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WOMEN'S, MEN'S AND CHILDREN'S EQUALITIES: SOME REFLECTIONS AND UNCERTAINTIES

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One of the most striking ideas that Edward J. McCaffery suggests in *Taxing Women*¹ is that equality, of the right sort, must be thought of in gendered terms. We must relinquish the idea that we can find or declare some neutral principle that will achieve the goal of equality, particularly with respect to the relationship between work and family, because the social context makes it impossible. Rather, we need to devise gender-specific strategies to achieve equality, even if they are couched in gender-neutral language. In my recent work examining single parent families, I have come to much the same conclusion: meaningful support for single parents, albeit extremely unlikely in the present political climate, requires separate consideration of the needs of single mothers and single fathers.² The dominant patterns of work and family for single mothers and fathers are remarkably distinct; thus, their greatest needs are quite different. Single mothers most need economic support for nurturing, while single fathers most need cultural support for a reconstructed notion of fatherhood. McCaffery similarly argues that in order to achieve work-family equality, married women need to have their wage work taxed less, while married men need to have their wage work taxed more.³

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1. EDWARD J. McCAFFERY, *TAXING WOMEN* (1997) [hereinafter *TAXING WOMEN*]; see also Edward J. McCaffery, *Equality, of the Right Sort*, 6 *UCLA WOMEN'S L.J.* 289 (1996) (arguing that achieving equality means looking at the terms and conditions on which critical social structures of work and family are built).

2. NANCY E. DOWD, *IN DEFENSE OF SINGLE PARENT FAMILIES* (1997).

3. *TAXING WOMEN*, *supra* note 1, at 200.

Deciding that gender-specific solutions are needed may, nevertheless, raise other questions. First, determining what those solutions or policies should be and whether they should be couched and/or justified in gender-neutral or gender-specific terms, is by no means an easy decision to make. While gender neutrality seems to be our preferred norm, it may only reinforce a false sense of objectivity, or contribute to a jaded view of professedly "fair" reforms. Second, identifying solutions may raise the risk of essentialism when the goal of legal reform is to permit or encourage particular gender roles. For example, by making it easier for women to do wage work, we may be conveying the message that wage work is the preferred gender role for women. Conversely, by making it more difficult for men to only do wage work, we may be similarly suggesting a preferred gender role for men that incorporates nurturing children. Third, the very separation of "male" and "female" roles can reinforce stereotypical notions of difference, as well as limit our sense of what an alternative, egalitarian vision would be. An overly simplistic dualistic approach can reconstitute the very gender limits that we decry. Fourth, failing to take account of race, ethnic and class differences perpetuates other kinds of inequalities, including a persistent pattern of attention to middle-class needs to the exclusion of low-income needs. Finally, the focus on adult, gender-specific needs may reinforce the trend of leaving children out of the discussion of the very restructuring that is purportedly for their benefit.

This essay discusses some of the equality issues generated by McCaffery's revolutionary yet modest gender-specific proposal for tax reform. In addition to considering some potential consequences for women and men, I also briefly consider the perspective of children.

McCaffery lays bare gender bias in tax and tax-related structures centering around support for traditional single-income, male-breadwinner marital families. He traces the core of this bias to tax rules constructed in the 1930s and '40s, which disproportionately disadvantage secondary wage earners by tying their income to primary earners and taxing their income at a higher rate. Since most secondary wage earners are women, this has the consequence of disproportionately taxing women for performing wage work. The beneficiaries of tax reform for secondary wage earners would be primarily working wives and mothers, with varying effects by income. McCaffery argues that the strong negative effects of current tax policies are especially severe at the low and high income levels, in addition to strongly discouraging

middle income women.⁴ At the lowest income levels, significant benefits may be lost by leaving welfare for wage work; at the highest income levels, tax rates are the highest when the economic incentive for a second income is the lowest.⁵

McCaffery proposes a gender-specific restructuring of our tax policies and suggests, among other things, that we use optimal tax theory to reform the system. Simply put, he would tax women less and tax men more.⁶ His proposal rests on certain core gender generalizations as well as his analysis of how the existing tax structure works. McCaffery points out that women have significantly changed their work-family roles,⁷ while men have not.⁸ Women do more wage work but men generally do not do more family work.⁹ Although women's wage work patterns look more and more like traditional male wage work patterns,¹⁰ women's feelings about and commitment to wage work are quite dissimilar to men's.¹¹ McCaffery characterizes women as generally more ambivalent and unhappy with full-time wage work than men. Although married women with children do not want to stay home, working full-time leaves them conflicted and unhappy.¹² Taxing women more heavily thus adds to an existing range of reasons not to engage in wage work.¹³ Women have high tax elasticity, meaning that they are quite responsive to changes in tax burdens. Taxing them less would result in less negative consequences for women who do wage work, and would therefore presumably encourage more women to engage in wage work. At a minimum, women could make their choices more freely. Most notably, they could decide whether or not to do wage work without the disincentive of a high tax burden pushing against wage work.

McCaffery views men, on the other hand, as implacably tied to their work and largely unresponsive to women's shifts in work and family responsibilities.¹⁴ The current tax system reinforces those

4. TAXING WOMEN, *supra* note 1, at 185-201.

5. *Id.* at 194.

6. *See id.* at 185-201.

7. *Id.* at 192-3.

8. *Id.* at 197.

9. *See id.* at 201.

10. *See id.* at 199.

11. *See id.* at 190.

12. *See id.* at 191.

13. *See id.* at 200.

14. *Id.* at 193.

trends. Men are pushed by their wives' tax burden and by the comparative ease of increasing their income versus adding another earner, toward greater commitment to full-time wage work.¹⁵ Men have strong tax inelasticity: they are largely unresponsive to tax changes; they simply keep on working.¹⁶ Men, he argues, would withstand a significantly higher tax burden before their behavior would change.¹⁷ If changing their behavior is desirable, then a higher tax burden is justified as a means to reallocate family responsibilities. The justification for changing their behavior is equality.¹⁸

Equality, in McCaffery's view, means not merely fitting women into male-defined, male-constructed structures of work, but rather means transforming work structures to achieve "diverse, creative, dynamic, and flexible work-family arrangements."¹⁹ McCaffery's goal is to contribute to that end. I do not read his proposal as claiming to get us there, but rather as a step along the way. His gendered proposal intrigues me as an opportunity to think through the implications of gendered solutions to gender inequalities. In the sections that follow I consider the implications of his optimal tax proposal for women and men, as well as the question of how to incorporate children's perspectives into re-envisioning work and family.

I. WOMEN

The theoretical and political appeal of McCaffery's proposal to eliminate gender bias in the tax structure by taxing women less is that it is in accord with widely accepted notions of formal equality, the model which has predominated thus far in achieving increased equality for women in the gender neutral tradition of liberal jurisprudence.²⁰ Under the liberal jurisprudence model, formal equality assures that women are treated the same as men. In its strongest form, liberal jurisprudence reaches beyond facial differentiation to include bias due to the disproportionate gender impact of facially neutral policies. An argument for the removal of tax rules that disproportionately discourage women from wage work fits the liberal model. It

15. *See id.* at 190.

16. *See id.* at 193.

17. *Id.* at 200.

18. *See id.* at 197.

19. McCaffery, *supra* note 1, at 314; *see also* TAXING WOMEN, *supra* note 1, at 275-83.

20. *See, e.g.,* Nadine Taub & Wendy N. Williams, *Will Equality Require More Than Assimilation, Accommodation, or Separation from the Existing Social Structure?*, 37 RUTGERS L. REV. 825 (1985).

eliminates a constraint on women's choices. In addition to removing a barrier women face, McCaffery's proposal also recognizes a key symbolic and real shift in our view of married couples, from the interconnected, dependent, secondary earner model to an individual tax model. To the extent women are viewed as independent rather than dependent taxpayers, the model of independence and individual worth also plays into individualized notions of equality and responsibility that resonate within liberal jurisprudence.

In addition to its symbolic worth and congruence with liberal principles, there is no doubt that McCaffery's reform would have a real impact on many women. It is significant, nevertheless, that women's work participation rates have risen in spite of tax barriers and in spite of the high degree of ambivalence and unhappiness that McCaffery also documents. I question, then, how great a response the removal of this tax barrier would create. There are certainly other areas where the logic of economics pushes strongly in one direction, but psychological response and social conduct nevertheless goes in another direction. Divorce is a good example. While the economics of divorce should have resulted in a declining rate of divorce, the divorce rate instead has remained relatively constant since the 1980s.²¹ The declining rate of real welfare benefits is another example; it should (and those who favor such cuts hope it will) act as an economic deterrent to the formation of single-parent families. Instead, the rate of single-parent family formation continues to rise.²²

Even if McCaffery's proposed reform were to change the behavior of a significant number of women to enter wage work or to do more wage work, the economic benefits to women would be significantly limited by ongoing limitations on women's employment opportunities. Although removal of tax disincentives may impact how women perceive their choices, it will not change the structure of the labor market, which is characterized by persistent differentials in employment opportunities for women as compared to men.²³ Tax reform may change the factors women weigh in deciding whether to

21. The rate of divorce per 1,000 population was 3.5 in 1970, rose to 5.2 in 1980, and then dropped slightly to 4.7 in 1990. The rate in 1994 was 4.6. U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 104 tbl. 146 (1996)[hereinafter 1996 STATISTICAL ABSTRACT].

22. See Dowd, *supra* note 2, at 4-5.

23. For a recent global view, see *Good for Business: Making Full Use of the Nation's Human Capital; Fact-Finding Report of the Federal Glass Ceiling Commission*, Mar. 16, 1995, reprinted in 1995 Daily Lab. Rep. (BNA) No. 52, at d30 (Mar. 17, 1995) [hereinafter *Glass Ceiling Report*]. For a detailed view within one company of promotional sex and race segregation

engage in wage work or care for children. However, tax reform will increase neither the range of opportunities for wage work, nor the salaries paid, nor the opportunity structure, all of which remain significantly more limited for most women, particularly women with sole or primary caretaking responsibilities for young children.²⁴ Removal of the tax bias only ensures that whatever money women earn is not taxed in a biased way—no longer adding insult to injury, but the underlying injury remains.

Just over 75% of women ages 25-54 are in the labor force.²⁵ According to recent statistics, women on average currently earn seventy-two cents for every dollar that men earn, a median hourly wage of \$8.59, up by thirty-four cents an hour since 1979.²⁶ Of those workers earning minimum wage, 64% are women, considerably higher than women's proportion of the workforce.²⁷ Not surprisingly, three-quarters of women make less than \$25,000 per year.²⁸ The gap is greater for mothers. Among younger women in the workforce (median age 30), the wage gap has narrowed to ninety-five cents in 1991, but only to seventy-five cents for mothers in the same age group. As one researcher has noted, the family status penalty intensified during the 1980s.²⁹ The wage gap persists at all levels: the ratio of female to male earnings ranged in one 1992 Census Bureau study of managerial workers from a low of 50% in banking to a high of 85% in human services.³⁰

Women are highly sex-segregated in the workforce, both between and within occupations. Nearly 75% of employed women work in the

and differential, see Elizabeth A. Paulin & Jennifer M. Mellor, *Gender, Race and Promotions Within a Private-Sector Firm*, 35 *INDUS. REL.* 276 (1996).

24. See DOWD, *supra* note 2, at 21; see also FRANCINE BLAU & MARIANNE FERBER, *THE ECONOMICS OF WOMEN, MEN AND WORK* (1992); SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 363-99 (1991).

25. *Labor Force: Women Slowly Making Gains in Workplace Report Concludes*, 1997 Daily Lab. Rep. (BNA) No. 3, at A2 (Jan. 6, 1997) [hereinafter *Women Slowly Making Gains*].

26. See Abid Aslam, *United States: Gender Wage Gap Narrows as Wages Fall*, Inter Press Service, July 31, 1996, available in LEXIS, NEXIS Library, Current News File. The gender wage gap has narrowed due to a significant fall in men's wages rather than any significant rise in women's wages. See *id.*

27. See *id.*

28. See Department of Labor, *Working Women Count Recommendations: Making Work Better for Women Report to the President*, Mar. 15, 1995, reprinted in 1995 Daily Lab. Rep. (BNA) No. 69, at D25 (Apr. 11, 1995).

29. See Pam Ginsbach, *Family Leave: Leave Coverage Offers Women Advantage of Job Continuity, Higher Pay, Says Study*, 1997 Daily Lab. Rep. (BNA) No. 13, at A-3 (Jan. 21, 1997).

30. See *Glass Ceiling Report*, *supra* note 23, at 37.

services industries, including wholesale and retail trade, finance, insurance and real estate. The jobs in these sectors are low-level, low-paying jobs with little mobility. To the extent women have made significant inroads in some nontraditional fields (pharmacists, editors, insurance adjustors, real estate agents), the wages in those fields have leveled or declined.³¹ Very few women rise to senior managerial jobs, although women constitute 43% of managers.³² From 1985-1995, in the Fortune 1500 companies, only three to five percent of the managers were women, and of those, virtually all of them were white.³³ The glass ceiling is firmly in place for most women; for women of color, it is so solid that it is described as "brick" or "concrete."³⁴

Inequality in the market requires stronger enforcement of existing discrimination laws as well as affirmative restructuring.³⁵ The role of antidiscrimination laws could be significantly expanded if the laws were vigorously used to attack sex segregation³⁶ and gender stereotyping,³⁷ as well as to enforce pay equity. But even with the most expansive and thorough enforcement of antidiscrimination laws, affirmative restructuring is needed. Top-down strategies are needed in conjunction with bottom-up proposals that unleash individual choices.

Expanding choice, or removing encumbrances from choices, is one of the core justifications for taxing women less. But another question McCaffery's proposed tax reform raises is whether making the choice to do wage work less burdened results in valuing wage work to the detriment of supporting care for children and other dependents. I do not think this is McCaffery's aim. But removing tax disincentives to wage work and shifting to an individual tax system nevertheless may have that effect by further supporting wage work and self-sufficiency without supporting non-wage family work as well. Therefore, this reform would open up one choice while doing nothing for

31. See *Women Slowly Making Gains*, *supra* note 25.

32. See *id.*

33. See *Glass Ceiling Report*, *supra* note 23, at 53.

34. See *id.* at 78.

35. See Nancy Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79 (1989).

36. See Vickie Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

37. The recognition of gender stereotyping should be expanded as a form of sex discrimination as in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and as developed by sexual harassment jurisprudence.

another. While the option of performing wage work is made more attractive, there is no support for part-time work or staying at home full-time, for some period of time or even a lengthy period of time. McCaffery suggests that women will respond to tax reform. However, would the effect of this removal of gender bias act as an incentive to push women more strongly toward a male model of work and family (or a female double shift model) rather than pushing the wage work structure and the allocation of family responsibilities to change? McCaffery's goal is clearly *not* to argue for an assimilationist, male-defined model. Is it possible to expand choices by a range of tax reform, or are we inevitably choosing one model over the other?

The Swedish example suggests that radical change in the distribution of work-family responsibilities is unlikely to occur as a result of an individual taxpayer system. The Swedish example is particularly important because the tax structure rests on principles of individual taxation, individual responsibility and a strong commitment to gender equality.³⁸ In addition to this tax policy, Sweden has the most generous array of family support policies in the world, including universal and need-based family allowances, paid parental leave, maternity leave, health insurance, parenting sick days and nearly universal child care.³⁹ Furthermore, public policy has strongly favored gender neutrality and a model of shared gender responsibility for work and family. Despite this structure, the degree of gender segregation in the Swedish workforce is as high as that in the United States, and the allocation of work and family responsibilities, while less skewed than in the United States, remains remarkably gendered.⁴⁰

McCaffery's reform powerfully demonstrates the bias in the system that treats most married women differently than most married men in order to support patriarchal family structures. The argument for fairness and neutrality in the face of this evidence is strong. Yet the limits of this reform are inherent in the inequalities of the existing workplaces. Restructuring of the labor market shows little evidence

38. See Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 *BUFF. L. REV.* 49, 86-87 (1972); Nancy Dowd, *Envisioning Work and Family: A Critical Perspective on International Models*, 26 *HARV. J. ON LEGIS.* 311, 322-23 (1989).

39. See Markus Jäntti & Sheldon Danziger, *Child Poverty in Sweden and the United States: The Effect of Social Transfers and Parental Labor Force Participation*, 48 *INDUS. & LAB. REL. REV.* 48, 50-52 (1994).

40. See Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 *COLUM. L. REV.* 2001, 2053-54 (1996); Dowd, *supra* note 38, at 322.

of occurring voluntarily.⁴¹ The Swedish example suggests that even with family support policies in place the process of achieving equality (if by that we mean shared gender responsibilities for work and family, on an androgynous model) is extraordinarily slow.

II. MEN

What McCaffery has to say about men intrigues me the most. He argues that we should "tax men more, precisely on account of their insistence on working as they always have and precisely until their behavior, in the aggregate, becomes as variable and susceptible to social and other pressures as women's behavior is. We will compel men to look for choices."⁴²

I can almost hear the screams, the howls of protest. It might be fine to remove the disincentives from women doing wage (male) work, but it would be another thing entirely to tax men more heavily for doing wage (male) work. The female side of McCaffery's proposal sounds modest and limited. It stays in line with the tradition of formal equality by removing unnecessary barriers connected to outmoded stereotypes. There is also a compelling logic in favor of a tax system that would support greater wage work, and therefore greater revenue, as well as promote equality by ensuring that individuals not face substantially different consequences by gender for engaging in wage work. But his proposal for men challenges the stereotypes, and rejects the traditional male role by disadvantaging that role with the express end of undermining patriarchy. Rather than expanding choices or making the consequences of choices more neutral, this proposal imposes negative outcomes connected to certain choices in an effort to discourage particular models, and thereby reorients fundamental roles and structures of work and family. In a sense, the reform functions in the same way as the very structure that McCaffery wants to dismantle:

41. See Jill Smolowe, *The Stalled Revolution*, TIME, May 6, 1996, at 63 ("The workplace really hasn't changed much, and public policies haven't kept up with the social changes.") (quoting Paul Roman, Director of the Public Policy Institute at Radcliffe College); see also Peter Busowski, *American Workers Face Time Crunch Reducing Job Performance and Satisfaction*, 1997 Daily Lab. Rep. (BNA) No. 5, at D-18 (Jan. 8, 1997) (discussing how employer's reluctance to implement change leads to a "disgruntled work force"); *Work, Family Conference Explores Conflicts, Impact of Technology*, 1994 Daily Lab. Rep. (BNA) No. 222, at D22 (Nov. 21, 1994) (discussing the need for corporations to recognize how work problems create family problems).

42. McCaffery, *supra* note 1, at 314-15; see also TAXING WOMEN, *supra* note 1, at 198-201, 229-66.

it supports a particular gender role model. Does the goal of eliminating patriarchy as opposed to legitimating patriarchy justify the different result? Can the power of law be used to mandate (or nearly so) normative change? And if the result is a more egalitarian distribution of work and family responsibilities, is that equality goal sufficiently valuable to justify such a policy?

This is a courageous, difficult position to take. Whether McCaffery is right or wrong about the means, he is right about the end: men must shift their lived responsibilities of work and family. If men are to stop being the fathers that patriarchy has pushed them to be, they must have models for the new fathers that they are to become.

It is a remarkable fact of the allocation of family responsibilities that it is so strongly gendered and that we seem to accept that pattern as a given. Historically, we explained the allocation as a conscious division of gender roles. Child rearing was women's role; wage work was men's role. Men's parenting role was defined as purely economic, providing sufficient income to support unwaged household work. Indeed, men were not even studied by the discipline of child development until the 1970s, and studies of mothers still predominate over those of fathers.⁴³ To the extent men's role went beyond the economic, they were viewed either as disciplinarians or as connections to the public sphere. As Talcott Parsons saw it, mothers had an internal, "expressive" role while fathers had an external, "instrumental" role connecting the family with the world at large.⁴⁴

In theory we have done away with all that, based on principles of gender neutrality in both wage work and family responsibilities. Old models die hard, however. We retain a strong sense of the uniqueness of fathering as opposed to mothering, even amidst gender neutrality. Much of the rhetoric around single parenting reflects this view: what makes these families dysfunctional, in the eyes of many, is the absence of male role models. This is premised on the assumption of men's difference as parents. Yet all the data that we have about fathers fails to support the uniqueness myth. Instead, the reality is that there are no significant differences: men who parent to the same or similar extent as women, nurture like mothers. The manner, form and content of their fathering replicates the care-giving model that we associate with motherhood.

43. See Down, *supra* note 2, at 13.

44. See *id.* at 28.

More significant than the persistence of myths of gender uniqueness, however, is the stark difference (or distance) between the rhetoric of gender neutrality and the reality of gendered patterns of nurturing. This pattern persists, and is largely accepted, *within* marital families at the same time that it is decried as inherently harmful in single-parent families. This strong gender pattern, reinforced by the gender bias in the tax code, generates the typical post-divorce family where actual nurturing is mother-centered even if legal responsibility is gender-neutrally "joint" or "equal." The highly gendered pattern of post-divorce parenting is predictable from the more hidden, but just as strongly gendered pattern of nurturing and caretaking work within the marital family. In this sense, both parents in the marital family are single parents, adopting the gendered parenting roles and differential combinations of work and family responsibility that emerge so clearly at divorce.

The patterns begin within marriage. The allocation of care-giving responsibilities within marriage has not changed much.⁴⁵ One wonders if we have only given up traditional gender roles for an implicit thesis of self-segregation: parenting roles (and housework responsibilities) are no longer dictated, but chosen. The choice of many men is not to nurture their children in any meaningful way. Why is that so? What is their notion of fatherhood? Why is the pattern of men's nurturing both within and outside of marriage so minimalistic?

The answer of some who decry father absence is to argue for reinvesting patriarchy with its traditional valued role. David Blankenhorn, for example, argues that fathers are the linchpin of families, and by extension, society.⁴⁶ He not only sees fatherhood as essential to children,⁴⁷ but more importantly, that fatherhood is essential to men. The premise is that fatherhood is essential to "civilize" the otherwise violent, anti-familial character of men. "[F]atherhood, more than any other male activity, helps men to become good men. . . . [F]atherhood bends maleness . . . toward prosocial purposes."⁴⁸ What is striking

45. See generally KATHLEEN GERSON, *NO MAN'S LAND: MEN'S CHANGING COMMITMENTS TO FAMILY AND WORK* 8 (1993) (discussing the slow trend toward more nurturing father figures); *Women Slowly Making Gains*, *supra* note 25, at 2 (married mothers have reduced housework from 30 to 20 hours since 1985; men have increased their work to nearly 10 hours from 5 hours).

46. DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* 25 (1995).

47. *Id.* Blankenhorn claims "fatherhood privileges children."

48. *Id.*

about this argument, beyond its lack of grounding in any proof of gender uniqueness, is the negative view of men and masculinity that it presumes. This biological, essentialist argument seems to see men's core nature in Hobbesian terms as nasty, brutish and short, tamed only by the constraints of marriage and family.

The real challenge for reconstructing fatherhood is not the assault on patriarchy, but rather the patriarchy itself. Can we imagine fatherhood outside of a hierarchical, biological, economic role? Can we imagine a valued nurturing role for men, whether as fathers or not? The example of men who do parent, primarily or solely, certainly suggests that it is possible. Men's capability, however, should not be confused with their choices. While more men are nurturing their children, the dominant pattern remains one of emotional disconnection to children. McCaffery's proposal suggests that men need to be forced to be different (and presumably) better fathers. I wonder whether this is necessarily so.

Some of the barriers are certainly economic. Fathers are unlikely to give up wage work (or feel that they can) when income cannot be replaced by the mother and the state provides no family support. The same market inequities that limit the impact of tax reform for women also generate a dynamic that separates men from nurturing. Moreover, the lack of family support policies disproportionately impacts men, because society provides far less formal or informal support for men to nurture.⁴⁹ Men are unlikely to change in the absence of radical structural change that would support a different role.

The more serious barriers, however, may be as much cultural as economic. It is simply astonishing that we accept the gendered pattern of parenting as a given; but not so if we accept a limited role as a norm. It is my thesis that the two most significant barriers to reconstructing fatherhood into a nurturing role are our cultural constructs of masculinity and the pervasiveness of violence in male culture. We have largely defined masculinity in a way that excludes parenting. Violence is so strongly tied to masculinity that it contradicts nurturing except, perhaps, that the highest form of male nurturance is the defense of one's children, or revenge for any harm done to them.

In addition, another challenge to the reconstruction of fathering is our understanding of what we mean by equal parenting, whether

49. See Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1073-74 (1996).

carried out within one household or not, and within a marriage or not. We have very little sense about what equal parenting is supposed to be. We don't have a model of how a partnership of men and women is supposed to work. Instead, we operate with a single parent model of parenting; a model supported, as McCaffery demonstrates, by the current structure of the tax system. The single parent model is consistent with a pattern of fatherhood within married couples as a role of support and backup for the primary or sole caregiver, usually the mother, rather than as a doubling of the nurture available to children. Certainly support of caregivers is important but it is at best indirect parenting. We seem to think equality means dual parenting, not an equal opportunity to be a single parent (in the primary, nurturing sense) within or outside of marriage. Reconstructing fatherhood is therefore intertwined with the question of what equality should be. If we continue to see children's needs as being provided on a sole caregiver model, then our structure needs to be sensitive to the needs of that caregiver to provide the care that our children deserve. To the extent McCaffery's proposals would begin to undermine that, is the implicit model one of roughly equal working and parenting? We have not restructured the workplace to support dual parenting nor have we thought through the dynamic of dual parenting in families. For men this raises the challenge of constructing a non-dominating, non-violent model for relationships. For women this invades a traditional sphere of women's value with the potential of intensifying violence-related dominance. Men's equality will continue to be partial until men confront the violent ideal in masculinity.

III. CHILDREN

Those who talk about work and family, and struggle with the difficult issues of gender equality often do so from, and for, the love of children. Children's equality is a powerful argument for affirmative restructuring to ensure equality in the balancing of work and family. If children are to have a meaningful equal opportunity to develop their full potential, their core familial environment must be supported. That requires not only supporting their families, but also social commitment and responsibility for the welfare of all children.

Our tendency is to assume we can achieve this best by focusing on the adults.⁵⁰ By looking at how the tax structure disadvantages secondary wage earners, McCaffery reminds us that there is bias in the way we tax the wage work of married women as opposed to the wage work of married men that reinforces the inequality. Removal of gender bias and redistribution of workforce responsibility is presumed to be to children's benefit. But the deeper question for children is whether they get more and/or better parenting. Is this a zero sum game (with a shrinking pie) where waged and unwaged work must be reallocated, or has the game fundamentally changed? The option of a single income family is rapidly disappearing; most families require the income of two wage earners simply to stay in place in real income terms.⁵¹ If more wage work is necessary, have we assumed, or simply accepted, that work will continue to be (and even increase) at the expense of family? Will we continue to follow the philosophy that children are an individual responsibility and take no social responsibility for children? The losers in this scenario are children, whose dependency needs disappear, subsumed beneath the struggle for redistribution of family burdens between mothers and fathers.

Determining, then, whether our model should be one of single parenting/primary caretaker, or dual parenting, with each parent committed to an expanded vision of care for children, should be evaluated from children's perspectives. From that point of view we might find the flexibility we desperately need, as well as the stark realities of children's needs that we must acknowledge. The flexibility comes from the data that indicate that children flourish in all forms of families, single or two parent, heterosexual or homosexual, marital or non-marital, nuclear or extended. The realities include the shocking rate of children's poverty, the sharp inequities of opportunity that creates,

50. See generally Wendy Anton Fitzgerald, *Maturity, Difference and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11 (1994) (examining how "both constitutional and family law jurisprudence exclude children's personhood").

51. See Aslam, *supra* note 26 ("It's been pretty obvious for the past 20 years that the economic situation of women and men has been worsening. Family incomes have been maintained only in families where two spouses have been put to work."). Real wages have been in decline since the 1970s. In constant dollars, the average weekly wage of production and nonsupervisory workers fell 16.1% from 1973 to 1993. By 1994, the average full-time production employee had after-tax income of \$16,833.00, barely above the poverty line. See Peter M. Cicchino, *The Problem Child: An Empirical Survey and Rhetorical Analysis of Child Poverty in the United States*, 5 J.L. & POL'Y 5, 67-68 (1996). Nearly one in five full-time workers is categorized as a low-income worker, a 50% increase since 1979. See U.S. Census Bureau, Press Release, *One in Five Full-Time Workers Earns Low Wages*, Census Bureau Says (Mar. 31, 1994) (unpublished press release, on file with the *Southern California Review of Law and Women's Studies*).

and the diminishing support for the unwaged care essential to children's success.

The most horrifying statistic about children is that one in five lives in poverty, and that number has moved steadily toward one in four.⁵² The rate of child poverty has been increasing since the mid-70s and continues to rise; currently, children are poor at double the rate of the general population. The degree of children's poverty is worsening, with the highest rates experienced by the youngest children under age five. The scope, intensity and duration are strongly correlated to race.⁵³ Poverty dooms equality for children. Poverty produces well-known correlations to low opportunity, especially with respect to housing and education, that condemns poor children to second class citizenship. In addition, the harmful effects include poor physical and psychological health, and high criminal victimization and crime commission.⁵⁴

In our focus on adults' equality, we have lost sight not only of children's economic needs but also of their other dependency needs, for psychological, social and cultural care. I worry about our inability to deal with dependency, to acknowledge children's needs, or to care for their care givers. As Professor Martha Fineman and Professor Anne Estlin have eloquently pointed out, our failure to conceptualize the place of this essential care and those who provide it, and by extension to provide our social and legal support for dependency without recreating patriarchal prisons, is a serious flaw in the family-law and employment-law equality norms.⁵⁵

The plus for children under McCaffery's proposal is that low income families would particularly benefit from a shift away from a gender biased structure. The tax incentive for these families currently disrupts family structure in order to increase family resources. On the other hand, the reform is tied to increasing wage work that is likely to be ill-paid and inadequate. Without an increase in the available

52. See 1996 STATISTICAL ABSTRACT, *supra* note 21, at 473 tbl. 733. Some estimates already put the figure at 26% using the federal poverty line as the relevant measure. See also Cicchino, *supra* note 51, at 10. If poverty is measured by income 150% of the poverty line (\$21,981 for a family of 4 in 1993), 34% of all children were poor; if measured at 175% (\$25,644 for a family of 4 in 1993), 39.8% of children were poor. See *id.*

53. See Cicchino, *supra* note 51, at 24.

54. See *id.* at 25.

55. MARTHA ALBERSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Anne Estlin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 721 (1993).

resources to match children's needs, this reform will have limited impact. An increase in resources could come from affirmative family support policies as well as strategies to increase wage work income (e.g., guaranteed family income or microcredit strategies). Just as important as expanding the economic strategies for equality, however, is the development of a guarantee or vision of children's nurture.

IV. CONCLUSION

It is not easy to think about equality. Equality issues can be thought of in several ways: uncovering and understanding the inequalities of our current context; defining an ideal or goal toward which policy should aim; or devising strategies to get from one to the other, considering short-term and long-term approaches, inevitable and unintended consequences. Looking at McCaffery's proposal from the perspectives of women's, men's and children's equality complicates the analysis further by considering the separate interests of inherently connected groups. Yet it also gives us a clearer sense of the benefits of this proposal and its place amidst other needed reforms. McCaffery proposes reform as a means to achieve more meaningful, nuanced, flexible, creative notions of equality. It is time to stop taxing women on their choices; it is time to open men to theirs. With that freedom, perhaps we can more clearly move toward equality.

AFTERWORD

