

Valuing Housework

Nineteenth-Century Anxieties About the Commodification of Domestic Labor

REVA B. SIEGEL

Yale Law School

This article explores the role that law has played in insulating wives' household labor from market exchange. During the 19th century, the feminist movement challenged giving a husband property rights in his wife's labor and argued that wives were entitled to rights in labor they performed in and out of the household. Legislatures and courts ultimately granted wives rights in labor performed for third parties but refused to countenance any arrangement that would give a married woman rights in the labor performed for her husband or family. In particular, courts refused (and still refuse to this day) to enforce spousal agreements compensating wives for the performance of household labor. In reforming the law of marriage, legislatures and courts struggled to distinguish between market and family relations. In so doing, they imposed legal boundaries on the labor market and defined the economic structure of family transactions for the industrial era.

Market and family are interdependent. The family produces and sustains individuals who perform market labor; the market, in turn, supplies goods, services, and income to support the family. Yet, we commonly view these two domains of social activity as radically disjunct, organized according to distinct and complementary forms of social logic. The market is the site of productive activities, driven by self-interested modes of exchange, whereas the family is the site of nurturant activities, animated by more altruistic modes of exchange.

Of course, reasoning in this fashion obscures important commonalities between the market and family. Many of the goods and services that markets supply are also produced in the family, and many of the forms of nurturance and support that families offer can be purchased on the market. There are self-interested modes of exchange in families and more altruistic modes of exchange among market actors. But if, on critical reflection, we can discern similarities between the market and the family, "common sense" continues to persuade us of their distinct—if not antithetical—social organization.

These commonsense intuitions about the market and family are, of course, historically contingent intuitions. Large sectors of today's markets in goods and services grew out of family-based units of production and consumption. It was

during this process of economic transformation that market and family were discursively constructed as distinct and complementary domains, involving fundamentally different modes of social activity.

This article will analyze the differentiation of family and market spheres in 19th-century American law, thereby recovering a wide-ranging debate over wives' household labor that historians of industrialization have overlooked. In this debate, we can see 19th-century Americans struggling with the question of how the social wealth created by women's household labor would be distributed in a world in which labor was, with increasing frequency, valued and compensated in money wages.

A LEGAL PERSPECTIVE ON THE HISTORY OF HOUSEWORK

Historians in a variety of disciplines have analyzed the process of industrialization—focusing initially on industrialization as a story about markets and then, belatedly, exploring the implications of this economic transformation for family life. During the past decade, historians of the family have begun to investigate the role that household labor played in the national economies of 18th- and 19th-century America—a story initially neglected by historians who approached industrialization as a story about the disaggregation of productive labor from the family setting (Boydston, 1990; Cowan, 1983; Dudden, 1983; Jensen, 1986; Matthews, 1987).

By the early 19th century, farmers were producing a variety of goods for sale, manufacture was spreading across the rural and urban landscape, and an increasing number of Americans secured a livelihood by means of wage labor rather than entrepreneurial enterprise. But—as historians such as Jeanne Boydston and Joan Jensen have demonstrated—the household remained a crucial site for the production of goods and services for family use and sale (Boydston, 1986, 1990; Faragher, 1986; Jensen, 1980, 1986). Wives, daughters, and women hired as household “help” played a key role in these activities, whether by performing the work of family maintenance, selling dairy products to local markets, keeping boarders, or doing industrial piecework. Yet, by the mid-19th century, women's economic contribution to the household was no longer as visible as it had been in the more subsistence-oriented agrarian economies of the colonial and Revolutionary eras. Although growing numbers of men had begun to work outside the household, wives continued to work in the family setting, and so their work increasingly appeared an indistinguishable part of “family life.” As it became more common for men to exchange their labor for money wages, production for use came to be identified as a distinctly female activity, associated with the social, but not economic, maintenance of family life. The first census measures of the economy that appeared in the aftermath of the Civil War characterized such labor as “unproductive” and, consistent with this gendered valuation of family labor, excluded women engaged in income-producing household work from the

count of those “gainfully employed” (Folbre, 1991; Folbre & Abel, 1989). In so doing, they gave official expression to what were already deeply entrenched assumptions of popular discourse, which denied that wives' work was work.

By the early 19th century, commentators had begun to characterize family and market as two distinct spheres, organized in accordance with fundamentally different norms. The market was a male sphere of competitive self-seeking, whereas the home was celebrated as a female sphere, a site of spiritual uplift that offered relief from the vicissitudes of market struggle. With the spheres of work and family gendered male and female, marriage was redefined as an exchange of material sustenance for spiritual sustenance, and wives were in turn defined as economic dependents of their husbands (Siegel, 1994a, 1996). “Ironically,” Nancy Folbre (1991) observes, “the moral elevation of the home was accompanied by the economic devaluation of the work performed there” (p. 465). Jeanne Boydston (1990) comments that

The pastoralization of housework implicitly reinforced both the social right and the power of husbands and capitalists to claim the surplus value of women's labor, both paid and unpaid. It accomplished this by rendering the economic dimension of the labor invisible, thereby making pointless the very question of exploitation: one cannot confiscate what does not exist. (p. 158)

Notwithstanding the power of separate-spheres reasoning, there was, however, a wide-ranging debate in the United States over the expropriation of wives' household labor during the 19th century. As we will see, partisans in this debate recognized that wives' household labor had economic value but disagreed about how the legal system should distribute property rights in this important family asset.

To understand how such a debate could have occurred, it is helpful to approach industrialization as a process involving changes in the social relations through which wealth is *produced*, as well as changes in the social relations through which wealth is *distributed*. For example, the spread of wage labor, partnership, and incorporation arrangements all entailed changes in the social arrangements through which wealth is produced and distributed. Analyzed from this vantage point, it is apparent that industrialization involves important changes in the legal infrastructure of economic relationships.

Recently, labor historians—including Robert Steinfeld and Christopher Tomlins—have begun to excavate the legal history of the employment relationship during the industrial era, demonstrating how contract doctrines that regulated “free labor” evolved out of ancient common-law rules governing the relation of household head and his dependents (Steinfeld, 1991; Tomlins, 1993). This ancient body of common law governed not only the relation of master and servant but also the relation of husband and wife. If we examine 19th-century conflicts over the reform of marital status law, we discover that, during the height of industrialization, Americans argued about how the legal system would and should distribute rights to the economic value of wives' household labor.

The common law of marital status vested in the husband, as head of household, extraordinary control over the household dependents for whom he had responsibility. On marriage, the Anglo-American common law gave a husband rights in his wife's person, labor, and property and then imposed on a husband the duty to support his wife and to represent her in the legal system. A wife was, in turn, expected to submit to her husband and serve him. The common law not only deprived a married woman of rights in her labor and property but denied her capacity to bring suits or enter contracts without her husband's consent and participation (Basch, 1982). For present purposes, it is important to note that the doctrine of marital service gave a husband property rights in all products of his wife's labor, whether she worked for third-party compensation or for the direct benefit of family members.

By the mid-19th century, a woman's rights movement had begun vociferously to protest the doctrine of marital service, as well as the restrictions the common law imposed on wives' capacity to contract. And by the second half of the 19th century, state legislatures began to enact statutes that were, in a measure, responsive to the movement's demands. These statutes reformed the common law by granting married women property rights in their earnings and the capacity to enter into contracts without their husbands' consent (Siegel, 1994b). Conventionally, historians have depicted passage of the earnings statutes as an aspect of market rationalization, in which the logic of contract supplanted the ancient status organization of the household. On this account, industrialization precipitated legal reforms that recognized married women as juridically autonomous agents with property rights in their own labor. But this account incompletely describes the actual contours of common-law reform. The earnings statutes that first gave wives rights in their labor generally applied only to work performed outside the household and so did little to alter the life circumstances of most married women, who worked on a compensated and uncompensated basis in the household setting. As I have shown, this result was not inadvertent but quite self-conscious—the product of legislative and judicial deliberation (Siegel, 1994a).

In an article titled "Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor" (Siegel, 1994a), I demonstrate that the antebellum woman's rights movement initially attempted to emancipate the labor wives performed in the household by advocating "joint property" laws that would give wives rights in marital assets to which husbands otherwise had title. The movement argued that wives were entitled to share ownership of family assets because of the paid and unpaid labor they contributed to the family economy. State legislatures uniformly repudiated the joint property demands of the woman's rights movement and instead enacted laws that granted married women rights in their "personal" or "separate" labor, often expressly excluding from the statutes' coverage the labor that a wife performed for her husband or family. However the reform statutes were drafted, courts insisted that the legislation did not give a wife rights in her household labor; this labor, judges insisted,

remained a husband's by marital right. Thus, when married women brought claims under the earnings statutes seeking to enforce contracts with their husbands involving the performance of household labor, courts uniformly insisted the agreements were unenforceable—and still refuse to enforce such agreements to this day.

In short, the doctrine of marital service was reformed, but not abolished, over the course of the 19th century. Legislatures and courts negotiating challenges to the doctrine of marital service repeatedly and insistently refused to treat the labor women performed in the household like work performed outside the household. Quite plainly, market rationality did not wholly supplant the status logic of the common law. In revising the doctrine of marital service, legislatures and courts self-consciously struggled to distinguish between market and family relations. In so doing, they imposed legal boundaries on the labor market and defined the economic structure of family transactions for the industrial era.

In the following sections, I briefly consider the joint property claim that legislatures repudiated and then consider litigation under the earnings statutes that they enacted. This record demonstrates that 19th-century Americans struggled with the question of how the social wealth created by wives' household labor would be distributed in a world in which labor was increasingly valued and compensated in money wages.

THE JOINT PROPERTY CLAIM

From the point at which 19th-century woman's rights activists first began convening in the 1850s, they demanded the passage of joint property laws. Feminists justified their demand for joint ownership of family assets by pointing to the many ways that wives' labor was crucial to family support and to the accumulation of family wealth. A woman's rights convention held in Worcester, Massachusetts, resolved in 1851

that since the economy of the household is generally as much the source of family wealth as the labor and enterprise of man, therefore the wife should, during life, have the same control over the joint earnings as her husband, and the right to dispose at her death of the same proportion of it as he. (*Proceedings of the Woman's Rights Convention, Held at Worcester, 1852*, p. 18)

Or, as Frances Gage put it in 1855,

"Labor is the foundation of wealth." The reason that our women are "paupers," is not that they do not labor "right earnestly," but that the law gives their earnings into the hands of manhood. . . . What reduces both the woman and the slave to th[e] condition [of paupers]? The law which gives the husband and the master entire control of the person and earnings of each; the law that robs each of the rights and liber-

ties that every "free white male citizen" takes to himself as God-given. (Stanton et al., 1881/1985, pp. 842-843)

Elizabeth Cady Stanton (1881/1985) distilled the joint property claim into a simple but provocative question: "Do not the majority of women in every town support themselves, and very many their husbands too?" (pp. 839, 842).

In this early period, when woman's rights advocates first began to argue about the ownership of wives' earnings, they did not take the labor market as the central point of reference for understanding the value of work. Indeed, they paid relatively little attention to the fact that much of wives' labor was, in the market idiom that now defines its marginality, "unpaid labor." Yet, the movement was cognizant of the ways in which a growing labor market had begun to affect social perceptions of women's household labor. In important respects, the joint property demand contested emergent market-based perceptions of women's work.

Why did the movement attempt to emancipate wives' labor through family law rather than contract, in the form of a joint property right in marital assets rather than a separate property right in labor that might be exchanged for a wage? Antebellum convention records provide intriguing evidence that the movement's effort to emancipate wives' domestic labor by means of a joint rather than a separate property right reflected considerations of principle and strategy. For some in the woman's rights movement, joint property ownership seems to have represented a vision of equality in marriage that was rooted in values of community and sharing rather than in the individualism of the liberal tradition. As the Reverend Antoinette Brown Blackwell put it, "I believe that in a true marriage, the husband and wife earn for the family, and that the property is the family's—belongs jointly to the husband and wife" (*Proceedings of the 10th National Woman's Rights Convention*, 1860, p. 89). This feminist vision of marriage as a form of community or partnership retained elements of the common-law conception of marriage as a relation of unity and undoubtedly drew strength from religious conceptions of the relationship.

But there is also evidence that the movement's effort to emancipate wives' labor in the form of a joint property right sprang from more pragmatic concerns about securing economic justice for women. A deep skepticism about the nature of the labor market shaped joint property discourse, as an exchange at an 1853 convention reveals.

At this convention, a member of the audience objected to the joint property proposal on the grounds that "he did not see why labor, worth in the market no more than one or two dollars per week, should be paid for at the rate of, it may be, \$200 per week" (Stanton et al., 1881/1985, p. 584). This market-based objection to the joint property proposal was not well received by the woman's rights advocates assembled at the convention. The group had just finished discussing the gendered organization of the labor market, with debate featuring observations such as Frederick Douglass's that "as teachers women get one-fourth the pay men do" (Stanton et al., 1881/1985, p. 584). Objections to gender

bias in the labor market were a common part of feminist gatherings since the movement's first conventions, at which Abby Price attacked the market as "undervaluing our labor,—taking from us our right to choice in our industrial avocations,—inflict[ing] . . . pecuniary dependence,—shutting us from the trades, and the learned professions" (Worcester Convention, 1852, p. 34), and Wendell Phillips (1851) objected that

the woman of domestic life receives but about one third the amount paid to a man for similar or far lighter services. The woman of out-door labor has about the same. The best female employments are subject to a discount of some forty or fifty per cent. on the wages paid to males. (p. 17)

This was not polemical excess; the wage ratios Phillips reported were substantially correct. At a time when it was common for employers to pay women and men different amounts for performing the same work, woman's rights advocates did not view the labor market as a neutral arbiter of value but instead saw the market as shaped by norms and practices of gender caste. The convention's resolutions described the market as an institution in which wages were set according to "the sex of the worker" and "women are kept poor, by being crowded together, to compete with and undersell one another in a few branches of labor" (Stanton et al., 1881/1985, p. 581). Indeed, feminists frequently criticized the gender-based wage system of the era on the grounds that low market wages drove women into legally enforced dependence in marriage. For these reasons, the group was, in fact, critically equipped to respond to market-based objections to the joint property claim.

Antoinette Brown Blackwell rejected the notion of compensating wives' domestic labor at market rates on the grounds that such an arrangement would perpetuate, rather than alleviate, conditions of gender inequality. Blackwell suggested that women would entertain market-based objections to the joint property proposal "when our brothers are ready to be paid a dollar a week for keeping house and nursing the children" (Stanton et al., 1881/1985, p. 586). In essence, Blackwell was arguing that it was because *women* performed the work of housekeeping and child care that such services could be purchased for a dollar a week; if the market value of wives' work was depressed by norms and practices of gender caste, it would be foolish to emancipate wives' labor from the caste structure of marriage by taking compensation for it at market rates.

Blackwell underscored this point by simple analogy: "If we are to be satisfied with things as they are," she contended, "so should the slave be. He should be grateful for the care of his master, for according to the established price paid for labor, he does not earn enough to take care of himself" (Stanton et al., 1881/1985, p. 587). Blackwell's rejoinder drew on criticisms of the employment relation as "wage slavery" to make a somewhat different point about the market in "free labor": The labor market was an integral part of systems of social caste that found more direct legal expression in the institutions of slavery and

marriage. This observation had enormous practical import. To emancipate wives' labor in the form of a separate property right, as labor that could be exchanged for a market wage, would secure formal equality for women but perpetuate social relations of inequality. In other words, given prevailing market conditions, if wives were granted the freedom to sell their household labor, they would attain formal equality with their husbands but remain *pecuniarily dependent* on them in fact. To secure pecuniary independence—that measure of autonomy that would signify an escape from gender caste status—another strategy was required.

The joint property claim represented such a strategy. The claim for joint property rights in marital assets amounted to an effort to secure compensation for wives' contribution to the family economy—in terms unbiased by assumptions of gender caste, as market measures of value were. Consider again the justification for the claim offered at the 1851 Worcester convention: "That since the economy of the household is generally as much the source of family wealth as the labor and enterprise of man, therefore the wife should . . . have the same control over the joint earnings as her husband" (Worcester Convention, 1852, p. 18). The movement was, in effect, asserting that a wife's labor contributed as much to family wealth as did the income earned by a husband from his labors—notwithstanding what the market might measure as its worth.

In the early years of industrialization, before the dissemination of the works of Marx and Engels, the woman's rights movement was exploring the social structure of the labor market in terms that are critically acute, even by modern standards. In describing how relations of gender caste penetrated the labor market, the movement offered its own critique of the employment relation, distinct from, although convergent with, labor criticisms of it as a form of wage slavery. And in devising a rights claim designed to rectify the latent caste structure of the labor market, joint property advocates anticipated by more than a century efforts of the contemporary feminist movement to secure pay equity for women. In theory, if not design, the joint property demand is an antecedent of the modern comparable worth claim.

However, with the spread of wage relations over the course of the 19th century, joint property discourse was increasingly infiltrated by market-based conceptions of labor. In the years after the Civil War, joint property advocates began to discuss wives' household labor in a new market idiom, as "*unpaid labor*," and to describe a wife as a "servant without wages" (Siegel, 1994a, nn. 461, 462). At the same time, they began to refer to the joint property claim as a demand for equal division of marital assets and to discuss a husband paying his wife for her work. Helen Jenkins (1872), writing for the *New Northwest*, expressed these new concerns about household labor when she observed that "the estimated worth of a thing . . . is its money value. Law and society say this home work need not be paid in money; therefore society and law value this work . . . at—how much? . . . Nothing" (Jenkins, 1872, p. 2). These observations prompted Jenkins to suggest that she "would . . . have the husband pay the wife" (Jenkins, 1872, p. 2).

These changes in feminist idiom and expectation suggest that the growing pre-eminence of wage work in the postwar industrial economy had isolated the labor of family maintenance in an increasingly anomalous economic status. Thus, although it was possible for antebellum feminists to discuss a wife's "earnings" without discriminating between her paid and unpaid labor, by the postwar period many feminists uneasily noted that wives "are not earners but savers of money" (Stanton et al., 1886/1985, p. 305). The emergence of market rhetoric within joint property discourse signaled an incipient shift in the movement's vision of wives' economic emancipation.

Even though no legislature proved willing to adopt joint property laws, the women's movement continued to press the claim in the decades after the Civil War, and regularly invoked joint property concepts in an effort to persuade women to join the suffrage cause. Paradoxically, legislative failure to adopt joint property principles provided compelling evidence of women's need for the vote. Yet, at the same time that movement leadership popularized joint property concepts, it increasingly settled for marriage reform legislation that would give wives' separate property rights in their earnings. It was during this period that movement leadership first began to challenge the division of labor in marriage, arguing that wives ought be able to work outside the home for market wages as their husbands did and proposing various cooperative-housekeeping schemes intended to facilitate this. As movement leadership began to focus on questions concerning the organization of labor in marriage, it paid less attention to the questions of distributive justice that joint property discourse raised (Siegel, 1994a). It thus fell to litigants claiming property rights under the new earnings statutes to raise questions concerning the ownership of wives' household labor that joint property discourse first broached.

TREATMENT OF DOMESTIC LABOR UNDER THE EARNINGS STATUTES

The statutes granting married women rights in their earnings were adopted in states across the nation at different times and often involved several waves of reform legislation. We know that in some jurisdictions, woman's rights advocates attempted to emancipate wives' household labor through joint property laws, and legislatures responded by enacting statutes granting wives separate property rights in their earnings; some of these statutes specifically excluded labor a married woman performed for her husband or family. In most jurisdictions, the earnings statutes simply gave a married woman rights in her personal or separate labor without further restriction (Siegel, 1994a). Yet, in all jurisdictions, courts construed the statutes to preserve, at least in part, the doctrine of marital service.

In earnings statute litigation, courts were called on to determine whether a husband still had rights to the value of the work his wife performed in a variety of contexts: when she did wage work for third parties outside the household or, as

was commonly the case, inside the household (for example, doing piecework, sewing, washing, ironing, or keeping boarders); when she worked in the family business or on the family farm; and when she worked in the household raising, clothing, and feeding her family. In the decades between the Civil War and the New Deal, courts slowly shifted from a presumption that the husband, by right of marriage, had property rights in all products of his wife's labor to a presumption, however tentative, that a married woman owned the product of her labor—so long as judges deemed that labor personal or separate, that is, distinct from the labor a wife owed her husband by reason of marriage. The labor all courts insisted that a wife owed her husband by reason of marriage was the household labor she performed raising, clothing, feeding, educating, and nurturing her family (Siegel, 1994b).

Judges called on to apply the earnings statutes were determined to insulate such household labor from market exchange. The earnings statutes conferred on wives the capacity to contract and a property right in their own labor and so raised a possibility not contemplated at common law: that wives might contract with their husbands for the performance of household labor and thereby introduce market relations into the family. In this respect, the statutes granting wives a separate property right in their earnings presented questions about the ownership of wives' household labor in more socially threatening form than joint property discourse did.

Anxieties about introducing market relations into the family haunt judicial interpretation of the earnings statutes. For example, many courts rejected wives' claims to earnings from boarders because judges saw no way of distinguishing the labor in question from the household work a wife performed for family members. For similar reasons, many courts were unwilling to recognize wives' claims for compensation for work performed in the family business or on the family farm. When women began to bring earnings claims arising out of contracts in which a husband agreed to pay his wife for performing household labor, judges condemned the arrangements vehemently on a variety of grounds. It is worth pausing to consider the reasons courts offered for refusing to enforce spousal agreements that compensated wives for performing household labor.

The simplest and most commonly repeated objection was that a husband owned a wife's household labor by right of marriage; hence, such labor did not supply the necessary "consideration" to make the husband's promise to pay for it legally enforceable. But this commonly repeated rationale was vulnerable on at least two grounds. First, it relied heavily on the doctrine of marital service to limit claims under the earnings statutes, when the language of the earnings statutes often seemed to abrogate the doctrine of marital service and vest wives with unrestricted property rights in their own labor. Second, the consideration-based objection to intramarital contracts that compensated household labor drew authority from the view that marital agreements should conform with general market principles, when courts were in fact profoundly anxious about analyzing marital transactions as market transactions.

This uncase finds vociferous expression in earnings statute case law. For example, in 1883, when the New York Court of Appeals rejected a wife's attempt to recover on a contract she entered into with her husband to care for his incapacitated mother, the court argued that introducing contracts into the family would desecrate the marriage relation:

It would operate disastrously upon domestic life and breed discord and mischief if the wife could contract with her husband for the payment of services to be rendered for him in his home; if she could exact compensation for services, disagreeable or otherwise, rendered to members of his family; if she could sue him upon such contracts and establish them upon the disputed and conflicted testimony of the members of the household. To allow such contracts would degrade the wife by making her a menial and a servant in a home where she should discharge marital duties in loving and devoted ministrations, and frauds upon creditors would be greatly facilitated, as the wife could frequently absorb all her husband's property in the payment of her services, rendered under such secret, unknown contracts. (Coleman v. Burr, 1883, pp. 25-26, italics added)

The court refuses to enforce spousal agreements for the compensation of household labor because, in its view, giving legal sanction to marital bargaining would transform the nature of the marital relation to the detriment of the husband, the wife, and society as a whole.

The anticontractarian justification for refusing to enforce spousal agreements compensating domestic labor is manifestly at odds with the contractarian justification for nonenforcement. Although the anticontractarian justification insists that transactions in the family and the market are governed by two discrete ethics, the contractarian justification assumes that market concepts of consideration are of universal applicability in determining the enforceability of promises. The anticontractarian argument insists that wives should give husbands the benefits of their labor freely—that is, out of love or duty and not for gain; by contrast, the contractarian argument refuses to enforce the husband's promise to pay on the grounds that he already owns his wife's labor, and, hence, will gain nothing from the transaction. The anticontractarian rationale deems the spousal agreement unenforceable because paying a wife for her labor will degrade her into a mere servant, whereas the contractarian rationale finds no consideration to support the spousal agreement because the husband already owns his wife's "services."

Yet, despite flagrant contradictions between the contractarian and anticontractarian rationales, courts invoked the two justifications for refusing to enforce spousal agreements as if they were entirely compatible. Courts invoked both types of justifications without sense of contradiction because the justifications are rooted in two traditions of reasoning about marriage that the common law has employed as it developed over the centuries: marriage-as-property and marriage-as-love. The contractarian objection to spousal agreements for household labor rests on the ancient common-law understanding that marriage is an

economic relation that gives a husband property rights in his wife's labor. By contrast, the anticontractarian objection draws its persuasive force from separate-spheres discourse of the industrial era, which conceives of marriage as an affective relation, animated by altruistic commitments that transcend the self-interested motives of the market. Thus, as the law of marital status was reformed during the 19th century, judges rationalized its new rule structure by drawing on historically evolving conceptions of marriage: Status relations that were once expressed in a discourse of property-in-persons could now be justified in the language of affect associated with companionate marriage in the industrial era.

In short, courts interpreting the earnings statutes translated the law of marital status into a more contemporary gender idiom. As important, judges interpreting the earnings statutes gave defining structure to the marriage relation. In the market—the realm of interested exchange—the state would enforce promissory bargains, but in the home, it would refuse to enforce spousal agreements. Judicial refusal to enforce spousal agreements concerning household labor has thus imposed legal boundaries on the labor market and defined the economic structure of family transactions for the industrial era. By disabling wives who might bargain with their husbands over the terms of their labor, this body of status law constructs marriage as a regime of “altruistic” exchange.

Today, few married women seek enforcement of household labor agreements, but the relative infrequency of such contract claims demonstrates the prescriptive force of the legal rule—not its inconsequentiality. Married couples may collaborate, bargain, and bicker over household affairs, but any agreements they arrive at are paradigmatically private—not formalized at law or subject to judicial oversight. Spouses do not look to the courts to enforce such agreements, and if they did, no aid would be forthcoming; to my knowledge, no American court has ever enforced such an agreement. Since passage of the earnings statutes, courts have denied married women recourse to state authority otherwise structuring contract and market exchange—disabling those who attempted to bargain with their husbands respecting the terms of their labor and discouraging any others who might be so inclined (Siegel, 1994b; Silbaugh, 1996).

The practical significance of these developments in marital property law can be better appreciated if we distinguish between *legal* and *customary* relations of distribution. The law distributes wealth in the family by allocating title to marital property, but, as we all know, the actual distribution of wealth in the family cannot be ascertained by a simple examination of legal title. A variety of customary norms and practices determine who has access to family resources and who makes decisions about how such resources are spent. Just as the legal rela-

tions of distribution in marriage have a history, as Viviana Zelizer (1994) has shown us, so, too, do the customary relations of distribution.

Reconsidering the history of the earnings statutes, we can see that legal relations of distribution play an important role in shaping customary relations of distribution. Judicial refusal to enforce spousal contracts did not bring spousal bargaining to an end; instead, it ensured that family exchange would proceed on a different social basis than market exchange, with certain predictable consequences for the gendered structure of marriage. Wives might strike bargains with their husbands to exchange their labor for cash and market goods, but because such agreements were not enforceable at law, title to the cash and market goods wives “earned” would remain with the husband.¹ From this standpoint, it is easier to appreciate how the legal relations of distribution shape the customary relations of distribution: The fixed allocation of property rights in marriage will influence the outcome of marital bargaining. The fixed allocation of property rights in marriage also affects wives' ability to assert themselves in marriage and to exit the relation and requires wives to develop skills for securing the benefits of bargains that cannot be enforced by law.

CONCLUSION

Nineteenth-century woman's rights advocates shared with 19th-century judges a deep skepticism about introducing market relations into the family, but their skepticism reflected radically different social concerns and prompted them to endorse fundamentally different property regimes in marriage. Both the women's movement and the judiciary understood marriage as a relationship that involved forms of sharing inconsistent with market norms, but this apparent commonality in perspective masked deep differences in their understanding of the relationship. The 19th-century women's movement resisted market-based approaches to valuing household labor at least in part because the movement viewed the labor market itself as an institution that enforced the economic subordination of women. Woman's rights advocates thus sought to empower wives through the medium of family law, by redistributing the property entitlements defining marriage. By contrast, the judiciary prohibited market relations in the family at least in part because it was concerned that giving legal sanction to marital bargaining would empower wives in ways that threatened the customary distribution of wealth and work in marriage. The modernized body of status law that courts enforced was self-consciously designed to “domesticate” marital bargaining by denying it the force of law.

Today, it would seem that the women's movement's fears about introducing market relations into the family were better founded. But, it bears observing, we have no idea what the market price of household labor would be in a world in which the state had not intervened—through centuries of laws governing marriage, slavery, labor relations, and immigration—to protect the supply of household labor and to ensure that it could be procured on easily “affordable” terms.

NOTE

1. At no point in American history have courts enforced spousal agreements remunerating household labor; thus, wives who labored in the household generally had no enforceable claims on their husbands' assets except those they might assert through family law as a husband's dependent. Even in community-property states in which wives nominally shared title to family assets, a husband retained dispositional control over “community” property during the life of the marriage—a prerogative that was not reformed until the past several decades (Siegel, 1994a). Today, married women in community-property jurisdictions have considerably stronger rights in community assets during the marriage and at divorce, and wives in separate-property jurisdictions are generally entitled to an “equitable share” of a husband's assets at divorce. Although current law offers more substantial protections to women at divorce, it does not give them property rights in what is arguably the most significant form of wealth families hold today: a husband's earning capacity or “human capital.” Generally, a husband's earning capacity is not treated as property to be distributed at divorce, although courts frequently award an ex-wife and children needs-based claims to a husband's postdivorce earnings. To this extent, the principle that “he who earns it, owns it” still persists as a foundational structure of marital status law, and the law continues to recognize wives' claims on family assets as claims of a wage-earner's dependent (Williams, 1994).

REFERENCES

- Basch, N. (1982). *In the eyes of the law: Women, marriage, and property in nineteenth-century New York*. Ithaca, NY: Cornell University Press.
- Boydston, J. (1986). To earn her daily bread: Housework and antebellum working-class subsistence. *Radical History Review*, 35, 7-25.
- Boydston, J. (1990). *Home and work: Housework, wages, and the ideology of labor in the early republic*. New York: Oxford University Press.
- Coleman v. Burr, 93 N.Y. 17 (1883).
- Cowan, R. S. (1983). *More work for mother: The ironies of household technology from the open hearth to the microwave*. New York: Basic Books.
- Dudden, F. E. (1983). *Serving women: Household service in nineteenth-century America*. Middletown, CT: Wesleyan University Press.
- Faragher, J. M. (1986). *Sugar Creek: Life on the Illinois prairie*. New Haven, CT: Yale University Press.
- Folbre, N. (1991). The unproductive housewife: Her evolution in nineteenth-century economic thought. *Signs*, 16, 463-484.
- Folbre, N., & Abel, M. (1989). Women's work and women's households: Gender bias in the U.S. census. *Social Research*, 56, 545-570.
- Jenkins, H. P. (1872). Do mothers earn their own support? *New Northwest*, 2.
- Jensen, J. M. (1980). Cloth, butter, and boarders: Women's household production for the market. *Review of Radical Political Economics*, 12, 14-24.
- Jensen, J. M. (1986). *Loosening the bonds: Mid-Atlantic farm women, 1750-1850*. New Haven, CT: Yale University Press.
- Mathews, G. (1987). *“Just a housewife”: The rise and fall of domesticity in America*. New York: Oxford University Press.
- Phillips, W. (1851). *Freedom for women*. Speech of Wendell Phillips, esq., at the convention held at Worcester, October 15 and 16, 1851, n.p.
- Proceedings of the 10th national woman's rights convention, held at the Cooper Institute, New York City, May 10th and 11th, 1860*. (1860). Boston: Yerrington & Garrison.
- Proceedings of the woman's rights convention, held at Worcester, October 15th and 16th, 1851*. (1852). New York: Fowlers & Wells.
- Siegel, R. B. (1994a). Home as work: The first woman's rights claims concerning wives' household labor, 1850-1880. *Yale Law Journal*, 103, 1073-1217.
- Siegel, R. B. (1994b). The modernization of marital status law: Adjudicating wives' rights to earnings, 1860-1930. *Georgetown Law Journal*, 82, 2127-2211.
- Siegel, R. B. (1996). “The rule of love”: Wife beating as prerogative and privacy. *Yale Law Journal*, 105, 2117-2207.
- Silbaugh, K. (1996). Turning labor into love: Housework and the law. *Northwestern University Law Review*, 91, 1-86.
- Stanton, E. C., Gage, M. J., & Anthony, S. B. (Eds.). (1985). *History of woman suffrage* (Vol. 1). Salem, NH: Ayer. (Original published 1881)
- Stanton, E. C., Gage, M. J., & Anthony, S. B. (Eds.). (1985). *History of woman suffrage* (Vol. 3). Salem, NH: Ayer. (Original published 1886)
- Steinfeld, R. J. (1991). *The invention of free labor: The employment relation in English and American law and culture, 1350-1870*. Chapel Hill: University of North Carolina Press.
- Tomlins, C. L. (1993). *Law, labor, and ideology in the early American republic*. New York: Cambridge University Press.
- Williams, J. (1994). Is coverture dead? Beyond a new theory of alimony. *Georgetown Law Journal*, 82, 2227-2290.
- Zelizer, V. (1994). *The social meaning of money: Pin money, paychecks, poor relief, and other currencies*. New York: Basic Books.