Destabilizing Domesticity

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I'm delighted to be here today. In fact, I feel positively lucky to be here today, because this is a conference that is supposed to bring together the fields of family law and property law, and I don't work in either property law or family law. However, I do write and teach in the area of feminist legal theory; and, as you might expect, feminists have a lot to say about the problems of unequal property allocation in and after marriage.

This comment will focus on one strand among the many Williams presents in this rich preview of her forthcoming book. It will not highlight the upper-income divorce cases such as *Wendt v. Wendt*, although some of these cases will enter into my discussion. This comment will, rather, explore the legally-implemented intuition Williams argues that such cases represent: that where the husband is the primary wage-earner and the wife does the lion's share of the family work, women "need" but men "own" the family property both in and after marriage. I will concur in Williams' judgment that this assumption needs to be changed, but question whether Williams' "joint property" approach is the best way to alter this widely-held premise. Acting partly as "agent provocateur," I will argue that two other schemes might do a better job of dislodging this long-standing premise. One is a more direct market valuation of women's family work, as articulated recently by Katherine Silbaugh; one is systematized governmental support for family work, as proposed by Martha

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Fineman.\footnote{See \textit{Martha Fineman, The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies} (1995) [hereinafter \textit{Fineman, The Neutered Mother}]; \textit{Martha Fineman, Engendering Justice} (1999) (unpublished book, on file with author).} My position is not that these schemes would be easy to implement: indeed in her article, Williams offers us good reason to anticipate practical difficulties. My position is that either of these approaches would go to the heart of the understandings that produce "she needs, he owns," in a way that Williams' joint property approach might not.

It is important, first, to explain more fully the "understandings" to which I refer. Williams' paper describes two interrelated routes to women's economic marginalization. First, she says, mothers and other caregivers are marginalized in the workplace by the fact that the forms and expectations of the best-remunerated work are inconsistent with the demands of caregiving.\footnote{See Williams, \textit{Do Wives Own Half?}, supra note 3, at 253-55.} Second, mothers are marginalized within the family economy by legal rules reflecting the premise that "he who earns it, owns it." Williams' paper emphasizes legal and institutional structures, and these are undoubtedly critical obstacles to women's equality. But I would argue (and I suspect Williams would agree\footnote{Id. at 256.}) that these rules express and perpetuate understandings that have more complex sources. As feminists and other critical scholars have argued, producing legal change requires not only new rules, but an understanding of the premises underlying the old ones and a strategy for changing them—of which the legal rules are only one part.\footnote{I would predict Williams' agreement on this point not only because her discussion of "domesticity" identifies influential beliefs or norms as well as laws and institutional structures, see \textit{infra} discussion concerning the "macro" and "micro" forms of domesticity, but because her earlier work on this subject also focuses on beliefs and assumptions held by women and men that are enmeshed in what she now calls the system of domesticity. See Joan Williams, \textit{Gender Wars: Selfless Women in the Republic of Choice}, 66 N.Y.U. L. REV. 1559 (1991) (describing women's assumption that highly constrained decisions about combining market and family work are the product of autonomous choice) [hereinafter Williams, \textit{Gender Wars}]; Joan Williams, \textit{Deconstructing Gender}, 87 MICH. L. REV. 797 (1989) (describing belief among women, including some feminists, that choices to minimize opt out of market work reflect a distinctive women's "voice" or moral orientation) [hereinafter Williams, \textit{Deconstructing Gender}].} So what are the understandings that give rise to the structures Williams critiques? She describes a larger ideological framework she calls "domesticity";\footnote{For a good example of this premise in recent critical scholarship, see Marc A. Fajer, \textit{Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men}, 46 U. MIAMI L. REV. 511, 522-30 (1992) (discussing notion of "pre-understandings" that ground legal treatment of gays and lesbians). \textit{See also} Kathryn Abrams, \textit{Title VII and the Complex Female Subject}, 92 MICH. L. REV. 2479, 2526-34 (1994) (describing assumptions about the nature of discrimination, and about the human subject, that would have to change before legal actors could treat legal subjects as complex).} I hope to flesh out what domesticity means for the attitudes of men and women who take part in it.

The gender system described as "domesticity" involves, first, an allo-
cation of labor within the family: men do the remunerated work, in the sphere outside the home; and women do the unremunerated work, caring for the family and supporting the remunerated worker, in the home. Domesticity also involves an ascription of characteristics to men and women that helps explain their assumption of these roles: women are selfless and nurturing, and instinctively commit their efforts to the well-being of others; men are more individualistic, ambitious and competitive. If this is the basic ideological framework, or “macro” vision of domesticity, what are the more “micro” attitudes that sustain it? What do men and women come to believe about their relationships and their division of labor when they live under this gender system? These attitudes are important to explore because they help hold the system in place. These are the deeply entrenched norms that we’d have to address if we wanted to unravel or replace the “she needs, he owns” framework. Williams alludes to a few of these attitudes in reporting the comments of various men and women, but I want to elaborate and examine them at greater length.

First, in keeping with the ascriptive feature of domesticity, women’s supposed penchant for unremunerated family work is understood to be natural. It is the product either of biology or of some irresistibly prevalent form of social construction (indeed, one of Williams’ best known works, *Deconstructing Gender*, explains how feminists themselves have contributed to this assumption). People think that women are acting out some deeply instilled impulse when they choose family work; hence, they do not view it as surprising when this happens, even if it tends to leave women at a significant material disadvantage. Second, family work is understood to be performed out of love, to the point where even to talk about its market valuation or remuneration—either abstractly or in the context of a case such as *Borelli v. Brusseau*—is viewed as unnatural and unseemly. Wil-

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11. *See id.* at 255.

12. *For an account of women’s “selflessness,” deployed as both a descriptive and a normative characterization within domesticity, see id. at Part.C.*

13. *See Williams, Deconstructing Gender, supra note 8.*

14. 16 Cal. Rptr. 2d 16 (Cal. Ct App. 1993). Williams discusses *Borelli*, noting by way of description:

*Borelli* involved a May/December marriage where both spouses had children by prior marriages. In 1988, the husband became very ill and needed 24-hour/day care. His doctors recommended a nursing home. Instead, he persuaded his wife to provide the care herself, promising to give her a very considerable amount of money and property in excess of what she had been promised under their prenuptial agreement.

To quote the *Borelli* court: “Appellant performed her promise, but the decedent did not perform his.” The court held the contract invalid for lack of consideration. . . . It rejected the notion that “spouses can be treated just like any other parties haggling at arm’s length.” [Modern marriage] continues to be defined by statute as a personal relationship of mutual support. Thus, even if few things are left that cannot command a price, marital support remains one of them.”

*Williams, Do Wives Own Half?, supra note 3, at 257 (quoting Borelli, 16 Cal. Rptr. at 18, 20) (footnotes omitted).*
liams describes this “commodification anxiety” as a feature of our legal system, or our culture more generally: one that we are perhaps better off trying not to buck. But I would argue that opposition to the commodification or more explicit remuneration of women’s familial work is closely linked to domesticity itself, and it is important to contest it if we want to ameliorate women’s material inequality. Imagining familial labor to be performed out of love—and to be profaned by being subject to market or governmental valuation—is one of the most important ways that inequalities produced by domesticity are defended. This argument renders it difficult even to talk quantitatively or comparatively about the contributions women make to a marriage. For some men commodification anxiety may function as a thinly veiled expression of self-interest: who would want to give up a framework so “metaphysically nearly perfect” that a man can receive a lifetime flow of labor-supporting familial services and still be able to claim that his wife is the recipient of the “Winchester welfare system”? But the anti-commodification argument is not simply the last refuge of scoundrels. It may also be offered by feminists who fear that women will be dehumanized or exploited by men and women who seek to reassure themselves about the fairness of dominant familial arrangements, or who fear their relationships may be rendered unrecognizable by the introduction of market valuation and logic.

If the anti-commodification argument is the more assertive—one might say, “masculine”—version of turning labor into love, there is also a more passive, or distinctively “feminine” version. Some women come to enact the loving self-abnegation that domesticity specifies as their lot: they assimilate their own interests to their husbands’ material or professional well-being. This is a support for domesticity that is likely to prevail during marriage. It would never occur to a wife with such attitudes to question whether she was being adequately compensated or valued for her labors—until her husband leaves her and she finds herself with nothing, or he divorces her and she is forced to sell the family home. I am haunted by the quote Williams gives us from one traditional wife, who is asked what would have happened if she had objected to her husband’s travel; she responds, “without hesitation ‘He probably wouldn’t be chairman of the board today’.”

15. See Williams, Do Wives Own Half?, supra note 3, at 258.
17. Williams, Do Wives Own Half?, supra note 3, at 250.
18. For a very thoughtful example of such analysis, see Elizabeth Anderson, Is Women's Labor a Commodity, 19 PHIL. & PUB. AFF. 71 (1990). For another fine critique of commodification that encompasses but does not specifically identify itself as coming from a feminist perspective, see Margaret Jane Radin, Market-Inalienability, 100 HARV. L. REV. 1849 (1987).
her husband's travel (as well she might have, considering that it was "constant"\(^{20}\)), he would have divorced her. *I* was clearly assessing the situation from the vantage point of her self interest; the startling thing is that she was not. She was so completely socialized to see herself as the facilitator of his career that she saw her objection only in relation to what it would produce for him. This refusal even to recognize a "his" and "hers" in a marriage also short-circuits comparative assessments of contributions to a marriage, which might be useful in divorce litigation; and it prevents the development of a discourse that refers to "her" property, as apart from his. Both of these constraints, not surprisingly, help to keep domesticity in place.

Yet if more traditional women adhere to the norms of domesticity by automatically subsuming their own interest within those of their spouses, the pattern is slightly different for less traditional women. Their support for domesticity, like that of many more progressive men, seems to rely in large part on the notion of "choice." Since women have had at least the formal option of working in a range of jobs outside the home, one could say that a particular woman considered all the available options and chose to perform unremunerated family work, or some combination giving pride of place to unremunerated family work. This, as Williams has shown us in her earlier work,\(^{21}\) is a crucial support to the system, because it means that the inequalities produced in such a marriage can be endorsed, as choice, by women who don't necessarily believe in the naturalness or inevitability of their domestic orientation.

So, as the preceding discussion suggests, there is a range of attitudinal supports for domesticity: first, a belief in its naturalness as some kind of gender preference; second, the construction of familial labor as love, aided by a resistance to the commodification of familial labor; third, a reflexive assimilation of the caregiver's interests to the wage-earner's interests, on the part of more traditional women; and, finally, on the part of less traditional women and men, the deployment of the rhetoric of choice. Each of these arguments helps men and women to accept the arrangements of domesticity, and keeps them from trying to assess men's and women's contributions and property holdings for signs of inequality. My claim is that in order to destabilize domesticity, you have to dislodge these crucial props. You must counter arguments that discourage you from thinking in comparative terms about a marriage, and asking whether women are getting a fair share. And I have serious questions about whether Williams' framework—meaning specifically, the joint property feature—is the best way of doing so.

Williams' general approach—to illustrate the ways in which women caregivers are marginalized both in the workplace and in the home—makes

\(^{20}\) Id.

\(^{21}\) See Williams, *Gender Wars*, supra note 8.
some important inroads on the first and last of these attitudinal supports. When we see how women are made marginal by institutional structures and legal principles in both these realms, we begin to recognize that there's nothing "natural" about the current arrangements that make men primary wage-earners (and therefore the "owners" of family property), and that any "choice" that operates between these realms is so constrained that the use of choice rhetoric almost begs the question. The joint property approach to wealth earned in a marriage could be viewed as an adjunct to the recognition of constrained choice—it could be seen as compensating women for their constrained choices—although in this paper, its effects are emphasized more than the way it will be understood by those who implement and live under it. The joint property approach seems more an instrument for achieving the equality that Williams' larger theory justifies than an expedient with a clear message, the implementation of which will help to challenge the assumptions that support domesticity. This is particularly true with respect to two of the supporting attitudes I just described: the tendency to characterize familial labor as non-commodifiable love, and the tendency of some women to assimilate their interests to those of their wage-earning husbands.

A legal rule holding property earned in a marriage to be held jointly provides no specific explanation for the fifty/fifty allocation, beyond the broad position that both parties to a marriage have contributed to the wage-earner's ability to function in the workplace. If the woman's equal share cannot be more specifically accounted for, it may not be sufficient to challenge entrenched assumptions. Those subject to the rule may believe that this is an unnecessary sop to a woman for doing what she is supposed to do anyway, in the context of an affectionate union, or a glorified feminist way of giving a woman what she "needs" rather than what she has earned. And those charged with applying it may gradually begin carving out exceptions the way they have with the *Wendt*-type cases under the current regime.

More importantly, however, the joint property approach tiptoes carefully around commodification anxiety.\(^2\) It seeks to achieve equality without ever assessing and quantifying what the woman has done. This appears to be intentional. In her article, which has a laudably practical tone, Williams seems to view anti-commodification sentiment as too prevalent an assumption to be taken on. However, declining to characterize family labor as work subject to the norms of market assessment prevents reformers from being able to effect a shift in discourse, a shift that might signal to men and women a need to think differently about the activity (familial

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work) being characterized. More to the point, commodification anxiety prevents reformers from employing a form of discourse that is uniquely suited to getting men to appreciate what women are doing in the home. Moreover, because the woman’s share, under the joint property system, is based on her support of a man, it does not clearly challenge the view that the woman’s contributions amount to love rather than labor.

This derivative character of the woman’s joint holdings also makes it difficult to challenge the reflexive self-abnegation of the more traditional woman. This rule continues to make what she gets dependent on what he earns. It encourages her to understand what she owns as deriving from what he owns. She does not have the opportunity to view her property as coming from her own labor, and is still encouraged to associate her well-being with his.

None of these weaknesses inheres in an approach that effects the economic valuation of familial work. Katharine Silbaugh advocates such an approach in her thought-provoking article Turning Labor Into Love. In this article, Silbaugh underscores the historical situatedness of the notion that familial labor is non-commodifiable. This notion emerges with the restructuring of the economy effected by the industrial revolution and with the rise of the notion of separate, gendered spheres. She proposes that we alter this understanding by adopting rules in a variety of legal areas that would permit us to assign market values to women’s labor in the home. Though Silbaugh resists a strong dichotomization of labor and familial commitment, and argues that commodified and non-commodified notions of the same work can co-exist, her approach forcefully challenges the notion that the work performed in the home is not compensable labor. She introduces a metric that permits specific valuations of the woman’s contributions. Perhaps more importantly, she establishes the notion that it is useful, not unseemly or illegitimate, to bring market relations into the family. It may help to rectify one form of inequality, even, one might say, as bringing the state into the family to stop domestic violence helped rectify another. As with state intervention in family violence, the question about the introduction of market values is not whether, but when, and how. If market valuation of women’s domestic labor more directly confronts reluctance about commodification, it also more directly addresses the tendency of some women to assimilate their interests to those of their wage-earning spouse. What she owns, according to this scheme, derives from the value of her own labor. She is less likely to see her material well-being, or her interests more generally, as inextricably linked with

23. For an interesting discussion of the way(s) that discourse matters, and an argument that economic discourse might be of benefit to women in encouraging men and women to think differently about familial work, see Silbaugh, Commodification, supra note 4, at 108-09.
25. See Silbaugh, Commodification, supra note 4, at 96-100 (discussing “plural meaning”).
those of her spouse.

This decoupling, of course, might be cast as a drawback, as well as a benefit. If legal reformers derive women's property ownership not from the earnings of their spouses, but from the recognition and compensation of women's own, largely-familial labor, they will quickly confront the fact that such work is grossly undervalued in our market system. Combating this devaluation would require, in part, that legal actors (and their expert witnesses) learn more accurately to characterize the multiple, compensable jobs that women perform in the home. One study, using input from economists, industrial psychologists and others placed the value of the works performed by an at-home "executive wife" at $189,000 per year.26 Yet, even were such an approach to highlight the depressed market value of caregiving, supportive work, it might still have important value in combating some of the other key assumptions. It would emphasize the inequality, rather than the naturalness of dominant familial divisions of labor. And it emphasizes the constraints under which women "choose" in the current regime, even while giving them fuller information to form the basis of future "choices" between market and family labor.

Yet, even with these adjustments, some might be deterred by the depressed market value of caregiving labor. Therefore, it is worth considering a second alternative to the joint property approach, one advanced by Martha Fineman. Fineman argues that we should stop viewing the family as being organized primarily around the sexual union, and begin viewing it as existing to facilitate the care of dependents.27 This caregiving should be compensated directly by the state, at a level that reflects the value to society of nurturing the next generation of human beings and citizens. It would have the advantage of not needing to incorporate the market's devaluation of caregiving labor. It would also have a number of other advantages in destabilizing domesticity. This approach, like Silbaugh's, would directly confront the anti-commodification assumption: caregiving labor would be explicitly compensated. It would also, interestingly, undermine the dichotomy between labor and love, because the compensable labor being performed would be loving nurturance of those who are biologically dependent. It would, even more radically than Silbaugh's scheme, encourage women to view their well-being as distinct from their spouse's. The "sexual dyad" would not be formally recognized at law under Fineman's scheme: the family would be organized, and subsidized, in relation to the

26. See William Symonds et al., Divorce Executive Style, Bus. Wk., Aug. 3, 1998, at 56, 58 (citing study by attorney Michael Minton). This evidence would not, of course, help "high-end" executive spouses such as Lorna Wendt, who sought a share of marital property amounting to far more than this sum. However, with the exception of entertainment responsibilities, which can vary, many of the tasks performed by the executive spouse are also performed by other wives, who might well be assisted by such valuation.

27. See Fineman, The Neutered Mother, supra note 5, at 228-33.
goal of caring for dependents.\textsuperscript{28} A woman's compensation would relate exclusively to her labor, in either the familial or the market sphere. With compensation predictably flowing from either realm, her "choice" as to where to place her labor would be palpably freer than it is under the current family law and property regime. Williams notes briefly that Fineman's regime would "preserve domesticity's marginalization of mothers."\textsuperscript{29} This claim arises, I suspect, from an exclusive focus on Fineman's first book on this subject, \textit{The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies},\textsuperscript{30} which focuses primarily on the subsidization of primary caregivers. Fineman's forthcoming book, \textit{Engendering Justice},\textsuperscript{31} however, is also concerned with transforming the workplace to accommodate significant caregiving roles.

I will end with a question that probably persists in the minds of at least some readers: might I be wrong about the need to combat commodification anxiety? Confronting this anxiety is the central advantage of the two approaches I have explored; and one might legitimately ask whether there isn't some salutary function served by this anxiety. Might the family cease to exist as we know it, if we were continually engaged in valuing individual's contributions to their intimates' well-being? The answer, I think, is yes and no. The introduction of market valuation would doubtless make us take more of an arm's length look, if not an arm's length approach, to our familial divisions of labor. It might make relations less spontaneous or intuitive, and more subject to discussion, calculation and negotiation.\textsuperscript{32} But while this would be a change, it would not clearly be a change for the worse, particularly from the less powerful partner's point of view. Patricia Williams tells a story that makes this point eloquently, by reference to another property relation, that of landlord and tenant.\textsuperscript{33} One summer, Williams and her colleague Peter Gabel both sought to rent apartments in Manhattan. While Gabel, a left-leaning white man, hoped for a informal arrangement that could be sealed with a handshake, Williams, an African-American woman, relished the notion of a formal lease. A lease accorded her the dignity of a formal rights bearer—a dignity that members of her racial group had not always been assured. It said to her that her rights, carefully set out and enumerated, would be more likely to be protected at
law. For women, whose dignity and rights within the family have been comparably uncertain, becoming a compensable laborer whose property ownership can be traced to her own productive work may be a similar source of legitimization and protection. When what we are socialized to call "love" functions as an engine of inequality, we might do well to replace it with a set of relations that are loving in the effects they produce, rather than simply in the name they bear.