

BARGAINING AND GENDER

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I. INTRODUCTION

Since the publication of John Rawls' *Theory of Justice*,¹ jurists have spilled a great deal of ink over the kinds of regimes that would be chosen by rational people, supposing that they had no idea where they would wind up in the pecking order of the regime ultimately selected. Among the specific questions raised by Rawls' book was the distribution of wealth, and especially the set of minimal entitlements that rational people would think necessary to sustain a just and proper life. But as Martha Nussbaum has pointed out, the modern theory of bargaining and games suggests that minimal entitlements really are not the whole story with respect to the distribution of wealth.² Endowments are not static, and they move around in part in response to the way people cut their bargains. This observation does not mean that bargaining simply re-slices the set of endowments in a zero-sum game—far from it—but rather that even positive sum bargains may nevertheless work out rather differently for different people. That pattern, of course, would have an effect on the distribution of wealth: while people in the aggregate are made better off by bargaining, some people might be “more better off” than others.

A few years ago I had the occasion to play with a similar idea in an article entitled “Women and Property: Gaining and Losing Ground.”³ That article attempted to apply some very elementary bargaining theories to questions of women's status, and especially to what appears to be the relatively low level of wealth of women in comparison to the level of wealth of men.⁴ This pres-

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1. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

2. Martha Nussbaum, *Justice for Women*, N.Y. REV. BOOKS, Oct. 8, 1992, at 43, 47-48 (reviewing SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY*; arguing that Rawlsian “primary goods” resources are less important than capabilities for action).

3. Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421 (1992).

4. Illustrating the opposite extremes of wealth & poverty, see, e.g., Jaclyn Fierman, *Why Women Still Don't Hit the Top*, *FORTUNE MAGAZINE*, July 30, 1990, at 40 (survey indicating that women make up less than one percent of the most highly paid directors and officers in the 799 public companies listed among the 1000 largest U.S. industrial and service

ent piece is essentially a pared-down version of that article, and interested readers should look to the original for a considerably more extensive treatment of the subject.

I initially became interested in the subject of bargaining and women's assets from a rather depressing subject, namely the terrible news stories about battered women. Looking at the "before" and "after" pictures of one battered woman made me think that her plight could not have occurred suddenly, but must have been the result of a more gradual process, taking place step by step; and that realization in turn made me think that she may have adopted what was effectively a losing strategy in the face of the predatory strategy of her batterer. She and other abuse victims might have adopted a strategy that was too forgiving towards persons whose strategy was to take advantage of victims' forgiveness, in order to take away all kinds of literal and figurative assets from them as battered partners. For this reason I toyed with the idea of calling the article, "Love Stinks."

But those somewhat rudimentary notions made me think that bargaining might have some more general applicability to women's assets, or rather their relative lack thereof. After all, the basic question of Virginia Woolf's famous *Room of One's Own*, so many years ago, was about assets.⁵ Woolf asked why women are poor. The answer might be explained in part by bargaining strategies.

While many other theories exist to explain women's relatively low level of wealth and status—theories based on history, exploitation, capitalism, and sociobiology, for example—approaching this issue by asking questions about bargaining strategies might also be useful.

It is fair to assume that men and women make many bargains to cooperate in various ways. Putting to one side such pathologies as battering, a bargain between a man and a woman should make both parties better off, just as cooperative deals generally make the bargainers better off. I however wanted to explore the ways in which, over time, gender-differentiated bargaining strategies

companies); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-60, NO. 163, POVERTY IN THE UNITED STATES: 1987 118-19 (1989) (tables showing over 34% of female-headed families in poverty, as compared to slightly under 11% for all families).

5. VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 35-37, 42 (15th impression 1974) (asking why women are so poor).

might result in men coming out with more assets than women—"more better off."

Consequently, I adopted as a hypothesis the idea that in the real world there is a "taste for cooperation" (a phrase I borrowed from Gary Becker's "taste for discrimination"),⁶ but I further adopted the hypothesis that the taste is unevenly distributed between the genders—that women are likely to have this taste more intensely than men, or apply it to more kinds of people. As my article noted, this hypothesis leaves room for individually cooperative men and stiff-necked uncooperative women—any such distribution, if it were to exist, would only be a matter of statistical distributions, somewhat like height or weight, and would say nothing about individuals.⁷ Moreover, I left the whole idea entirely as a hypothesis, and in fact would not vouch for it, even though the proposition is advanced (and disputed) in a variety of ways in feminist literature.⁸ For example, the much-cited Carol Gilligan discusses women's relationship-based morality;⁹ studies suggest that women are more likely than men to take care of the children, the elderly relatives, the sibling relationships, and the neighbors;¹⁰ and many kinds of pop books refer to "women who care too much," as if their caring attitudes got them into trouble.

Well, maybe they do. But as I worked through the subject, it seemed that women's *actual* taste for cooperation—if such a taste exists—is much less important than something else: people *think* women are likely to be cooperative types. It appeared that the strong assumption of women's greater taste for cooperation in

6. GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 14-17 (2d ed. 1971).

7. Rose, *supra* note 3, at 428-29. Richard Epstein, who took time out of another commentary to critique the article, seems to have missed this point, stating that the hypothetical would differentiate all men from all women. Richard A. Epstein, *Some Reflections on the Gender Gap in Employment*, 82 GEO. L.J. 75, 85 (1993).

8. See generally Deborah L. Rhode, *The "Woman's Point of View,"* 38 J. LEGAL EDUC. 39, 42-44 (1988) (describing "relational feminism"); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14-15 (1988) (stating that "cultural" and "radical" feminists, though not "liberal" feminists, adopt some version of women's particular connectedness to other human lives); see also Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 26 (1990) (arguing that the central task of feminist theory is articulation of a theory of difference).

9. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982) (discussing women's ethic of care).

10. Tamar Lewin, *Aging Parents: Women's Burden Grows*, N.Y. TIMES, Nov. 14, 1989, at A1 (reporting that daughters rather than sons usually care for elderly relatives); Marcia Saft, *Risks and Benefits in Having Siblings*, N.Y. TIMES, May 27, 1990 (Conn. section) at 3, (reporting that sisters establish and continue stronger sibling ties); Kathleen Teltsch, *What's In a Neighborhood?* N.Y. TIMES, July 10, 1988, at A20 (reporting that women ease entry of immigrants into urban neighborhoods).

thinking about gender differences in bargains is unnecessary. Much can be explained about women's lesser assets on the much weaker assumption that people simply believe women are more likely to be cooperators than men.

The stronger version (a real-live taste for cooperation) is an easier vehicle by which to explain the theory, so I will use this version for a few pages, even though it is basically a heuristic device. I will then turn to the subject that seems to be really important, the *culture* that assumes women's cooperativeness, and how that set of cultural assumptions affects a gendered allocation of assets.

II. GENDER BARGAINS WITH DIFFERENT TASTES

Garden variety bargains are normally a positive-sum game. I have a candy bar, you have an extra notebook; I want your notebook and you want my candy bar; we trade; we are both happier and better off. "Win-win" is the current phrase for this happy result.

Consider another example: two people, Sam and Louise, have access to a common field, and they decide to cooperate by restraining their cows, so that the grasses can regenerate. Suppose that they are collectively better off by some amount, which I will call "X." Their now-renewable grassy field has a capitalized value of X dollars more than it would have been if their respective Bossies and Sadies had just munched and tramped away until all the grass died out. That X amount is the surplus of their positive-sum, win-win deal.

But another question lurks here: how are Sam and Louise going to split that X gain? Sam and Louise have entered a positive sum game from their big decision to cooperate, but after that, they face a zero sum game about splitting gains made from cooperation. What Sam gets of X is at Louise's expense, and vice versa.

Suppose Louise has a greater taste for cooperation than Sam does. This characterization should make their bargaining develop along predictable lines, but those lines will not be to Louise's advantage. First, while it is predictable that she will indeed be better off when she and Sam decide to cooperate, it is also predictable that she will not be *as much* better off as Sam is. She will find herself getting less than Sam because of her greater taste for cooperation.

Louise has to offer Sam more incentives for him to cooperate, or even to notice that cooperation might be a good idea. He was not terribly interested in cooperating in the first place, so he will not cooperate at all unless he receives a disproportionate amount of the gain. Conversely, Louise is more interested in a cooperative relationship, more quickly sees its necessity, or feels more responsible for it; for those reasons, she is likely to agree to the deal even though, in a sense, she has to pay a somewhat higher price for it. In sum, Sam has a bargaining advantage, because of his relative indifference or even hostility to cooperation.¹¹

Moreover, this advantage continues. When the two of them later buy fertilizer or fenceposts to improve the field, Sam will be the more stringent enforcer of the deal. He can more credibly threaten to walk away from the whole arrangement unless she contributes a disproportionate amount of the upkeep costs.

Notice that Louise is still ahead of where she would have been without the deal. Without the deal, she and Sam would have been in a classic "prisoners' dilemma," where both parties have an incentive to overuse the resource, to the ultimate damage of the resource itself, and to their mutual loss thereby. She is better off with the deal, but not *so much* better off as Sam is, because the deal costs her more. He gets a larger portion of the X amount they jointly realize from dealing. His portion may not be a much bigger cut of X, but it is still more than the cut Louise gets.

A pattern of this sort could have a considerable effect on assets and entitlements in a number of areas. First, in what might be called the domestic economy of housework, wife Louise could find herself doing the bulk of the housework and child care, while husband Sam spends a disproportionate amount of time loafing in front of the TV. Why? First of all, some X gains will result when the two of them set up house together, because, as in the old adage, two can live as cheaply as one—economies of scale exist in the world of domestic arrangements. Louise however is more "invested" in commonality, or just takes more responsibility for keeping things together. Sam, on the other hand, is less interested, and can more credibly threaten to leave; he has to be paid off a bit to stay in a cooperative arrangement. As a result, the

11. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 152-53 (1984) (discussing the advantage of a reputation for bullying and readiness to retaliate in the context of computerized game strategies).

reward for Louise's good nature is negative: she has to contribute more to the domestic economy than Sam.¹²

Next, we consider the labor market. We should note that a transaction for employment should be a win-win or positive-sum exchange, despite the way labor relations may sometimes appear to labor theorists and historians. The employer presumably values labor more than the dollars it costs to hire that labor, while the employee values the dollars more than the leisure he or she would otherwise enjoy. Some X gains result from this exchange, too.

The next question is, how will employer and employee split those gains? Generally, the employer might have to offer more to Sam than to Louise. Sam is not all that interested in a cooperative exchange or relationship at the outset, and he can more credibly threaten to bail out later, because he is more tolerant of confrontation. On the other hand, the employer might offer Louise somewhat less: she is more alert to cooperative gains, and more attracted to cooperative relationships, so it does not take as much to get her on board.

In the labor market, of course, neither employer nor employee is stuck with one trading partner, in the way that one might characterize bargains in an ongoing marriage. Both parties have more choices. Hence if hiring Louise looks like a good deal for an employer, then one would think that a rational employer would hire a lot of Louises instead of Sams, and eventually bid up the price for Louise's labor to the level of Sam's.¹³

In fact, sometimes employers do hire a lot of Louises. An historic example was the mills of nineteenth-century Lowell, Massachusetts, when mill owners hired large numbers of women from the surrounding New England countryside.¹⁴ But still, if Louise's

12. See, e.g., PAULA ENGLAND AND GEORGE FARKAS, HOUSEHOLDS, EMPLOYMENT, AND GENDER 94-99 (1986) (women continuing to do most of the housework even when employed outside). In the original article I think I shocked some people by suggesting that there might be a feminist rethinking of polygyny, or "plural marriage," insofar as the institution would allow women more choices of cooperative Sams; the cooperative Sams would presumably get lots of wives whereas no one would marry the loutish Sams at all. Despite the generally bad press of polygamy (or polygyny), some others have also made this suggestion; see Joan Iversen, *Feminist Implications of Mormon Polygyny*, 10 FEMINIST STUD. 505 (1984); Elizabeth Joseph, *My Husband's Nine Wives*, N.Y. TIMES, May 23, 1991, at A31 (lawyer describing her plural marriage as ideal for professional women).

13. See ENGLAND AND FARKAS, *supra* note 12, at 171-72 (describing neoclassical arguments that discrimination is overcome by competition).

14. See, e.g., Nancy Zaroulis, *Daughters of Freemen: The Female Operatives and the Beginning of the Labor Movement*, in COTTON WAS KING: A HISTORY OF LOWELL, MASSACHUSETTS 105, 106-108 (Arthur Eno, Jr., ed., 1976).

cooperative nature is a plus to employers, why should Louise have to take a shorter gain than Sam in the employment bargain, especially over time? Richard Epstein took me to task on that point (and others) in some comments on the original article, so I was a little surprised that he did not address the other parts of the argument.¹⁵

There are several possible reasons for Louise to receive a smaller gain. There may be some real or perceived differences between Sam and Louise (and I will come back to the perceived ones shortly): an employer may desire some attributes that he thinks only Sam can offer, such as greater physical strength, or even Sam's reputation for *uncooperative* behavior, especially a reputation for toughness or meanness that might keep other employees in line. Or the employer may think, correctly or incorrectly, that the cooperative Louise is going to be tied down by her sense of obligations to third parties, notably her children, who may get sick or need more attention than Sam is likely to give them.

All this relates to a critical point that Epstein makes: some of the things I have said look as if Sam and Louise *do* look different to an employer—and implicitly, Sam looks better.¹⁶ But why does Sam look better? One point already mentioned is that Sam looks as if he will not have to stay home to take care of the children. However, if this improves Sam's employability, it is because Louise *is* taking care of the children; the reason she looks less attractive still stems from her greater taste for cooperation. Her willingness to help third parties such as children (and Sam's unwillingness to do so) makes Sam look like a better bet for the employer.

There are other reasons why Sam might seem to an employer to be stronger or better educated, and indeed there are reasons why he might *be* stronger or better educated. I will revisit these issues shortly,¹⁷ because these too may relate to Louise's appearance of cooperativeness; preliminarily, my own view is that the

15. Epstein, *supra* note 7, at 86.

16. Epstein, *supra* note 7, at 84-86, raises this point by suggesting that unequal shares of the surplus are unlikely to account for very much of the wage differential between men and women; this implies that if men are more highly paid, it is likely to be because men bring different (and more highly valued) traits or skills to the employment market. He also posits that men may have a higher tolerance for risk, possibly a beneficial trait in high-stakes and high-paying work. *Id.* at 88.

17. See text at notes 27-31, *infra*.

most serious consequence of Louise's supposed cooperativeness is that others—especially family members—may invest less in her “human capital.” This reduced investment can in turn impede her chances to develop skills that would enhance her employability.¹⁸

Another important factor, however, is the way that Sams behave. Often there are not enough Louises to fill the entire labor force, particularly if the cooperative Louise has to take care of a large part of the home front: employers are likely to have to hire some Sams. Sams are not completely devoid of cooperative traits, particularly when it comes to keeping their prerogatives; they may cooperate among themselves enough to keep other potential rival workers out, to frighten interlopers, and to punish those in their own ranks who might be more tolerant.¹⁹ Sams may quit if they have to compete against Louises, or they can use harassment to keep her “in her place”²⁰—just as, in other contexts, they might harass migrants or minorities or other people who might accept a lower wage. If an employer does need Sams, the employer might think it wise to segregate Sams and Louises into high and low paying jobs respectively. The employer may see no reason to pay Louise to drive a truck, when she can be hired so much more cheaply as a secretary. The employer may find Louise's skills just as essential as Sam's, but Sam won't work as a secretary at all, for as “women's work,” it would be beneath Sam's dignity, and certainly beneath his wage expectations.²¹

All these results touch on issues of comparable worth, an issue of great sensitivity in American law.²² Though there are many reasons to be cautious on this front, one approach to comparable worth might be to analyze Louise's real or imagined taste for co-

18. Cf. Epstein, *supra* note 7, at 76 (treating differential technical skills, education, etc., as exogenous factors in employment).

19. For retaliatory “cooperation,” see Jon Elster, *Norms of Revenge*, 100 *ETHICS* 862 (1990).

20. Workplace harassment may amount to a norm; see JERRY A. JACOBS, *REVOLVING DOORS: SEX SEGREGATION AND WOMEN'S CAREERS* 151-55 (1989); see generally CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979). When sufficiently widespread, harassment norms may seem “reasonable” to society; see Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 *YALE L.J.* 1177, 1205-1210 (1990).

21. See JACOBS, *supra* note 20, at 178-81 (maintaining job classification as higher-paid male preserve is a part of the “implicit contract” between employer and male employees).

22. For an exhaustive account of theories on this subject, see Mark Seidenfeld, *Some Jurisprudential Perspectives on Employment Sex Discrimination Law and Comparable Worth*, 21 *RUTGERS L.J.* 269 (1990); see also JACOBS, *supra* note 20, at 190 (describing results of experiments in comparable worth from perspective of job opportunities).

operation, and its effect on her share of the gains from trade in the employment market.²³

Readers should note that a taste for cooperation is not necessarily an undesirable trait from the point of view of making the affairs of the world run smoothly. In fact, everyone is better off if people have cooperative inclinations, because if they did not, no one could work with anyone else. Among other things, the world of commerce and contract would fall apart. Moreover, a taste for cooperation is not an undesirable trait if others share one's taste. It is just disadvantageous to have when you are dealing with others who do not have it, or do not have as much of it, or do not have it towards *you*. In such instances, a taste for cooperation can lead to a losing strategy: if you behave too cooperatively, you will wind up with the short end of the stick.

Even under those circumstances, those who cooperate will get *something* from their cooperation. They just won't get as much as the "testers" and the bad guys. Incidentally, as a larger social matter, we might expect fewer nice guys where nice guys finish last. That result should make gender relations a matter of greater concern, and I will return to this topic at the end of the article.

III. GENDER BARGAINS WITH SEEMINGLY DIFFERENT TASTES

Social issues lead to the next point: we can considerably relax any assumption that women have a taste for co-operation, and still come to depressingly similar results with respect to Sam's and Louise's share of X. It is not as important that a gendered difference in tastes for cooperation actually exists, as that people simply think it exists.

Returning to the employment situation, when an employer offers Louise a job, let us suppose that he believes she has a taste for cooperation, so that he offers her a smaller percentage of the gains made from trading wages for labor. He may also think—again related to his views on her taste for cooperation—that she is the one doing the bulk of the housework and the child care at home, so she has little time to search for other employment. Consequently, he offers her less of the gains from trade. What if she refuses? Beliefs do not vanish instantly; the employer will

23. See Charles F. Mason, Owen R. Phillips & Douglas B. Redington, *The Role of Gender in a Non-Cooperative Game*, 15 J. ECON. BEHAV. & ORGANIZATION 215, 216 (1991) (noting possible relationship between comparable worth issues and gender differences in bargaining).

continue to make low bids to women, and at least some will accept, making him think that he was right in the first place.²⁴ Indeed, in a sense, perhaps he *is* right, if his beliefs are sufficiently widely shared. Louise knows what people think about her wage demands, and she knows that even if she refuses, she will continue to get low bids from other potential employers. Thus, it costs her something and avails her little to break the pattern, and so she may well accede to the very stereotype that disadvantages her.²⁵

Conversely, the offer to Sam will be higher, on the assumption that Sam will demand a higher percentage of the gains. Any particular Sam might in fact have been willing to accept a lower cut; but he will not be presented with that choice. Ian Ayres has told a similar story about auto sales: sales people apparently give white men a more favorable initial offer and are more willing to bargain with white men than with minority men or any women. In Ayres' story, the salespersons engage in a low-cost quest to find "suckers"; they make quick guesses about potential buyers' search costs, and they propose unfavorable terms to those they think likely to be less informed or less able to search out bargains elsewhere.²⁶

Physical threats to women may have a similar pattern. People may assume that women are weaker than men, and although a particular woman is in fact very strong, she has no good way to signal that characteristic until challenged. Louise will have to prove her strength constantly, unlike a weak Sam, who will not be challenged; it is assumed that he will retaliate even if in fact he will not. The result is that he gets to walk around at night and go have a beer at the local bar, while she may tire of the constant hassles and just stay home instead.

24. Cf. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 827-36 (reporting auto sellers' disparate price offers, bargaining tactics based on race and sex of potential purchaser), 850-51 (noting that sellers' bargaining assumptions may be self-fulfilling prediction).

25. See Robert Sugden, *Contractarianism and Norms*, 100 ETHICS 768, 779-82 (1990) (explaining persistence of conventions of inequality, using gender example: where unequal payoffs are a norm or convention, it is rational for both "winner" and "loser" to follow convention; even though "losers" might gain higher benefits if they demand an equal payoff, free rider considerations impede their making a demand).

26. Ayres, *supra* note 24, at 855-56, and n.113, 114 (noting that even small differences in customer class characteristics may elicit widespread "testing" behavior in bargaining negotiations, likens testing to search for "suckers"). Since bargaining is administratively costly, an employer may not bother making low bids to men on whom she thinks "testing" is probably fruitless, whereas the employer may "test" those thought to be weaker bargainers.

We may see the same pattern at home. Loutish husband Sam may assume that his wife Louise will cook, do the dishes and iron his shirts as well, and he will yell at her if she does not perform these chores. But when he is out hunting with the guys, he assumes that they will all split the chores. While he does not even raise the issue with his friends on vacation, at home, Louise would be lambasted if she were to refuse to do all the work. On occasion, Louise may well give in rather than face another scene, and when she does, she reinforces Sam's smug assumptions about her willingness to take on a disproportionate set of the household duties.

The upshot is that whether Louise really has a taste for cooperation or is just thought to have it, she receives a smaller share of any gains than Sam. She does get something from her various cooperative relationships—just not as much as Sam. And the *perception* that she is more cooperative—probably much more than any *actual* taste for cooperation—plays a large role in creating patterns that make her life more difficult, and put her to more challenges than Sam has to face.

But each individual factor is minuscule compared with the result of the interaction of factors. The snowball effect of all these differences in tastes for cooperation (or rather all these *perceived* differences) disadvantage women severely.

In the financial world, Louise is not likely to have as easy access to capital as Sam does. Because of her lower share from past bargains, she has relatively fewer assets than Sam, and consequently she is a riskier prospect for a lender. In turn, that means that in order to get a loan, she has to put more money down, or pay higher interest rates, or face some other relatively unfavorable terms. But quite aside from Louise's actual personal history, a lender may also assume that, since she is supposedly cooperative, Louise will hesitate to retaliate against the scoundrels of the business world; if so, she may risk business losses that Sam would not. The lender may also assume that the rest of the world will think she is a pushover, so that she, unlike Sam, will face constant and distracting challenges. All these factors combine to make the lender tell Louise that she has to make a larger down payment, pay higher interest, or maybe even get out of the bank.²⁷

27. See Susan S. Blakely, *Credit Opportunity for Women: The ECOA and its Effects*, 1981 Wis. L. REV. 655-57 (describing discrimination against women prior to antidiscrimination legislation).

Of course, if Louise cannot get capital on good terms, it is harder for her to be independent. Most serious of all, it is harder for her to get what is now called "human capital"—particularly an education, because others (especially family members) are less willing to invest in her than they are in Sam.²⁸ They think she will not be tough enough to put an education to work, whether this is true or not of any given Louise; and when they look around at the common views of Louises generally, they think that she will face constant challenges and harassment that will not be applied to Sam. Louise's family will see less reason to spend money educating her when Sam's prospects seem so much more promising. In many parts of the world, parents invest substantially less even on daughters' health and nutrition.²⁹

Amartya Sen shares my own interest in possible gendered bargaining patterns underlying these social practices, or as Sen puts it, how "cooperative conflicts" in the home seem to result in lesser attention to the well-being of wives and daughters, and how they result in some very disturbing statistics of excess mortality among women.³⁰ This is chillingly illustrated in the title to one of his articles: "More than 100 Million Women are Missing."³¹

Families do not skimp on Louise's human capital and lavish their attentions on Sam because of irrationality or meanness; rather, they base their investment decisions on their assessment of how a purportedly more cooperative Louise would fare in a world that would constantly put her to the test. Sam looks like a better bet in that world, because it seems likely that he will face

28. On "human capital," see Seidenfeld, *supra* note 22, at 326-329.

29. For the relatively low investments in women's nutrition, particularly in less developed countries, see Hanna Papanak, *To Each Less than She Needs, From Each More than She Can Do: Allocations, Entitlements, and Value*, in Irene Tinker, PERSISTENT INEQUALITIES: WOMEN AND WORLD DEVELOPMENT 162, 165 (1990); Amartya K. Sen, *Gender and Cooperative Conflicts*, in *id.* at 140-43; AMARTYA K. SEN, RESOURCES, VALUES, AND DEVELOPMENT 346-60 (1984); on education, *id.* at 383-84. In the United States, however, investment in men's and women's education is more equal; see JACOBS, *supra* note 20, at 41-43; but see Susan Chira, *Bias Against Girls Is Found Rife in Schools, With Lasting Damage*, N.Y. TIMES, Feb 12, 1992, at A1 (reporting A.A.U.W. study showing discrimination against female public school students from teachers, textbooks, tests, and male classmates). The A.A.U.W. study itself has been controversial; see, e.g., Christina Hoff Sommers, *The Myth of Schoolgirls' Low Self-Esteem*, WALL ST. J., Oct. 3, 1994, at A20.

30. See Sen, *supra* note 29.

31. Amartya K. Sen, *More Than 100 Million Women Are Missing*, N.Y. REV. BOOKS, Dec. 20, 1990, at 61.

fewer challenges and be taken more seriously.³² For these reasons, Sam gets a disproportionate share of the family resources—education, food, health care. Everyone, mothers as well as fathers, brothers as well as sisters, can be trapped in the cultural norms that dictate such gendered investment decisions, but these decisions dramatically reinforce the pattern that leaves Louise with a relative dearth of alternatives.

The question of human capital is extremely important in Louise's predicament. Human capital investment is the key issue on which Louise's taste for cooperation, even if it is just a purported taste, limits her possibilities. If she has less-developed talents to bring to the job market, if she receives less on-the-job training, if she has difficulty striking out on her own financially, if she does all the drudge work in a marriage that she can neither alter nor escape, we may want to trace that situation back to the expectations that her family and other potential "investors" had about her willingness to cooperate. We may want to investigate how those expectations cut her off from an equal share of the family and workplace human-capital investments, and how that pattern affects her subsequent ability to bargain in any of the spheres of her life.³³ Human capital investment decisions may well be based on assessments about her bargaining abilities, but those decisions may in turn diminish her ability to bargain all the more.

IV. GENDER BARGAINS AND "HOSTAGES"

The bargaining patterns I have described suggest how Louise might fall behind relative to Sam, but a real or purported taste for cooperation might make Louise fall behind not simply relatively to Sam, but relatively to the point from which she began. Here I should briefly mention the issue that made me think about a gendered pattern of bargaining in the first place, that is, abusive and battering relationships, in which Louise's "disinvestment" seemed to take place over time, in something like a series of gambler's moves against a relentless dealer.

Louise's responses to abuse and battering can be viewed as a hostage story. In this story, Louise's cooperative (or purportedly

32. See GARY S. BECKER, *A TREATISE ON THE FAMILY* 192-95 (enlarged ed. 1991) (noting that some families invest more in sons if they think this will maximize the next generation's income).

33. Insofar as risk preferences are related to wealth, differentials in human capital investment might also explain what seems to be her lesser willingness to take risks, cited by Richard Epstein, *supra* note 7, at 87-88; see also *supra* note 18.

cooperative) nature makes her care too much about relationships and about other persons, notably children. These relationships and other persons, so treasured to Louise, are in a sense "hostages" to an abusive Sam. He can use his threats to them to force her into short-term decisions in which, one step at a time, she bargains away more and more of her capital—human, physical, social, and perhaps psychological—and ultimately becomes isolated from friends, family, employment relations, and the shreds of balance of her past life. Those who are interested in this extremely unpleasant tale should look at my original article and the sources it cites.³⁴ In some ways it resembles a story of kidnapping, and describes behavior that most people regard as deplorable; but it is still all too recognizable. An important aspect of abusive relationships is that they can be seen through the lens of a gendered pattern of bargaining, however perverse.

V. CONCLUSION

I am very far from claiming that my baleful tales of Sam and Louise add up to an accurate picture of every woman's position in the world relative to every man's. There are many women whose parents dote on them and invest heavily in them. There are many women who later grow up to enjoy wonderful marriages and supportive families of their own, along with splendid work opportunities. There are probably many more Louises whose life successes are rather more muted, but who are not appreciably worse off than the Sams they encounter. But the larger patterns one sees as between men and women worldwide—unequally small shares of "human capital," financial assets and work opportunities for women, together with unequally large shares of domestic and family duties—might suggest that we can learn something about gender relations from the vantage point of bargaining strategy, and the effect of real or perceived tastes for cooperation in the pattern of bargains. There are numerous rough spots and lapses in the original paper, and certainly in this present abbreviated version, but my object basically has been to start a further exploration of what seems to me an important and somewhat neglected approach.³⁵

34. Rose, *supra* note 3, at 443-54.

35. One exception, aside from the work of Amartya K. Sen, *supra* notes 29-31, is Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life,"* 16 J.

Another useful aspect of bargaining theory is that it helps to dissolve the notion of separate spheres—the “in-here” of family relations and the “out-there” of employment. Bargains and entitlements saturate both spheres, however understated and implicit they may be domestically. Moreover, the two spheres are thoroughly porous. If women are “entitled” to only minimal investment within the family, they are not going to have a lot of opportunities outside of it either; and to complete the cycle, if they have few alternatives outside it, their bargaining position at home is that much weaker. It is simply elementary in bargain theory that one’s ability to bargain in any context hinges quite sharply on one’s alternatives outside that context.

I do not think that property and bargaining regimes are bad for women. Quite the contrary: women benefit greatly from their ability to bargain. Women are far better off in commercial regimes of private ordering than they are in status-oriented regimes that attempt to prevent any bargains—bargains that can move people away from appointed status roles. This has been true historically as well: seventeenth-century Europeans marvelled at the freedom of Dutch and British women, and they quite rightly associated that freedom with the extensive commerce and trade in those countries.³⁶ Louise is really stuck in a regime whose laws and politics block her from the independent management of her property and her trading affairs. Those regimes radically reduce the willingness of others to invest in her, and they punish her dramatically for any effort to escape her prescribed status.³⁷

A bargaining approach suggests that Louise can do something about her position. She can take a leaf from the experiences of immigrant groups, who have used mutual help to climb out from despised and isolated situations.³⁸ She can use her real or appar-

LEGAL STUD. 267 (1987) (analogizing marriage to contractual arrangement in which one party, the wife, performs first, creating exploitable “quasi-rents”).

36. See Peter C. Sutton, *Dutch Treat*, N.Y. REV. BOOKS, Feb. 17, 1994, at 31, 32 (reviewing JAMES A. WELU, ET AL., *JUDITH LEYSTER: A DUTCH MASTER AND HER WORLD* (1993)). See also FRANCES E. MASCIA-LEES, *TOWARD A MODEL OF WOMEN’S STATUS* 112 (1984) (noting that economic development is positively related to status of women).

37. For a horrible example, see Mary Williams Walsh, *At the Mercy of Men: Pakistan Women Look to Bhutto to Improve a Harsh Existence*, WALL ST. J., May 3, 1989, at 1, col. 1 (woman aiding others in divorce hunted down by own brothers; other women jailed, mutilated for leaving husbands; lack of women’s education, economic independence, independent property).

38. See, e.g., HUMBERT S. NELLI, *FROM IMMIGRANTS TO ETHNICS: THE ITALIAN AMERICANS* 115-118 (1983) (Italian immigrants formed mutual aid societies); RONALD TAKAKI, *STRAN-*

ent cooperativeness to make alliances with other Louises. She can look to those alliances for support if she needs to bail out from some no-account Sam. Besides, it would be gravely mistaken to suppose that the Sams are all bad guys; this is not at all the case, and Louise should be on the lookout for alliances with the unquestionably numerous sympathetic and cooperative Sams.

Finally, a bargaining approach suggests that bargaining is not simply about alliances and cooperation. That picture would be too rosy. In fact, the social world mixes non-cooperators and "testers" with the cooperators. Successful negotiations require some ability to retaliate against non-cooperators, or at least an ability to walk away from them. If Louise (or Sam, as far as that goes) is too forgiving, if she finds it too hard to retaliate or say no, then she is likely to get snookered, at least some of the time.³⁹

On the other hand, non-cooperators have an even more serious problem: the inability to get any deal off the ground at all, or even to imagine dealing in the first place.⁴⁰ Without cooperation, capitalism and indeed any version of private ordering is impossible.⁴¹ For that reason—that is, from the perspective of the larger social preconditions for private ordering—all of us should be concerned if what seem to be cooperative traits become synonymous with playing a losing game. Proponents of private ordering have to be very wary of the systematic neglect or punishment of people who are, or simply *seem* to be, the cooperators, lest we drive cooperation down to a level of mutual immiseration. Thus,

GERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 193, 241, 275-76 (1989) (Asian immigrants created mutual assistance & revolving credit associations). An extensive discussion of rotating credit associations, common to Chinese, Japanese and African immigrants, is given in IVAN LIGHT, *ETHNIC ENTERPRISE IN AMERICA: BUSINESS AND WELFARE AMONG CHINESE, JAPANESE, AND BLACKS* 22-36, 58-61 (1972).

39. AXELROD, *supra* note 11, at 39, 44-45, describes some of these scenarios: the game TIT FOR TWO TATS (a model that is forgiving of at least one default) is very successful when played with equally forgiving players, but becomes a losing strategy against TESTER (a model that defaults unless punished, and that can exploit more forgiving strategies).

40. See ANTHONY DE JASAY, *SOCIAL CONTRACT, FREE RIDE* 65, n. 17 (1989) (prudential policy of rational self-interest is not to cooperate in deal, since it always pays for other party to "take the money and run," particularly given the endgame problem); JON ELSTER, *THE CEMENT OF SOCIETY* 5 (1989) raises the interesting question how a "rational" player might even contemplate being in a situation where another party moves cooperatively.

41. See generally Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295, 308-317 (1992).

the story of Sam and Louise should be a matter of general concern—to Sams as well as to Louises.

