

# Book Review

## Cross-Dressing in the Master's Clothes

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*Unbending Gender: Why Family and Work Conflict and What To Do About It.* By Joan Williams. New York: Oxford University Press, 2000. Pp. 338. \$30.00.

Feminist legal theory has, famously, spotlighted the connection between substance and method.<sup>1</sup> Epistemological assumptions, forms of reasoning, even nuances of tone, feminists remind us, can help to entrench or disrupt damaging gender rules or norms. Thus, feminist legal work has often nested a substantive critique in a broad challenge to the norms of legal scholarship, legal reasoning, or both. Joan Williams's new book, *Unbending Gender*,<sup>2</sup> exemplifies this approach. She has as much to say about the way that change should be framed, debated, and produced as she does about the particular changes that are required. And her offerings in

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1. Examples of works highlighting this connection abound. In law, see, for example, Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); and Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990). In philosophy, see, for example, SANDRA HARDING, *WHOSE SCIENCE? WHOSE KNOWLEDGE? THINKING FROM WOMEN'S LIVES* (1991); and SARA RUDDICK, *MATERNAL THINKING: TOWARD A POLITICS OF PEACE* (1989).

2. JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000).

both areas provide useful challenges to lawmakers, feminist theorists, and the public.

Williams's substantive innovation is a shift in focus, from the eroticization of dominance to the unresolved dilemmas of work/family conflict.<sup>3</sup> For more than a decade, she argues, feminists have focused almost exclusively on sexualized dominance as an engine of women's inequality. One casualty of this necessary focus has been a neglect of problems that fall outside this pattern, such as the persistent tension between market work and family work.<sup>4</sup> Williams returns feminists to this problem, yet she does so in a way that contrasts with earlier feminist efforts. The problem, in Williams's analysis, is not simply a lack of institutional expedients, such as family leave or flextime. It is domesticity, a complex system of norms and institutional arrangements that keeps men tethered to an increasingly demanding workplace, women professionally marginalized and economically dependent, and children often destitute upon their parents' divorce.<sup>5</sup> Williams's goal is to illuminate the norms and practices of domesticity and to explain how they can be deconstructed.

Yet Williams also proposes to address this challenge in a methodologically distinctive fashion.<sup>6</sup> Resisting a tendency toward unitary or totalizing theory,<sup>7</sup> Williams forges an approach that she describes as pragmatic.<sup>8</sup> Its pragmatism inheres in two primary features. The first is its eclecticism: Williams combines a heterogeneous range of expedients in order to achieve her goal. Domesticity is a system in which institutions reflect and perpetuate popular attitudes toward market and family work; therefore, a full program for change must address both attitudes and institutions. Williams does so by advocating legal changes that would require employers and families to recognize and to accommodate the work

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3. *See id.* at x.

4. For an example of a discussion in which Williams makes this point, *see id.* at 6-7.

5. *See id.* at 1-4.

6. In the context of this review, I use the word "methodological" in a broad and non-technical way, to include: (1) elements of the manner in which the substantive argument is presented, such as choice of target audience, tone, and forms of reasoning; and (2) elements of meta-strategy, such as Williams's embrace of Deweyian pragmatism, *see infra* notes 10-11 and accompanying text, which intersect with the substance of an argument.

7. The theory that Williams is most likely attempting to resist is the dominance theory of Catharine MacKinnon. *See, e.g.,* WILLIAMS, *supra* note 2, at 245. MacKinnon has been criticized for offering a unitary account that fails to take account of women's differences. *See, e.g.,* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Martha R. Mahoney, *Whiteness and Women*, in *Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217 (1993). Yet Williams also resists a feminist tendency toward "utopian" approaches (which need not be totalizing), a tendency she associates with the work of Martha Fineman. *See* WILLIAMS, *supra* note 2, at 238-39 & 327 n.93 (citing MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 230-33 (1995)). *See generally* FINEMAN, *supra* (taking the view that the way we conceive family must change in order to recognize and facilitate caregiving).

8. *See, e.g.,* WILLIAMS, *supra* note 2, at 244.

done by parents in caring for children. She also seeks to change the way that people conceptualize this problem, so as to encourage public support for flexible institutions. The second feature of Williams's pragmatism is its emphasis on short-term workability. Practicality is a paramount concern, and there is a limit to her willingness to challenge formative norms and assumptions of the existing system. Williams clearly distinguishes her approach from those she describes as "utopian," which seek to achieve transformation over the long run and to challenge bedrock assumptions about gender, family, and institutional life.<sup>9</sup> Williams takes a Deweyian perspective,<sup>10</sup> albeit a revisionary one: She seeks to "tease out the 'precious values embedded in our traditions.'" <sup>11</sup> She then deploys those values as the basis of either an immanent critique<sup>12</sup> or a "drag" performance that uses modified versions of certain norms in order to challenge others.<sup>13</sup>

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9. See, e.g., *id.* at 238-39, 254-63.

10. When I use the term "Deweyian," I refer to those aspects of Dewey's pragmatist philosophy that involve the valuation and use of elements within the existing "tradition" or normative framework. See JOHN DEWEY, *Philosophy and Democracy*, in 2 CHARACTERS AND EVENTS 841 (Joseph Ratner ed., 1929), quoted in WILLIAMS, *supra* note 2, at 244.

11. WILLIAMS, *supra* note 2, at 244 (quoting JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 26 (1948) ("precious values embedded in social traditions")).

12. An immanent critique uses the dominant norms of a culture, institution, or political order to provide a critique of a practice within it that fails to live up to those norms. It challenges the institution or polity to fulfill the promise embodied in its dominant norms in the particular case. Williams frequently states, for example, that a policy or outcome does not adequately reflect or achieve "our commitment to gender equality," leading the reader to infer that Williams seeks to use that ostensibly shared commitment to produce changes in the flawed policies. *Id.* at 37; see also *id.* (arguing that viewing mothers' marginalization in the workforce as "[d]iscrimination involves a value judgment that the constraints society imposes are inconsistent with its commitment to equality"); *id.* at 120 (arguing that the "he-who-earns-it-owns-it" rule involves a "heroic leap, which reflects assumptions drawn from coverture that are inconsistent with current commitments to gender equality").

13. As defined by Williams, "drag" refers to the practice of dressing up in the kinds of clothing conventionally considered to be appropriate to the other sex, in order to question or subvert traditional gender roles through the discordant juxtaposition of sex and gender or of the viewer's expectations about gender and the drag performer's presentation of gender. See *id.* at 7-8, 198-204. According to the most prominent theorist of "drag," Judith Butler, the purpose of "drag" extends beyond the subversion of traditional gender roles to the subversion of naturalized, binary notions of gender and sex and to the ostensibly unitary relation between them:

The performance of drag plays upon the distinction between the anatomy of the performer and the gender that is being performed. But we are actually in the presence of three contingent dimensions of significant corporeality: anatomical sex, gender identity, and gender performance. If the anatomy of the performer is already distinct from the gender of the performer, and both of those are distinct from the gender of the performance, then the performance suggests a dissonance not only between sex and performance, but between sex and gender, and gender and performance. As much as drag creates a unified picture of "woman" (what its critics often oppose), it also reveals the distinctness of those aspects of gendered experience which are falsely naturalized as a unity through the regulatory fiction of heterosexual coherence. . . . In the place of the law of heterosexual coherence, we see sex and gender denaturalized by means of a performance which avows their distinctness and dramatizes the cultural mechanism of their fabricated unity.

JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 137-38 (1990).

Williams's pragmatism, however, is not her only methodological innovation. She has also written a book that is professedly popular in its orientation.<sup>14</sup> *Unbending Gender* is not intended to bypass academic audiences. There is much of theoretical interest here; some of it even draws on the dense, demanding language of Continental social theory. But Williams has looked beyond the law, and beyond institutional structure, to the role played by "gender talk": the ways in which the problem of domesticity is framed and debated by average people. And it is to these people, as potential readers, that Williams directs a substantial portion of her argument. This choice means not only that she elects to present her ideas in a highly accessible style, sometimes forgoing the elaboration of theoretical nuances for the sake of clarity. It also means that she directs her attention to aspects of political engagement not frequently the subject of academic writing, such as the tone of a debate or the use of humor.<sup>15</sup>

In joining others who have redirected feminist attention toward questions of work and family,<sup>16</sup> Williams makes an important contribution. She takes this step with great gusto and an abundance of new ideas. While one can dispute some of her proposed solutions, her thirst to get to the bottom of work/family conflict and her resourcefulness in reframing debates and generating proposals are palpable in each chapter. I am ambivalent, however, about the pragmatic and popular elements of her approach. While the practical, "can do" ethos of the book is invigorating, I remain unconvinced by the Deweyian aspect of Williams's pragmatism: the decision to deploy the norms of domesticity against themselves. Whether "the master's tools," in the words of the late Audre Lorde, can disassemble "the master's house"<sup>17</sup> is, to my mind, a context-specific question: It depends on the nature of the problem, the flexibility of the tools, and the durability of the house. In this respect, Williams's incisive articulation of the problem undermines, to some degree, her ability to solve it. The more I

14. See WILLIAMS, *supra* note 2, at 244.

15. See, e.g., *id.* at 245 (humor), 271 (male bashing).

16. See, e.g., FINEMAN, *supra* note 7; ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* (1997); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985). For other legal feminist works that reflect more generally on the relations among the family, the state, and the market, see, for example, MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 267-311 (1990); and Mary E. Becker, *Politics, Differences and Economic Rights*, 1989 U. CHI. LEGAL F. 169.

17. AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER* 110, 112 (1984) (emphasis omitted). In this essay, Lorde critiques mainstream feminists (including those who organized the conference for which the essay was prepared) for neglecting the contributions and experience of women of color. Thus, the "tools" to which Lorde refers are not, as some invocations of her language suggest, ostensibly neutral methodological assumptions, but rather the habits of solipsism and exclusion that characterize those in positions of relative privilege, whether they be men or women. For Williams's reference to Lorde's argument, see WILLIAMS, *supra* note 2, at 200 & 322 n.55.

learn from Williams about the interwoven norms of domesticity, the more I am convinced that these norms need to be challenged profoundly by a systematic program of change that is possible only over the long run. I fear that Williams's proposals, insightful and practical though they may be, will rearrange only the surface features of our work and family structure, leaving intact the attitudes toward masculinity, femininity, capitalism, and the state that are responsible for much of the debilitating problem of domesticity. These norms may be too institutionally entrenched for successful resolution by the "serious play"<sup>18</sup> of "drag" and the strategy of pluralizing options. This may be one problem for which the "pragmatist" must at least join hands with the "utopian" to ensure a solution.

Williams's decision to focus on a popular audience prompts a more mixed assessment. The section of *Unbending Gender* that most clearly addresses a more popular audience—Williams's analysis of "gender talk"—falls, in some respects, wide of the mark. It treats a series of differences that are at best a distraction as a central cause of the current impasse. The book's effort to *mobilize* a popular audience (through the coining of phrases or the prescription of styles of engagement) may also accomplish little if Williams's Deweyian pragmatism keeps her as far from the heart of this problem as I suspect. However, Williams seems more likely to succeed in the effort to *engage* a popular audience, which is also one of her central goals. Feminist analysis of the causes and remedies of this problem, as Williams recognizes, extends far beyond the formal legal regime. Sustained exchange between feminist legal theorists and others with lived experience of a problem might point to solutions that theorists alone would not have anticipated. Williams's bold move in the direction of "genre-bending" should encourage feminist theorists to explore these possibilities.

This review will have three parts. After sketching the outlines of Williams's ambitious project, I will turn first to the legal expedients she proposes for restructuring the workplace and reallocating family property in the event of divorce. I will then consider the "discursive" or "talk"-related portion of Williams's agenda. In the final Part, I will offer an assessment of Williams's primary methodological innovation: her pragmatic, popular approach to restructuring market and family work.

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18. "Drag" is often undertaken in a spirit of playfulness or fun, notwithstanding its serious, subversive purpose. The paradoxical character of this practice is thus captured by the apparently oxymoronic phrase "serious play."

## I. BREAKING THE BONDS OF DOMESTICITY

*Unbending Gender* opens with a vivid portrait of the tensions between family and market work.<sup>19</sup> Men are consumed by the demands of their employers, salvaging only brief intervals to connect with their families. Women, who remain the primary caregivers whatever their employment status, move frantically from dissatisfied employers to needy children, exhausting and disappointing themselves in the process. Mothers who devote themselves exclusively to caregiving—and the children who remain in their custody—are predictably impoverished upon divorce. The cause of this predicament is a complex system of gender norms that Williams refers to as “domesticity.”<sup>20</sup> Describing domesticity is Williams’s central project in Chapter 1.

Domesticity, which is both an ideology and a practice, positions men as “ideal workers” in the market and women as economically marginalized caregivers in the home.<sup>21</sup> It justifies this arrangement by reference to the innate characteristics of the two sexes and to the incontrovertible needs of corporations and of small children. The normative assumptions of domesticity, Williams argues, are embodied in three central tenets: Employers are entitled to “ideal workers” who are immunized from family responsibilities; men are expected and entitled to perform as “ideal workers”; and women should have “all the time and love in the world to give” to their children.<sup>22</sup> Yet these tenets do not exhaust the normative structure of domesticity. It is held in place by at least two supporting assumptions, which make it particularly difficult to glimpse the influence of domesticity or to reach it by structural or attitudinal reforms.

The first of these supporting assumptions is “commodification anxiety”:<sup>23</sup> a tendency to characterize (women’s) familial labors as an expression of love and commitment and a corresponding reluctance to regard family work as compensable labor. “Commodification anxiety” leads legal actors, as well as family members, to underestimate caregivers’ contributions to their families’ material well-being;<sup>24</sup> it is an animating

19. See WILLIAMS, *supra* note 2, at ix-x, 1-9.

20. See *id.* at 1.

21. See *id.* at 1-2.

22. *Id.* at 30 (quoting DEBORAH FALLOWS, *A MOTHER’S WORK* 13 (1985)); see also *infra* text accompanying notes 30-33.

23. This term is actually introduced in Chapter 4 in Williams’s discussion of the legal treatment of caregiving women upon divorce. See WILLIAMS, *supra* note 2, at 118. As I argue *infra* Subsection II.A.2, I view “commodification anxiety” as a central attitudinal support of domesticity; thus, I think it might profitably have been introduced earlier in Williams’s discussion.

24. See, e.g., WILLIAMS, *supra* note 2, at 117-20.

factor in judges' tendency to shortchange caregiving women upon divorce.<sup>25</sup>

The second support for domesticity is the use of a rhetoric of choice to describe and justify work/family decisions.<sup>26</sup> Motivated by liberal precepts and by psychological mechanisms of denial, men and women tend to see themselves as free agents, acting on their individual preferences in addressing family and work responsibilities. What this assumption of "choice" obscures is both the constrained character of the alternatives available and the fact that all choices are rigorously conditioned by the normative "force field"<sup>27</sup> created by domesticity. Workers affected by this "force field" make choices consistent with the basic premises, yet they experience and defend those choices as an authentic expression of their individual character. As with "commodification anxiety," this assumption makes it more difficult to see domesticity at work in the structure of market and family labor and to do something about it.

Williams succeeds in demonstrating that domesticity presents a complex and profoundly entrenched problem. In fact, her diagnosis of that problem is the most compelling section of the book. Chapter 1 moves from strength to strength in identifying the central elements of domesticity. Williams's ability to see this system at work in such an unprecedentedly broad array of contexts is one of her distinctive strengths. As a scholar who works in the areas of family law and property as well as in feminist jurisprudence, Williams is well-situated to observe these effects, and she makes the point powerfully, showing readers that this is not simply a scuffle over maternity leaves or flextime schedules, but a complex, multifaceted system that renders most women professionally marginalized and economically dependent or destitute.

A second engrossing and rhetorically powerful stroke is Williams's decision to deduce the key elements of domesticity from the central narrative of Deborah Fallows's *A Mother's Work*.<sup>28</sup> From the vividly told story of a mother who journeyed from market employment to full-time parenting in the home,<sup>29</sup> Williams draws the central elements of her portrait:

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25. See, e.g., *id.* at 135-36.

26. Williams frequently describes those who hold this view as residing in the "republic of choice." See, e.g., *id.* at 134.

27. Williams's initial discussion of the operation of gender (including domesticity) as a "force field" occurs in *id.* at 37-39.

28. FALLOWS, *supra* note 22.

29. Fallows's narrative is introduced in WILLIAMS, *supra* note 2, at 16-19. Although I have not read Fallows's book beyond the excerpts reproduced and discussed by Williams, it seems an ideal choice for this kind of treatment. Fallows is highly intelligent and sharply observant of her situation, so the assumptions or arrangements she appears to take for granted form a useful index of the kinds of premises that have become ingrained in many of us through the operation of domesticity. In addition, the tenor of the excerpts, which ranges from harsh criticism of "full commodification" to a self-celebratory view of her own choice to leave market work (see, for example, the title of the book), attests to the tensions produced within women by this issue. In

the assumption that employers are entitled to “ideal workers” free from family responsibilities<sup>30</sup> and that men are entitled to perform in this way regardless of their familial commitments;<sup>31</sup> the assumption that women, whatever their market labor commitments, should have “all the time and love in the world to give”;<sup>32</sup> and the belief that women who select among the slender and socially policed range of options available for accommodating market and family responsibilities are exercising authentic, autonomous choice.<sup>33</sup> To make matters more interesting, Williams situates her reading of Fallows within a larger historical discussion of the movement “from status to affect.”<sup>34</sup> Williams describes in evocative detail how explanations emphasizing women’s inferiority gave way to those emphasizing their characteristic domestic proclivities in accounting for the distinctive roles of women.<sup>35</sup> The combination of a historical frame and a contemporary analysis drawn from an accessible, popular text creates a sophisticated and engaging account that seems likely to draw in all of Williams’s potential audiences.

The more difficult problem, however, is to think about how this multifaceted problem might be addressed. What is required, Williams argues, is not simply a maternal effort to replicate “ideal-worker” patterns and a reliance on the market to pick up the all-too-plentiful slack. This “full-commodification”<sup>36</sup> strategy, Williams reports in Chapter 2, has led to employers feeling dissatisfied and working parents feeling inadequate and time-starved.<sup>37</sup> Contemporary families need an approach that challenges the three central tenets of domesticity and also contends with its supporting assumptions. Williams’s wide-ranging, multifaceted solution, which she

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particular, the excerpts’ tone suggests the painful pressures experienced by many mothers who decide not to pursue market work to justify their choices under a “full-commodification” regime.

30. *See id.* at 20-24.

31. *See id.* at 25-30.

32. *Id.* at 30 (quoting FALLOWS, *supra* note 22, at 13).

33. *See id.* at 5-6.

34. *Id.* at 16.

35. In this discussion, Williams draws primarily on the work of legal historian Reva Siegel. *See id.* at 16-19 & 280 nn.8, 16, & 18 (citing Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994); Reva B. Siegel, “The Rule of Love”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996)).

36. *See, e.g., id.* at 40 (attributing the term to economist Barbara Bergmann).

37. First, the strategy tended to overestimate the extent to which child-related responsibilities could be delegated to the market. *See id.* at 44-48. Second, the optimistic tone of the strategy, essential perhaps to igniting change, obscured the fact that working primary care providers, even supported by market-based childcare, could not perform like “ideal workers” or full-time parents. As a result of this failure to acknowledge the partial character of the change, employers have been perturbed by absenteeism, the inability to work overtime, and other inflexibilities produced by the inevitable intrusion of family responsibilities. And parents, usually mothers, who sense that they are shortchanging their children and disappointing their employers, feel perpetually frantic and inadequate. *See id.* at 44-54.

characterizes as “reconstructive feminism,”<sup>38</sup> embodies two basic kinds of initiatives. The first initiatives are legal proposals, which restructure the workplace to accommodate employees with important parenting responsibilities and redefine family income as the joint property of wage-earners and caregivers, both during marriage and, particularly, upon divorce. The second initiatives are “discursive” or “talk”-related proposals, which reframe longstanding debates and provide feminists with conceptual and relational guidance as to how to proceed. These two categories of proposals are presented in Chapters 3 and 4 and Chapters 5 through 7, respectively. Both sets of proposals embody Williams’s strategy of “domesticity in drag”—deploying dominant norms in a way that seeks to challenge or change them—and her belief that the path to change lies in pluralizing employers’ and parents’ options for managing market and family work, rather than directly challenging those choices that currently exist.

## II. DECONSTRUCTING RECONSTRUCTIVE FEMINISM

### A. *The Legal Agenda: Too Much, and Not Enough*

Williams’s legal agenda is a large and innovative piece of work. A skilled autodidact, she has learned a great deal from historical, sociological, and empirical perspectives about the contexts she proposes to regulate. In addition to the vast base of knowledge that grounds her approach, Williams’s proposals are creatively and fully elaborated. She does not simply gesture in the direction of a new legal claim: She offers a series of antidiscrimination actions aimed at protecting and demarginalizing part-time and flextime work, and she proposes a regime of joint property that would protect primary caregivers and their children upon divorce. Williams elaborates each of these claims in painstaking detail, demonstrating a care and conscientiousness about the nuts and bolts of her proposals that many legal scholars lack. Finally, the substantive vision enacted by Williams’s proposals is itself positive: I have no doubt that, were we to wave a wand and enact Williams’s legal changes, we would be considerably better off than we are today.

Yet my concerns about the efficacy of these proposals may be found in both parts of this qualified praise. First, we *cannot* wave a wand in order to implement these changes; we must rely on a judicial embrace of the claims or rules proposed. It is not clear to me that most courts would be willing to

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38. See, e.g., *id.* at 4. “Reconstructive feminism,” as Williams uses the term, also encompasses her methodological innovations and such tactical solutions as the use of humor in feminist persuasion. In fact, the term “reconstructive feminism” might be viewed as co-extensive with Williams’s approach in *Unbending Gender* as a whole.

accede to the assumptions they reflect. This difficulty is not a failing in a more “utopian” theory, which operates on the basis of an extended time horizon. But in a theory whose road-readiness is presented as an important virtue, judicial resistance or incomprehension is a more serious drawback.

Second, even if we assume that courts will embrace these legal innovations, the proper question is not whether these changes will make us better off than we are today. The current structure of market and family work is prejudicial to virtually all parents (albeit in different ways), and many kinds of changes would have at least slight ameliorative effects. The question, rather, is whether the changes proposed are sufficient to make important inroads on the tenacious, tentacular system of domesticity that Williams exposes. Here it is not easy to share Williams’s optimism. While these proposals reflect important departures from the current abysmal arrangements, they quite explicitly leave intact many normative premises on which domesticity thrives: the single-minded, unencumbered worker as at least one vision of the ideal employee, and the “commodification anxiety” that renders courts and policymakers reluctant to assign market value to the work performed in the home. The persistence of such norms, even in the face of limited legal change, may press the system in the direction of domesticity, isolating and limiting any legal changes that can be achieved. I will explore the likely reactions of legal decisionmakers and the consequences of leaving dominant norms intact in the context of proposals targeting the workplace and those directed at the family. As to both, I will suggest that, while Williams’s proposals may go too far to win the prompt assent of legal decisionmakers, they are unlikely to go far enough to destabilize domesticity.

### 1. *Litigating Change in the Workplace*

Antidiscrimination law is Williams’s legal framework for restructuring the workplace. In Chapter 3, she builds on an analysis introduced by feminists such as Vicki Schultz<sup>39</sup> to argue that employers who construct workplaces around male bodies and male norms deny equal employment opportunities to women. To expect an employee to work overtime, to travel on short notice, or to undertake other tasks that require insulation from family needs is to presuppose an employee who is male or who is, at least, inhabiting a masculine gender role. “Given that nearly ninety percent of women become mothers during their working lives,”<sup>40</sup> that most of them

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39. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (describing sexual harassment as a means of establishing masculinity as a norm or requirement for the most desirable jobs).

40. WILLIAMS, *supra* note 2, at 2.

work part-time or exclusively within the home,<sup>41</sup> and that virtually all eschew overtime,<sup>42</sup> to require the attributes of the "ideal worker" for promotion, benefits, or "plum" assignments is to deny the vast majority of women basic employment opportunities. To provide grounding for a prospective legal claim, Williams surveys a range of policies that individual employers have undertaken to accommodate familial responsibilities; she also reviews a sizeable empirical literature that demonstrates that these expedients reduce absenteeism and employee turnover and increase productivity and employee loyalty.<sup>43</sup> She then proposes claims under Title VII and the Equal Pay Act that would establish that a failure to provide these options or to promote those who choose them is employment discrimination.<sup>44</sup>

Of Williams's proposed legal reforms, using employment discrimination law to prevent the marginalization of workers who are also caregivers seems to me the most promising. The insight that contemporary workplaces marginalize women not by straightforward exclusion, but rather by instantiating and defending a range of masculine norms represents an important development within feminist antidiscrimination scholarship. By analogizing the marginalization of workers who are primary caregivers to the sexual harassment of working women or to the design of equipment to male body specifications, Williams takes this insight in a fascinating direction.

But while *I* have no difficulty believing that basing an "ideal-worker" prototype on characteristically male patterns of employment and characteristically male access to a flow of household services discriminates against women, asking *courts* to believe it is a different challenge altogether. Male characteristics may define work, but what makes the patriarchal legal system "metaphysically . . . perfect,"<sup>45</sup> as Catharine MacKinnon has memorably observed, is that this socially established identity between the good and the male is kept carefully hidden from view. Where feminists see gendered work requirements, many employers see the job as it has always been done. I suspect that courts may share this more prevalent view, as well as its (inaccurate) corollary: that the job as it has been done is the job the only way it can be done. If courts view the current structure of market labor as arising from the nature of the work itself rather than from the masculine identities of most of those performing it, it may be difficult for them to accept Williams's claims.

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41. Williams puts the figure for married mothers at "nearly two-thirds." *Id.*

42. Williams notes "that jobs requiring extensive overtime exclude *virtually all mothers* (93 percent)." *Id.*

43. This discussion occupies a substantial part of Chapter 3. *See id.* at 84-100.

44. *See id.* at 101-10.

45. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 116 (1989).

Consider how this problem might emerge in one particular context: the disparate-impact claim under Title VII for the design of a promotion track that excludes most mothers or primary caregivers of young children.<sup>46</sup> Three showings, Williams explains, constitute the plaintiff's prima facie case: She must demonstrate, first, that the promotion process produces a disparate impact on women; second, that the paucity of women in upper-level jobs is a product of the employer's action rather than women's choices; and, third, that the employer has specific policies relating to promotion that produce the disparities cited. The defendant must then demonstrate that the promotion policies constitute a business necessity; if this showing is made, the plaintiff must demonstrate the availability of a "less discriminatory alternative."<sup>47</sup>

One could imagine ingrained judicial assumptions about the nature of the "ideal worker" affecting adjudication under this approach in at least two ways. First, courts have proven remarkably reluctant to acknowledge the ways in which employer policies or attitudes shape women's choices.<sup>48</sup> Williams is either less impressed by this pattern than I am or more optimistic about the prospects for change. She notes that while women may have a great deal invested in considering their choices as authentic and unencumbered, courts have no such investment.<sup>49</sup> Yet the *Sears* case,<sup>50</sup> which Williams mentions in an earlier discussion of "choice"<sup>51</sup> but does not revisit in this chapter, is a sobering recent indication that the courts may be no more eager to deconstruct "choice" than are individual women.<sup>52</sup> The

46. It is also easy to imagine a second context in which prevalent judicial attitudes might create a stumbling block: Williams's claim of discrimination against part-time workers under the Equal Pay Act. See WILLIAMS, *supra* note 2, at 107-08. If one considers the way that part-time workers are currently viewed in the legal profession, which is the professional context from which judges emerge, it is easy to imagine that judges might have difficulty concluding that the work done by part-time employees, particularly in white-collar settings, is "substantially equal" to the work done by full-time employees. Williams acknowledges this as a possible problem but does not confront its potential to undermine her proposed claim. See *id.* at 102-03.

47. See *id.* at 105-07.

48. See, e.g., Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1081-82 (1992) (finding that, during the period 1965-1989, courts were more likely to credit the lack-of-interest defense in gender than in race cases in large part because of a "presumption that sex segregation is the expression of women's own culturally (or even biologically) inspired 'differences' in job preferences").

49. She observes that "[t]heir mandate is to consider whether the constraints women face constitute discrimination. If they do, the fact that many women may have internalized those constraints does not provide employers with an excuse for continuing the discrimination." WILLIAMS, *supra* note 2, at 106.

50. *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

51. See WILLIAMS, *supra* note 2, at 14.

52. This treatment is somewhat puzzling, inasmuch as Williams wrote one of the leading articles about *Sears* and the double-edged triumph of difference feminist theories. See Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989). One of her central arguments in this article was that the judicial embrace of difference feminism, or cultural feminism, created an

reasons for this investment are not personal, but rather professional and ideological. Acknowledging socially imposed constraints on "choice" means at least placing a social constructivist gloss on, and perhaps revising altogether, a central liberal premise of the legal system. I agree with Williams that revising this premise is a crucial goal, but I see it as a major undertaking, not a pragmatic solution one might expect to see readily achieved.

Second, courts may also encounter difficulty resisting employers' claims of "business necessity." Williams seeks to protect potential plaintiffs against the claim that a workforce of unencumbered employees is essential to business success. The chapter contains an impressive review of the empirical literature suggesting that "family-friendly" policies reduce absenteeism and turnover and increase employee loyalty and, sometimes, productivity.<sup>53</sup> I suspect, however, that most judges could be exposed to such evidence without abandoning their belief that businesses require employees who can work overtime, travel at will, and live free from the need to reconcile personal and professional demands. Employers, as Williams observes, have known about such studies for years but have not initiated widespread efforts to redesign their promotion tracks.<sup>54</sup> If employers, for whom questions like absenteeism and turnover would be likely to loom large, are able to compartmentalize such evidence, we might expect to see the same pattern among judges. In the absence of a sustained political assault on dominant conceptions of work and productivity, judges may view such studies as limited investigations of how particular policies affect certain indicia in specific workplaces, not as data that should challenge their intuitive sense of the optimal structure for producing competitive legal work or safe electrical wiring. Were judges to hold the latter view, it would affect their findings regarding both "business necessity" and the question whether a plaintiff's proposed approach was actually a viable *alternative*, less discriminatory or not.

But my main concern does not revolve around whether or not judges are currently prepared to embrace the necessary assumptions. As I will make clear below, I strongly support a sustained campaign to produce major normative change, although the need for such an effort might be seen

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expectation that women would make different kinds of choices about market labor than would men, rendering it difficult for courts to see that some of these choices could be understood as the products of social constraint. See *id.* at 819-21. For another useful analysis of judicial reluctance to apply a more critical lens to women's employment choices, see Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1750 (1990).

53. See WILLIAMS, *supra* note 2, at 84-94 (discussing "family-friendly" policies including childbirth leave, part-time work, telecommuting, job sharing, flextime, compressed workweeks, and employer support for childcare and elder care).

54. See *id.* at 84-86, 113.

as a drawback in a “pragmatist” program like Williams’s. But whether such assumptions are adopted over the short term or in the longer run, they need to effect a major transformation of our currently unacceptable system of market and family labor. Here is where I have my most serious doubts about Williams’s proposal. Most of Williams’s antidiscrimination expedients, from the Title VII disparate-impact claim,<sup>55</sup> to the Equal Pay Act claim,<sup>56</sup> to the enactment of a strengthened Contingent Workforce Equity Act,<sup>57</sup> are designed to bolster part-time and other family-friendly work patterns. The goal of these initiatives is to prevent employers from making such work patterns marginal, by requiring employers to assign comparable (or pro rata) pay, benefits, and opportunities for advancement to those who elect them. This strategy is meritorious, even ingenious. Yet I question whether it will actually alter the dominant norms of most workplaces or the kinds of roles that men and women play within them.

First, because of Williams’s reluctance to challenge fully the sources of privilege within the status quo, I suspect that this strategy underestimates the informal resistance that may emerge.<sup>58</sup> One piece of Title VII history that may be germane is the stigmatization to which many people of color have been subjected in workplaces that have been required by law to hire, retain, and promote them.<sup>59</sup> When the law protects non-dominant persons or patterns without exploring and challenging sources of privilege for dominant groups or patterns (in this case, the assumptions that make the largely male class of full-time, familially supported workers “ideal”), the

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55. *See id.* at 104-10.

56. *See id.* at 101-04.

57. *See id.* at 108.

58. The emergence of sexual harassment in recently integrated (and traditionally male) employment categories is but one example of the ability of opposition to women in the workplace to “morph” into new and elusive forms. *See* BARBARA A. GUTK, *SEX AND THE WORKPLACE* 133-34 (1985). It is also possible to observe this phenomenon in the prevalence of job categories such as road crews, police forces, and air traffic controllers in sexual harassment cases. Advocates or legislators can, of course, adapt the law to try to capture these new expressions of resistance, but such a strategy makes for a slow and incremental movement forward.

59. This theme can be found in two distinct and even opposed bodies of literature: the critical race literature on continuing stigmatization, *see, e.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (describing the operation of various forms of stigmatization in the employment process); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (describing the operation of unconscious racism in academic and employment settings), and a body of work critical of Title VII-inspired measures such as affirmative action that have ostensibly contributed to the stigmatization of people of color in educational and professional settings, *see, e.g.*, Jeff Howard & Ray Hammond, *Rumors of Inferiority: The Hidden Obstacles to Black Success*, NEW REPUBLIC, Sept. 9, 1985, at 17, 17 (contending that the intellectual performance of blacks is being stymied by a tendency to avoid intellectual competition, which in turn reflects the internalization of stigmatizing views of black intellectual potential); Charles Murray, *Affirmative Racism: How Preferential Treatment Works Against Blacks*, NEW REPUBLIC, Dec. 31, 1984, at 18, 18 (arguing that affirmative action facilitates the hiring and promotion of workers who are underqualified for their jobs, fueling a stigmatization of minorities that undermines the original goals of affirmative action).

results are likely to be incomplete. The gap between formal requirement and informal perception may give rise to new ways of penalizing alternative work patterns or privileging "ideal workers."<sup>60</sup>

Williams does not forgo all opportunities to question the sources of privileging "ideal workers." She points to the economic goals of productivity and efficiency as supporting the ideal of a worker who does not attempt to reconcile his workplace obligations with other commitments. Her extensive review of the literature on part-time schedules provides the internal critique that privileging this kind of worker does not always conduce to efficiency or productivity within the firm. However, Williams declines to take the next step: to challenge the notion that norms of efficiency and productivity should figure centrally in assigning privilege to work patterns. Alternative norms, such as the norm of parental care, are pressed as a justification for ending the *exclusive* privilege of the "ideal worker" and for demarginalizing workers seeking to integrate work and family obligations. But neither the basic privilege of the "ideal worker" nor the economic norms that are used to justify it are ever subjected to sustained criticism. Williams does not propose that the government require a thirty-hour work week<sup>61</sup> or reward firms for encouraging employees to take parental leave.<sup>62</sup> The principles, and beneficiaries, of a capitalist economic regime are permitted to move ahead at full throttle; Williams simply seeks to allow others to jump aboard this moving train.

Second, protecting women who favor alternative schedules is only half the battle. While such protection is crucial to prevent women from being professionally marginalized by childrearing or rendered destitute by divorce, family work will be more equitably shared (and less professionally costly for women) only if men can be persuaded to play a substantial role and to avail themselves of family-friendly policies. Here, the distance between formal requirement and informal perception can be critical. The

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60. In the context of race and employment opportunity, the increasingly successful attack on race-conscious employment policies, *see, e.g., Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (finding federal contractor set-aside programs to be unconstitutional); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (finding a municipal affirmative action program to be unconstitutional); Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. REV. 1583 (1999) (book review) (critiquing affirmative action at the university level as an unjustified and ineffective means of responding to racial inequality in education), may be viewed as one product of the gap between formal requirement and informal perception.

61. This proposal has been actively, if unsuccessfully, advanced in Sweden, not only by feminists within the Social Democratic Party, but more recently by two smaller parties. *See* Linda Haas, *Nurturing Fathers and Working Mothers: Changing Gender Roles in Sweden*, in *MEN, WORK, AND FAMILY* 238, 254 (Jane Hood ed., 1993).

62. *See* Michael Selmi, *Family Leave and the Gender Wage Gap* 7 (unpublished manuscript, on file with *The Yale Law Journal*) (arguing for amendments to the Family and Medical Leave Act that either require or offer strong incentives to encourage the taking of parental leave by all male employees).

expectation that men will perform as family-free “ideal workers” arises both from employers’ (structurally entrenched) assumptions and from more pervasive gender norms that link masculinity with the ability to function as the family provider. I noted above Williams’s reluctance to challenge employers’ assumptions; but she also declines to interrogate the assumptions that have linked masculinity with provider status. Williams suggests that these norms have been gradually changing, creating an opening for a regime that allows men, as well as women, greater choice to complete the process.<sup>63</sup> However, a growing body of scholarship suggests a far more complicated relationship between masculinity and the provider status associated with primary commitment to market work.

While men have slowly and incrementally expanded their role in childcare over the past two or three decades,<sup>64</sup> it has been far more difficult to loosen their attachment to “primary provider” status within the family, a role that usually calls for “ideal-worker” performance. Sociologist Michael Kimmel, for example, observes that some men’s widely cited willingness to give up their jobs to spend more time with their children is “more often rhetorical than real; few men would actually switch places with their non-working wives if given the opportunity.”<sup>65</sup> This is partly because, within many corporate cultures, “investing more energy into the home is a form of treason”<sup>66</sup>—a view that throws the normative weight of American capitalism into the effort to preserve the link between masculinity and provider status. But even where governmental and corporate cultures have become increasingly accommodating, men may struggle with conceptions of masculinity that have been instilled in a broad range of social settings. Evidence of this tendency is found in studies of paternal leaves in Norway and Sweden, countries that have striven to facilitate men’s access to and use of paternity leaves by means of a broad range of governmental regulations.<sup>67</sup> In these contexts, men take less frequent and shorter leaves<sup>68</sup> and engage in different kinds and styles of parenting activities.<sup>69</sup> More interestingly, some of these fathers attempt to distinguish their parenting

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63. See, e.g., WILLIAMS, *supra* note 2, at 99 (citing data describing how many men would be willing or eager to stay home with their children).

64. See Joseph Pleck, *Are “Family-Supportive” Employer Policies Relevant to Men?*, in MEN, WORK, AND FAMILY, *supra* note 61, at 217, 219-29 (noting that men have gradually increased their caregiving roles in the family and the extent to which they use such policies as flextime or parental leave, but that they use such policies differently than women do, often taking “informal” leaves or other less conspicuous forms of departure from “ideal worker” performance, so as not to raise questions about their commitment to the workplace).

65. Michael S. Kimmel, *What Do Men Want?*, HARV. BUS. REV., Nov.-Dec. 1993, at 50, 55.

66. *Id.*; see also Pleck, *supra* note 64, at 231-32 (observing that male employees are reluctant to use formal parental leave because employers and co-workers view it negatively).

67. See, e.g., Berit Brandth & Elin Kvande, *Masculinity and Childcare: The Reconstruction of Fathering*, 46 SOC. REV. 293, 293 (1998); Haas, *supra* note 61, at 239-43.

68. See Brandth & Kvande, *supra* note 67, at 298-99; Haas, *supra* note 61, at 249.

69. See Brandth & Kvande, *supra* note 67, at 301-05; Haas, *supra* note 61, at 248.

activities explicitly from those of mothers by criticizing the mothers' style of parenting or by designating certain activities, most notably housework, as outside the bounds of the paternal caregiving job.<sup>70</sup> While scholars attribute some of these differences, such as those involving frequency or length of paternal leave, to structural features of market work,<sup>71</sup> they see others, such as the explicit abstention from housework, as reflecting an attitudinal struggle over whether serious caregiving activity can be reconciled with dominant understandings of masculinity.<sup>72</sup> Unless the norms that support a link between masculinity and provider status are identified, analyzed, and gradually revised—something that Williams seems reluctant to do<sup>73</sup>—her family-friendly alternatives will remain hothouse flowers, artificially protected by a set of legal supports, but normatively inconsistent with their environment and viewed with suspicion or ambivalence by many employees. The price of Williams's reluctance to challenge bedrock norms of our economic and gender systems may be a limit on her ability to transform the structure of market work.

## 2. *Litigating a Change in Family Entitlements upon Divorce*

Williams's second legal proposal, presented in Chapter 4, addresses the economic well-being of caregivers and their children upon divorce. Family law in most states, Williams argues, reflects a "he-who-earns-it-owns-it" rule<sup>74</sup> that views family income and other property as the exclusive property of the wage-earning partner, most often the man. This rule is the product of gender norms that position the man as the wage-earner and economic

70. See Brandth & Kvande, *supra* note 67, at 301-07.

71. See Haas, *supra* note 61, at 251-57 (citing the wage gap and sex segregation of the labor force as factors that may make it more costly for a father to be out of the work force).

72. See Brandth & Kvande, *supra* note 67, at 307-10 (concluding that primary parenting by men can be reconciled with "hegemonic masculinity" only where it is differentiated from mothering and where it is undertaken by the most privileged and professionally successful men).

73. Williams's treatment of this question is ambivalent: In earlier sections of the book she offers a more nuanced portrait, highlighting economic, structural, and normative factors that tether men to the "ideal-worker" pattern, while also underscoring a yearning many experience for a larger familial role, *see, e.g.*, WILLIAMS, *supra* note 2, at 3-4; yet in Chapter 3, she stresses the economic and structural barriers to alternative patterns (now removed) and the yearning (now sufficient to motivate the change) without reemphasizing the constraining force of traditional conceptions of masculinity, *see, e.g., id.* at 99-100.

74. See *id.* at 120-22. This interpretation of current family law doctrine is not, however, shared by all family law scholars. *See, e.g.*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 1-2 (Proposed Final Draft Part 1, 1997) [hereinafter PRINCIPLES OF THE LAW] (describing "equitable distribution" as having become the dominant rule, replacing the previous division between common-law states, which viewed property as belonging to the wage-earner, and community-property states, which viewed it as the joint property of the two marital partners); MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 17-36 (1991) (describing feminist-supported reforms in divorce law that reconstructed marriage as an equal partnership and allocated property accordingly).

provider; it is also the product of "commodification anxiety." Because market work is labor, and family work is love, only those who work in the market are entitled to the economic fruits of their labor. Upon divorce, what has been earned remains the property of the (male) spouse who performs the market labor; the domestic contribution of the non-"ideal-worker" spouse, viewed as a sacrifice undertaken out of familial love and obligation, produces little or no entitlement to property. Post-divorce awards to primary care providers and their children are thus based upon a notion of what such dependents "need" for sustenance, not upon what they have become entitled to as a consequence of their labor. This approach, when coupled with the "clean break" rule<sup>75</sup> that restricts alimony or child support to a level consistent with the ability of the non-custodial parent (again, usually the man) to begin a new family, has meant that divorce spells downward mobility and often poverty for many caregivers and their children.

The present legal approach fails to recognize, Williams argues, that a market wage is in fact earned by two members of a two-parent family: the one who focuses on market work and the one who (whether she performs her own market work or not) provides the stream of family services that permits him to function as an "ideal worker."<sup>76</sup> An appropriate family-law rule would recognize this type of couple as having joint property in the past earnings of the primary economic provider.<sup>77</sup> With respect to the more pivotal post-divorce income, this equal division may be inadequate because one household usually contains both a parent and the children of the marriage, while the other contains only a parent, at least initially living alone. So Williams proposes an allocation of income that equalizes the standard of living of the two post-divorce households.<sup>78</sup> This arrangement should continue throughout the children's dependence, a period which should be recognized as concluding with the end of their formal (usually

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75. See WILLIAMS, *supra* note 2, at 126. This rule is also sometimes referred to as the "fresh start" rule. See *id.* This view of current divorce law, too, is contested by some family law scholars. One study has concluded:

[The "clean break" ] vision of alimony does not describe the law that one finds today in most appellate opinions. At least in long term marriages one . . . finds a widespread view that marital dissolution should not dissolve all financial ties between the former spouses if the result would be a significant disparity in the spouses' post-dissolution financial standing. A similar intuition encourages awards in marriages of shorter duration as well, where there are children of the marriage who are still young and will be primarily in the care of one spouse.

PRINCIPLES OF THE LAW, *supra* note 74, at 5.

76. See WILLIAMS, *supra* note 2, at 124-25. Without ongoing nurturance of the children, care of the house, and even such specialized services as the keeping of household accounts or the entertainment of co-workers and clients, it would be impossible for the "ideal worker" to commit himself to the workplace in the single-minded (and consequently highly valued) way that he does.

77. See *id.* at 125-27.

78. See *id.* at 129.

college) education. But it should also be extended for an additional period, facilitating the caregiving woman's transition to market labor.<sup>79</sup>

The joint-property approach, while provocative and well-elaborated, reflects some of the same drawbacks as its market counterpart. It is likely to be viewed with skepticism by courts and legislatures, particularly in the short run. Yet, because of Williams's resolve to accommodate "commodification anxiety," her approach is unlikely to produce systematic changes in divorce law, even if courts were to adopt it. Williams acknowledges the first problem toward the end of the chapter, where she treats a series of probable objections to the joint-property approach based on cases in which wives have unsuccessfully claimed a joint interest in the products of their husbands' graduate degrees.<sup>80</sup> Williams discounts the degree cases as atypical because they impinge on the judges' personal interests in believing that their degrees are the products of their own labor. Judges also resist these cases, Williams notes, because of their larger belief that "the husband's career success and the wife's marginalization both result not from a system that privileges men because they can command a flow of domestic services from women, but from the idiosyncrasies of two individuals residing in the republic of choice."<sup>81</sup> Williams observes, finally, that the women's use of human-capital theory in these cases may have triggered the courts' "commodification anxieties," a problem that would not occur under her joint-property approach.<sup>82</sup> While I applaud Williams's effort (here and elsewhere) to respond to possible objections, I think her answers understate the potential barriers to the joint-property approach.

While the degree cases may implicate the interests of judges, as advanced degree holders, in a particularly immediate way, this is only a specific manifestation of a more generalized tendency to see autonomous choice where one could see instead a system of unequal constraints. This tendency operates among men, who want to credit their hard work and who do not want to feel implicated in the marginalization of their wives. It also operates among women, who do not want to feel that their labor has been unfairly exploited. Because the image of "individuals residing in the republic of choice"<sup>83</sup> receives such widespread structural and normative support, it is easier to persist in this belief than to challenge it. This is especially true for judges, whose legal socialization gives them a professional investment in the liberal conception of "choice." Thus, in the short run, when courts have not had time to benefit from a full-fledged

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79. *See id.* at 129-30.

80. *See id.* at 131-38 (citing, *inter alia*, *Hodge v. Hodge*, 520 A.2d 15 (Pa. 1986); *Gardner v. Gardner*, 748 P.2d 1076 (Utah 1988)).

81. *Id.* at 134.

82. *See id.* at 136.

83. *Id.* at 134.

political challenge to these norms, they are likely to view the joint-property proposals as another effort to get women what they “need,” rather than as a valid justification for a new system of entitlements. This misunderstanding of Williams’s approach becomes more likely because she draws very specific, carefully quantified economic consequences (for example, that courts should treat all marital property as jointly owned) from a concept of the caregiver’s contribution that is not made subject to any kind of quantification. Judges may be willing to accept that a woman who has provided domestic services is entitled to some of her former husband’s income, but that she should be entitled to upwards of fifty percent for a period often substantially exceeding the dependency of the couple’s children may be harder to grasp, particularly when the proposed approach offers no comparative quantitative analysis of the couple’s contributions.

As this last argument suggests, Williams’s decision to leave non-commodification norms in place may be less an advantage than a drawback. This is true not simply because it forecloses precise quantification of the caregiver’s contribution, but also because it leaves a central support for domesticity intact. Williams treats “commodification anxiety” as a distinguishing feature of the current normative environment, one that feminists would do well to respect. Yet in important ways she understates its integral link to domesticity. Characterizing women’s family labor as love has fostered many of the norms, practices, and expectations that have kept domesticity firmly in place. Most obviously, it has made men unwilling to credit women with having performed labor capable of creating economic entitlements. This not only affects divorce settlements—women’s claims are addressed through the more discretionary regime of family law rather than through the more determinate entitlements of property<sup>84</sup>—but it also influences relationships within the family. Men regard themselves as the primary providers of the material well-being of the family. They expect accommodation of their professional needs, such as overtime work and professional entertainment, and deference to their choices, such as where to work. Because men cannot conceive of their spouses’ familial contribution in economic terms, they may understate both their spouses’ contribution to their families’ economic well-being and the demands that their own “ideal-worker” patterns impose on their wives. Caregiving women, however, also become more firmly yoked to domesticity through the lessons of non-commodification. Not only do they fail to recognize their contribution to the economic well-being of their families; they may also come to embrace the loving self-abnegation that non-commodification specifies as their lot. A woman influenced by these assumptions may readily assimilate her own

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84. Williams observes this difference in the legal realms in *id.* at 120.

interests to her husband's material or professional well-being.<sup>85</sup> She may never question whether she is being adequately compensated or valued for her labors until her husband leaves her and she is left with nothing, or until he divorces her and she is forced to sell the family home.

Williams seeks to compensate women's domestic contribution in market terms, thereby mitigating the worst harms of domesticity. Yet she proposes to do so without confronting dominant conceptions that classify family work as a distinctly non-market phenomenon.<sup>86</sup> Without more strenuous disruption of the "commodification anxiety" that prevents us from seeing family work as a value-creating enterprise, it is not clear that courts or family members will actually alter the way they think about familial labor. Williams's effort to describe family work as support of the market worker<sup>87</sup> does not give women's caregiving labor its own independent status. It is compensable only upon divorce, and even then it is characterized as dependent or derivative, something that is of value because it assists the market worker. Men, be they husbands or legal actors, may believe that the post-divorce property allocation that follows from this view is simply "compassionate domesticity": a dressed-up claim by which women obtain what they "need." Women, for their part, may continue to view their contribution to the family in a derivative way. Because the joint-property approach links the economic valuation of the woman's work with the support it provides to her "ideal-worker" husband, she may continue to see her role as supporting her husband's (market) work and her economic entitlements as deriving from this. All of these assumptions might be better contested were Williams to characterize women's labor as straightforwardly compensable or worthy of the other forms of support—from retirement benefits to spousal accommodation—that men conventionally receive for their work.

The benefits of connecting women's family labor with the conventional indicia of work have been recognized by other feminist contributors to the "work/family" literature. Martha Ertman advocates the use of commercial

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85. In an essay addressing the same themes as Chapter 4 of *Unbending Gender*, Williams describes an interview with the wife of a high-level executive. Asked what might have happened had she objected to his "[near-]constant travel, she responded without hesitation, 'He probably wouldn't be chairman of the board today.'" Joan Williams, *Do Wives Own Half? Winning for Wives After Wendt*, 32 CONN. L. REV. (forthcoming 1999) (manuscript at 25, on file with *The Yale Law Journal*). This response startled me because I had already formulated my own answer: If she had objected to his travel (as she might well have done, given its frequency), he probably would have divorced her. I found it fascinating that I was assessing this "work/family" tension in terms of her interests, when she was thinking only of his.

86. She explains that, by characterizing women's family labor as work that is performed in support of a market employee, she can draw on "widespread notions of marital sharing within the context of the dominant family ecology" without invoking "off-putting language that seems to commodify intimate relations." WILLIAMS, *supra* note 2, at 136.

87. See *id.* at 115-16 ("[T]he husband can perform as an ideal worker only because he is supported . . . by a flow of family work from his wife.").

metaphors to determine the allocation of property upon divorce.<sup>88</sup> Katharine Silbaugh urges the commodification and compensation of women's familial labor.<sup>89</sup> Martha Fineman eschews the market mechanism for a state-based system of support for caregiving.<sup>90</sup> None of these theorists offers an easy answer. Commodifying women's labor comes with a variety of risks, from exploitation by opportunistic middlemen<sup>91</sup> to the painfully low market valuation assigned to the various categories of work that constitute family labor.<sup>92</sup> Proponents of governmental solutions must persuade the public that we need more government support for families at a time when the current legislative priorities suggest a desire for less.<sup>93</sup> These proposals will entail a host of difficulties in implementation specifically because they require explicit confrontation of deeply embedded assumptions. However, they reflect a crucial insight that Williams's analysis omits. They recognize that, in a normative context that dichotomizes labor and love and places women's family work in the latter category, there may be no room for accommodating hybrid characterizations. Familial labor may continue to be viewed as love unless it is explicitly associated with the forms of support and compensation that help us recognize it as work.<sup>94</sup>

88. See Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998).

89. See Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996).

90. See FINEMAN, *supra* note 7, at 231.

91. Andrea Dworkin has offered a critique of this sort in relation to proposals to legalize surrogacy, which are in essence proposals to commodify women's reproductive labor. See ANDREA DWORKIN, *The Coming Gynocide*, in RIGHT-WING WOMEN 147, 174-88 (1983). Similarly, Noah Zatz has discussed this problem in relation to the legalization of prostitution, which might be regarded as the commodification of women's sexual labor. See Noah Zatz, *Sex Work/Sex Act: Law, Labor, and Desire in Constructions of Prostitution*, 22 SIGNS 277, 289-90 (1997).

92. Williams has made this point in other contexts, and it is a valid one. See Williams, *supra* note 85 (manuscript at 4) (describing the "market replacement approach" to valuing women's contributions). However, one recent study valued the domestic labor of an "executive wife" at \$189,000 per year by valuing, on a pro rata basis, all the tasks that make up her daily work. See Williams C. Symonds et al., *Divorce Executive Style*, BUS. WK., Aug. 3, 1998, at 56, 58 (citing an update of a study contained in MICHAEL H. MINTON & JEAN LIBMAN BLOCK, WHAT IS A WIFE WORTH? THE LEADING EXPERT PLACES A HIGH DOLLAR VALUE ON HOMEMAKING (1983)). While this study focuses particularly on the work of a wife who also shoulders entertainment and other social obligations in support of her spouse's career, it could well have implications for the valuation of the contribution of other at-home spouses, because their labor in areas outside entertainment would not seem to differ greatly from the work of the "executive wife."

93. A prime example of the contraction in government support for families is the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, 110 Stat. 2105. This Act repealed Aid for Families with Dependent Children and the Basic Skills and Emergency Assistance programs and replaced them with Temporary Assistance to Needy Families, a time-limited program in which assistance is tied to participation in work activities. PRWORA also affected eligibility for food stamps, Medicaid, and other benefits programs.

94. For a more extended treatment of this argument, see Kathryn Abrams, *Destabilizing Domesticity*, 32 CONN. L. REV. (forthcoming 1999) (manuscript at 6-8, on file with *The Yale Law Journal*).

## B. *The "Discursive" Agenda*

It is not difficult to imagine a kind of "discursive"<sup>95</sup> agenda that would serve as a complement to Williams's legal proposals. As I argue above, each of these proposals has the paradoxical feature that, while it may not be systematically challenging enough to incite broad-based transformation, it requires enough legal, institutional, and normative change to discomfit decisionmakers. One could envision a "discursive" agenda that was committed to initiating, through broad-based political action, the changes in understandings and expectations that would support Williams's legal initiatives. One could imagine a political campaign to highlight the integral contributions of part-time or flextime workers, or a comparable effort aimed at destabilizing the strong bifurcation between labor and love. One might also imagine an effort to affect discourse that went beyond the scope of the legal changes Williams proposes to target the even more deeply embedded assumptions that these proposals leave unscathed: the norms that connect masculinity to the role of provider or that make us reluctant to commodify women's familial labor. This sort of "discursive" agenda might make legal decisionmakers more receptive to Williams's specific proposals and prepare the ground for broader legal and institutional change.

But the reader encounters no such agenda in Part II of *Unbending Gender*. Committed as Williams is to proposing workable change that can be implemented in the context of existing normative frameworks, she targets neither the bedrock assumptions underlying domesticity nor the more readily accessible norms that will make implementation of her legal program difficult. Instead, her targets are the conceptual and strategic errors that have been made in the most prominent debates over market and family work. This agenda reflects a kind of pragmatism that contrasts with that of Part I. Williams's search for the workable solution in this section leads her to take not simply foundational norms, but also the terms of prominent past debates, as an explicit point of departure.

In this section as well, the range and multiplicity of Williams's proposals are impressive. She advocates relational changes such as abandoning the prevalent tone of anger toward men<sup>96</sup> and framing arguments in terms that reflect humor and empathy.<sup>97</sup> She advocates other changes that combine the relational and the substantive. For example,

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95. I am using the word "discursive" in two senses here. First and foremost, I mean an agenda that is organized around (gender) talk or "discourse," as opposed to the first part of Williams's agenda, which centered on proposed legal changes. But I also use the term more broadly to invoke the assumption of discursive formation—the notion that we are shaped not only by laws or institutions, but also by social, cultural, and linguistic norms and practices.

96. See, e.g., WILLIAMS, *supra* note 2, at 170.

97. See, e.g., *id.* at 247. Many of Williams's chapters begin with political cartoons designed to convey this lighter and more inclusive form of political discourse.

she suggests that feminists will be less likely to alienate women of color and working-class women if they adopt a “tone of respect” toward full-time caregiving.<sup>98</sup> Still other proposed changes are substantive, such as Williams’s recommendations for reconceptualizing “choice”<sup>99</sup> or reformulating the debates between “equal treatment” and “special treatment” advocates.<sup>100</sup>

The first three chapters of Part II critique the manner in which such debates have occurred in the past and offer ways of reconceptualizing often painful differences of opinion. Chapter 5 explores the “full-commodification” approach that has alienated working-class women and women of color by assuming that women find market work more challenging and desirable than caring for children in the home<sup>101</sup> and by failing to recognize the embattled masculinity of many men in these communities.<sup>102</sup> Chapters 6 and 7 return to the most familiar feminist conflict framing discussions of work and family: the debate over sameness and difference, “equal treatment” and “special treatment.” She seeks to reconceptualize these debates, not as struggles over women’s essence or over work/family advocates’ central goals, but as differences in how women respond to conventional gender roles<sup>103</sup> and how they seek to achieve the goal of family accommodation that most of them share.<sup>104</sup> Having reframed these differences, Williams concludes that it is not necessary to resolve them in any definitive way, because these divergent strategies are best seen as compatible resources from which feminist advocates can draw. Deciding which strategy to press depends on which of the “three axes” of “work/family” change one is trying to effect: a reallocation of labor between partners within a family, between the employer and the employee in the workplace, or between the public and the private sphere more generally.<sup>105</sup>

The final chapter revisits the central themes of the book in a more theoretical vein. Williams elaborates on her earlier position that domesticity is a “force field” that powerfully conditions, but does not thoroughly dictate, the choices made by women and men about work, parenting, and

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98. *Id.* at 174.

99. *See, e.g., id.* at 5-6.

100. *See id.* at 241-42.

101. *See id.* at 151-53.

102. *See id.* at 157-60.

103. The central disagreement, Williams argues, is not between those who view women as similar to men and those who view them as different, but between “tomboys,” who seek to distance themselves from traditional gender roles, and “femmes,” who seek to enjoy and validate traditional femininity. *See id.* at 183-98.

104. “Equal-parenting advocates” believe this accommodation should be undertaken in a gender-neutral way that encourages transformation in traditional, gendered parenting roles. *See id.* at 226-28. “Maternalists” argue that care is given predominantly by women and that employers’ (or other) programs should more specifically target those who are actually doing the work. *See id.*

105. *See id.* at 232-41.

other attributes of gender roles.<sup>106</sup> People can and do engage in “gender negotiation,” an ongoing process of responding to, resisting, and attempting to reshape the gender roles created by domesticity or other forces of gender formation.<sup>107</sup> One form of “gender negotiation” is the strategy of “drag”: the reproduction of specific attributes of gender, modified in such a way as to cast problematizing light on the original.<sup>108</sup>

In this chapter, Williams also considers whether a theory such as hers, which is committed to acknowledging a range of truths regarding gender, family, and work, leads inevitably to some form of moral relativism.<sup>109</sup> Her answer—that it does not—is delivered in two parts. First, she reformulates “truth” as an expression of the central values, or the “identity,” of the person who speaks it.<sup>110</sup> Second, she argues that this position does not give rise to a moral system in which “anything goes.” From a position that embodies identifiable premises, such as the “reconstructive feminism” that Williams introduces in this book, it is possible to explain how to “draw the line”—that is, to identify the stances or practices one simply cannot endorse, given one’s assumptions.<sup>111</sup> Williams illustrates this point by elaborating her view of two controversial gender-related practices: female genital cutting and the wearing of the veil.<sup>112</sup>

Perhaps the greatest strength of this section is the way that it updates longstanding debates in light of recent theoretical developments. Dominance theorists such as Catharine MacKinnon did not, as Williams suggests, simply “change the subject” from the tension between market and family work to the eroticization of dominance.<sup>113</sup> They introduced a new way of thinking about gender as the product of social construction. Though Williams does not ascribe this insight to dominance feminists, she uses it expertly to reframe important debates. Thus, the dispute between “sameness” and “difference” feminists becomes a debate between those who resist and those who embrace traditional gender roles. And the struggle between “equal treatment” and “special treatment” advocates becomes a difference of opinion between those who seek to reward feminine gender performances and those who seek to produce change in gender roles.

Translating a historic debate into contemporary terms, however, is different from resolving it. It is less apparent to me that Williams’s reformulations will necessarily reduce the distance between contending parties or advance popular discussions of market and family work. People

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106. *See id.* at 244-47.

107. *See id.* at 257-60.

108. *See id.* at 259-60.

109. *See id.* at 260-63.

110. *See id.* at 261-62.

111. *Id.* at 263.

112. *See id.* at 263-70.

113. *Id.* at 180.

who disagree about how to respond to dominant gender formations still disagree about something fundamental, particularly if the social formation of human subjects is a widely accepted premise. It seems inaccurate to suggest that disagreement about dominant social formations is any less strenuous or enduring than disagreement about male or female essence.

Moreover, Williams's extended analysis of the special treatment/equal treatment debate focuses our attention on historical divisions at the expense of divisions that possess greater salience in contemporary discussions. I suspect that the greatest tensions in this field today are not between mothers who do market work and mothers who work exclusively in the home, or between advocates of gender-specific and gender-neutral approaches to familial accommodation.<sup>114</sup> They are, rather, between those who see an urgent need to alter the structure of market and family work and those who do not. The latter are a substantial group within the ranks of feminists. While they offer some arguments that are not specifically feminist in orientation (for example, that advocates such as Williams require employers, or citizens via the state, to subsidize the choices of some people to reproduce but not the equally valid choices of others), they offer others that sound specifically in feminist analysis (for example, the point that supporting familial work helps perpetuate the hetero-patriarchal norm of the nuclear family by appearing to take it as a given).<sup>115</sup> This division could pose a real challenge to feminist efforts to mobilize around the question of market and family labor, yet Williams does not acknowledge this possibility.<sup>116</sup>

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114. Williams herself has opined that the central emerging dichotomy may be between proponents of two of her three new axes of reform: those who favor redefining the relationship between employees and employers in the market, and those who favor shifting responsibilities for supporting parenting from the private to the public sphere. See E-mail from Joan Williams (Aug. 16, 1999) (on file with *The Yale Law Journal*). While I understand that the norms and priorities of these two groups may differ, I am not convinced that this is an inevitable or particularly fractious divide. Some feminist theorists, such as Martha Fineman and Williams herself, draw expedients from both categories. See WILLIAMS, *supra* note 2, at 232-41; Martha Albertson Fineman, *Contract, Marriage and Background Rules*, in *ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY* 183 (Brian Bix ed., 1998). Williams, too, claims that this division, while potentially worrisome, is not inevitable. See E-mail from Joan Williams, *supra*.

115. It is not easy to find any of these arguments in print. Indeed, given the liberatory, anti-subordinate impulse that fuels feminist commitment to work/family conflict and the more conventional, pronatalist impulse that infuses dominant discussions of family in this society, it can be difficult to raise such arguments at all. At the Hegemonic and Resistant Genderings Conference (June 1999), organized by Williams and her colleague Adrienne Davis, one participant who advanced these sorts of arguments described herself, only partly in jest, as functioning as "the turd in the punchbowl." Yet such arguments are increasingly being raised in feminist discussions of restructuring market work and family work. This issue was explored in an "Uncomfortable Conversation" Conference, entitled "Children: Public Good or Private Responsibility?," sponsored by Martha Fineman's Feminism and Legal Theory Project Workshop at Cornell Law School on November 19-20, 1999.

116. Moreover, Williams's framing of the "work/family" challenges in *Unbending Gender* does little to vitiate the force of this division. For example, an emphasis on the range of caregiving roles might strengthen interest in their accommodation, even among those who do not choose to

Ultimately, I am unconvinced that even a focus on contemporary divisions among feminists would be the most fruitful tack for Williams to take. Williams's analysis suggests that divisions among feminists, women, and men have effectively sidelined the struggle to restructure market and family work and that healing these divisions is essential to setting a broad-based movement in motion again. This suggestion places an almost substantive emphasis on the largely formal virtues of peaceful coexistence. Divisions among feminists (and others) may have been a distraction in the first period of struggle over this topic; they may have fractured potential coalitions and reduced the number of activists pressing for particular change. But they are less a central cause of the problem of domesticity than a symptom of the larger normative framework that has produced it.

One of the most powerful effects of a gender system is its ability to naturalize the particular way it tends to frame issues or debates. Catharine MacKinnon has made this point about liberal legalism: It frames questions of equality as questions of sameness and difference.<sup>117</sup> Because its hold on the public mind is strong, this approach is viewed not simply as one way of framing questions of equality, but as the only way of conceiving of those questions. This frame exaggerates the differences between two conceptually related views and makes these differences appear to be the only matters worth worrying about. Something similar has occurred in connection with domesticity, where the failure to question norms such as productivity,

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have children. Martha Fineman defines "dependency work" as care for the elderly, the ill, and the disabled, as well as for children; this definition comprehends circumstances that adults are likely to experience and that involve no choice whatsoever. See Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy and Self-Sufficiency*, 49 AM. U. L. REV. (forthcoming 1999) (manuscript at 7, on file with *The Yale Law Journal*). Moreover, Fineman's redefinition of the family as a caregiving, rather than a sexual, unit makes the family and its accommodation a vehicle for change rather than an instrument for reinforcing the norms of hetero-patriarchy (that is, a gender system that privileges maleness, masculinity, and heterosexuality in intertwined ways). See FINEMAN, *supra* note 7, at 227-33. Williams endorses a broader conception of caregiving and supports the pluralization of the family form. I have heard her take both positions explicitly in public appearances. Joan Williams, Address at the Gallivan Conference (Apr. 9, 1999); Joan Williams, Commentary at the Hegemonic and Resistant Genderings Conference (June 1999). Neither of these potentially ameliorating positions, however, is clear from the framing of her argument in this book. Virtually all of her examples concern the accommodation of childcare responsibilities within a nuclear family, most frequently a family that began with two heterosexual parents. And though Williams is generally conscientious about the exploration of differences in this work, she disavows responsibility for discussing caregiving in gay relationships and for normalizing nuclear family life through a virtually exclusive focus on it, by means of a series of brief "provisos" in the introduction. See WILLIAMS, *supra* note 2, at 8-9. Finally, Williams's decision to support a second species of "ideal worker"—the family-centered employee who works part-time—rather than to challenge the single-minded, conventional model may make obtaining support and accommodation more difficult for employees whose external commitments do not run to family. A workplace freed from the current, impregnable commitment to maximizing production or profits would be a more receptive home to employees with a range of external interests and commitments.

117. See CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32, 34 (1987).

masculinity, and the patterns of the “ideal worker” has not only foreclosed many solutions, but has framed views with many common assumptions (such as “equal treatment” and “special treatment” approaches to familial accommodation) as polar opposites. However, if our goal as feminists is to challenge the hegemony—or even the validity—of the system in question, we should not focus on rearranging the terms of the debates it has produced. We should launch a frontal assault on the conceptual framework that produces them.<sup>118</sup> Or, as a first step, we should shift the public gaze toward wholly distinct ways of conceptualizing the problem in question. Thus, MacKinnon, for example, describes questions of equality as questions of dominance and subordination. Williams does not neglect this point entirely. Her effort at the end of Chapter 7 to shift the debate from “special treatment” and “equal-treatment” (or from her preferred terms, “maternalists” and “equal-parenting advocates”) to a focus on the “three possible axes” of change is a move in the right direction.<sup>119</sup> However, this nine-page discussion, coming at the end of an almost sixty-page reframing of sameness and difference, seems almost an afterthought. Williams’s failure to elaborate on these axes in any other part of the text, or to justify what appears to be a marked preference for the axis of revising roles and responsibilities between employers and employees, makes readers wonder how prominently this reconceptualization figures in her vision of reform.<sup>120</sup>

### III. GENDER-BENDING AND GENRE-BENDING: PRAGMATISM AND POPULISM REVISITED

The analogy to MacKinnon’s work on dominance is, in other respects, inapt. Williams explicitly rejects the kind of frontal assault on a dominant framework that MacKinnon undertakes. Her book proposes not a theoretical attack on the conceptual foundations of domesticity so much as a grassroots effort to subvert the system, by pitting certain of that system’s elements against itself. In this Part, I assess two features of Williams’s method (or perhaps, one might say, her meta-strategy): her subversive strategy of

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118. *See id.* at 40-45.

119. WILLIAMS, *supra* note 2, at 232-41.

120. It does not help this section that it is presented as a survey in which Williams canvasses the pros and cons of each approach without expressing preferences among them or even detailing the kinds of contexts in which each would be most likely to be effective. (This seems particularly odd given that her legal proposals suggest a preference for the third axis: redefining the relationship between employers and employees.) In addition, this section is peppered with examples of how each strategy has been attempted in a number of different nations or cultures. Although this approach demonstrates the breadth of Williams’s learning on this subject and avoids the cultural solipsism present in much American feminist work, it is also confusing. These varied contexts are presented, as it were, out of context. The reader does not learn enough about these settings to understand what the strategies’ success or failure means for their use in the United States.

“domesticity in drag” and her effort to engage and mobilize a popular audience.

#### A. *Is Gender Bending? Assessing “Domesticity in Drag”*

“Domesticity in drag” is presented as the ultimate expression of Williams’s pragmatism.<sup>121</sup> This strategy permits her to work with the elements of the existing normative framework but to problematize or alter them in ways that are intended to produce change. It is thematically related to her strategy of pluralizing gender performances and institutional arrangements rather than launching a frontal assault on dominant arrangements and imagery. But “drag,” as an emerging literature tells us, is a precarious and risky undertaking.<sup>122</sup> A “man in a skirt,”<sup>123</sup> to take Williams’s initial example, may be provocative and disturbing; or he may simply look silly. A woman in a tuxedo or a suit may raise questions about the fixity of gender roles or the ambivalent character of heterosexual desire; or she may, like the legions of women who trudged off to work in ill-fitting blue suits, simply look like a woman who is trying to look like a man. Much depends on who is watching the performance and how it is conceived and executed. Both of these factors raise questions about Williams’s case.

Williams’s deployment of “drag” may be counterproductive with respect to at least part of her prospective audience. The choice of an avant-garde sexual metaphor<sup>124</sup> to cap an argument directed at a popular audience is an unusual one, to say the least. “Drag” as a concept has tended to engage those who practice it, academics who study it, and (mostly young) people who are exploring their sexual identities.<sup>125</sup> When Williams says, “Picture a man in a skirt,”<sup>126</sup> I do not see the newly divorced caregiver, the overextended working mother, or the disillusioned blue-collar father leaning forward with curiosity and enthusiasm. And the possible mismatch between message and audience has the potential to affect not only interest

121. See, e.g., WILLIAMS, *supra* note 2, at 198, 260.

122. For a thoughtful discussion of the advantages and dangers of deploying some elements of the dominant normative system to expose or undermine others, see Susan Eita Keller, *Viewing and Doing: Complicating Pornography’s Meaning*, 81 GEO. L.J. 2195, 2239–42 (1993).

123. WILLIAMS, *supra* note 2, at 245.

124. Among the prominent theorists whom Williams cites in developing and supporting her strategy are Pierre Bourdieu and Judith Butler. See *id.* at 38 & 285 nn.101-02 (citing PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 26, 56, 58 (1980)); *id.* at 322 nn.49 & 59 (citing JUDITH BUTLER, *BODIES THAT MATTER* 231 (1993)); BUTLER, *supra* note 13). In the following discussion, I will rely primarily on Butler’s theory of “drag” as a political strategy, using her book *Gender Trouble*.

125. For an interesting popular exchange over whether “drag” has been broadly embraced as a social or cultural norm or strategy, see Jesse McKinley, *Reinventing Hedwig from Wig on Down; Ally Sheedy in a Man’s World, the Gender-Bending Role of Drag Queen*, N.Y. TIMES, Sept. 16, 1999, at E1.

126. WILLIAMS, *supra* note 2, at 245.

but understanding. Williams's prescribed performances, unlike some other forms of "drag," will inevitably operate in many social settings in which reading these performances as simply peculiar, or as reproducing the existing gender arrangements, is easier or more "natural" than reading them as subversive. As Susan Bordo has argued in a critique of Judith Butler's deployment of "drag," "[S]ubversion is contextual, historical, and above all social. No matter how exciting the 'destabilizing' potential of texts, bodily or otherwise, whether those texts are subversive or recuperative or both cannot be determined in abstraction from actual social practice."<sup>127</sup> Butler herself, notwithstanding the breadth of her endorsement of a politics of "drag" or "subversive repetition,"<sup>128</sup> admits that the question of which repetitions become "disruptive" and which become "domesticated" depends on "a context and reception in which subversive confusions can be fostered."<sup>129</sup> Williams does not explore the "recuperative" (or system-reinforcing) potential of "domesticity in drag," nor does she identify contexts in which it is likely to pose a danger. In failing to provide this contextualization, she runs the risk that insisting on the norm of parental care, for example, will result not in disrupting but in reinforcing a regime in which the parent who provides the care is the mother.

But the difficulties with "domesticity in drag" go beyond matters of audience and interpretation, to the presentation and conception of the strategy itself. Williams does not always seem comfortable in employing her preferred strategy. Although she frequently invokes the label "domesticity in drag" as a means of highlighting a conceptual unity in her proposals, there are comparatively few occasions on which she actually deploys a(n altered) norm of domesticity to challenge domesticity's hold. Using the norm of parental care to challenge the norm of the "ideal worker" is the most prominent example;<sup>130</sup> she also invokes responsible parenthood to justify abortion<sup>131</sup> and, more indirectly, uses anti-commodification sentiment to justify the choice of the joint-property approach.<sup>132</sup> Yet a handful of examples in a book of this length does not seem to warrant the central billing this strategy receives. More importantly, with some of these examples, it is not clear whether Williams is turning the norm to subversive purposes or acquiescing in a dominant view of it: Her criticism of the "unhealthy" commodification implicit in human-capital

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127. Susan Bordo, *Postmodern Subjects, Postmodern Bodies*, 18 *FEMINIST STUD.* 159, 172 (1992) (reviewing, inter alia, BUTLER, *supra* note 13).

128. BUTLER, *supra* note 13, at 185.

129. *Id.* at 177.

130. See WILLIAMS, *supra* note 2, at 200.

131. See *id.* at 202.

132. See, e.g., *id.* at 134-36.

approaches to the division of marital property is an unsettling example.<sup>133</sup> Finally, few of these examples entail the “serious play” of a “drag” performance.<sup>134</sup> Far from being open-ended and multilayered, the invocation of dominant norms is generally assigned a very specific meaning. And rather than being playful, their deployment frequently has the earnestness and sobriety of an immanent critique.

Yet my main concern is not that Williams’s deployment of “drag” is less skillful or even less appropriately targeted than it might be. My concern is that it is less searching than the term or its most prominent theorization implies—and less strenuous than displacing the system of domesticity requires. Gender-bending is urgently required to elude the bonds of the current system, but it is gender-bending of a more vigorous sort. Revising the structure of market and family work demands that we reveal masculinity as a contingent, re-configurable construct that can be connected with the provision of care as well as with the provision of material support. It requires that we expose the role of “mother” as a cultural construct that can be re-articulated with productive labor, rather than exclusively with love. These reconfigurations of conventional roles are a serious challenge; they trouble our most deeply held assumptions about what it means to be a man or woman in this society. They might be facilitated by a feature that is central and explicit in Butler’s theorization of “drag,” but that is evanescent and only fleetingly captured by Williams’s. That is the goal of “destabiliz[ing] and render[ing] in their phantasmic dimension”:<sup>135</sup> male and female, masculine and feminine, or “confounding the very binarism of sex, and exposing its fundamental unnaturalness.”<sup>136</sup> This goal is not absent from Williams’s account. She persistently seeks to de-naturalize gender, to describe it as a social construct that can be performed, bent, or otherwise modified. But she does not describe gender as “phantasmic,” an effect of social discipline “inscribed on the surface of bodies”<sup>137</sup> rather than the expression of an interior psychic order. Abandoning the notion of gender as an expression of interiority—complex and socially mediated, but interiority nonetheless—would require a rupture with Williams’s Deweyian premises: The notion of the human subject as at least a partial cause, rather than an effect, of social processes is at least as firmly entrenched as, for example, “commodification anxiety.” The move from a theory of interiority to a Butlerian theory of “signification” or performance would certainly risk

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133. *Id.* at 135.

134. *See id.* at 198 (“Suppleness and a sense of open-ended play are important weapons if the goal is domesticity in drag.”).

135. BUTLER, *supra* note 13, at 147.

136. *Id.* at 149.

137. *Id.* at 136.

confusing or alienating Williams's more general audience.<sup>138</sup> Thus Williams's pragmatism seems ultimately to be in tension with the demands of a genuinely destabilizing version of "drag," one which might serve as the prelude to a stark reconfiguration of masculinity, femininity, or "mothering."

I am not convinced that a radical strategy of "drag" is the only, or even the best, route to the disruption or displacement of the gender norms that comprise "domesticity." The proliferation of gender norms associated with this strategy<sup>139</sup> may be most useful when the goal is to destabilize a binary arrangement held in place by an assumption of naturalism. The pluralism of gender norms that tends to be produced by "drag" presentations that distinguish between "sex and performance, . . . sex and gender, and gender and performance"<sup>140</sup> may help, in a conceptual way, to trouble the naturalized dichotomies between male and female, masculine and feminine. But this destabilizing of a conceptual frame is different from achieving palpable change in institutional settings. Domesticity incorporates sex and gender binaries, but it also associates them with patterns of work and care, and institutionalizes them in professional and legal structures and cultural expectations. It is not clear that pluralizing gender norms, or even pluralizing norms of performance in the workplace (as Williams seeks to do with her legal protection of part-time and flextime work), can disrupt these entrenched institutional and cultural arrangements.

One version of this point has been made by Susan Bordo in discussing the postmodern tendency to "celebrate 'resistance' . . . and the instabilities of systems rather than their recuperative tendencies":<sup>141</sup>

[E]ven as we rightfully insist on recognition of the creative responses that are open within even the most oppressive regimes, we [should] neither overromanticize the degree of actual cultural

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138. In her excellent review of Butler's *Gender Trouble*, Susan Bordo describes the book as so difficult to read and understand that it is likely to "stir[] up 'trouble' only for a handful of academic sophisticates." Bordo, *supra* note 127, at 173-74. One could imagine Butler's ideas communicated in a more accessible fashion; however, the conceptual distance of the book from conventional, liberal notions of agency and subjectivity would in any case make its central ideas difficult for many segments of Williams's prospective audience to comprehend.

139. Williams does not simply proliferate gender norms. She applies this "drag"-related strategy more broadly by striving to create a kind of democratic pluralism of work and family arrangements. She counsels respect for a variety of decisions regarding market and family work, presses the workplace to be receptive to part-time and flextime as well as "ideal workers," and proposes three potential "axes" of change to be deployed in different contexts. There is much to be said for this approach. It accepts the fact of women's diversity and respects the contingency created by the various contexts in which women find themselves, and it allows for the postmodern strategy of localized resistance and the "pragmatist" preference for pursuing what works in a given situation. Yet, as I argue above, it is not clear that this strategy of pluralization is capable of producing systematic or institutional change.

140. BUTLER, *supra* note 13, at 137.

141. Bordo, *supra* note 127, at 172.

disruption and change that these responses represent or allow emphasis on individual choice and creativity to obscure continued patterns of systematic subordination . . . . The "reproductive" tendencies of [dominant ideologies] are very powerful; most people, apparently, have no problem accommodating data which *should* subvert their assumptions to *fit* their prevailing organization of reality.<sup>142</sup>

Joel Handler offers a slightly different version of this point: It is not only individual "resistance" but also social movements organized around postmodern theories that have failed to dislodge entrenched, institutionalized norms.<sup>143</sup> Surveying a series of social movements that have reflected aspects of the democratic pluralism of postmodern social theorists, Handler concludes that they have failed to sustain coalitions or to produce institutional change, in part because their commitment to contingency, pluralism, and localism have disabled them from dealing with opponents that are not similarly constrained.<sup>144</sup> When it is not so much the naturalism of the gender binary but its institutional manifestations that need to be challenged, a more direct attack on dominant institutional norms, of the sort that I described above, may achieve greater success. But whether the answer to domesticity lies in a radical destabilization and denaturalization of gender or in a systematic, substantive challenge to institutionalized norms, it is unlikely to be found in "domesticity in drag." Williams's solution may make domesticity less constraining. It may add, in Lorde's coinage, a few rooms to "the master's house." But it cannot be expected to bring the structure down.

#### B. *Genre Wars, or the Uncertain Courtship of a Popular Audience*

Williams's most striking innovation may be her decision to direct a challenging, intellectually rich book to a substantially non-academic audience. It may be useful to reflect on how this form shapes her treatment of her topic and on how a popular effort of this degree of intellectual seriousness may influence norms and practices in the legal academy. My assessment here is mixed. The complications of this approach are tangible, particularly with respect to presentation. Moreover, the breadth of the audience may conspire with the Deweyian emphasis on the "precious

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142. *Id.* at 172-73.

143. See Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 L. & SOC'Y REV. 697, 719-28 (1992).

144. See *id.* at 726 ("The postmodernists defend their position with the claim, 'But there *are* no Grand Narratives.' However, the opposition is not playing that game. It has belief systems, meta-narratives that allow theories of power, of action.").

values embedded in our traditions”<sup>145</sup> to root the effort too firmly in the normative status quo. However, the greater transformation produced by Williams’s effort may be found in another area: its challenge to the way that feminist legal scholars seek to produce change. Williams challenges us to engage with those non-specialists who will be affected by social and legal change. Reaching out to people not as lawyers or claimants, but as discussants or activists, acknowledges that feminist legal analysis has pressed beyond the purely legal to address social structures or cultural practices. The ensuing dialogue may also help us to reflect more fully on the problems we propose to solve.

Writing a book that can speak simultaneously to academic and lay audiences is no small task, and Williams heightens the challenge by pluralizing the groups she seeks to reach within each segment of her audience. Her academic targets include legal scholars interested in doctrine; feminist students of second-wave disputes over work and family; sociologists interested in gender norms, family life, and workplace innovations; postmodernist social theorists; and scholars drawn to pragmatic philosophical approaches. Her non-academic audiences include groups that have been subject to work/family tensions, including overextended working mothers, full-time caregivers impoverished by divorce, and men struggling in various ways with the expectations and disillusionments of being “ideal workers.” Also among the intended non-academic readers are courts, policymakers, and well-intentioned employers.

Addressing so broad a topic to so diverse a group is bound to entail complications, and some of these are evident on the face of the effort. Every reader must push through passages that were not written with her in mind: Time-starved working parents may become impatient with a discussion of Bourdieu’s concept of “habitus,”<sup>146</sup> and academic lovers of the subtle or oblique introduction may balk at a preface entitled “What This Book Is About.”<sup>147</sup> Sometimes even addressing the right material to the right audience becomes a challenge. For example, much of Chapter 7, which deals with core issues of “gender talk,” is far more academic than one might expect. It offers a more detailed account of a technical legal academic debate than most educated laypersons, or even policymakers, are likely to have a taste for.<sup>148</sup> Conversely, Chapter 8’s exploration of truth as an expression of identity is so uncomplicated and accessible in its exposition that it neglects some of the subtleties an academic might prefer

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145. WILLIAMS, *supra* note 2, at 244 (quoting DEWEY, *supra* note 11, at 26 (“precious values embedded in social traditions”)).

146. *See id.* at 38.

147. *Id.* at ix.

148. *See, e.g., id.* at 218-31.

in a controversial theory of truth.<sup>149</sup> Indeed, those most concerned with the implications of reconstructive feminism for a theory of truth are likely to be philosophically oriented academics.

Finally, notwithstanding the energy and originality of its exposition, the range of ideas and audiences risks argumentative overload. Williams has the heart and the endurance of a long-distance runner; she is indefatigable in reconstructing debates, chasing down the flawed assumptions in decades-old arguments, and reporting mounds of empirical data. However, her persistently energetic exposition sometimes exceeds the number of ideas that a mortal can hold in mind at one time. But there is more than battle fatigue at stake here. The sheer weight of her arguments, combined with her primarily popular presentation, often obscures the theoretical structure of Williams's central argument. Glimpsing the connection between "commodification anxiety" and domesticity, or between Williams's Deweyian pragmatism and her strategy of "domesticity in drag," requires far more effort than it might in a more conventionally structured academic work.

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149. *See, e.g., id.* at 261-63. Williams states:

A closer examination of my truth about abortion shows that it does not reflect timeless, universal principles. Instead, it reflects who I am. Like most women of my class, I view an active sexual life as an entitlement and children in part in terms of opportunity costs. From the time I was sexually active, I knew I had a lot to lose if I had children at the wrong time. A pregnancy could deprive me of "my future." I would have said in college. . . .

Now consider a middle-aged Mormon mother of five who believes that her purpose in life was defined by her marriage, that the purpose of marriage is procreation, that sex outside of marriage is wicked, and that the wicked shall be punished. She is unalterably opposed to abortion under any circumstances.

Am I in danger of being persuaded by the Mormon mother? No. This is merely to say I like being who I am. And as long as my life retains the shape it has today, my position on abortion will not change. My views reflect who I am, just as the opposing truth of the Mormon mother reflects the shape and tenor of her life. Our truths are a product of our social location and what we have chosen to make of it. . . . Truths are expressions of identity.

*Id.* at 261. This surprisingly straightforward discussion of what Williams clearly knows to be one of the thorniest questions in contemporary philosophy elides a range of questions that occur to an academic reader on even a casual perusal of her discussion. Much of Williams's discussion focuses, for example, on the relation of truth to one's social location. What precisely does she mean to add with the phrase "what we have chosen to make of it"? Does this refer to Williams's decision to capitalize on her relatively privileged social circumstances by attending college and fostering the expectation of a "future" (that presumably was not comprehended by childbirth)? Or might it also mean the particular ways in which Williams has reflected on her social location, which may be partly but not entirely determined by the features of that location? Does irrational, or otherwise deeply flawed, reflection on one's social situation represent a "truth"? How does one account for such phenomena as weakness of the will (that is, visceral inability to do what one believes to be the right thing) or strong, persistent ambivalence in a definition of "truth" rooted in "identity"? My point is not that Williams is obliged to answer these questions in a book that is clearly addressed primarily to other issues. My point is that it seems surprising for her to "pitch" this discussion at a level best suited to the educated lay reader, when the question itself seems most likely to be of interest to the more academic reader.

The greatest difficulties with Williams's appeal to a popular audience, however, are not formal but substantive. Though Williams is not explicit about the relation between her pragmatism and her popular focus, there appears to be a kind of synergy between them. She may address a lay audience because she believes that "gender talk," which is not the exclusive province of academics, is the key to solving the current impasse. But she also sets her sights on the "values embedded in our traditions" because those are the values of the people she cares about engaging. Whatever the order, Williams's popular focus may be responsible for yoking her program more firmly to the status quo. She is constrained, at least to some degree, by the tone, imagery, and institutional structures that she believes her lay audience will accept. Thus, we get the "man in a skirt," instead of more radical forms of gender-bending. This constraint exacerbates the tendency toward the normative status quo that is already implicit in Williams's Deweyian pragmatism. And, in some respects, it may also defeat her purpose. Unless we raise a more disruptive, systematic challenge to the norms of gender, work, and love that construct the current impasse, any grassroots mobilization may be unavailing.

However, there are many ways to draw upon the energies of a lay audience, and deploying them as foot soldiers in a carefully orchestrated campaign of change, which seems to appeal to Williams,<sup>150</sup> is only one of them. Some of the most transformative books that have addressed this topic, such as Betty Friedan's *The Feminine Mystique*<sup>151</sup> and Arlie Hochschild's *The Second Shift*,<sup>152</sup> have also been addressed to a general public. But they have sought less to mobilize their readers than to raise their consciousness and to engage them in a broad public debate about solutions. Though portions of Williams's book have a more tactical sound, such a consciousness-raising strategy seems to be part of her effort as well. Through her compelling analysis of domesticity, she challenges readers to see that the tensions between market work and family work go further than the availability of family leave or the necessity of working overtime. They implicate a range of values, beliefs, and argumentative positions that have

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150. At least two features of Williams's argument lead me to suspect that she is interested in broad-based political mobilization. The first is her fairly persistent effort to coin phrases that might take hold of the popular imagination. See, e.g., *id.* at 4 ("reconstructive feminism"), 8 ("domesticity in drag"), 38 (domesticity as a "force field"), 185 ("femmes" and "tomboys"). The second is her effort to make specific, tactical suggestions for arguing to others, such as the use of humor or the avoidance of anti-male rhetoric. See, e.g., *id.* at 245 (humor), 271 (male bashing).

151. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 15-32 (1984 ed.) (identifying the "problem that has no name": women's lack of fulfillment in being relegated exclusively to the role of wife and caregiver).

152. ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989) (describing the ways in which even working mothers perform a "second shift" of labor in the home).

become so familiar that we have ceased to recognize them as debatable norms that can be changed. Creating this awareness can be crucial; like *The Feminine Mystique* and *The Second Shift*, *Unbending Gender* could ignite a new debate over what should happen next.

Williams's choice of audience offers a further lesson to legal academics. A bold effort such as Williams's, one that reaches so far beyond the usual terrain of legal scholarship, challenges us to see how little we know about social change enacted outside the courtroom or the legislature. Since the early debates over "work/family conflict," feminist legal scholars have come to identify legal barriers to women's equality as part of larger, more intricate social patterns and practices. Solving the problems of women's oppression that we identify, therefore, has become a task of which legal expedients form only one part. Yet, if legal feminists have begun to learn from our counterparts in the humanities and social sciences how to move our analysis of inequality beyond the analysis of legal institutions, we have not gained a comparable understanding of how to envision or to formulate extra-legal solutions. Most legal feminist work, including work with a broad critical vantage point, culminates in highly particularized legal proposals.<sup>153</sup> We have been unable, or unwilling, to translate our theoretical perspectives into language that a non-academic audience can understand; most of us know little about when the time is right to seek a broader audience, what kinds of approaches engage popular attention, and other crucial tactical questions. Williams recognizes this deficit and is committed and courageous enough to do something about it. Her accessible style, her emphasis on "gender talk," and her focus on relational political practices—such as the use of humor or the respectful treatment of mothers who choose not to do market work—are evidence of her commitment to engage this new audience. By extending the legal academic conversation to policymakers, activists, and men and women simply trying to live their lives, Williams challenges us to enrich the process through which we develop answers and to see our work in a less insular way.

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153. I could pick any number of articles to support this point, but particularly illustrative is one of my own. In *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995), I criticize the failure of some feminist scholars to characterize adequately the agency that women retain even under circumstances of oppression, and argue that these characterizations have had consequences not only in legal doctrine, but in popular political struggles as well. The solutions I propose, however, are either conceptual proposals aimed at scholars or doctrinal proposals aimed at courts and advocates. See *id.* at 354-76. I do not direct any proposals to the public, though I specifically argue they have been affected by feminist theoretical characterizations.

## IV. CONCLUSION

*Unbending Gender* is a stunningly rich effort, full of new ideas and methodological innovations. Its Deweyian pragmatism may be its greatest weakness, curtailing its normative challenge and limiting feminists to the uncertain strategy of turning dominant norms against themselves. But Williams's provocative analysis of domesticity, and her challenge to consider the role of a non-academic audience in legal academic work, are crucial contributions that will continue to bear fruit, for this problem and for others.