would be better for us all.[1]

I. INTRODUCTION

When Nikki Waller and Joann S. Lublin presented the question "why aren't there more women in the upper ranks of corporate America?" in their September 2015 *Wall Street Journal* article,[2] the question appeared almost cliché. With the recent revitalization, and arguable re-branding of modern feminism, the debate regarding female representation in the upper echelons of government and business continues to gain greater attention.[3] While women have made great strides toward equality, they remain noticeably absent from top leadership positions,[4] prompting many to seek ways to

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1. Anne-Marie Slaughter, *Why Women Can't Still Have It All*, THE ATLANTIC, July/August 2012, at 100.

2. Nikki Waller & Joann S. Lublin, *What's Holding Women Back in the Workplace?*, WALL ST. J., Sept. 30, 2015, at R1.

3. *Id.* (arguing one of the most vocal supporters of female leadership development is Facebook COO and *Leanin.org* founder, Sheryl Sandberg). *See also* SHERYL SANDBERG, LEAN IN (1st ed. 2013) (a book that seeks to identify barriers to female top leadership, and present possible solutions to overcome those barriers). *See also About Lean In*, LEANIN.ORG, http://leanin.org/about, (outlining Sandberg's nonprofit "offering women the ongoing inspiration and support to help them achieve their goals. If we talk openly about the challenges women face and work together, we can change the trajectory of women and create a better world for everyone").

4. DEBORAH RHODE, WOMEN AND LEADERSHIP, 1 (2017) ("Despite a half century of equal opportunity legislation, women's leadership opportunities are far from equal. The most comprehensive survey finds that women occupy less than a fifth of senior leadership positions across the public and private sectors.") (citing Colorado Women's College, *Benchmarking Women's Leadership in the United States* (Denver: Colorado Women's College, 2013)). *See also* Catalyst, Pyramid*: Women in S&P 500 Companies*, CATALYST (last updated Aug. 22, 2017), http://www.catalyst.org/knowledge/women-sp-500-companies (showing only 4.4% of S&P 500 are female). *See also* Center for American Women in Politics, *Women in Elective Office 2015*, CENTER FOR AMERICAN WOMEN IN POLITICS, EAGLETON INSTITUTE OF POLITICS,

promote and develop female leadership.

But why should we, as a society, care about female leadership? Far from merely benefitting one particular portion of society, enhancing and improving female representation in leadership positions can be beneficial for society as a whole.[5] Although many focus on enhancing the welfare of those in the lower and middle classes, attention must also be paid to those residing in the top of the socioeconomic scale, for "it would be a grave mistake, from a behavioral perspective, to ignore the upper classes."[6]

Once we have determined the general utility of improving top female earners' wellbeing, the question becomes: how do we improve top management representation? While ignoring the need for essential changes in societal views on female leadership would be illogical, there is more that can be done to improve the pathway toward female management than merely relying on developing socio-normative views. Thoughtful policy can provide significant momentum in the movement toward equal management representation.[7]

Enter the Internal Revenue Code.[8] The Tax Code is a powerful tool that can be used to promote social objectives.[9] This paper seeks to demonstrate ways in which the Tax Code has previously influenced behavior,[10] and to provide a possible way to use the Tax Code that would positively impact top female workforce representation.

This article is set forth in three subsequent sections. Section II proceeds by discussing the gendered nature of tax policy through joint filing for married couples and the current child and dependent care credit structure. This section also identifies how this gendered structure provides significant disincentives to those women seeking top positions.[11] Section III then presents what I have deemed the Equal Participation Model, with equal monetary and nonmonetary contributions among men and women in families and in various sectors of the workforce.[12] This model would positively impact not merely top-earning women, but society as a whole.[13] Finally, Section IV presents a possible way to use the Tax Code to work toward the Equal Participation Model through both individual and employer

RUTGERS UNIV., http://www.cawp.rutgers.edu/women-elective-office-2015 (last visited Nov. 14, 2015) (women hold approximately 20% of U.S. Congressional seats and approximately 25% of state level elective offices).

5. *See infra* section III and accompanying footnotes.

6. Edward McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1028 (1993).

7. *See infra* section IV.A and accompanying footnotes.

8. Hereinafter the "Tax Code."

9. *See infra* section II, IV.A, and accompanying footnotes.

10. *See infra* section II and accompanying footnotes.

11. *Id.*

12. *See infra* section III and accompanying footnotes.

13. *Id.*

incentives.[14] While this paper does not provide all of the solutions to the many challenges facing women who seek top positions, it does seek to contribute to the ongoing conversation concerning female leadership.

II. CURRENT GENDER IMPLICATIONS IN THE TAX CODE FOR HIGH ACHIEVING WOMEN

The Tax Code has become a source of political, economic, and social debate, frequently suffering criticism for its treatment of certain vulnerable groups.[15] The Tax Code's treatment of women's issues is no exception to this critique, as its impact on women has been evaluated since as early as 1939.[16] While the Tax Code has since adjusted its treatment of certain women's issues,[17] the current system remains a source of gender inequity based upon two particular elements of the Tax Code: joint filing and the Child and Dependent Care Credit.[18]

In addition to analyzing the Tax Code's treatment of women as a whole, it can also be enlightening to assess its impact upon particular segments of the female population to perhaps uncover further economic and social effects.[19] In his article "Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code,"[20] Edward McCaffery identifies specific provisions, as well as other federal income taxation principles, and analyzes their effects upon three distinct sectors of the female population:

14. *See infra* section IV and accompanying footnotes.

15. *See, e.g.*, TAXING AMERICA (Karen B. Brown & Mary Louise Fellows eds., 1996) (anthology of critical tax theory articles spanning subjects including racial segregation, income inequality treatment, and gender implications under the Tax Code); Nancy J. Knauer, *Critical Tax Policy: A Pathway to Reform?,* 9 NW. J. L. & SOC. POL'Y 206, 210 (2014) ("By viewing taxpayers only in terms of income level, tax policy is free to consider distributional issues without having to account for countervailing concerns such as gender or race equity."). *See generally* Susan Pace Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 VA. TAX REV. 671 (2006); Stacey Y. Abrams, Income, *Deductions and Wealth: A Survey of Policy Remedies to the Intersection of Color, Gender and Taxation*, 28 S.U. L. REV. 255 (2001).

16. *See generally* Smith v. Comm'r, 40 B.T.A. 1038 (1939) *aff'd*, 113 F.2d 114 (2d Cir. 1940); Poe v. Seaborn, 282 U.S. 101 (1930); Martha T. McCluskey, *Taxing the Family Work: Aid for Affluent Husband Care*, 21 COLUM. J. GENDER & L. 109 (2011); McCaffery, *supra* note 6; Allan J. Samansky, *Child Care Expenses and the Income Tax*, 50 FLA. L. REV. 245, 259–69 (1998); Mary Louise Fellows, *Rocking the Tax Code: A Case Study of Employment-Related Child-Care Expenditures*, 10 YALE J.L. & FEMINISM 307, 386 (1998); Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987).

17. For example, the adoption of the childcare deduction and the evolution to the current Child and Dependent Care Deduction came as a response to the initial policies allowing absolutely no deductions or credits for childcare expenses arising out of full time employment of two spouses. *See infra* section II.B and accompanying footnotes.

18. *See infra* sections II.A, II.B and accompanying footnotes.

19. *See infra* sections II.A, II.B, II.C and accompanying footnotes.

20. Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the* Code, 40 UCLA L. REV. 983 (1993).

the "uppers," the "middles," and the "lowers."[21] McCaffery concludes that those women falling in the "lowers" and "uppers" categories are significantly more affected by the current federal income tax regime than those in the "middle" class.[22] While national social and economic situations have changed since 1993,[23] the reality of severe Tax Code based disincentives for high earning women remain.[24] In fact, some critics have described the current systems of joint filing and childcare expense as "aid for affluent husband care."[25] By recognizing the inherent gender biases and resulting disincentives for female workforce participation, particularly among those women in potential top-earning positions, we can identify ways to reduce, if not eliminate, these impediments to the benefit of all.[26]

A. JOINT FILING

The joint filing system was implemented to address the disparity between community property and non-community property states concerning single income couples' ability to decrease their tax liability by offsetting a portion of the single earner's wages as income of the nonearning spouse.[27] However, since its establishment in its current form in 1948,[28] the joint filing structure has developed into a marriage penalty for dual income

21. McCaffery, *supra* note 20, at 1014.

22. *Id.* at 1014–15, 1020, 1028–29.

23. For example, the most recent economic recession severely impacted employment throughout the United States and other members of the Organization for Economic Cooperation and Development ("OECD"), driving many women to both enter into and remain engaged in the workforce. *See* KATRIN ELBORGH-WOYTEK ET AL., INTERNATIONAL MONETARY FUND, WOMEN, WORK, AND THE ECONOMY: MACROECONOMIC GAINS FROM GENDER EQUITY, 12 (2013).

24. The Joint Filing and Child and Dependent Care Credit system has virtually gone unchanged, in terms of substantive elements, since 1993. *Compare* I.R.C. § 21 (1988) *to* I.R.C. § 21. *Compare* § 1 (1990) *to* I.R.C. § 1 (2014).

25. Martha T. McCluskey, *Taxing the Family Work: Aid for Affluent Husband Care*, 21 COLUM. J. GENDER & L. 109, 111 (2011). *See also* Brigid Schulte, *Unlike in the 1950s, there is no 'typical' U.S. family today*, WASH. POST (Sept. 4, 2014), https://www.washingtonpost.com/news/local/wp/2014/09/04/for-the-first-time-since-the-1950s-there-is-no-typical-u-s-family/ ("And yet, despite the diversity now of U.S. families, most of the laws and policies that affect families' work and life have not changed. U.S. tax policy, the Social Security system, laws governing work hours, all still favor married breadwinner-homemaker families.").

26. *See infra* sections III, IV, and accompanying footnotes.

27. "Adoption of these income-splitting provisions will produce substantial geographical equalization in the impact of the tax on individual incomes. The impetuous enactment of community-property legislation by States that have long used the common law will be forestalled. The incentive for married couples in common-law States to attempt the reduction of their taxes by the division of their income through such devices as trusts, joint tenancies, and family partnerships will be reduced materially. Administrative difficulties stemming from the use of such devices will be diminished, and there will be less need for meticulous legislation on the income tax treatment of trusts and family partnerships. In effect, these amendments represent the adoption of a new national system for ascertaining Federal income tax liability. The adoption of these amendments will extend substantial benefits to residents of both community-property and common-law States." Revenue Act of 1948, 1948-1 C.B. 285 (I.R.S. 1948).

28. Revenue Act of 1948, Pub. L. No. 471, 62 Stat. 110.

couples and a marriage bonus for single income households.[29] In his article *Taxation and Marriage: A Reappraisal*,[30] Yair Listokin describes the theoretical underpinnings of the current joint filing structure.[31] Under this system, the Tax Code favors couples equity[32] and the progressive marginal rate, often to the detriment of marriage neutrality.[33]

While single income couples enjoy the benefits of wider tax brackets and ultimately a lower marginal rate under the current joint filing structure,[34] the current joint filing system for married couples provides a disincentive for the secondary earner[35] to continue working.[36] For potential dual income households, the first dollar of the secondary earner's income will be taxed at

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29. In her article, *Competing Goals Amidst the "Opt-Out" Revolution*, Lora Cicconi elaborates upon the marriage penalty and bonus structure in the Tax Code:

> Because tax rates are progressive, meaning that marginal rates increase as income increases, this system benefits couples with disparate incomes by allowing them to shift some of the income of the higher earning spouse into a lower tax bracket.[52] In contrast, it adversely affects those with equal incomes because neither the joint filing brackets nor exemption levels are twice as large as under the single filing system; the system pushes part of the income of equal earning spouses into a higher marginal tax bracket than the bracket applied to single filers. This result is the oft-discussed "marriage penalty."

Lora Cicconi, *Competing Goals Amidst the "Opt-Out" Revolution: An Examination of Gender-Based Tax Reform in Light of New Data on Female Labor Supply*, 42 GONZ. L. REV. 257, 266 (2007); McCaffery, *supra* note 6, at 991 ("Whether or not there is an actual 'marriage penalty' under the general rate structure depends on the relative allocation of earnings between spouses: those who already have a 50-50 division receive no benefit from the deemed income splitting, and purely pay the price of the higher rates; for those who have a 100-0 split, the benefits of the split income predominate over the burden of the higher rates. The marriage penalty is thus relative.").

30. Yair Listokin, *Taxation and Marriage: A Reappraisal*, 67 TAX L. REV. 185 (2014).

31. *Id*. at 185-95. Listokin identifies three theoretical foundations for taxation, namely couples equity, marriage neutrality, and progressive marginal rate taxation, and then explains how the current joint filing structure adheres to two of these theories: progressive marginal rate taxation and couples equity.

32. "Couples equity" is the theory that couples earning equivalent gross income as a couple should be taxed equally. *Id.* at 187.

33. *Id.* at 188. Listokin defines marriage neutrality as the idea that two individuals should be taxed the same regardless their marital status. *Id.* at 187. Listokin further proposes that couples equity and marriage neutrality are of equivalent importance in a modern Tax Code, thus both principles must "share the burden" under the most efficient and effective system. *Id.* at 194. As Listokin identifies in his article, "high rates on secondary earners are likely inefficient, as secondary earners' labor decisions are much more sensitive to taxes than primary earners' labor decisions." *Id.* at 189.

34. McCaffery, *supra* note 6, at 991.

35. In this paper, secondary earner is defined as the spouse whose first dollar of income will be taxed at a higher initial marginal rate based upon the greater income of the primary earner. Described another way, the primary earner is the spouse who earns more income. While it is not always the case that the primary earner will be the husband and the secondary earner will be the wife, this is likely going to be the scenario, particularly once the couple has children. McCafferey, *supra* note 6, at 993.

36. Cicconi, *supra* note 29, at 266 (2007) ("The joint filing system, in combination with the progressive rate structure, creates disincentives for secondary earners to enter the labor force.").

a greater marginal rate than if the two earners filed separate returns.[37] Therefore, comparatively the secondary earner will have significantly fewer after-tax dollars than the primary earner, resulting in a "marriage penalty" for dual income couples with relatively equivalent incomes.

This disparity in after-tax income is made even more pronounced among top-earning couples.[38] For couples earning fewer total dollars, the secondary earner's base marginal rate is not that much different from that of the primary earner. However, the higher the primary earner's marginal bracket, the higher the base bracket for the secondary earner.[39] For couples with at least one earner in the top marginal rate, the secondary earner's first income dollar will be taxed at 39.6%.[40] Thus joint filing provides a particularly significant disincentive for secondary earner workforce participation among couples in top-earning brackets.

The dual income marriage penalty, together with the fact that the vast majority of secondary earners are women, only serves to reinforce gender stereotypes in workforce participation.[41] When their labor is taxed at a higher rate, secondary earners subtly are informed that their workforce participation is less valuable, and thus less desirable for society as a whole, encouraging these secondary earners to opt out of the labor market.[42]

B. THE CHILD AND DEPENDENT CARE CREDIT

In addition to the marriage penalty under the joint filing structure, dual income couples face social and financial complications when it comes to child care. While social stigma surrounding the "working mother" has continued to dissolve, the Tax Code continues to reflect antiquated notions of gendered labor.[43]

37. Cicconi, *supra* note 29, at 267 ("When the secondary earner is faced with her labor force decision, her first dollar of income is subject to the same marginal tax rate as the primary earner's last dollar of income—the exemption and lower tax rates that apply at the lower income levels no longer apply because they have already benefited the primary earner.").

38. McCaffery, *supra* note 6, at 1025–29 (discussing disincentives among top-earning couples for secondary earner workforce participation); Cicconi, *supra* note 29, at 267 ("Even part-time work at low wage rates may be taxed at up to 35% under the current tax system if the primary earner places the couple in the highest tax bracket, and once social security and payroll taxes are included, that number can easily increase to over 50%."); Margaret Ryznar, *To Work, or Not to Work? The Immortal Tax Disincentives for Married Women*, 13 LEWIS & CLARK L. REV. 921, 939 (2009) ("Professional couples who are married also disproportionately suffer a higher tax bill—in such cases, one spouse must also pay the couple's top marginal rate on most, if not all, of her income.").

39. Compare couples in which the primary earner receives $20,000 to one in which that earner receives $100,000. In the $20,000 example, the top marginal rate for primary earner will be 15%, causing the secondary earner's "base marginal rate" to be 15%. For the couple in which the primary earner receives $100,000, the secondary earner's "base marginal rate" will be 25% because that is the primary earner's marginal rate. *See* I.R.C. § 1(a).

40. *See* I.R.C. § 1(a).

41. Listokin, *supra* note 30, at 189.

42. *Id.*

43. "A couple fitting the stereotypical pattern in which the husband works and the wife does not will have a minimal marriage penalty, or even a marriage benefit, if the spouses file

The current Dependent Care Credit is the result of a decades-long evolution in female workforce participation and debate.[44] First rising to national attention with the case *Smith v. Commissioner*,[45] the proper treatment of child-care expenses for dual income couples has become a consistent source of debate and scholarship.[46] In Smith, the Board of Tax Appeals held, and the Second Circuit affirmed, that expenses for child-care, while a necessary expense of Mrs. Smith's income production, were not eligible for inclusion with the general business expense deduction because such expenses were primarily personal.[47] Although the Smith opinion is no longer held in great esteem due to its blatant sexism and the growing prevalence of female workforce participation, this holding laid the foundation for the tax treatment of child-care expenses.[48]

Although Congress enacted a limited deduction in 1954 for those child-care expenses incurred for employment purposes,[49] the Tax Reform Act of 1976[50] and its subsequent revisions currently give a limited credit for child-care expenses.[51] The current Dependent Care Credit contains several similarities to the former deduction, including an "employment related expense" requirement for credit eligibility,[52] echoing the general

jointly. However, the more the couple strays from this traditional living pattern, that is, the more equivalent the spouses' incomes, the more severe their marriage penalty." Amy C. Christian, *The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law*, 13 J.L. & POL. 241, 303 (1997).

44. *See infra* notes 47-64 and accompanying text.

45. 40 B.T.A. 1038 (1939) *aff'd*, 113 F.2d 114 (2d Cir. 1940).

46. *See generally* Cicconi, *supra* note 29; Fellows, *supra* note 16; McCaffery, *supra* note 6; McCluskey, *supra* note 16; Samansky, *supra* note 16.

47. *Smith*, 40 B.T.A. at 1039 ("We are not prepared to say that the care of children, like similar aspects of family and household life, is other than a personal concern.").

48. Samansky, *supra* note 16, at 259–69 (1998). *See also* Fellows, *supra* note 16, at 386 (1998) ("By treating child-care expenditures as personal, the tax law perpetuates the economic exploitation, sexism, and racism that is rationalized by distinguishing between public production and private reproduction.").

49. Samansky, *supra* note 16, at 260. The 1954 childcare deduction was limited to women and widowers, and included a relatively strict phase out for dual income couples. I.R.C. § 214(a), (b)(2) (1954). This structure reflected the Congressional bifurcation of childcare expenses incurred out of necessity, which were treated as a business expense, and those incurred out of choice, which were treated as a personal expense. Samansky, *supra* note 16, at 260–61. This deduction was revised in 1971 to extend greater benefits to more taxpayers; yet the rationale for any deduction was limited by some element of necessity and phased out above a certain income level. Revenue Act of 1971, Pub. L. No. 92-178, § 210, 85 Stat. 497, 518 (incorporated in I.R.C. § 214 (1971)); *see* 1971 U.S.C.C.A.N. 1918, 1965–70 (discussing Congress's reasons for the 1971 revisions of § 214).

50. Tax Reform Act of 1976, Pub. L. No. 94–455, 90 Stat. 1520 (1976) (incorporated in I.R.C. §44A (1976)).

51. I.R.C. § 21. Section 21 states, "In the case of an individual for which there are 1 or more qualifying individuals (as defined in subsection (b)(1)) with respect to such individual, there shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to the applicable percentage of the employment-related expenses (as defined in subsection (b)(2)) paid by such individual during the taxable year." *Id.* at § 21(a)(1) (2017).

52. I.R.C. § 21(b)(2) (2017). The language in current Section 21, "amounts paid for the following expenses, but only if such expenses are incurred to enable the taxpayer to be

Congressional expectations that any tax benefits resulting from child-care expenses must be necessary to the taxpayer's employment.[53] Second, there is a specific dollar limit on the deduction or credit available to taxpayers under these structures.[54] Additionally, the § 21 Dependent Care Credit phase down reflects the former § 214 phase out at certain income benchmarks.[55] Furthermore, those couples seeking to take advantage of these tax benefits must file jointly under both the former deduction framework and current credit.[56]

Although the current Dependent Care Credit retained several elements of the pre-1976 deductions, the current credit structure reflects the Congressional desire to benefit low and middle-income households.[57] Some scholars have even gone so far as to argue that the current Dependent Care Credit aims primarily at wealth redistribution,[58] and reflects a certain level of progressivity.[59] Although credits generally are structured to benefit equally all taxpayers with the same reduction in tax liability regardless of marginal rate, the Dependent Care Credit under Section 21 phases down among higher-earning individuals.[60] Under this system, two secondary earners who must pay the same amount of after-tax dollars for dependent care will be treated differently by the sheer fact that one has a higher adjusted gross income.[61] Therefore, the Dependent Care Credit provides an additional

gainfully employed," almost directly mirrors the language in former Section 214, "but only if such care is for the purpose of enabling the taxpayer to be gainfully employed." I.R.C. § 21 (b)(2)(A); I.R.C. § 214(a) (1954).

53. The text of § 21 includes the qualification that deductions are allowed for child or dependent care expenses "only if such expenses are incurred to enable the taxpayer to be gainfully employed." I.R.C. § 21 (b)(2). Note that even the title of § 21 qualifies deductions for expenses "*necessary* for gainful employment." I.R.C. § 21(emphasis added). *See also* Samansky, *supra* note 16, at 260-61.

54. I.R.C. § 21(c); I.R.C. § 214(c) (1971).

55. I.R.C. § 21(a) (reducing the allowable credit by "1 percentage point for each $2,000 (or fraction thereof) by which the taxpayer's adjusted gross income for the taxable year exceeds $15,000" but not below twenty (20) percent); I.R.C. § 214(d) (1975) (beginning the deduction phase out at $35,000 with no deduction allowed for taxpayers with income in excess of $44,600). Note that legislation has been proposed in the House of Representatives that would increase the amount deductible to a 50% cap and likewise increase the phase down percentage to 35% of the eligible expenses incurred. H.R. 2703, 114th Cong. (2015).

56. I.R.C. § 21(e)(2); I.R.C. § 214 (e)(1) (1971).

57. "While deductions favor taxpayers in the higher marginal tax brackets, a tax credit provides more help for taxpayers in the lower brackets." S. Rep. No. 94-938, pt. 1, at 132 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3438, 3565.

58. "By circumventing the progressive rate structure to allow for greater reductions in tax liability for lower-income taxpayers than for higher-income taxpayers, the credit appears more related to redistribution of wealth concerns than determining the appropriate tax base under an ideal accretion tax." Fellows, *supra* note 16, at 386.

59. Amy Dunbar and Susan Nordhauser, *Is the Child Care Credit Progressive?*, 44 NAT'L TAX J. 519 (1991) (presenting their study considering the credit structure and concluding that the credit is progressive).

60. I.R.C. § 21(a)(2).

61. Consider two secondary earners who, for simplicity, must each pay $1,000 in childcare expenses in a particular year. The low-income taxpayer will be able to take a $350 credit,

disincentive for workforce participation among top-income secondary earners.[62]

C. GENERAL IMPLICATIONS FOR HIGH ACHIEVING WOMEN

The current joint filing system and Dependent Care Credit are two distinct elements of the Tax Code that impact those secondary earners in the top marginal tax brackets.[63] First, secondary earners in top-income couples will feel the sting of the "marriage penalty" more severely than their lower earning counterparts.[64] The entirety of their income will be taxed at a much higher base marginal rate, resulting in less after-tax income.[65] Second, the Dependent Care Credit is designed to benefit lower and middle income households, and the current phase down results in fewer effective benefits for those top earners.[66]

In addition to joint filing and dependent care credit disincentives among top-earning couples, secondary earners face additional unique barriers to workforce participation. The first barrier is the lack of necessity; while necessity frequently is the deciding factor that keeps secondary earners working in lower earning couples,[67] this necessity is not a factor driving higher-income secondary earners to workforce participation. The second barrier is the unattractiveness of part time options for top secondary earners because of the few after-tax dollars as a result of high base marginal rates on secondary-earner income.[68] Despite the fact that a notably high percentage of top earners operate in dual income households, the disincentive for part-time workforce participation has the potential to push secondary earners in top-earning couples to opt out of workforce participation as opposed to

whereas a top earner may only claim a $200 credit. *See id.*

62. The Obama White House published a Fact Sheet setting forth the President's tax reform proposals. *See* Office of the Press Secretary, *FACT SHEET: A Simpler, Fairer Tax Code That Responsibly Invests in Middle Class Families*, THE WHITE HOUSE (Jan. 17, 2015), https://www.whitehouse.gov/the-press-office/2015/01/17/fact-sheet-simpler-fairer-tax-code-responsibly-invests-middle-class-fami. As the title of the publication notes, these reforms are focused on the improving the welfare of middle class families by increasing the maximum credit allowed. ("The President's [Obama's] tax proposal would streamline child care tax benefits and triple the maximum child care credit for middle class families with young children, increasing it to $3,000 per child."). Even if these proposals were adopted, top-income secondary earners would not benefit from these reforms because their income would exceed the maximum income under which the credit may apply.

63. *See supra* section II.A and accompanying footnotes.

64. *See supra* notes 28-42 and accompanying text.

65. *See supra* notes 36-37 and accompanying text.

66. Fellows, *supra* note 16, at 386.

67. *See* Amy C. Christian, *The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law*, 13 J.L. & POL. 241, 289 (1997) ("Unless prompted by economic necessity, her return to work is generally considered discretionary."); McCaffery, *supra* note 6, at 1019 ("simple survival creates a strong economic incentive to work among lower income classes"); Margaret Ryznar, *To Work, or Not to Work? The Immortal Tax Disincentives for Married Women*, 13 LEWIS & CLARK L. REV. 921, 939 (2009) ("Other mothers need to work just to provide the basic necessities for their families.").

68. McCaffery, *supra* note 6, at 1027-28.

continue working in part-time positions.[69]

Furthermore, high achieving, and thus high earning, women in particular face an additional barrier to workforce participation as mothers. The social expectation to be a "good mother," often at the expense of direct workforce participation, pressures high-earning women more than their lower earning counterparts precisely because of their elective workforce participation.[70] While lower income secondary earners must work to maintain a certain level of comfort, top-income secondary earners are often criticized for neglecting their familial obligations for "selfish" income production outside the house.[71] In fact, the Tax Code consistently has reflected a bias in favor of necessary child-care expenses over elective child-care expenses.[72]

Consequently, high achieving women face workforce participation disincentives both under the Tax Code and in society as a whole. Although clearly not the sole or even primary source of female workforce opt-out, the Tax Code's joint filing and Dependent Care Credit structures establish additional barriers to those women seeking top positions by perpetuating a gendered labor division between monetary and nonmonetary family contributions.[73]

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69. *See* McCaffery, *supra* note 6, at 1025 ("But the tax laws by and large do not support this reality; they stick to a single-earner model. The results are tax-related incentives not to have children, not to marry if the spousal incomes are apt to be equal, and to specialize between market and nonmarket production."). Note, however, that McCaffery recognizes that reality does not always reflect those incentives within the Tax Code, "[t]he fact that many upper-income families have resisted these incentives is testimony to the appeal of different familial models, as well as to the flexibility that money brings to ignore certain economic incentives." ***Id.*** at 1025.

70. SCOTT COLTRANE, FAMILY MAN, 25 (1996). "According to the so called traditional view, it is a man's duty to serve his family by being a breadwinner and protector, whereas a woman's duty is to be a good wife and mother. More than any other cultural belief, this idealized notion of separate spheres for mothers and fathers shapes what it means to be a man or woman in our society." ***Id.*** Therefore, to fulfill their role in the traditional model, potential top-earning mothers are incentivized to stay home and commit to full time parenting rather than reenter the workforce. *See id.*, McCaffery, *supra* note 6, at 1027-28.

71. *See* COLTRANE, *supra*, note 70, at 25; Slaughter, *supra* note 1 (describing women who step back from high pressure careers to devote more time to their family obligations, "Many factors determine this choice, of course. Men are still socialized to believe that their primary family obligation is to be the breadwinner; women, to believe that their primary family obligation is to be the caregiver. But it may be more than that. When I described the choice between my children and my job to Senator Jeanne Shaheen, she said exactly what I felt: "There's really no choice."); Tyler G. Okimoto & Madeline E. Heilman, *The "Bad Parent" Assumption: How Gender Stereotypes Affect Reactions to Working Mothers*, 68 J. SOCIAL ISSUES 701 (2012) (finding that working mothers are often perceived as less competent parents only when "working out of choice.").

72. 1971 U.S.C.C.A.N. 1918, 1965–70 (discussing Congress's reasons for the 1971 revisions of former § 214); Smith v. Comm'r, 40 B.T.A. 1038, 1039 (1939) *aff'd*, 113 F.2d 114 (2d Cir. 1940); Fellows, *supra* note 16, at 386; Samansky, *supra* note 16 at 260; *see* I.R.C. § 214 (1954); I.R.C. § 214 (1971).

73. "Encouraging upper income women to stay home deprives women of powerful, and symbolically important, roles." McCaffery, *supra* note 6, at 1028.

III. THE IDEAL MODEL: EQUAL PARTICIPATION

After identifying the inherent gender bias in the Tax Code as a reflection of greater gendered labor and caregiving roles in society, one must turn to how these structures should be altered. By defining the ideal model, we will be able to identify how to achieve that model and determine the most efficient and effective steps toward its achievement. While some scholars argue that gendered labor division is the most effective method of economic production and family organization,[74] this model serves to perpetuate deeply entrenched gender stereotypes.[75] Moreover, workforce and family participation that breaks these rooted gender stereotypes have been found to promote desirable outcomes.[76] Therefore the most effective family structure should reduce, if not completely eliminate, these gender stereotypes.[77]

This ideal structure, which we will define here as the Equal Participation Model, contemplates equal participation in all spheres of life. It is a model where, in the aggregate, women and men participate equally in the individual family unit and in society as a whole.[78] In different industries and different levels in each organization, men and women share equal representation.

The Equal Participation Model contains both micro benefits in the family unit and macro benefits for society. For the individual family unit, equalizing monetary and nonmonetary contributions between spouses helps to promote harmony in the household, social development for fathers, and positive gender ideals in children.[79] Stepping away from the individual unit, equal male and female participation in the family unit will in turn positively impact gender participation in larger social structures. More balanced male and female participation in top positions will positively impact education, business, and government for all members of society.

74. COLTRANE *supra* note 70, at 153 (explaining how "human capital theory . . . legitimizes separate spheres and promotes a gender-segregated division of family and market labor" using a neutral efficiency analysis); Joel S. Hollingsworth, *Save the Cleavers: Taxation of the Traditional Family*, 13 REGENT U. L. REV. 29 (2001) (arguing certain modifications under the Tax Code to minimize penalties for traditional single earner households to promote effective child-care).

75. *See* COLTRANE, *supra* note 70. *See generally* Fellows, *supra* note 16, at 373 (describing the work of notable tax Scholar Henry Simons, "The stereotype of the non-working wife was powerful enough to let his argument pass as the equivalent of sound analytical tax policy.").

76. *See infra* sections III.A, III.B and accompanying footnotes.

77. *Id.*

78. Note that this model considers participation in the aggregate, for it clearly would be impossible for every single family to reflect a perfect 50-50 participation split. Even under this model, certain families would not reflect an equal split. Furthermore, the Equal Participation Model would result logically in roughly equivalent percentages of men and women opting out of the workforce to engage in full time child rearing.

79. *See infra* section III.A.

A. BETTER FAMILIES THROUGH BALANCED MONETARY AND NON-MONETARY CONTRIBUTIONS

Equal participation in the family unit envisions roughly equivalent[80] division between spouses in monetary and nonmonetary labor;[81] unlike the traditional family model that would allocate most, if not all, monetary labor to the husband, while the wife performed non-monetary labor for the household.[82] The Equal Participation Model, through its equitable labor allocation, benefits households in three distinct ways: First, this model establishes equity and harmony in the family unit by dividing income producing and caregiving functions equally between spouses;[83] second, this model helps develop often overlooked and under-emphasized social skills in men, further strengthening spousal relationships; and finally, equal participation among spouses provides positive role models for children.

Women, and mothers in particular, are the most direct beneficiaries of the equal participation model. Greater equality in labor allocation in the family unit promotes harmony in the household.[84] Roughly equivalent monetary contribution establishes greater equality in relationships by giving women more breadwinning power. While women on average devote twice as much time to nonmonetary labor as their male counterparts,[85] the equal participation model would reduce this time, allowing for more monetary contribution or personal time. For high earning women in particular, greater equality within the family unit can help reduce the additional stress that arises from balancing a demanding career and family obligations.[86] This

80. Theoretically such contributions would be divided exactly in half, however realistically it would be impossible given physical differences and practical considerations. As Scott Coltrane observed in his 1987-1992 survey among "sharing couples," labor allocation was usually made on an ad hoc basis without significant scheduling or forethought. COLTRANE, *supra* note 70, at 67. Although Coltrane identified certain inequalities even among sharing couples (for example, mothers generally performed more laundry duties whereas fathers tended to focus on external household repairs), "couples were usually happy to live with unbalanced tasks if they could maintain an image of cooperation and trust underlying their efforts." *Id.* at 65–68.

81. For purposes of this section, monetary labor constitutes that labor for the production of income, often performed outside the home. Conversely, non-monetary labor is labor performed within the home for which no direct compensation is earned. While there are several variations and iterations of monetary and nonmonetary labor, this division is the most common in modern households.

82. COLTRANE, *supra* note 70, at 25 ("Kind and gentle women are supposed to stay home to care for children and family, allowing bold and aggressive men to venture out into the competitive worlds of work, politics and war.").

83. *See infra* notes 86-89 and accompanying text.

84. Ryznar, *supra* note 67, at 938 ("One commentator has noted that, in fact, equally financially dependent spouses are more likely to be equally committed spouses.").

85. THE WORLD BANK, WORLD DEVELOPMENT REPORT 2012, 19 (2012).

86. *See* Debra L. Nelson and Ronald J. Burke, *Women Executives: Health, Stress, and Success*, 14 EXECUTIVE HEALTH 107,112–13 (2000) (identifying the discrepancy between the total workload experienced by executive men and women, leading to increased overall stress for female executives and further highlighting the greater risk for anxiety and depression among executive women resulting from work-family conflict); Slaughter, *supra* note 1

stress reduction can improve female executive health and wellbeing by reducing anxiety and depression triggers than can lead to more serious health concerns over time.[87]

In addition to benefitting women through enhanced market participation and relief from some domestic responsibilities, the Equal Participation Model serves men and fathers by developing essential social and caregiving skills.[88] In particular, caregiving has been shown to increase fathers' sensitivity and social development.[89] Caregiving participation has also been shown to improve men's health[90] and effectiveness in their monetary labor.[91] Moreover, reduction in out-of-home working hours may also lead to enhanced workplace performance.[92]

By enhancing male sensitivity and increasing female empowerment through employment, the equal participation model can strengthen marriages.[93] Increased male sensitivity through childcare helps improve communication and commitment in the marriage, and female employment helps establish equal income producing roles in the marriage.[94] Furthermore, roughly equivalent monetary and non-monetary labor provides similar

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(identifying how more balanced scheduling and sharing within the family unit can help those women seeking to attain top careers while maintaining family obligations).

87. *See* Nelson & Burke, *supra* note 86, at 113, 116–17.

88. COLTRANE, *supra* note 70, at 76–80. *See also infra* notes 89–97 and accompanying text.

89. COLTRANE, *supra* note 70, at 76–77. "Recognition of increased sensitivity on the part of the fathers, and their enhanced competence as parents, were typically evaluated with reference to adopting a vocabulary of motives and feelings similar to the mothers.'" *Id.* at 77.

90. Julianne Holt-Lunstad, Ph.D., Wendy Birmingham, M.S., Adam M. Howard, B.S., & Dustin Thoman, Ph.D., *Married With Children: The Influence of Parental Status and Gender on Ambulatory Blood Pressure*, 38 ANNALS OF BEHAVIORAL MEDICINE 170, 176 (2010). This study revealed significantly lower blood pressure among parents, though this difference was more pronounced among women. *Id.*

91. Jamie J. Ladge, Beth K. Humberd, Marla Baskerville Watckins, & Grad Harrington, *Updating the Organization Man: An Examination of Involved Fathering in the Workplace*, 29 THE ACADEMY OF MANAGEMENT PERSPECTIVES 152, 165 (2015) ("We find that spending more time with their children during the workday is related to many important work outcomes for fathers that can have a positive impact on organizations.").

92. Gary Siniscalco, Lauri Damrell, & Clara Morain Nabity, *The Pay Gap, The Glass Ceiling, and Pay Bias: Moving Forward Fifty Years After the Equal Pay Act*, 29 ABA J. LAB. & EMP. L. 395, 414–17 ("numerous studies show that long hours do not necessarily enhance the bottom line or equate to success").

93. COLTRANE, *supra* note 70, at 78–79; Katherine Twamley, Ginny Brunton, Katy Sutcliffe, Kate Hinds, & James Thomas, *Fathers' Involvement and the Impact on Family Mental Health: Evidence from Millennium Cohort Study Analyses*, 16 COMMUNITY, WORK & FAMILY 212, 217–18 (2013) (finding a positive correlation between father involvement in child-caregiving and overall family mental well-being). In fact, research has shown that couples "who spend more time on household labor report more frequent sex. Even after controlling for time spent in paid labor, the positive association between hours spent on housework with sexual frequency remains, and paid work hours are also positively associated with sexual frequency." Constance T. Gager and Scott T. Yabiku, *Who Has the Time? The Relationship Between Household Labor Time and Sexual Frequency*, 31 JOURNAL OF FAMILY ISSUES 135, 156 (2010).

94. COLTRANE, *supra* note 70, at 78.

responsibilities, expectations, and considerations in the family unit.[95] Although female workforce participation was once blamed for increasing divorce rates and family instability, recent scholarship actually has concluded that such trends have significantly declined, if not ceased altogether.[96]

Finally, children can benefit from the equal participation model because they are able to observe positive gender role models and receive diverse caregiving from two parents.[97] Generally speaking, "[t]he involvement of men in child care . . . influences the socialization of children into gender roles and family formation processes, including gendered divisions of labor in the next generation of families."[98] Studies consistently have found positive correlations between paternal involvement and child wellbeing.[99] For example, daughters who observe more egalitarian domestic and workforce participation among parents are more likely to aspire towards careers apart from traditional gender roles.[100]

Within the family unit, the Equal Participation Model mirrors the growing social roles of fathers and mothers sharing duties of both caregiving and economic production for the household.[101] As Jill Yavorksy identifies in her article *The Production of Inequality: The Gender Division of Labor*

95. COLTRANE, *supra* note 70, at 79.

96. Bisakha Sen, *Does Married Women's Market Work Affect Marital Stability Adversely? An Intercohort Analysis Using NLS Data*, 60 REVIEW OF SOCIAL ECONOMY Vol. 1, 71, 87 (Mar. 2002) (finding that current trends show greater family stability when both spouses work, and concluding that the data "impl[ies] that further economic opportunities for women will not be detrimental to familial stability, and hence should not be discouraged").

97. *See infra* notes 99–101 and accompanying text.

98. Scott Coltrane, *Gender Theory and Household Labor*, 63 SEX ROLES 791, 796 (2010) (hereinafter Coltrane, *Gender Theory*). *See also* Scot M. Allgood, Troy E. Beckert, & Camille Peterson, *The Role of Father Involvement in the Perceived Psychological Well-Being of Young Adult Daughters: A Retrospective Study*, 14 NORTH AMERICAN JOURNAL OF PSYCHOLOGY 95, 98 (2012) ("greater father participation in child rearing was associated with less stereotypical views of gender roles").

99. Twamley et al., *supra* note 93, at 216 (citing several studies, "There appears to be a positive correlation between fathers' involvement in childcare and children's wellbeing."); Allgood, *supra* note 98, at 98 (noting studies demonstrating that daughters' greater self-esteem is positively correlated with father involvement).

100. Alyssa Croft, Toni Schmader, Katharina Block, and Andrew Scott Baron, *The Second Shift Reflected in the Second Generation: Do Parents' Gender Roles at Home Predict Children's Aspirations?*, 25 PSYCHOLOGICAL SCIENCE 1418, 1426 (2014) ("children's explicit beliefs about gender differences in domestic labor were predicted by the same beliefs held by their mothers, as well as by their fathers' tendency to self-stereotype as more work oriented than family oriented. But for daughters, in particular, a tendency to self-stereotype as more family than work oriented in the future was uniquely predicted by their parents' beliefs and behaviors. Specifically, girls were more likely to envision themselves as working outside the home when their fathers reported more gender-egalitarian beliefs about domestic labor, but also when their mothers reported doing relatively less domestic work and self-stereotyped as more work oriented. Over and above explicit gender-role beliefs, however, fathers' actual division of labor and implicit gender-role associations played a key role in predicting daughters' occupational aspirations.").

101. Jill Yavorksy et al., *The Production of Inequality: The Gender Division of Labor Across the Transition to Parenthood*, 77 J. MARRIAGE AND THE FAMILY 662, 663–64 (2015).

Across the Transition to Parenthood, "Cultural conceptualizations of fatherhood have progressed from a sole focus on economic responsibilities to expectations that fathers be directly involved in the care of their children and form close, emotional ties to their children . . . At the same time, mothers' roles have expanded to include economic responsibilities."[102] However, as Yavorsky identifies later in her article, actual household labor distribution has not completely caught up with these changing social conceptualizations.[103]

B. BETTER BUSINESS THROUGH EQUAL FEMALE MANAGEMENT PARTICIPATION

Stepping back from the benefits of equal labor allocation in the home, the Equal Participation Model seeks gender balance in the greater social and economic structures. While equal workforce participation has become a virtual reality, women are noticeably absent from top management positions.[104] The Equal Participation Model seeks equal female management at all levels because it would establish additional role models for future high achieving women and result in more effective decision making through leadership diversity.[105]

First, it is important to identify how exposure to women in top leadership positions helps to initiate and perpetuate growing female workforce participation and aspiration. Role models help inspire young women to reach toward high achieving careers.[106] This inspiration, in turn, perpetuates a cycle of higher achievement and further aspiration outside of traditional

102. Yavorksy et al., supra note 101, at 663.

103. *Id*. at 675 (finding that mother spend approximately 8 more hours working, including both paid economic production and unpaid household labor, than fathers following the transition to parenthood).

104. *See* INTERNATIONAL MONETARY FUND, WOMEN, WORK, AND THE ECONOMY: MACROECONOMIC GAINS FROM GENDER EQUITY, 4 (2013); *supra* note 24 and accompanying text.

105. Kimberly Weisul, *Women on boards: Are Quotas really the Answer?*, FORTUNE (Dec. 5, 2014), http://fortune.com/2014/12/05/women-on-boards-quotas/; Ruth Sullivan, *Can Gender Quotas Get More Women Into Boardrooms?*, BLOOMBERG.COM (July 1, 2015) http://www.bloomberg.com/news/articles/2015-07-01/can-gender-quotas-get-more-women-into-boardrooms-; *see* RHODE, *supra* note 4, at 3 ("For effective performance in an increasingly competitive and multicultural environment, workplaces need individuals with diverse backgrounds, experienced, and styles of leadership.").

106. Lori Beaman, Esther Duflo, Rohini Pande, and Petia Topalova researched how women village leaders in India affected adolescent female future aspirations. Lori Beaman, Esther Duflo, Rohini Pande, & Petia Topalova, *Female Leadership Raises Aspirations and Educational Attainment for Girls: A Policy Experiment in India*, 335 SCIENCE MAGAZINE 582, 582-83 (Feb. 3, 2012). They found that successive female leaders eliminated the aspiration gap between boys and girls in terms of educational and career goals, concluding, "It is their presence as positive role models for the younger generation that seems to underlie observed changes in aspirations and educational outcomes of adolescent girls." *Id*. at 586; Joann Lublin, *How Companies are Different When more Women are in Power*, WALL ST. J., Sept. 26, 2016 (*quoting* Robin Ely) ("The more women who are in positions of power visibly, the better it is for women lower in the organization.'').

gender roles and stereotypes.[107] Therefore, steps toward equal participation would empower female leadership.

In addition to the specific value for women, society as a whole will benefit from equal female management participation.[108] It is generally accepted that women frequently display a distinct leadership style from that of their male counterparts.[109] Studies have previously found that women have a tendency to display what has been described as a "transformational" and "interactive" leadership style, focusing more on consensus and development as opposed to the traditional male "transactional" approach.[110] These styles encouraged participation and consciously strove to develop self-worth among all participants in the enterprise, ultimately strengthening group identity.[111]

Alongside improving workplace satisfaction, female management has also proven effective through enhanced performance of companies with female CEOs.[112] While not all companies led by women display improved performance, expanding research on this subject reflects a general trend where female directed Fortune 1000 Companies produced 226% better equity returns than the S&P 500 during the years 2002-2014.[113] Similarly, female politicians have been cited as more effective than their male counterparts in the performance of certain functions in the political process.[114]

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107. *Female Leadership* at 584 ("By the second cycle of female leadership, the gender gap in educational outcomes is completely erased (and even reversed), and girls spend less time on household activities….").

108. Booz & Company, *Empowering the Third Billion: Women and the World of Work in 2012*, 21 (2012) ("This is perhaps the most noteworthy conclusion of our research—the economic advancement of women doesn't just empower women but also leads to greater overall prosperity . . . economically empowering women is the key to greater societal gains.").

109. Cheryl de la Rey, *Gender, Women and Leadership*, 65 AGENDA: EMPOWERING WOMEN FOR GENDER EQUITY 4, 5 (2005). Although de la Rey addresses the debate concerning whether women in fact reflect a distinctive leadership style, she points out that the majority of scholars agree with the assertion that women leaders do display characteristics that set them apart from their male colleagues. *Id.*

110. Judy B. Rosener, *Ways Women Lead*, HARV. BUS. REV. (Nov./Dec. 1990).

111. *Id.* ("[T]he women encourage participation, share power and information, enhance other people's self-worth, and get others excited about their work."); *see* RHODE, *supra* note 4, at 5–6 (discussing use of a transformational leadership style among women leaders).

112. *See infra* notes 114–15 and accompanying text; Caroline Fairchild, *Women CEOs in the Fortune 1000: By the numbers*, FORTUNE (July 8, 2014), http://fortune.com/2014/07/08/ (noting that "[o]nly 5% of Fortune 1000 companies have female CEOs, but those giants generate 7% of the Fortune 1000's total revenue" and "Fortune 1000 companies with female chiefs outperformed the S&P 500 index over their respective tenures").

113. Pat Wechsler, *Women-led Companies Perform Three Times Better than the S&P 500*, FORTUNE (Mar. 3, 2015), http://fortune.com/2015/03/03/women-led-companies-perform-three-times-better-than-the-sp-500/.

114. *See* Tony Dokoupil, *Why Female Politicians are More Effective*, NEWSWEEK (Jan. 22, 2011), http://www.newsweek.com/why-female-politicians-are-more-effective-66889 (stating that female politicians were noticeably more effective in the introduction and sponsorship of federal bills than male politicians, and those bills were considered most important among the bills introduced, ultimately suggesting that women were better politicians than men).

Thus the Equal Participation Model would benefit not only the female portion of the population through increased representation and the establishment of beneficial role models, but also society as a whole through enhanced performance in several fields through uniquely leadership techniques.[115] Moreover, reduction in out of home working hours may also lead to enhanced workplace performance for both male and female employees as a result of more effective working hours.[116]

IV. ACHIEVING THE IDEAL MODEL

Once the equal participation ideal has been identified, the question becomes how to achieve this model. While abolishing the glass ceiling will require significant social and psychological evolution, there are ways to implicitly propel this evolution through tax policy.[117] Achieving equal participation can be advanced through tax policy in the form of individual and employer centered policies. Individual policies include individual filing and enhanced childcare deductions for dual income households at all income levels.[118] At the employer level, it would be beneficial to introduce policies incentivizing flextime for all employees and female workplace advancement initiatives.[119]

A. THE TAX CODE AS A MODE OF SOCIAL CHANGE

Sociologists have studied the relationship between social policy and gender roles for many decades.[120] In his brief article Gender Theory and Household Labor, Scott Coltrane provides a succinct schematic of the various underlying conditions and causal connections that impact gender stratification.[121] Coltrane suggests that policy, gender ratios among elites, and changes in gender resources can influence gender stratification in a society.[122] In short, policy undoubtedly will impact behavior, and tax policy is no exception.[123]

115. *See supra* section III.B and accompanying footnotes; Nelson, *supra* note 86, at 119 ("interventions aimed at increasing women's opportunities and career development, providing flexibility at work, and instituting work-family programs can benefit both women and organizations").

116. *See* Siniscalco et al., *supra* note 92, at 414–17 ("numerous studies show that long hours do not necessarily enhance the bottom line or equate to success").

117. *See infra* section IV.B and accompanying footnotes.

118. *See infra* section IV.B.1 and accompanying footnotes.

119. *See infra* section IV.B.2 and accompanying footnotes.

120. *See* Coltrane *Gender Theory, supra* note 98, at 794–99.

121. *Id*. at 794–99.

122. *Id.* at 795.

123. *See id.* (This phenomenon has been described, "government leaders have . . . levers they can pull to economically empower their female citizens. . . . Countries that do so are producing results."); Booz & Company, *supra* note 108, at 6 ("[T]here is a clear correlation between the front end processes and policies regarding women's economic opportunities (inputs) and the actual success of women in their national economies (outputs)."); Ryznar, *supra* note 67, at 934–35 (observing "the inordinate power of the tax code as a policy tool");

While some scholars would argue that the Tax Code should not seek to achieve certain policy objectives or modify behavior, it remains a fact that the Tax Code will affect taxpayer decisions.[124] Although the social and psychological effects of tax policy may not be apparent at first blush, the implicit and subconscious effects of these policies ultimately will impact behavior.[125] Therefore it is not only efficient, but also effective to use the Tax Code to positively impact gender workforce participation and social stereotypes.

B. Policy Proposals to Achieve the Equal Participation Model

The Tax Code can effect positive change in gender stratification through amendments both at the individual and employer level. For the individual taxpayer, the Tax Code can be friendlier to secondary earners through mandatory individual filing and an improved child-care deduction scheme.[126] The Tax Code can provide further policy improvements to gender stratifications by providing employer incentives for universal flextime and female leadership and advancement.[127] These policies will improve secondary earner workforce participation, particularly among women in high achieving, high earning professions.

1. For Individuals

The two primary disincentives for secondary earner workforce participation arise out of the joint filing model of marriage taxation and the Dependent Care Credit.[128] By adopting mandatory individual filing, the Tax Code would reduce, if not eliminate, the current marriage penalty for dual income households while reducing the marginal rate of secondary earners.[129] By reforming the Dependent Care Credit, top secondary earners will benefit equally by this policy.[130]

a. Individual Filing

Individual filing for married couples would vastly improve marriage neutrality in the Tax Code.[131] While couples' equity is another worthwhile

see Slaughter, *supra* note 1 ("I would hope to see commencement speeches that finger America's social and business policies, rather than women's level of ambition, in explaining the dearth of women at the top.").

124. *See supra* note 123.

125. Coltrane, *Gender Theory*, *supra* note 98, at 795 (identifying that policies are one of the many factors influencing gender stratification).

126. *See infra* section IV.B.1 and accompanying footnotes.

127. *See infra* section IV.B.2 and accompanying footnotes.

128. *See supra* section II and accompanying footnotes.

129. *See infra* section IV.B.1.a and accompanying footnotes.

130. *See infra* section IV.B.1.b and accompanying footnotes.

131. Listokin, *supra* note 30, at 189. Listokin argues that neutrality is desirable under the Tax Code because "A system of marriage taxation that is marriage neutral does not alter incentives to marry, enhancing efficiency. Marriage neutrality also ensures that labor/leisure

principle in tax policy, and is the principle favored under our current joint filing structure,[132] marriage neutrality is more desirable in modern society.[133] Indeed, many of the income shifting reasons for Congress's current joint filing rate structure are not as prevalent in modern society, and in fact should be discouraged to achieve the Equal Participation Model.[134]

Joint filing eliminated the incentives for couples with large income discrepancies to split income and reduce tax liability. In the Equal Participation Model, this income discrepancy is, in an ideal scenario, completely eliminated so that the incomes of both spouses are essentially the same.[135] Therefore the Tax Code should seek to reduce income discrepancy between spouses, which can be achieved through individual filing because tax liability of couples would be lowest when each earns roughly equivalent income.[136] By improving marriage neutrality in the Tax Code, there will be fewer disincentives for secondary earner opt-out, thus increasing secondary earner, and thus female, workforce participation.[137]

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trade-offs are unaffected by the system of marriage taxation. Marriage neutrality also embeds the equitable principle that marriage should not change someone's tax liability." *Id.* at 191.

132. *Id*. at 188 ("From 1948 through the present day, the Code has prioritized progressive marginal rates and couples equity.").

133. *Id.* at 188–91. Listokin argues that marriage neutrality and couples equity are equally desirable, which, although persuasive, is not the case when looking at policy used to effect social change in gender roles. *Id.* at 192. Listokin justifies his marriage taxation model, "Rather than coping with the trilemma by disfavoring some taxpayers but not others, taxpayers behind a veil of ignorance should prefer to share the burdens of the trilemma more equally." *Id.* at 194. While couples equity is a worthwhile principle, it does not provide a strong enough justification in light of the significant joint filing disincentives for female secondary earners; *see supra* section II.A and accompanying footnotes. Moreover, most modern families do not follow the same single income structure that was common when the joint filing system was first introduced. *See also* Brigid Schulte, *Unlike in the 1950s, there is no 'typical' U.S. family today*, WASH. POST (Sept. 4, 2014) https://www.washingtonpost.com/news/local/wp/2014/09/04/for-the-first-time-since-the-1950s-there-is-no-typical-u-s-family/.

134. Listokin, *supra* note 30, at 190–91. Listokin states: "Joint filing eliminates the incentive to engage in specious transactions or otherwise undesirable legal changes in an attempt to minimize the total tax liability of a married couple. Joint filing also obviates the need to allocate income from communal property to one spouse or the other, an unavoidably byzantine process." *Id.* at 190–91.

135. *See supra* section III.A and accompanying footnotes.

136. In an individual filing system, consider couples AB and CD in which A earns $40,000, B earns $0, C earns $20,000 and D earns $20,000 before taxes. Using the rates under § 1(c), C and D will both be taxed at a rate of 15%, resulting in $3,000 tax liability each and a total after tax income of $34,000 to CD. *See* I.R.C. § 1(c). Under those same brackets, A will be assessed taxes of $3,315, plus 28% of A's income over $22,000 ($5,012), resulting in a total AB after tax income of $31,673. *See id*. Recognize that these calculations are rudimentary and are intended for illustration purposes only.

137. INT'L MONETARY FUND, WOMEN, WORK, AND THE ECONOMY: MACROECONOMIC GAINS FROM GENDER EQUITY, 13 (2013); INT'L MONETARY FUND, FISCAL POLICY AND EMPLOYMENT IN ADVANCED AND EMERGING ECONOMIES, 24–25 (2012) (presenting empirical studies showing overall greater female workforce participation elasticity and demonstrating that tax relief for women and secondary earners would stimulate workforce participation).

While optional filing would be a more politically feasible alteration of the current filing structure, achieving the Equal Participation Model would require a more radical approach such as mandatory individual filing. Optional individual filing such as that proposed in the late 1990s Marriage Tax Elimination Act[138] would present only a marriage bonus, without any penalty for couples with large income discrepancies.[139] To achieve the Equal Participation Model, policies favoring dual income households over single income households would need to be adopted. Furthermore, optional individual filing would be economically undesirable because it would only reduce married couples' tax burden without any structural alterations to make up that lost revenue.[140] However politically undesirable, mandatory individual filing would be a significant step towards increasing secondary earner workforce participation, leading towards the Equal Participation Model.

Although moderate reforms in which dual-earning couples with roughly equivalent incomes receive a lesser marriage penalty than under the current joint filing scheme are appealing and more politically feasible,[141] they would not be an effective step toward equal participation. Similarly, proponents of a secondary earner credit would not further the goals of the Equal Participation Model because they often favor those in lower income brackets at the expense of top earners.[142]

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138. Marriage Tax Elimination Act, H.R. 2456, 105th Cong. § 2 (1997); Marriage Tax Elimination Act, S. 1314, 105th Cong. § 2 (1997).

139. The Marriage Tax Elimination Act provided optional individual filing for married couples under § 1(c) in addition to joint filing under § 1(a). Marriage Tax Elimination Act, H.R. 2456, 105th Cong. § 2 (1997); Marriage Tax Elimination Act, S. 1314, 105th Cong. § 2 (1997). This reform would have only eliminated the marriage penalty for dual income couples, while single income couples would still be eligible for the joint filing marriage bonus. *See* Marriage Tax Elimination Act, H.R. 2456, 105th Cong. § 2 (1997); Marriage Tax Elimination Act, S. 1314, 105th Cong. § 2 (1997).

140. Cicconi, *supra* note 29, at 285 ("[A]n optional single filing system would be very costly, because it would eliminate the marriage penalty while retaining the marriage bonus").

141. Although a proposal such as Listokin's reformed § 1(d) married filing separately does provide significant relief for dual income couples, achieving the Equal Participation Model requires an elimination of any marriage penalty for dual income couples, if not a marriage bonus for those households. Listokin, *supra* note 31, at 199–200. Other scholars have essentially ruled out joint filing as a politically feasible alternative in the United States and thus turned to other sources of reform to help alleviate secondary earner bias in the Tax Code. *E.g.,* Cicconi, *supra* note 20, at 290 (proposing a secondary earner credit); Office of the Press Secretary, *supra* note 62 (proposing dependent care credit expansion).

142. Cicconi presents a "secondary earner work expense credit" available to all secondary earners for all expenses related to entering the workforce, including childcare. Cicconi, *supra* note 29, at 293–94. Cicconi's proposal phases out starting at incomes above $25,000, resulting in no available credit for dual income couples earning more than $105,000. *Id.* Similarly, the White House Fact Sheet also focuses on expanding dependent care credit availability to lower and middle income households. Office of the Press Secretary, *supra* note 62.

Mandatory individual filing would shift the Tax Code's preference away from couples' equity towards a marriage neutral system.[143] This reform would significantly reduce secondary earner labor disincentives through lower marginal rates for secondary earner income. The impact would be felt most by those with higher incomes because they feel the marriage penalty most severely.[144] Overall, reduction of secondary earner workforce participation disincentives, especially among top earners, would make significant strides towards the goal of equal participation.

b. Child and Dependent Care Credit Reform

Alongside mandatory individual filing, the Tax Code can further promote the Equal Participation Model by reforming the current Child and Dependent Care Credit to benefit top earners in addition to those in lower and middle brackets. President Obama's proposal to reform the Dependent Care Credit, while effective in alleviating burdens on lower and middle-income families through increased access to the credit and amount available under the credit, does not address the additional disincentives for top-income secondary earners.[145] Even though adopting a childcare deduction would be the most effective in reducing top earner workforce participation disincentives, itemized deductions such as childcare expenses tend to benefit top earners more significantly than their lower income counterparts.[146] The Dependent Care Credit therefore should remain a credit, but the current phase down for top earners should be eliminated to reduce top-income secondary earner disincentives to workforce participation.

Reforms to the Dependent Care Credit should incorporate an elimination of the current phase down and an increase in the credit value available to reflect current childcare costs. Elimination of the current phase down would reduce progressivity,[147] making this credit available for top earners in the same amount as their lower earning counterparts.[148] The prior White House

143. Listokin, *supra* note 30, at 189.

144. *See supra* section II.A and II.C and accompanying footnotes.

145. Office of the Press Secretary, *supra* note 62. One key goal of President Obama's proposal is to make the Tax Code more simple and fair for middle income families. *Id.* One method to accomplish this goal is to "[s]treamline child care tax incentives to give middle-class families with young children a tax cut of up to $3,000 per child." *Id.*

146. In fact, the current system was adopted in 1976 as a reformed version of the dependent care credit. *See supra* notes 49-62 and accompanying text. The change from a deduction to a credit arose out of critiques of the deduction's regressive nature. *Id.*; S. Rep. No. 94-938, pt. 1, at 132 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3438, 3565 (describing the credit's benefits for lower and middle income households).

147. Fellows, *supra* note 16, at 386 ("By circumventing the progressive rate structure to allow for greater reductions in tax liability for lower-income taxpayers than for higher-income taxpayers, the credit appears more related to redistribution of wealth concerns than determining the appropriate tax base under an ideal accretion tax.").

148. Fellows, *supra* note 16, at 386. ("Another reason for favoring a deduction that is not limited either by the income level of the taxpayer or the amount spent for employment-related childcare concerns the tax inequity created by the exclusion of childcare services, performed in the home by parents, from the tax base, and the class, gender, and race

proposal to increase Dependent Care Credit available for lower and middle income households would alleviate some of these pressures, the continuation of the phase-down at incomes exceeding $120,000 would still preclude a significant portion of top-income couples from taking advantage of the credit.[149] However, the additional pressures on high income secondary earners requires credit availability for those families to provide incentives to continue workforce participation. This proposal reflects fairness because childcare expenses are no less expensive for top earners.[150]

In addition to the elimination of the Credit's phase down, there are several other changes that could be introduced to more accurately reflect expenses while simultaneously providing necessary limitations on the available credit. First, the applicable percentage of the demonstrable expenses credited should be increased to more accurately mirror the costs of secondary earner workforce participation.[151] However, to maintain reasonable restrictions on the Dependent Care Credit, the current cap on allowable credit amount would remain to avoid a bias in favor of top earners who chose to spend more on childcare.[152] This cap should be increased to more accurately reflect the current costs of childcare, and should be re-evaluated regularly to assure adequacy.[153]

This reformed Child and Dependent Care Credit would only be available to the lesser income spouse. By allocating the credit to this earner in the household, this policy would provide further incentives for equal workforce participation. Single parent households would be eligible for the reformed credit because they will incur the same childcare expenses as dual income couples. Childless dual income couples would be eligible for a reduced credit under this same section, a credit roughly attributable to the costs

implications of that exclusion.").

149. Office of the Press Secretary, *supra* note 62.

150. While it may be argued that top earners have more disposable income to spend on childcare, progressive marginal rates and increased labor hours for elite careers would reduce the available childcare funds while at the same time increasing childcare expenses. Eliminating the Dependent Care Credit phase down would reduce the effects of other progressive elements of the Tax Code for secondary earners (primarily women) in top-earning, elite professions. As explained above, it is desirable to increase female participation in these elite professions, as they remain the primary area of female underrepresentation.

151. Under current § 21, taxpayers can claim a credit of up to 35% of the cost of employment-related expenses. I.R.C. § 21(a)(2) (2007).

152. I.R.C. § 21(c) (2007).

153. The average annual cost of infant care ranges from approximately $4,000 to $17,000 across the states. CHILD CARE AWARE OF AMERICA, PARENTS AND THE HIGH COST OF CHILDCARE: 2015 REPORT, 30 (2015). Unfortunately President Obama's proposal would not sufficiently increase the available credit in a majority of states. *See* Office of the Press Secretary, *supra* note 62 (this proposal would increase the available credit to $3,000). A more adequate credit increase would raise the available credit to be closer to the national average, and ideally vary by state based upon the state's average childcare cost for children of a given age. *See* CHILD CARE AWARE OF AMERICA, PARENTS AND THE HIGH COST OF CHILDCARE: 2015 REPORT, 30 (2015).

associated with workforce participation.[154] However, single income, dual parent households would not be eligible for the reformed credit, to further reflect actual childcare expenses and further incentivize dual income households. Reforming the Child and Dependent Care Credit by eliminating the phase down, increasing the allowable percentage credit allowed, and shifting this credit to the lower income spouse in the individual filing model would further the goals of the Equal Participation Model.

2. Employer Incentives

In addition to incentives aimed directly toward taxpayers through individual filing and enhanced secondary earner dependent care credits, the Equal Participation Model would be furthered by employer related policies including: flextime and childcare assistance incentives for all employees and female leadership incentives.

The first prong of employer directed policies includes incentivizing flextime employment for all employees. While flextime employment has been primarily directed towards female labor, encouraging flextime for all employees would reflect current trends in family/work mindsets.[155] Increased flextime for women would improve female workforce participation,[156] and flextime options for men could also improve their workplace contributions and job satisfaction.[157] More specifically, improved, no fault flextime options for women could improve their ability to attain top careers, because their advancement would not be as hindered by family obligations.[158] Increasing flextime would not only encourage equal family participation in households, but also may potentially improve workforce productivity.[159]

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154. *See* Office of the Press Secretary, *supra* note 62 (this would mirror the $500 secondary earner credit under President Obama's proposal).

155. Ladge et al., *supra* note 91, at 154. Ladge identifies how current workforce expectations conflict with growing desires among fathers to participate in childcare. *Id.*

156. INT'L MONETARY FUND, *supra* note 137; Booz & Company, *supra* note 108, at 62.

157. Ladge et al., *supra* note 91, at 165 ("Yet our research suggests that it may actually hurt organizations to not support involved fathering. We find that spending more time with their children during the workday is related to many important work outcomes for fathers that can have a positive impact on organizations . . . Thus, it appears to be in the organization's best interest to create conditions that allow fathers to be involved at home and at work.").

158. Booz & Company, *supra* note 108, at 62 ("Women in professional and managerial positions generally have more autonomy and control over their daily work schedules, but the same principles apply. If companies are to realize the benefit of their talent investments, formal policies and programs are needed to help women stay in the game and maintain a career path throughout life's many phases. These policies may include areas such as telecommuting, flextime, and "off-ramp" and "on-ramp" career paths that allow highly qualified women to take time off for family obligations without sidelining their opportunities for promotion and greater responsibility.").

159. *See* Siniscalco et al., *supra* note 92, at 414. Increased flextime and reduction in working hours can result in more sleep for historically high hour workers. It has been estimated that "lack of sleep drains more than $63 billion from the nation's economy each year." *Id.* (*citing* Amanda MacMillian, *Insomnia costs U.S. $63 Billion Annually in Lost Productivity,* CNN (Sept. 1, 2011), http://www.cnn.com/2011/09/01/health/insomnia-cost-

Alongside enhanced flextime programs, employer incentives to provide some measures of childcare assistance would improve female workforce participation. This can come in the form of tax incentives for employers offering childcare services, paid leave for childcare, and childcare cost subsidies for their employees.[160] Perhaps the most necessary form of employer childcare assistance solutions is an adoption of income support or paid leave during maternity leave as has been adopted in other OECD countries.[161] Another alternative for those seeking a more universal solution to childcare problems would be the implementation of a quality national day care.[162] While required paid maternity leave and national day care would greatly improve workforce participation incentives for mothers, a more modest and effective proposal would be simply incentivizing private, employer-funded alternatives.[163]

The second prong of employer-focused reforms would be incentives to increase female management. While some countries have required female quotas in management,[164] history has proven the general American distaste for affirmative action programs. These incentives can be in the form of tax credits to organizations that demonstrate increased female management participation, and to a lesser degree those organizations demonstrating conscious efforts to enable female advancement. By rewarding both employer accomplishment and efforts in female advancement and leadership, more organizations will be able and willing to adopt female friendly policies. Examples of employer policies eligible for these tax incentives include: programs to help women who have stepped out of the workforce,[165] results only work environments,[166] and programs designed to enhance female management development.[167] Adopting these programs will help improve the percentage of women in top management positions, thus

productivity/). Flextime could also improve performance by reducing the instance of burnout. Siniscalco et al., *supra* note 92, at 415.

160. Booz & Company, *supra* note 108, at 62; INT'L MONETARY FUND, *supra* note 137.

161. *See* INT'L MONETARY FUND, *supra* note 137.

162. *See* Heather S. Dixon, *National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success*, 36 COLUM. HUM. RTS. L. REV. 561, 566 (2005).

163. Employer established programs would transform gender relations in individual organizations instead of imposing broad one size fits all mandates.

164. Norway, Spain, Germany, France, the Netherlands and Switzerland are examples of countries that have implemented gender quotas in business management. *See* Alison Smale & Claire Cain Miller, *Germany Sets Gender Quota in Boardrooms*, N.Y. TIMES, A1 (Mar. 6, 2015), http://www.nytimes.com/2015/03/07/world/europe/german-law-requires-more-women-on-corporate-boards.html?r=0. *See also* Sullivan, *supra* note 105.

165. McCaffery, *supra* note 6, at 1033.

166. Siniscalco et al., *supra* note 92, at 415 ("Results Only Work Environments' employees flexibility to decide when, where, and how they work, as long as they get their work done. Rigorous studies have demonstrated that ROWE reduces turnover, interruptions at work, and unproductive time and increases employees' sense of job involvement.").

167. Developing female management styles and potential can improve both female representation and entity performance. *See supra* section III.B and accompanying footnotes.

working toward the second goal of the Equal Participation Model.[168]

V. CONCLUSION

As the preceding pages have shown, there are many ways in which the Tax Code reflects antiquated gender stereotypes through the current joint filing and dependent care credit, stereotypes that no longer reflect the modern family structure.[169] Moreover, there is evidence that a more balanced family structure among spouses and in the workforce can positively impact varying sectors of society: women are empowered by increased opportunity, men are able to contribute to the family unit and develop additional social skills, children are influenced by a more diverse parenting structure, and management is enhanced through a more diverse team of employees.[170] Therefore it is not only rational, but also desirable to strive toward the Equal Participation Model, where spouses share parental and income producing roles in the family unit, and where businesses divide all levels of the workforce evenly between men and women.[171] Finally, the Tax Code can be a positive force for achieving this ideal model by eliminating those outdated barriers to equal participation by adopting individual filing for married couples and a more neutral dependent care credit among all income strata.[172] By embracing the spirit of these policies, we can continue to move toward a more egalitarian and productive workforce and society.

168. *See* Slaughter, *supra* note 1 ("[Some] scholars have concluded that good family policies attract better talent, which in turn raises productivity, but that the policies themselves have no impact on productivity.").
169. *See supra* section II and accompanying footnotes.
170. *See supra* section III and accompanying footnotes.
171. *Id.*
172. *See supra* section IV and accompanying footnotes.

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