



EARLY CLAIMS FOR JOINT PROPERTY

Recognizing the Preindustrial Work of the Home

BY ERIKA BACHIOCHI

In *Democracy in America*, Alexis de Tocqueville assumed that American women freely sacrificed themselves for the new nation; perhaps most did. He saw in them an interior strength and independence that inspired them to dedicate their lives, not to their own personal aggrandizement or wealth, as American men seemed wont to do, but to the cultivation of virtue and the building of families, churches, schools, and civic associations. All of these Tocqueville viewed as essential to the survival of the new democratic enterprise. American women took republican self-governance seriously and knew the essential role they played in it, “tak[ing] pride in the free relinquishment of their will” for the sake of the new country.¹ These women maintained networks of kinship, solidarity, and reciprocity in and through their productive family homes, thereby creating what historian Allan Carlson aptly called “islands of antimodernity within the industrial sea.”²

But the common law doctrine of coverture also promoted the assumed sodality—and separate spheres—of husband and wife, too. Under the doctrine, the spouses were regarded as a single legal entity, with the wife “incorporated” into the husband. Upon marriage, the woman lost any property rights she had had as a *femme sole*; the husband gained full use of his wife’s real property and full rights to her personal property and services. In exchange, he was bound by law to protect and provide for her. Thus, in common law jurisdictions, married women held no legal title to the common family enterprise; title was held by the husband alone, who served as the legal and, assuming he owned land, political representative of the family. Were the husband to predecease his wife, she would inherit a mere third of a life interest in their shared investment. In the handful of civil law jurisdictions, such as Louisiana, however, husband and wife owned their property “in community,” with the husband as head of the family legally empowered to manage the property.

British philosopher Mary Wollstonecraft, in her 1792 treatise, *A Vindication of the Rights of Woman*,

argued that unjust marital laws undermined the capacity of husband and wife to share fruitfully in the collaborative duties and goods of the home; the wife’s legal subservience worked against authentic marital intimacy and the development of virtue for both husband and wife—and, therefore, domestic happiness. For nearly two hundred years, arguments against coverture were a central theme in the cause of women’s rights. Indeed, in the movement’s very earliest legal claims, advocates for joint property ownership maintained the very closest philosophical kinship with Wollstonecraft’s original rationale. As we’ll see, “joint” property rights within marriage were not urged for the separate or individualistic undertakings of each spouse; rather, these rights were advocated by Wollstonecraft’s American disciples for the sake of greater union of husband and wife engaged together in their most essential task: shaping themselves and their children through the productive work they carried out in their homes.

With the cooperative and interdependent management of household duties in the young agrarian republic, the shared, if male-headed, legal status between spouses caused little public protest among American women early on. But as the industrializing American economy grew increasingly more commercial, and American men claimed their “individual rights” vis-à-vis the new republican government, more American women began to challenge the fitness and justice of applying the traditional common law approach to new economic circumstances. As work valued with wages began to command more economic power and cultural respect, women grew simultaneously more and more vulnerable to familial and social inequalities. Wollstonecraft’s concerns about the ways in which married women’s economic dependence upon their husbands could corrupt the essential goods of the marital relationship, and so the nation, became even more pressing as industrialization wore on. Equally relevant was her concern that the growing commercial mentality would undermine the development

¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 602 (George Lawrence trans., J. P. Mayer ed., Harper Perennial Modern Classics 1969) (1835).

² ALLAN C. CARLSON, *FROM COTTAGE TO WORK STATION* 34 (1993).

of virtue in a people. Was women's essential work in the private sphere—a sphere increasingly cut off from the hustle and bustle of American markets, trade, and politics—truly valued, if such work enjoyed no economic or legal status whatsoever?

The first married women's property legislation amending the common law was passed in the United States in the 1840s. Though different states enacted the law with slight differences, these new "separate property" acts allowed married women to hold property acquired separately in their own name, before and even during the marriage. They often protected wives' real property from the debts of their husbands, as equitable trusts drawn up for wealthy families had for centuries before.³ A decade later, states began to enact earnings statutes that also gave married women rights to their own wages and often provided these women with the legal capacity to contract and sue. Although these acts amended the common law in discernible ways, their effect on the lives of most married women was not discernible at all.⁴ Fewer than five percent of married women worked for wages during the nineteenth century; the rest, who continued to labor in their own homes, received little or no benefit from these legal amendments.⁵ Something more would be needed to recognize more publicly women's work in the home.

In the 1850s, the women's movement began to focus its organizing efforts on claims for "joint" property rights, in contrast to the "separate" property acts passed a decade earlier. The movement argued not only that women's household labor was valuable "work," but that it also entitled women to an equal legal share in their families' assets. As industrialization drew more and more men out of the agrarian home to work for wages, the traditional and productive work of the home became increasingly synonymous with family life *simpliciter*. This downgrading of the economic value of the work of the home was further exacerbated by the growing

cultural depiction of the private sphere as the moral and spiritual counterpoise to the often harsh realities of industrial society. Economist Nancy Folbre observes: "The moral elevation of the home was accompanied by the economic devaluation of the work performed there."⁶ The great moral contributions that Tocqueville had noticed women were making to the new nation were not easily, nor desirably, counted in the new economic terminology.

And yet, the household economy remained enormously productive. Indeed, its productivity, and the industriousness, thrift, and cooperation such work required, was a good part of the reason Wollstonecraft had regarded middle-class homes, especially, as enjoying the capacity to shape the characters of both children and their parents. Although such household productivity varied by region, household capacity, and the wealth of the family, women were actively laboring to improve the economic well-being of their families, either by sale of home-produced goods and services or by their own frugality and inventiveness. As the market economy grew more sophisticated, new economic measures of local and national productivity were developed. Such measures excluded household labor, characterizing such work as "unproductive," and women who labored in the still-productive home were uncounted among the "gainfully employed."⁷ As a result, says Yale legal scholar Reva Siegel in a lengthy 1994 essay devoted to the topic, a notable rhetorical shift occurred in the depiction of marriage.⁸

Before industrialization, as we've seen, married women were "under the cover" of their husbands' protection and provision at common law, and so were regarded *legally* as "dependent." But given the interdependent communal nature of the productive agrarian home, the substantial *economic* contribution women made to the family unit was never in doubt, even if that unit was represented legally by husbands alone. If they

³ As far back as the thirteenth century, courts of equity had allowed lawyers to create separate estates, by way of trust, for married women to ensure the family property they brought into the marriage would be kept in their family of origin's bloodline, protecting that property from their husbands' creditors. These marital trusts, created for wealthy families, provided the legal mechanism to, centuries later, extend the "separate" marital property concept to all families, regardless of their capacity to hire an attorney.

⁴ MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 111 (1989).

⁵ Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, *YALE L.J.* 1073, 1084 (1994).

⁶ Nancy Folbre, *The Unproductive Housewife: Her Evolution in Nineteenth Century Economic Thought*, 16 *SIGNS: J. WOMEN IN CULTURE & SOC'Y* 465 (1991).

⁷ Siegel, *supra* note 5, at 1092.

⁸ *Id.* at 1093.

were dependent on their husbands, so too were their husbands dependent on them. Historian Alice Clark states that women could “hardly have been regarded as mere dependents on their husbands when the clothing for the whole family was spun by their hands.”⁹

But once the mechanism measuring productive labor was altered by the new wage economy, married women’s legal subordination to their husbands took on an all-new economic cast. As the productive work of the home became more and more economically invisible—winning cultural esteem for its moral and spiritual qualities alone—the traditional interdependence of spouses was transformed into the image of an economically and legally *autonomous husband* and an economically and legally *dependent wife*. But the culturally powerful image was grossly inappropriate: spousal interdependence remained the economic reality in the industrial age, even if that reality was now obscured by the new accounting. Just as homebound wives were economically dependent on their husbands to bring home the new currency, wage-earning husbands were economically dependent on their wives to maintain and grow the family household. Husband and wife still built up their family assets together.

But the common law doctrine of coverture, now enlarged by the new economic visage of “productive” husband and “dependent” wife, made married women increasingly marginalized in the market-based economy and increasingly vulnerable to their husbands’ bad choices. The new stresses of factory work, more time spent away from the home, and the enhanced accessibility of urban bars and brothels made those choices all the more tempting. The Christian Temperance movement of the late nineteenth century, spearheaded by and composed mainly of women, demonstrated the growing concern. Siegel writes that although joint property advocates initially hoped to protect economically vulnerable wives from profligate husbands, the movement increasingly sought

to “empower . . . economically productive women to participate equally with men in managing assets both had helped to accumulate.”¹⁰ The target of their advocacy was not yet the division of labor in the family wherein husbands left home to work for wages while women remained working in the home; rather, the focus was on the disparate value now accorded each of the separate spheres.

At the First National Woman’s Rights Convention in Worcester, Massachusetts, in 1850, the following resolution was presented, modeled on the community property regime of civil law jurisdictions, but dropping the legal authority of husband as head of the partnership:

Resolved, That the laws of property, as affecting married parties, demand a thorough revisal, so that all rights may be equal between them;— that the wife may have, during life, an equal control over the property gained by their mutual toil and sacrifices, be heir to her husband precisely to the extent that he is heir to her, and entitled, at her death, to dispose by will the same share of the joint property as he is.¹¹

The women’s movement sought to match better the laws of marriage and inheritance with the interdependent reality taking place in their homes.

Joint property statutes did not become a reality until a full century later, in the 1960s and 70s.¹² One reason for the marked delay was the shift in nineteenth-century

women’s rights advocacy itself. In the years following the Civil War and Reconstruction amendments, as arguments for women’s suffrage began to gain more steam, these early efforts to pass joint property legislation took a back seat, even as the injustices brought to the forefront by joint property advocates had become more rhetorically effective in efforts to garner support for the vote. Husbands’ vicarious representation of the family—the single most prevalent argument

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⁹ ALICE CLARK, *WORKING LIFE OF WOMEN IN THE SEVENTEENTH CENTURY* 145 (1968).

¹⁰ Siegel, *supra* note 5, at 1116.

¹¹ THE PROCEEDINGS OF THE WOMAN’S RIGHTS CONVENTION, HELD AT WORCESTER, OCTOBER 23D AND 24TH, 1850, at 15 (photo. reprint) (1851) (emphasis added), <https://babel.hathitrust.org/cgi/pt?id=hvd.rslfbk&view=1up&seq=5>.

¹² Siegel, *supra* note 5, at 1115, citing Glendon, *supra* note 4, at 123.

against married women's suffrage—lost its resonance as women began to see their domestic industriousness culturally disregarded and their economic dependence on their husbands culturally assumed. More outspoken suffragists, such as Susan B. Anthony, began to describe then extant marital law as imposing a “condition of servitude,” akin to slavery, which was abolished by the Thirteenth Amendment in 1865.¹³ If women were denied the equal cultural accord and legal share their essential work in the home merited, then “family” representation on the part of their husbands no longer seemed just.

In an effort to assuage suffragists' growing demands for the vote, state legislatures in the 1870s began more aggressively to pass *separate* property statutes ensuring married women's title in her own earnings.¹⁴ But, in an explicit knock against decades-old arguments for joint property, these statutes now often explicitly exempted wives' domestic contribution from their coverage. In excluding wives' marital service to their husbands from legal recognition, state legislators sought to preserve husbands' spousal duty of support to their wives and children, duties that the growing temperance movement suggested they often abrogated. But for joint property advocates, the spousal duty on the part of the husband ought to have justified a correlative right on the part of the wife, not to bring suit against him (which was apparently the legislators' fear), but to share fully in legal management, and justly in inheritance, should he predecease her. Instead, these separate property statutes doubled down on the common law view that the joint earnings of husband and wife together belonged properly to him alone; in the new separate property regime, she individually owned legal title only to that work she performed outside of the home. In common did they labor, but only separately did they own.

By the 1870s, some involved in the growing women's movement, now more likely than their predecessors to engage household help, began themselves to disparage the traditional, productive work of the home.¹⁵ In step with the logic implied by the newly enacted separate property statutes, they began to argue that if married women wanted true economic independence, they ought to seek wage labor outside of the home. Some even expressly denounced the assumption inherent in decades of joint property advocacy: that both the public and private spheres were of equal value, committed

interdependently to the well-being of the family. Rather, to these more radical elements, cultural efforts to extol home labor would keep women content in their subordinate position, uninterested in freeing themselves from such burdens to pursue more culturally valued opportunities in the public sphere.

With this shift came a radical transformation in discourse about women's traditional work: no longer was the work of the home so culturally essential that it defied market valuation. Now work began to be regarded, by some in the movement, as mere “unpaid labor,” with “real work” regarded as what earns a wage. The very arguments that early advocates had strongly denounced in their efforts to hold back the culturally ascendant market mentality had now become fair game. Indeed, in 1898, with the publication of *Women and Economics*, Charlotte Perkins Gilman flipped those early arguments on their head.¹⁶

Expressly repudiating the joint property view that husbands and wives were economically interdependent partners in marriage and so ought to be treated as such by the law, Gilman instead argued that wives were *in fact* dependents in marriage and that only a repudiation of the family as an economic unit as such would free women from such marital inequality. Because of the increasingly dramatic split between the private and public spheres wrought by industrialization, Gilman suggested that women and men had each been overdeveloped in their respectively feminine and masculine traits. In her view, the work of the home, theoretically requiring less rigorous thought than market labor, had a stifling effect on women's authentic development. Moreover, Gilman argued, the public sphere would benefit from women's influence in it. Thus did Gilman trade domestic (in her mind, “feminine”) values for modern (“masculine”) economic ones. For her, no longer should the home remain an antimodern island in the industrializing sea, preserving a sphere of solidarity and kinship from market forces. She sought instead to bring the home, and the women in it, sharply in line with the modern economizing project.

In Gilman's view, the home should be freed from all work in order to become a pure refuge of rest and relaxation; likewise, women should be freed from home labor to seek wage labor and, therefore, economic autonomy, of their own. Gilman writes: “Specialization and organization are the basis of human progress, the

¹³ Siegel, *supra* note 5, at 1148.

¹⁴ *Id.* at 1168.

¹⁵ *Id.* at 1189-90.

¹⁶ *Id.* at 1203.

organic methods of social life. They have been forbidden to women almost absolutely.¹⁷ And so, the traditional work of the home ought to be contracted out as much as possible: childcare professionals should take over the most important work of caring for and educating children (since most mothers were, according to Gilman, incompetent in this regard); household cleaning ought to be conducted by professionals too; and meals ought to be shared among families in common kitchens, with professional cooks. Kitchen-less houses would be preferable since “a family unity which is only bound together with a table-cloth is of questionable value.”¹⁸ Modern efficiency, now applied to the home, was Gilman’s watchword.

To be sure, Gilman was not repudiating motherhood altogether: like many of her time, she regarded motherhood as the “common duty and common glory of womanhood.”¹⁹ But she sought to decouple motherhood from the time-consuming household tasks that kept women from the kind of professional work that would ensure better personal development and so give way to a more nurturing relationship with her husband and children. Where women might find this kind of professional work during the Industrial Revolution flexible enough to allow them valuable time with children, including a year off after each child, Gilman does not say. Perhaps hers was a theory for another time. Gilman’s quest for efficiency and specialization was the women movement’s forebearer for contemporary promotion of professional caregivers, household cleaners, and restaurant dining.²⁰ Yet it would remain, to our day, a vision that only the more well-off could afford. Gilman’s theories, which gained immediate currency in the halls of newly opened women’s colleges such as Vassar, portrayed married women working in the home as economically subordinate while repudiating the robust joint property arguments that once responded to their unjust situation.

Siegel writes, “Whether or not women ... viewed their work for the family as intrinsically degrading, they were in no position to escape it; nor, for that matter, were

their prospects in the market such that wage work necessarily promised ‘personal development.’”²¹ More still, many women (and men) still viewed the work of the home, productive as it remained, and deeply meaningful in its educative and nurturing elements, as the more essential of the two spheres: the place where their family’s flourishing was rooted and would grow strong. One notable public rebuttal to the view advanced by those like Gilman that “all work becomes oppressive that is not remunerative” was printed in *The New Northwest*: “To this idea, more than any other, may be traced the prejudice against bearing children which has become so ingrafted upon the minds of married women, that tens of thousands annually commit ante-natal murder.”²²

Although Wollstonecraft, like Gilman, believed women, the family, and the public sphere would be served by women’s greater educational and professional opportunities, Wollstonecraft argued that the work of the home afforded the character development men, women, and children needed for true success in the public sphere. Without that intentional human development properly prioritized in the life of the home, persons (and markets) would do little good outside of it.

Excerpted (with some modification) from The Rights of Women: Reclaiming a Lost Vision by Erika Bachiochi © 2021 University of Notre Dame Press.

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¹⁷ CHARLOTTE PERKINS GILMAN, *WOMEN AND ECONOMICS: A STUDY OF THE ECONOMIC RELATION BETWEEN MEN AND WOMEN AS A FACTOR IN SOCIAL EVOLUTION* 67 (1898), <https://archive.org/details/womeneconomicst00gilmuoft>.

¹⁸ *Id.* at 244.

¹⁹ *Id.* at 246.

²⁰ Allan C. Carlson, *The Productive Home vs. The Consuming Home*, in *LOCALISM IN THE MASS AGE* 116 (Mark T. Mitchell & Jason Peters eds. (2018)).

²¹ Siegel, *supra* note 5, at 1208.

²² *Id.* at 1166.