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WOMEN AND PROPERTY: GAINING AND LOSING GROUND

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A quite common perception about women and property is that women do not have much, at least by comparison to men.¹ Even if women do have property formally in their names, men seem to be the ones who initially acquired it and actually control it. Though there are exceptions—even whole societies that are exceptional—they have a rather exotic air.² In the ordinary course of things, we are surprised to find women of great wealth, just as we are surprised to

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¹ See, e.g., Virginia Woolf, *A Room of One's Own* 34-37, 42 (15th impression 1974) (asking why women are so poor).

² See, e.g., Robert A. Williams, Jr., *Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context*, 24 *Ga. L. Rev.* 1019, 1039-42 (1990) (describing women's extensive ownings in traditional Iroquois culture); Matt Moffett, *The Strong Women of a Mexican Town Crush Stereotypes*, *Wall St. J.*, Apr. 2, 1991, at A1 (describing town dominated by women, descendants of tribe with "Amazonian traits").

find women who lead Fortune 500 companies.³ On the other hand, it is hardly news that women are disproportionately represented as heads of household among the poor.⁴ Between these extremes of wealth and poverty, women just do not seem to be as “propertied” as men, except insofar as they happen to be located in families headed by men.⁵ Indeed, even within the household, the serious money often seems to be at the disposal of the husband, not the wife.⁶

Why might this be? Why might women be systematically worse off than men when it comes to acquiring and owning property? There are many possible explanations, including theories of exploitation,⁷

³ See, e.g., Jaclyn Fierman, *Why Women Still Don't Hit the Top*, *Fortune*, July 30, 1990, at 40 (reporting that women comprised less than 0.5% of the highest paid directors and officers in a survey of 799 of the 1000 largest publicly held industrial and service companies in the United States).

⁴ See, e.g., Bureau of the Census, U.S. Dep't of Commerce, *Current Population Reports, Series P-60, No. 163, Poverty in the United States: 1987*, at 118-19 (1989) (showing that over 34% of female-headed families live in poverty, as compared to slightly under 11% for all families).

⁵ When households are divided out by types, married-couple households have the highest net worth. Bureau of the Census, U.S. Dep't of Commerce, *Current Population Reports, Series P-70, No. 22, Household Wealth and Asset Ownership: 1988*, at 10-11 (1990). In addition, households maintained by females under 55 have “significantly lower net worth” than the comparable male-maintained households, though this is not the case when households maintained by females over 55 are taken into account. *Id.* This suggests households headed by older females include many widows who have inherited the married-couple household upon the death of the male. But cf. Mary L. Fellows, *Wills and Trusts: “The Kingdom of the Fathers,”* Lecture at the University of Minnesota Law School (Mar. 5, 1991) (on file with the Virginia Law Review Association) (detailing historic pattern of leaving widows maintenance rather than entire estate).

⁶ See Viviana A. Zelizer, *The Social Meaning of Money: “Special Momes,”* 95 *Am. J. Soc.* 342, 352-67 (1989) (disputing the notion that all members of a household share equally in its wealth, and instead noting the relatively minor “special money,” i.e., “pin money,” historically available to wives, by contrast to the serious money disposed of by husbands). Mary Louise Fellows describes the long-standing legal extension of this pattern beyond the grave—i.e., the assumption that a widow's share of family wealth is at most maintenance during the remainder of her life whereas the widower disposes of the entire estate. See Fellows, *supra* note 5. On a different kind of intrafamilial wealth distinction, see Amartya Sen, *Resources, Values, and Development* 346-60 (1984) (noting lesser amounts of food given to females in families in India and Bangladesh).

⁷ For a famous historical example, see 1848 Seneca Falls Declaration of Sentiments and Resolutions, *in Feminism: The Essential Historical Writings* 77-82 (Miriam Schneir ed., 1972) (1848). The Declaration was modeled on the Declaration of Independence and included in its grievances, “He [man] has taken from her all right in property, even to the wages she earns. . . . He has monopolized nearly all the profitable employments,” *id.* at 79, and a number of other grievances relating to men's denial of property and earning power to women.

sociobiology,⁸ and historical circumstance.⁹ I will take an approach somewhat different from those, although some of the ideas from those other approaches will appear here, too.

My plan is to take a few simple ideas from game theory and explore how women might systematically do worse than men with respect to acquiring property, if one makes either of two related assumptions. The first assumption is that women have a greater "taste for cooperation" than men.¹⁰ The second, somewhat weaker assumption is that women are merely *perceived* to have a greater taste for cooperation than men, even though that perception may be erroneous. Following the lead of much of the modern law-and-economics literature, my analysis will draw examples from both market and nonmarket "economies." Though these examples are largely hypothetical, I expect some will seem quite familiar. Indeed, that is precisely the goal: to see if these assumptions can explain a wide range of familiar examples.

At the outset, I want to stress that I am not arguing that women would be better off in a world without property or entitlements generally. I think that is wrong. On the contrary, women are generally better off in a regime in which they and others can acquire property. But I do mean to suggest that in a world of property and entitlements, there may be systematic reasons why women may tend to acquire less property and fewer entitlements than men. Moreover, there may even be some cases in which dealings with property make women worse off in an absolute sense—that is, not just worse off relative to men, but worse off than they themselves would have been but for such dealings. Again, I do not think that this is generally true, but I think that such more or less exceptional cases are nonetheless important enough to explore, and I try to do so in the later Sections of the Article. Needless to say, I do not think either of these situations is a desirable state of affairs, either for women in particular or for the larger society of women and men. By the end of the Article, I hope the reasons will be clear.

⁸ See, e.g., Nancy Chodorow, *The Reproduction of Mothering* 154-58 (1978) (criticizing Sigmund Freud's "biological determinism" with respect to sex roles).

⁹ See, e.g., Nancy F. Cott, *The Bonds of Womanhood: Woman's Sphere in New England, 1780-1835* (1977) (describing restriction of women's role to motherhood as family lost other roles to nonfamily institutions); Phyllis Palmer, *Domesticity and Dirt: Housewives and Domestic Servants in the United States, 1920-1945*, at 71-87 (1989) (describing situation of minority women domestic servants in 1930s).

¹⁰ See *infra* text preceding note 21 (defining "taste for cooperation").

I. THE GAME-THEORY APPROACH

To set the stage, I will discuss two analytical “games” that are now familiar in legal academic circles. The first is the “prisoners’ dilemma” (“PD”), named for its most famous illustrative story in which two prisoners are induced to “rat” on each other even though jointly they would be better off if both remained silent. The second, which has no conventional name except perhaps the descriptive “zero-sum game,” is a noncooperative game in which the parties vie to win the most of a fixed total payoff.

A. PD Games

PD games ought to be positive-sum games—that is, games that result in gains from working together—but they have an unfortunate propensity to fail. In such games, two (or more) parties are collectively better off if they cooperate than if one or another of them “cheats” or “defects,” but both (or all) have an incentive to cheat rather than to cooperate.¹¹ I will not run through the traditional PD story here because it is so familiar but instead will use an agrarian version: Suppose two people, Sam and Louise (and perhaps a number of others) graze cattle on common grounds. They would be collectively better off if each would cooperate and restrain the number of their cattle or the intensity of their grazing, so that the field’s grasses could replenish themselves. But Sam may fear that Louise will cheat while he restrains his cows—that he will be a patsy while she benefits from his self-restraint. On the other hand, even if he thinks she will cooperate, he may calculate that he himself can gain while she goes along with the program and restrains her cows. Thus, whether or not Sam thinks Louise is going to cheat, his immediate wealth-maximizing strategy is to cheat and, by parallel reasoning, so is hers. As a result of these calculations, of course, they wind up with an overgrazed desert—they have reenacted the dilemma, or the “tragedy of the commons,” as multiple-person PD games are often called.¹²

¹¹ For the prisoners’ dilemma and its more general application to commons problems, see Jack Hirshleifer, *Evolutionary Models in Economics and Law: Cooperation Versus Conflict Strategies*, 4 Res. L. & Econ. 1, 17 (1982).

¹² The main difference between the PD and the tragedy of the commons is that the former involves only two players whereas the latter potentially involves large numbers of players—that is, it can be mapped as an “n-person” prisoners’ dilemma. See Elinor Ostrom, *Governing the Commons* 2-3 (1990).

1. Overcoming PD Problems: Watching and Mimicking

Luckily, there are some ways around the dilemma or tragedy. One such escape route opens up when Sam and Louise can observe each other. Sam will start by restraining his own cows, but he will keep an eye on Louise. If Louise does not restrain her cows, too, he will let his just go ahead and munch. If Louise knows that Sam can detect her noncompliance and will untether his cows when she does not control her own, then she will have a good reason to cooperate. But Louise can watch Sam, too, so he will have the same reason to cooperate. Their cooperative arrangement is enforced by their mutual threat of retaliation—the ability of each to call off the deal and cancel the gains that both might have made.¹³

It has been noted in game-theory literature that there are some major roadblocks to this escape from the PD. One such roadblock is the fact that someone has to start by cooperating, presumably at a point when the players have no prior history of dealing and no reason to trust each other.¹⁴ Beyond that roadblock is another: the escape works only where there is a sequence of moves and where the iteration of the players' respective moves raises the threat of retaliation if one should cheat. But the iterated game has a problem in the so-called "endgame" stage.¹⁵ Unless Sam and Louise anticipate an infinite sequence of cooperative steps, there is going to be a last move in their little minuet. As they approach that point, they realize that there are no further opportunities for retaliation, so each has an incentive to cheat just before the last move. Unfortunately, this endgame incentive infects the second-to-last move, too, where each thinks, "Hmm, I will cheat before he or she does." Then the cheating infects the third-to-last move and so on, all the way back to the first move.¹⁶

With all these problems, one might suppose that cooperation would be rather rare. Even where cooperation could make all players better

¹³ See Robert Axelrod, *The Evolution of Cooperation* 19-21 (1984).

¹⁴ See Anthony de Jasay, *Social Contract, Free Ride* 45-46 (1989); see also Douglas G. Baird, *Self-Interest and Cooperation in Long-Term Contracts*, 19 *J. Legal Stud.* 583, 584 (1990) (arguing that "mutual suspicion" may prevent some trades and that contract law helps to allay such suspicions). The problem with contract-law assurances, of course, is that the establishment of law and government presents another large-scale variant of the PD problem. See Jesse Dukeminier & James E. Krier, *Property* 46-47 (2d ed. 1988); Carol M. Rose, "Enough, and As Good" of What?, 81 *Nw. U. L. Rev.* 417, 438-39 (1987).

¹⁵ See de Jasay, *supra* note 14, at 65 n.17 (describing endgame problem).

¹⁶ *Id.*

off, the tendency to act as self-interested utility-maximizers runs counter to the collective best interest and makes the players more likely to cheat and lose the advantages of cooperation. Prudence dictates that each player let others take the first step toward cooperation even though, if all are prudent, none will take that step.

2. *Attitudinal Solutions: A Taste for Cooperation*

If we shift gears and move to the real world, however, we realize that cooperation is not rare at all. In fact, we see an enormous amount of cooperative behavior in everyday life. Feminist psychologists such as Carol Gilligan point out that many people are willing to put the common good ahead of their own self-interest.¹⁷ Moreover, many of our legal institutions certainly notice and promote cooperative and altruistic behavior.¹⁸ But we should note that from the perspective of individual utility maximization, this kind of behavior is not rational.¹⁹ At the very least, the willingness to take that trusting, risky first move—the move that makes further cooperative gains possible—depends on one or both parties' behaving imprudently, acting on something like a "taste for cooperation" that is not explained by the pure logic of self-interest.²⁰

By "taste for cooperation" I mean one or another of those nonrational attitudinal factors that enable cooperation to begin. By using the word "taste," of course, I do not mean to suggest only mild preferences; I also include deeply felt emotions or convictions. For example, the taste might derive from an enjoyment of the process of working with others. Alternatively, the taste might stem from a personal identification with a team or other group that shares a common goal. Quite commonly, the taste might come from an altruistic enjoy-

¹⁷ See Carol Gilligan, *In a Different Voice* (1982) (discussing women's ethic of care); see also Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 *Yale J.L. & Human.* 37, 46 (1990) (observing that cooperative, helpful characters are common in historical and fictional narratives).

¹⁸ See Rose, *supra* note 17, at 47-48.

¹⁹ Cf. Robert H. Frank, *Passions Within Reason* 14-16 (1988) (arguing that tastes temper self-interest). See generally *id.* at 51-56 (discussing role of emotions in overcoming variety of problems requiring commitment).

²⁰ Cf. de Jasay, *supra* note 14, at 58-59 (arguing that rigorous, or "single-minded," PD games must exclude actions based on collective rationality or attentiveness to payoffs of others); Annette C. Baier, *What Do Women Want in a Moral Theory?*, 19 *Noûs* 53, 57 (1985) (arguing that issue of trust should be at center of moral theory).

ment of, or a sense of responsibility for, the well-being of other individuals. Any of these motivations might lead one to act in the furtherance of a common good or the good of another, even at some risk to one's purely personal self-interest.²¹

Noncooperative attitudes—the converse of the taste for cooperation—also may take several different forms. Most common, no doubt, is a merely “rational” indifference to others or to common interests, or a merely prudent unwillingness to risk personal loss in taking the first steps toward forming or maintaining associations.²² An intermediate form of noncooperation involves a limited range or scope for cooperation. For example, the noncooperator may be willing to cooperate only on a limited basis, or with some classes of persons but not with others.²³ The most extreme form of noncooperation is malice or hostility—a willingness to take actions that alienate or hurt others, such as punishment or cruelty. This type of noncooperator is the reverse altruist because he does indeed care about the well-being of others, albeit negatively.²⁴

In real life, we do find considerable taste for cooperation, though we also see the noncooperative attitudinal factors. Although the former facilitates utility-maximizing cooperation, the latter may hinder such cooperation, particularly at the outset, when a trusting move has to be made.²⁵ If we make the conventional supposition that rationality means indifference to others, however, the helpful attitudes are irrational (nonindifferent/helping), whereas the unhelpful ones may be either rational (indifferent) or irrational (nonindifferent/hostile).

²¹ See Jon Elster, *The Cement of Society* 44-49 (1989) (describing various process-oriented and outcome-oriented motivations for collective action). An overlapping feature may be simply a matter of scope or intensity—that is, supposing that many people have *some* cooperative attitudes, the taste would signify a relatively broad or deep attitude of sociality or responsibility for others.

²² This is the “*homo oeconomicus*” that I have elsewhere described as John Doe. See Rose, *supra* note 17, at 43-44.

²³ This version of noncooperation overlaps with what Gary Becker has named a “taste for discrimination,” defined as the willingness to forgo income in order “to be associated with some persons rather than others.” Gary S. Becker, *The Economics of Discrimination* 14-17 (2d ed. 1971). The income forgone is opportunities for wider scope of trade and other cooperative ventures.

²⁴ Cf. Elster, *supra* note 21, at 35-36 (arguing that envy and spite are negative altruisms).

²⁵ Note, however, that some willingness to retaliate may serve to protect cooperators against noncooperators. See *infra* text accompanying notes 47-49.

B. *The Zero-Sum Game*

All this discussion about cooperative moves, and their difficulties and solutions, brings me to a brief mention of the second game—the zero-sum game. This game is not about making gains through cooperation, but rather about divvying up a fixed sum. At the same time, however, this game does have a bearing on potentially positive-sum games, such as PD games, in which there are gains from acting in concert.

Suppose that our two parties, Sam and Louise, do agree in principle to cooperate on restraining their cows' use of the grazing field. Collectively, the two of them are better off by some amount, which I will call X . They now have a self-renewing grassy field that is worth X dollars more than it would have been had they rushed in to fatten up their cows and left a wasteland behind.

But how are Sam and Louise going to split that gain of X dollars? The point here is that even if Sam and Louise do see the advantage of a cooperative deal, they still have to decide how to split those X proceeds. Every part of X that Sam gets is at Louise's expense, and vice versa. They are faced, in short, with a zero-sum game inside the bigger positive-sum game; indeed, unless someone "gives" on the zero-sum game, they may be unable to solve the larger positive-sum game.

II. THE TWO GAMES APPLIED

How can these two games—the PD game and the zero-sum game—explain the relative property acquisitions of Sam and Louise? One way to think about this is to focus on the taste for cooperation. In the discussion that follows, I will suppose that the taste for cooperation is distributed unevenly between the genders and that women have this taste more strongly than men do. I will not try to prove that such a gender difference actually exists, though the idea might find support from a variety of quarters.²⁶ Moreover, my hypothetical assumption

²⁶ The idea is also stated—and vigorously debated—in feminist literature, where some argue that women are more concerned with relationships than men. 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).

There is also a variety of anecdotal materials to suggest that this may be the case. See, e.g., Lynda L. Moore, *Not as Far as You Think* 140-42 (1986) (study finding women adopted more

does not suggest that all women are cooperators and no men are. Even though I will continue to talk about Sam and Louise in a generic sense, the assumption can coexist with lots of wonderfully cooperative Sams and stubbornly uncooperative Louises. The only assumption is that women, taken as a group, are more likely to make cooperative moves than men, taken as a group.

All the same, even this generic mode is quite a strong assumption, and at certain points I will relax it considerably. At those points, I will ask instead how things would look if women were merely *thought* to have a more highly developed taste for cooperation. Because it makes the whole picture easier to understand, however, my plan is to begin with the stronger assumption and to explore the ramifications of a hypothetical gender difference in the taste for cooperation.

A. Losing Ground Relatively

1. Sam and Louise Strike a Deal

If we suppose that Louise has a greater taste for cooperation than Sam, we can predict that it will be easier for Sam and Louise to arrive at a cooperative use of the grazing field than it would have been for, say, Sam and Tom. This means that Louise's taste for cooperation aids in the creation of the agreement that produces collective gains. We also can predict that Louise will be better off than she was before she and Sam decided to cooperate. But, alas, we also can predict that

cooperative negotiating tactics and men were more likely to compete with and deceive other bargainers); Charles F. Mason, Owen R. Phillips & Douglas B. Redington, *The Role of Gender in a Non-Cooperative Game*, 15 *J. Econ. Behav. & Organization* 215, 217 (1991) (reporting the finding that female bargaining pairs began with greater cooperation, though gender differences disappeared over time); Bill Carter, *Children's TV, Where Boys Are King*, *N.Y. Times*, May 1, 1991, at A1 (arguing that, because girls watch everything, but boys watch only males, male-oriented shows predominate); Taniar Lewin, *Aging Parents: Women's Burden Grows*, *N.Y. Times*, Nov. 14, 1989, at A1 (reporting that daughters rather than sons normally take care of aging parents); Marcia Saft, *Risks and Benefits in Having Siblings*, *N.Y. Times*, May 27, 1990, § 12 (Conn. section), at 3 (reporting that sisters establish and maintain stronger sibling ties). Such studies suggest that some current concerns in bargaining theory, particularly the way in which bargaining tactics dissipate gains from trade, see, e.g., Peter C. Cramton, *Bargaining with Incomplete Information: An Infinite-Horizon Model with Two-Sided Uncertainty*, 51 *Rev. Econ. Stud.* 579 (1984), may assume a "male" model of bargaining. See Baier, *supra* note 20, at 54 (suggesting that "preoccupation with . . . [the] prisoners' dilemma is a big boys' game, and a pretty silly one too," to which few women have been attracted).

she will not be *as much* better off as Sam. She will wind up with the smaller share of the proceeds.

Why is this so?

At the outset, Louise has to offer Sam more to induce him to cooperate. He may not even notice so readily that cooperative arrangements are beneficial. In any event, he puts his own interests before a cooperative deal and certainly will not take any risky first steps to get things started. Because a cooperative deal does not rank as high in Sam's priorities as in Louise's, he can insist that he take a disproportionate amount of the proceeds, so that, in the now-familiar example, he gets to run more cows than Louise.

Louise, of course, is just the reverse. She is quick to see the mutual benefits of cooperation, she likes such cooperative relationships, and she is willing to take responsibility for getting such arrangements off the ground. All those traits mean, however, that she may be willing to accept a deal even though she pays a higher price for it. Sam thus has an advantage in bargaining with Louise, just as he would with anyone who is more anxious than he for the deal, or who has a "higher discount rate" about it.²⁷ When Sam knows that Louise is the more eager player, he can offer her less favorable terms right from the start. In other words, when the two of them successfully play the larger positive-sum game, Sam has an advantage in the smaller zero-sum game of splitting the proceeds.

This asymmetry continues through the course of the deal. Indeed, it may not even begin until later, when the pattern of dealings is under way. At those later points when, for example, some contribution has to be made to the upkeep of the field, Sam may have an advantage as well, and he may be able to get Louise to pay for the greater share of the field's routine maintenance. This is because he can make a more credible threat than Louise can to scotch the whole arrangement.²⁸ In general, this makes him the better enforcer of the ongoing arrangement. He can demand that she stick to the letter of the deal, whereas she may put up with more shirking on his part and wind up doing part of what she initially thought would be his chores. All of this happens because she is more committed to maintaining deals than he

²⁷ See, e.g., Cramton, *supra* note 26, at 579-80, 590.

²⁸ For a discussion of the advantage of having a reputation for bullying and readiness to retaliate in an analogous context, see Axelrod, *supra* note 13, at 152-53.

is, or because she feels a greater responsibility to him than he does to her.

Notice that Louise is not losing absolutely here; she, too, is getting some portion of the X amount that they are jointly gaining from their arrangement. She is losing ground only relative to Sam, because she contributes more to the deal. Sam, on the other hand, can contribute less to the deal and walk away with the larger portion of the gains from dealing.

Now let us leave the arena of cow-field negotiation and examine how the world of entitlements reflects the Sam-Louise negotiating pattern.

2. *The Nonmarket "Economy" of Domestic Relations*

We may assume that, insofar as material goods are concerned, Sam and Louise are better off married (or at least living together) than they would be if they each maintained a separate residence. The theory here is that two may live more cheaply than one, or, more accurately, than two "ones," so that there are gains to be made from living in a common household.

But from Sam and Louise's bargaining pattern, we can predict that Louise is going to have to do more to keep the household together. In particular, she (like wives generally) will be stuck doing the bulk of the housework.²⁹ She is the one with the taste for commonality, whereas he can bide his time until he gets a favorable offer on the household work front. Moreover, he can make a more credible threat of withdrawing from the household unless she cooks the meals and keeps his shirts ironed. We may think he is a lout for doing so—indeed, he probably is a lout—but that is not the point. The point is that, because her desire or sense of responsibility for cooperative

²⁹ See Paula England & George Farkas, Households, Employment, and Gender 94-99 (1986) (women continue to do bulk of housework, even when employed outside the home); see also John P. Robinson, Who's Doing the Housework?, *Am. Demographics*, Dec. 1988, at 24, 26 (reporting that, despite an increase in the percentage of housework done by men from 1965 to 1985, women still do four-fifths of traditionally female-dominated work, such as cooking, dishes, cleaning, and laundry, and slightly more than two-thirds of male-shared work, such as outdoor work, repairs, gardening, and bills). This pattern persists even where the wife is employed outside the home. See Beth A. Shelton, *The Distribution of Household Tasks: Does Wife's Employment Status Make a Difference?*, 11 *J. Fam. Issues* 115, 130-31 (1990).

arrangements is stronger than his, he can cut a deal in which he gets the lion's share of their joint gains.³⁰

One might well think that Louise would rather share the household with someone other than Sam, or find a more cooperative Sam; no doubt many Louises do feel this way. Can Louise do anything about it—say, find a different domestic partner or organize her domestic affairs differently? Well, yes, but it is tricky to do so within conventional notions about sexuality and family.³¹ Quite aside from any difficulties associated with single-sex relationships, monogamous marriage itself has a bearing on Louise's problem. Whatever the attractions of monogamy (and they are no doubt many), the institution does mean that each monogamous domestic unit places one Louise with one Sam. If enough such units are formed, and if the taste for cooperation is indeed distributed unevenly between the genders, then at least some cooperative Louises will be stuck with loutish Sams. Indeed, even though they phrased it somewhat differently, some nineteenth-century Mormons thought that the Sams' greater propensity for loutishness was a pretty good reason for plural marriage, where the more cooperative Sams got lots of wives and the less cooperative ones presumably got none.³²

³⁰ For a similar approach to the household economy, see England & Farkas, *supra* note 29, at 54 (describing negotiations within marriage as splitting surplus of bilateral monopoly). For the wider ramifications of household bargaining inequalities, see Amartya K. Sen, *Gender and Cooperative Conflicts*, in *Persistent Inequalities* 123 (Irene Tinker ed., 1990) [hereinafter Sen, *Cooperative Conflicts*] (describing women's lesser share of gains from cooperation). A somewhat more popular version of some of Sen's themes appears in Amartya K. Sen, *More Than 100 Million Women Are Missing*, N.Y. Rev. Books, Dec. 20, 1990, at 61 [hereinafter Sen, *100 Million Women*].

³¹ See, e.g., Martha L. Fineman, *Book Review*, 101 *Ethics* 647, 648 (1991) (pointing out that the discussion of "family" in Susan Moller Okin, *Justice, Gender, and the Family* (1989), ignores all but traditional heterosexual families); Will Kymlicka, *Rethinking the Family*, 20 *Phil. & Pub. Aff.* 77, 83-85 (1991) (reviewing Susan M. Okin, *Justice, Gender, and the Family* (1989)).

³² See Julie Dunfey, "Living the Principle" of Plural Marriage: Mormon Women, Utopia, and Female Sexuality in the Nineteenth Century, 10 *Feminist Stud.* 523, 529 (1984). Modern feminism may suggest a sympathetic reconsideration of "plural marriages." See Joan Iversen, *Feminist Implications of Mormon Polygyny*, 10 *Feminist Stud.* 505, 513 (1984); cf. Jessie L. Embry, *Mormon Polygamous Families 94-99* (1987) (greater variety of employment, division of labor among polygamous wives). For some of the attractions of polygamy in a modern setting, see Elizabeth Joseph, *My Husband's Nine Wives*, N.Y. Times, May 23, 1991, at A31 (describing plural marriage as ideal for working mothers like herself, a lawyer). For more on the Joseph family and other members of modern plural marriages, see Dirk Johnson,

Short of divorce, then—that is, giving up on a common household—there is little Louise can do to extricate herself from this regrettable state of affairs, at least within traditional notions of domestic relations. Besides, divorce negotiations themselves may only replicate the bargaining disadvantage that Louise has in marriage.³³

3. *The Employment World*

Note that the employment agreement is another positive-sum game: the employer values labor more than the wages he or she pays for it, whereas the employee puts a higher value on wage dollars than on the leisure he or she would enjoy otherwise. Consequently, both employer and employee benefit from the exchange of dollars for labor.

The next question is, how do they split the gains they jointly make from the positive-sum game? In general, the employer might offer Sam a greater portion of those gains. Sam has less taste for cooperation than Louise does, and more tolerance for confrontation, so he can make a more credible threat that he will walk away from a potential job or quit an actual one.

On the other hand, the employer might offer Louise a relatively smaller share of the collective gains from a labor-wage trade. The employer can rely on her taste for cooperation—her willingness to give up something to be sure that the cooperative relationship will take place or (perhaps a more likely scenario) to be sure that she can take care of others for whom she feels responsible.³⁴ If Louise is skittish, the employer might offer her the same wage he offers Sam at the outset, in order to bring her into a relationship, but then give her relatively few promotions and pay raises over time. He can rely on

Polygamists Emerge From Secrecy, Seeking Not Just Peace but Respect, *N.Y. Times*, Apr. 9, 1991, at A22.

³³ See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *Yale L.J.* 1545, 1603 n.272 (1991) (noting women's greater vulnerability as a cooperative partner in divorce mediation).

³⁴ See Mason et al., *supra* note 26, at 216 (noting that gender differences in bargaining could affect wage differences). For the moment I leave to one side the issue of Louise's sense of responsibility for dependents, because I will take it up later, see *infra* Part III.B., but her position vis-à-vis the employer clearly is weakened if the latter knows that she feels particularly responsible for supporting such third parties. Louise is not the only one, of course, given the traditional breadwinner role of some Sams.

the attachments she makes during the course of her employment to weaken her bargaining power over these issues.³⁵

One would think that the rational employer would hire more Louises and fewer Sams because Louises cost less. Furthermore, one might think that if a sufficient number of employers did this, the increased bidding for Louises would raise the price for Louise's labor until it equaled the price of Sam's.³⁶ Indeed, sometimes employers do hire a lot of Louises when there are a lot of Louises around, as, for example, in the famous milltown of Lowell, Massachusetts, where great numbers of young women were hired in the 1820s and 1830s for quite low wages.³⁷ Similarly, immigrant laborers sometimes have been hired in large numbers for low wages, raising the point that a taste for cooperation resembles a dearth of alternatives.³⁸ I will return to that subject, but for now note only that both conditions—the taste for cooperation and the lack of alternatives—make the potential employee desire the job more urgently, which means that the employer can do relatively well in wage negotiations with such

³⁵ See Gilligan, *supra* note 17, at 164-65. An alternative "on the job" explanation is that women learn to lower their expectations of advancement when they experience prevailing patterns of sex segregation in the workplace. 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.* 1749, 1827-32 (1990).

³⁶ See England & Farkas, *supra* note 29, at 171-72 (describing neoclassical arguments that discrimination is overcome by market forces).

³⁷ See 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, 106-08 (Arthur L. Eno, Jr. ed., 1976). Employers may have been able to hire these young women more cheaply because of their taste for cooperation, too. The women apparently enjoyed the chance to be in the company of other employees and formed a number of educational and social groups. *Id.* at 113.

³⁸ For examples of low-wage immigrant labor in America around the turn of the century, see, e.g., Ronald Takaki, *Strangers from a Different Shore* 182-85 (1989) (Japanese farm, construction, factory laborers); *id.* at 274-75 (Korean farm workers); *id.* at 302 (East Indians paid even less than Japanese laborers). On the relationship of the availability of alternatives to bargaining power, see England & Farkas, *supra* note 29, at 56 (stating that bargaining power within relationship increases with alternatives outside relationship); cf. Joan C. Tronto, *Beyond Gender Difference to a Theory of Care*, 12 *Signs* 644, 649-52 (1987) (criticizing Carol Gilligan's association of "ethic of care" with women, arguing that this ethic may instead be class-based, associated with minority or otherwise marginal status). In discussing the wage gap between male and female workers, the United States Department of Labor has suggested that women traditionally tend to be "crowded" in fields like nursing and teaching, which are dominated by single employers with large numbers of employees, and which may have patterns of monopsony in which wages can be held down. See Women's Bureau, U.S. Dep't of Labor, *Facts on Working Women*, No. 90-3, at 2 (1990).

persons. But, by the same token, one would expect these laborers both to crowd out other laborers and eventually to rise in cost as employers bid for their services. Why do employers hire so many Sams, then, at such relatively high costs?

One reason is that the employer may need to hire some workers with characteristics conventionally associated with Sam instead of Louise—perhaps physical strength or the image of toughness and willingness to punish. If so, the employer may think he needs to hire Sams, even though he knows the Sams will demand more of the gains from trade. Other employee skills may be worth just as much to the employer, but he does not have to pay as much for them because he can buy them from Louise, who is not so demanding.³⁹

In any event, if the employer does try to hire more Louises, and if their asking price does increase as a result, he may then start to bid for the relatively higher priced Sams, too. Sams who get hired are not without *some* taste for cooperation, and they may be able to hold together and credibly threaten to quit if they have to compete for jobs against Louises. Some of the Sams may be of the more or less hostile variety, and they may happily take the lead in punishing interloping Louises, often through ridicule and ostracism.⁴⁰ One might expect similar retaliatory measures against any other “undesirables” whose dire needs lead them to accept low wages, or even against the more cooperative Sams who agree to work with the Louises and the others. Insofar as the employer needs Sams, a pattern of retaliation among the Sams may encourage the employer to segregate the Sams and Louises into the high-paying and low-paying jobs, respectively.⁴¹ Why should an employer pay Louise as much as he pays Sam to operate a forklift, when she can be hired as a secretary so much more

³⁹ Cf. Suzanne M. Bianchi & Daphne Spain, *American Women in Transition* 198 (1986) (concluding from analysis of census data that some “institutional factors, including discrimination,” rather than productivity factors, may explain gap between male and female wages).

⁴⁰ For retaliatory “cooperation,” see Jon Elster, *Norms of Revenge*, 100 *Ethics* 862 (1990). In the employment context, various forms of 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* 18-23 (1979) (arguing that the “sexualization” of female workers is a basic component of many jobs they typically hold). Indeed, conformance to a norm of harassment may be sufficiently widespread as to seem “reasonable.” See Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 *Yale L.J.* 1177, 1205-10 (1990).

⁴¹ For a discussion of sex segregation generally, see Jacobs, *supra* note 40.

cheaply, and with so many fewer hassles? Note that the employer cannot hire Sam as a secretary at all, at least not at the wages he is paying secretaries, and he cannot hire Louise as a forklift operator either, because the Sams may either hound her out or quit en masse.⁴²

This pattern of segregation does not always happen, but it does happen rather often.⁴³ Note that the pattern touches on issues of "comparable worth"—the attempt to classify and pay sex-segregated jobs according to skill levels rather than at the levels arrived at through bargaining. This is, of course, a large and difficult area with many complicated subissues, not the least of which is whether comparable worth payments might lessen actual job opportunities for women.⁴⁴ There are real questions of "comparability," too. For example, insofar as Sam is perceived as "tough" and Louise is not, an employer may think that personnel struggles may be avoided if he promotes Sam instead of Louise to the foreman's job, particularly if there are a lot of working-stiff Sams who would not cooperate with a Louise-foreman, or who would challenge any foreman perceived to be a softie. Nevertheless, one way to approach the subject might be to consider whether the comparable worth problem is attributable, at least in part, to Louise's greater taste for cooperation. It is at least

⁴² See Schultz, *supra* note 35, at 1832-39; see also, e.g., Jacobs, *supra* note 40, at 178-81 (maintaining job classification as higher paid male preserve in job is part of "implicit contract" between employer and male employees); Katherine Bishop, *Scant Success in California Efforts to Put Women in Construction Jobs*, N.Y. Times, Feb. 15, 1991, at D15 (reporting that job obstacles, such as harassment of women in certain trades, persists despite ameliorative efforts); cf. Irene Padavic & Barbara F. Reskin, *Men's Behavior and Women's Interest in Blue-Collar Jobs*, 37 Soc. Probs. 613, 622 (1990) (noting that widespread harassment of women in blue-collar jobs does not appear to lessen women's stated interest in such jobs).

⁴³ See Jacobs, *supra* note 40. The pattern of segregation may affect established employment situations more than new ones, perhaps because in new industries employers' own urgent need for labor overcomes other segregative tendencies. See Fierman, *supra* note 3, at 58 (stating that high-tech and start-up ventures have no established "old boy network" and are preoccupied with survival). This would suggest that women fall behind later because, over time, male employees may develop segregative and retaliatory norms undermining women. For some provocative suggestions in the case of third-world women employees in multinational export firms, see Linda Y.C. Lim, *Women's Work in Export Factories: The Politics of a Cause*, in *Persistent Inequalities* 101, 116-18 (Irene Tinker ed., 1990) (suggesting that conservative elements may join with Marxist-feminists to undermine new employment equality for third-world women).

⁴⁴ For an exhaustive account of the 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 40, at 190 (enumerating pros and cons of comparable worth from perspective of job opportunities).

possible that this taste, rather than some lesser value of her employment to the employer, could result in her lower levels of pay and slower rates of promotion.⁴⁵

Could Louise look for another employer, another Louise, for example? As with domestic arrangements, again the answer is a qualified "yes." Any given Louise will have experiences that typically lower her earning power relative to Sam, however, and this could have cumulative ill effects on her ability to raise capital.⁴⁶ If that is the case, there will not be very many Louise-employers to offer jobs to Louise-employees.

4. *Tastes and Deals in the Bigger Picture*

It is important to notice that Louise's taste for cooperation is not a *bad* taste, from the point of view of the world at large. In fact, we are much better off if at least some people have such a taste; otherwise, it would be much harder to start and to sustain cooperative arrangements.⁴⁷ Indeed, the taste for cooperation is not a bad taste even for those individuals who have it, so long as they are dealing with other individuals who share the taste.⁴⁸ Nor, finally, is a taste for cooperation entirely a bad thing for those who have it even if they have to deal with others who do not share it equally. Even in this circumstance the cooperators do get something out of the deals they make.

⁴⁵ See Mason et al., *supra* note 26, at 216 (noting possible relationship between comparable worth issues and gender differences in bargaining).

⁴⁶ See *infra* text accompanying notes 57-61.

⁴⁷ See *supra* text accompanying note 25.

⁴⁸ For example, according to the somewhat anxious stereotypes of the rest of the industrialized world, the Japanese seem to have a marked taste for cooperation and for putting the interests of the collectivity first—a taste that appears to have resulted in an enormous increase in their collective wealth. For the role of cooperation in Japanese management, see Jon P. Alston, *The American Samurai: Blending American and Japanese Managerial Practices* 31-47 (1986); for a more jaded view, from the perspective of American baseball players in Japan, see Robert Whiting, *You Gotta Have Wa* 78-110 (1989) (clashes of American players' individualism with ethic of *wa* (harmony)). Apparently, however, Japanese men are cooperative—that is, act like Louises—toward women only reluctantly, if indeed at all. See Masayoshi Kanabayashi, *More Women in Japan Get Jobs, Shaking Up Traditional Marriages*, *Wall St. J.*, May 14, 1985, at 1; Ukban Lehner & Kathryn Graven, *Japanese Women Rise in Their Workplaces, Challenging Tradition*, *Wall St. J.*, Sept. 6, 1989, at 1; Yumiko Ono, *Women's Movement in Corporate Japan Isn't Moving Very Fast*, *Wall St. J.*, June 6, 1991, at A1; see also Mary Brinton, *Women and the Economic Miracle: Gender and Work in Postwar Japan* (forthcoming) (observing that discrimination against women in work force continues).

They just do not get as much as their bargaining partners, who are less eager to work collectively.

Louise's situation suggests a very important point: successful cooperative ventures, taken over a broad mix of partners, require both cooperative and noncooperative traits or tastes. The success of the "tit-for-tat" strategy has become almost a cliché in the game-theory literature, and this strategy entails *both* a willingness to cooperate, in order to get things under way, *and* a willingness to exit or even retaliate to protect against noncooperation. The characteristic flaw of those with a taste for cooperating, but not for retaliating, may be vulnerability to exploitation by noncooperators; this may explain some of Louise's travails in the examples above.⁴⁹ On the other hand, the noncooperators have a characteristic flaw, too, and, in a way, it is a good deal more serious. The noncooperator's flaw is the inability to get things going in the first place, or perhaps even to imagine how a cooperative solution might occur.⁵⁰ This is not a trivial matter: a systematic failure of this sort could dramatically constrict the social gains available through cooperative ventures.⁵¹

I will return to the importance of making cooperation safe for cooperators. Before doing so, we should examine why, if we weaken the assumption that women actually have a greater taste for cooperation, we may find more or less the same relationship between Sam and Louise. We need to assume instead a certain set of norms or cultural beliefs about men and women.

⁴⁹ Robert Axelrod 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 is a losing strategy against TESTER (a model that defaults unless punished and that can exploit more forgiving strategies). Axelrod, *supra* note 13, at 39, 44-45.

⁵⁰ See de Jasay, *supra* note 14, at 65 & n.17 (stating that prudential policy of rational self-interest is not to contribute, because it always pays for other party to "take the money and run," particularly given the endgame problem). Jon Elster raises the interesting question of how a "rational" player might even contemplate being in a situation where another party moves cooperatively. See Elster, *supra* note 21, at 5.

⁵¹ For a famous study of a kind of family-based Hobbesianism and its effects, see Edward C. Banfield, *The Moral Basis of a Backward Society* 85-101, 158-60 (1958) (concluding that the inability of "amoral familists" to trust or cooperate outside immediate family results in political and economic ill effects).

B. Losing Ground Relatively, Reconsidered: The Culture Version

It may not matter very much that any difference actually exists between Sam's and Louise's respective tastes for cooperation. What may matter is that people *think* such a difference exists. An earlier passage, for example, described the employer who capitalizes on Louise's taste for cooperation by offering her a low percentage of their mutual gains from the employment relationship.⁵² Attentive readers may have noticed, however, that the employer believed in advance that she was likely to take such an offer, perhaps thinking that she enjoyed or felt responsible for cooperating.

Suppose, however, that she has no such taste and refuses to take such a low cut. Given a sufficiently widespread cultural presumption that women have a greater taste for cooperation than men, the employer will continue to make low bids for women for some time before he changes his mind. Moreover, he may never change his mind at all because at least some Louises will take his low offer, and this will make him think he was right about Louises all along.⁵³

Indeed, in a sense the employer may be right, because Louise may be unable to challenge this set of beliefs. If she thinks that she will only face another low bid from Employer *B*, she may well just accept Employer *A*'s offer. The Louise who insists on something better may well not get a job at all, given a widespread set of beliefs about what her wage demands should be. In other words, it costs her something to try to break the stereotype that affects all the Louises in the labor market. Why, then, should she be the first to stick her neck out to break the pattern, particularly when the effort looks hopeless?⁵⁴ This set of beliefs, in short, presents Louise with a collective action problem; her failure to solve that problem only reinforces the belief system.

⁵² See *supra* text accompanying notes 34-35.

⁵³ Cf. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 *Harv. L. Rev.* 817, 827-36 (1991) (reporting auto sellers' disparate price offers and bargaining tactics based on race or sex of potential purchaser); *id.* at 850-51 (noting that sellers' bargaining assumptions may be a self-fulfilling prediction).

⁵⁴ See Robert Sugden, *Contractarianism and Norms*, 100 *Ethics* 768, 779-82 (1990) (explaining persistence of conventions of inequality, using gender example: in convention of unequal payoffs, it is rational for both "winner" and "loser" to follow convention; even though "losers" might gain higher benefits if they demand equal payoff, free-rider considerations impede their making demand).

The employer's offer to Sam, on the other hand, will be higher, on the assumption that Sam will demand a higher percentage of the gains from the employment relationship. This assumption can be quite false for any given Sam: a particular Sam might well have accepted a job at lower pay. But, given the employer's beliefs about Sam, and given that dickering over wages costs time and money, the employer will not think it worth the effort to challenge or "test" Sam with a low offer.⁵⁵ Hence, here, too, the actions the employer takes, on the basis of even weakly held cultural beliefs, may reinforce those very beliefs.

A similar tale can be told of physical threats to women. Suppose that people believe women are weaker than men. A particular woman in fact may be very strong, but she will have to prove it constantly if she goes to places where others think women are vulnerable. A man in the same situations actually may be weaker than she, but he will not be challenged, or not challenged so constantly, because it is assumed that he can retaliate, even if he cannot. Hence, a man is more likely to feel that he can roam where he wishes, whenever he chooses. A woman, on the other hand—even a physically strong woman—may grow weary of the constant challenges and simply stay at home.⁵⁶ By doing so, of course, she reinforces the very stereotype that disadvantages her.

One also can think of domestic examples of this belief-reinforcing phenomenon. Husband Sam may assume that wife Louise will cook and do the dishes, too, but when he is out with his hunting buddies he will split the campground chores. Louise faces the prospect of a scene if she refuses, whereas Sam's hunting buddies do not even encounter a request. Sam simply assumes that they will "play the game" only on even terms. As between Louise, who has to face a scene, and Sam's friends, who face no such scene, Louise is doubtless more likely to give in and do a disproportionate amount of the housekeeping. Here, too, her acquiescence only reinforces Sam's belief that he can shirk with Louise in a way that he cannot with his hunting pals.

⁵⁵ See Ayres, *supra* note 53, at 855-56 & nn.113-14 (noting that even small differences in consumer class characteristics may elicit widespread "testing" behavior in bargaining negotiations and likening testing to search for "suckers").

⁵⁶ See Sugden, *supra* note 54, at 781-82 (pointing out free-rider problem in challenging convention).

C. Cumulative Effects

The effect of all this is that Louise falls relatively behind Sam, whether she actually has a taste for cooperation or is just thought to have it. Note the snowball effect of this pattern, too, because this is where things can get really serious.

Let us now make a quick move to the world of finance. Louise does get something from her various cooperative relationships with Sam, but not as much as Sam. This means that, by comparison to Sam, Louise acquires relatively few assets, and this makes her a riskier investment prospect. As a consequence, she has to pay higher interest or otherwise bear relatively unfavorable credit terms.⁵⁷ Not only might a bank look to Louise's relatively low assets in setting these terms, but it also might assume that she will be insufficiently quick to retaliate against the uncooperative Sams of the business world and hence may risk business losses that Sam would not. From the bank's point of view, she is a riskier proposition than Sam, so she is going to have to pay more to obtain capital. This means, of course, that it is more difficult for Louise to be financially independent.

Business loans, however, are not the only investments for which Sam and Louise may compete. Though the phrase sometimes may seem odd, it is now fairly widely recognized that one can see certain kinds of expenditures as investments in "human capital."⁵⁸ Education and training are the most notable items under this rubric, and nutrition and health-related expenditures might be candidates as well. Quite aside from the pleasures that such investments may bring, to both giver and receiver, they also can be cast in quite hard-nosed business terms: they are expected to enhance future income by some amount greater than the investment expenditures themselves.

As with conventional business investments, Louise also may fall behind with respect to these human capital investments.⁵⁹ Potential investors (such as parents) may be reluctant to pay for her education,

⁵⁷ See Susan S. Blakely, *Credit Opportunity for Women: The ECOA and its Effects*, 1981 *Wis. L. Rev.* 655, 655-57 (describing discrimination in the extension of credit against women prior to enactment of federal antidiscrimination legislation).

⁵⁸ See Seidenfeld, *supra* note 44, at 326-29 and literature cited therein; for the oddity of the phrase, see Bianchi & Spain, *supra* note 39, at 189.

⁵⁹ See Gary S. Becker, *A Treatise on the Family* 180, 192-95 (enlarged ed. 1991) (observing that some families may invest more in sons if they think this will maximize the next generation's income).

for example, because they think that she is going to get suckered too often in dealing with the Sams and that an investment in her will just not pay off. The investors will think it better to put their money on Sam's education; they think he will protect himself (and, by extension, their investment in him) by ready retaliation. In fact, the general belief in Sam's readiness to retaliate means that he may never even be faced with that unpleasant prospect. By contrast, Louise will be challenged at every step, and she is bound to slip sometimes. At every turn, it seems that the better bet is to invest in Sam—in his business, in his education, in his health and nutrition, too,⁶⁰ and in whatever other projects for which he needs capital, whether financial or "human."

In these investment decisions, Louise's second-fiddle status starts to hurt her exponentially. This is where her taste for cooperation—or the mere belief in her cooperative taste—really begins to limit her possibilities.⁶¹ And this is where we might begin to suspect that her apparent taste for cooperation really derives from her relative lack of alternatives. Investment could have made her more independent, but she is competing for scarce investment resources against the Sams, who look like a better bet. Hence Louise is looking more and more stuck: her willingness to take the short end of the stick—or, more accurately, the belief in her willingness to do so—ultimately puts up a barrier to her independence and further limits her alternatives. The belief that she will stand back and make sacrifices for others finally may mean that she has little choice but to do so, whatever her real taste may be.

Now, this is a rather bleak place to shift to a new story, but things are going to get bleaker, at least for a time.

⁶⁰ For the relatively low investment in women's nutrition, particularly in less developed countries, see Sen, *supra* note 6, at 346-60; Hanna Papanek, To Each Less than She Needs, from Each More than She Can Do: Allocations, Entitlements, and Value, *in* *Persistent Inequalities* 162, 165 (Irene Tinker ed., 1990); Sen, *Cooperative Conflicts*, *supra* note 30, at 123-25. On education, particularly in developing countries, see Sen, *supra* note 6, at 383-84. In the United States, however, investment in men's and women's education is more equal. See Jacobs, *supra* note 40, at 41-43 (statistics lead author to discount educational differences as explanation of employment-related disparities).

⁶¹ See Jacobs, *supra* note 40, at 176-77 (discussing feedback effects of discrimination, especially in investment decisions).

III. LOSING GROUND ABSOLUTELY

The problem of falling behind *absolutely*—that is, not just a tale of Louise getting fewer of the gains from trade than Sam, but rather of losing the assets she had before the “game” started—initially made me think that game theory might have some application in the analysis of Louise’s cooperative moves. In particular, the problem that set me thinking was that of battered women, and of their battered or murdered children, whose plight appears all too often in horrifying stories of women who appear to have bargained away all assets, literal and figurative.⁶² That such ghastly scenarios could happen all of a sudden hardly seemed plausible. Rather, each seemed much more likely to have been played out in a kind of dreadful sequence, where the woman adopted some losing strategy and each move left her worse off than she had been before.

Do women get into such scenarios in disproportionate numbers? And if they do, can one analyze these scenarios on the assumption of an unevenly distributed taste for cooperation? I think one can, but once again, there is a version with a strong assumption, and a version with a weaker assumption. The strong version postulates that women do indeed have a greater taste for cooperation than men. The weaker version is cultural—that women are *thought* to have such a taste—but though in a sense “weaker,” this version is, if anything, even more devastating to Louise’s prospects and aspirations.

A. *Disinvesting in Assets, Literal and Figurative*

Let us begin by picking up the subject we just left, namely, investment. With conventional assets, if you do not continue to invest in a given asset, you may find it losing ground compared to the assets of others—for instance, your manufacturing plant may decline, relatively speaking, if owners of other plants are plowing more funds back into retooling. But there is more to the story than that: whether your asset is a farm or a factory, you may need to make continuing investments just to keep the asset in good working condition. If you never reinvest even in maintenance, your farm or factory eventually will become less productive than it once was, and you are simply treating it as a wasting asset. This is a sensible decision, of course, when repair

⁶² For a particularly dramatic instance, see William Glaberson, *Why Hedda Nussbaum Fascinates: Most Can Identify*, N.Y. Times, Dec. 9, 1988, at B1.

costs are too high relative to expected future gains. Sensible or not, if you decide to consume your assets by failing to keep them in good repair, you may have a higher initial income from them, but the cost will be paid later: over time, your farm or factory will decline, relative both to other farms or factories and to what your own farm or factory used to earn. This is one result from having a high “discount rate”—you consume lots now, but you have less to work with later.

One can say much the same about “human capital.” Suppose your only assets are your body and mind, and their ability to labor. Even here you need to “invest” over a very short run, for example, in food, so that you can work later in the day. Over a longer period, you need to invest in your health so that you can continue to work, and in your education and training so that you can keep up with changing needs for labor. If you do not make these investments—if your discount rate is too high, and you spend too much on other things right now—you are effectively disinvesting, albeit gradually. You are treating your abilities as wasting assets, and your greater consumption today comes at the cost of lesser wealth tomorrow.

Now, how does a taste for cooperation relate to this sort of disinvestment? To start with something already discussed, we know that *noncooperation* can bring about disinvestment, especially in a jointly held asset. This disinvestment, of course, is what the “tragedy of the commons” is all about. The “tragedy” involves assets that are available to a number of persons who need to cooperate by investing positively (e.g., by buying fertilizer) or by restraining practices that disinvest through overuse (e.g., overgrazing). If the partners do not cooperate in investing or restraining disinvestment, the common asset effectively wastes away.

In the case of the tragedy, lack of cooperation wastes a commonly held asset. In some cases, *too much* cooperation—as in the adage about “too many cooks”—also may waste common goods.⁶³ But usually the disinvestment that comes from too much cooperation has a different structure. Louise’s problem is the disinvestment that comes from asymmetrical cooperation; here, the disinvestment is likely to be in the assets of only *one* of the partners, namely, hers. If Louise coop-

⁶³ For examples of cases where overcooperation wastes public goods, see Elster, *supra* note 21, at 189-91.

erates too much, she might get into a pattern of decisions whereby, step by step, she loses the assets with which she started.⁶⁴

B. Losing Ground Absolutely: The Strong Version

One major reason why our friend Louise may have such a seemingly self-destructive inclination is that her cooperative tastes create “hostages”—persons or things that Sam can use as leverage in bargaining with Louise because she values them more than he does. These hostages put her at risk. One type of hostage is a relationship itself, which may matter more to Louise than it does to Sam, perhaps because Louise is one of those “women who love too much” and becomes “overinvested” (as we sometimes say) in sticking to some nogoodnik. Another reason why Louise might care more about her relationship with Sam is that, trusting soul that she is, she has given up more for the relationship at the outset than Sam has, and thus she has more to lose from its collapse.⁶⁵ For Louise, this means that something that matters very much to her is controlled by another.

Then, too, the hostages in question may be children, or other people that Louise worries about—elderly parents or other relatives, or an ailing friend. Louise is disproportionately burdened by such hostages, of course, if she does have a greater taste for commonality and its attendant responsibilities. Because she cares about other persons, or at least feels responsible for them, she cannot make a threat as credible as Sam’s that she will abandon existing relationships.⁶⁶ Con-

⁶⁴ She may lose these assets to Sam, in which case there may be no net loss because it is a zero-sum game. On the other hand, (a) her assets may be worth less to Sam than they were to her; and (b) the example of her losses may discourage other Louises from cooperating, in which case there may be less wealth-maximizing cooperation.

⁶⁵ See Lloyd Cohen, *Marriage, Divorce, and Quasi Rents*; or, “I Gave Him the Best Years of My Life,” 16 *J. Legal Stud.* 267, 287-89 (1987) (analogizing marriage to a contractual relationship in which one party, the wife, performs first, creating “quasi rents” that, like hostages, may be exploited by the other party); see also June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 *Vand. L. Rev.* 1463, 1491-94 (1990) (exploring restitution as a remedy to compensate divorced women who sacrificed career opportunities for their families during the marriage); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497, 1537 (1983) (pointing out that easy divorce may create greater risk to one who has sacrificed more for a relationship).

⁶⁶ Cf. England & Farkas, *supra* note 29, at 57-58 (stating that women’s emotional attachment to children weakens their bargaining position); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 *Tul. L. Rev.* 953, 1005-06 (1991) (describing economic disadvantage to women of greater desire for children).

versely, she has to believe the feckless Sam when he says he will not take care of Mom or the kids, leaving only her to undertake these efforts.

Children (or other hostages for whom Louise feels responsible) are a negative factor in Louise's ability to make rational investment choices. The needs of hostages may make her even more anxious to have current income, even if this means a job with low wages and killing hours. Their needs also may induce her to bargain away personal relationships or her own aspirations, sometimes in order to persuade Sam, her higher wage spouse, to help her support the kids. Thus, Louise's sense of responsibility to others translates into a higher discount rate: she has to use up more of her current resources to take care of others, even if the cost is long-term disinvestment in her own abilities, personal well-being, or even the respect of the community.⁶⁷ For her, the price of losing the kids or seeing them suffer is even greater than the price she will pay later in life for being poor, ill-trained, and perhaps sick and friendless.

Louise might be a better bargainer and might make better investment decisions if she did not have the kids, but she cannot make a credible threat to give them up or stop caring for them. Her high discount rate is obvious to all; thus, her bargaining position is weakened vis-à-vis those who might wish to take advantage of her.⁶⁸ And she gives in, takes the job, and maybe moonlights, too. She may even "spend" more of her assets than she takes in—that is, she spends the assets she has in her bodily health and social contacts, and does nothing to retool her skills. She is treating what she has as a wasting asset. She is losing ground.

⁶⁷ If examples are needed, two appearing in major newspapers, only one day apart, are Dorothy Gaiter, *Pygmalion Story*, *Wall St. J.*, July 24, 1991, at A1 (reporting that a woman committed welfare fraud in attempt to care for ten children, including four left on streets, and four more nieces and nephews orphaned by sister's fatal auto accident); Joel F. Handler, *The Judge and His Sister, Growing Up Black*, *N.Y. Times*, July 23, 1991, at A20 (letter to the editor) (commenting on sexism implicit in Supreme Court nominee's disparagement of his sister, who went on welfare after her husband's desertion, and who subsequently was unable to care for her infirm elderly aunt and her own children).

⁶⁸ As an example, in divorce negotiations, husbands sometimes enhance their bargaining position for family assets by strategically threatening to seek child custody. See, e.g., Martha A. Fineman, *The Illusion of Equality* 164 (1991); Lenore J. Weitzman, *The Divorce Revolution* 310-13 (1985); Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 *Yale L. & Pol'y Rev.* 168, 171-72, 178-79 (1984).

It is in this sense that Louise's hostages can do her in: they make her vulnerable to third parties. In the larger bargaining world of commerce and employment, the relevant third parties have no direct control over the hostages Louise gives up; hostages are simply a factor that others can use, more or less abstractly, for greater bargaining leverage with Louise. Even if such parties do exploit their bargaining advantage, they may not know or care that Louise is treating herself as a wasting asset.

Domestically, however, the story may be very different. At home, the hostages Louise gives up may be in the direct control of Sam and may make her an object of purposeful abuse—a steady assault on the assets that could enable her to act independently.⁶⁹ Through threats to her hostages, most notably to her children and to her own body, Louise can be punished radically for noncooperation. Though she may cooperate to stave off threats and protect the hostages, she herself loses ground each time she does so.⁷⁰ Renewed threats of violence may lead her, step by step, to bargain away her own sources of income, her contacts with friends and family, and ultimately the independent judgment that such contacts would provide. Now she no longer is bargaining to get some part—even a relatively small part—of a positive joint good; instead, in the face of each new threat, she is bargaining to keep from losing more of what she has and cares about, and losing that even faster. In short, because Louise's hostages make her subject to the control of a third party, they eventually may make her lose grip on whatever assets she had at the outset.

⁶⁹ For the special relevance of hostages in a domestic setting, see, e.g., Carole Pateman, 'God Hath Ordained to Man a Helper': Hobbes, Patriarchy and Conjugal Right, 19 *Brit. J. Pol. Sci.* 445, 457 (1989) (arguing that infant children give women greater need for protection, leading to their conquest and servile status in Hobbesian theory). A somewhat different slant, emphasizing women's earlier investment in a marriage, appears in Cohen, *supra* note 65.

⁷⁰ This is how one may read Linda Gordon, *Heroes of Their Own Lives* (1988) (discussing the plight of battered women of the turn of the century, who regarded themselves as taking abuse to protect their children).

A particularly moving example is given in Kimberle Crenshaw, *Race, Gender and Violence Against Women of Color: The Intersections of Racism and Misogyny* 15-21 (forthcoming, on file with author), which discusses the battering of immigrant women who are dependent on their husbands for residency status. Many have accepted abuse in preference to deportation and the breakup of their families. Congress has attempted to address this problem in the Immigration Act of 1990, Pub. L. No. 101-649, § 701(a)(4), 1991 U.S.C.A.N. (104 Stat.) 4978, 5085, though Professor Crenshaw thinks the problem will continue.

It is not clear what Sam gains by a steadily increasing domination over her, and for the record, Sam certainly seems like the crazy person in the duo. But the prevalence of spousal abuse suggests that, for some, domination brings a perverse payoff and may satisfy a kind of anticooperative or malicious taste like jealousy or spite.⁷¹ It is not surprising that our law often disfavors motives of this sort when they are discernible and, for example, enjoins the "spite fences" sometimes built by feuding neighbors.⁷² On the whole, actions taken out of spiteful motives make us collectively worse off because they serve the doubly wasteful end of spending resources in order to destroy those of others.⁷³ In domestic relations, however, the law's slow pace in intruding may leave Louise pretty much on her own to deal with an abusive Sam.⁷⁴

⁷¹ On malicious tastes or envy, see Elster, *supra* note 21, at 252-63. Spiteful or envious tastes suggest dependencies on the part of the abusive partner, though they are no less deadly to the abused. See, e.g., Don Dutton & Susan L. Painter, *Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse*, 6 *Victimology* 139, 145 (1981) (citing accounts of battering partners' extreme jealousy and possessiveness); see also Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 *U. Chi. Legal F.* 23, 27 n.18 (arguing that battering should be considered the problem of the batterer, rather than the battered).

⁷² See, e.g., *De Cecco v. Beach*, 381 A.2d 543 (Conn. 1977) (10-foot fence erected to block neighbor's view of river); see also Richard T. Drukker, *Comment, Spite Fences and Spite Wells: Relevancy of Motive in the Relations of Adjoining Landowners*, 26 *Cal. L. Rev.* 691 (1938) (concluding that malicious motive is what makes spite fences illegal).

⁷³ Spite and malice also are capable of spiraling into ongoing feuds, which are likely to be less than zero-sum games. See Elster, *supra* note 40, at 867-68.

⁷⁴ See, e.g., Charles P. Ewing, *Battered Women Who Kill 15-17* (1987) and authorities cited therein (noting the scarcity of legal and social services for battered women). Some associate the weak legal intervention in domestic affairs with a "public/private" dichotomy common in modern Western law, where the family is seen as "private" despite the actual fact of legal restraints on women. See Okin, *supra* note 31, at 128-30. For a recent historiography about the trend to an ostensibly "private" family model, see Tamara K. Hareven, *The History of the Family and the Complexity of Social Change*, 96 *Am. Hist. Rev.* 95, 119-23 (1991). Some patriarchal societies, with a weaker public/private distinction, may take a more interventionist stance to intrafamily abuse, see, e.g., Edmund S. Morgan, *The Puritan Family: Religion and Domestic Relations in Seventeenth-Century New England*, 39-40, 44-47 (rev. ed. 1966) (patriarchal organization of the family, but limited by community's intervention against violence, abuse); however, some other patriarchal societies may tolerate considerably more violence against women. See, e.g., June Kronholz, *Lingering Cruelty: Amid Social Progress, Bride-Burning Seems on the Rise in India*, *Wall St. J.*, Aug. 21, 1986, § 1, at A1 (reporting that there are large numbers of suspected murders of wives over dowry disputes but little intervention by wider community).

So Louise may deal with Sam by cooperating, which, under the circumstances, may not be an irrational thing to do. In cooperating with an abuser, for example, by agreeing to give up a job or to stop seeing family and friends, she is retreating and losing ground, but she also is cutting her short-term losses. At each step she staves off a drastic punishment in the present by cooperating and "spending" some further portion of her long-term assets, whether those assets are financial or social, physical or psychological. With each loss of assets, of course, she weakens her bargaining position for the next move, when she begins from a more isolated and more desperately needy position. Given a sufficiently demanding partner, we can predict that Louise ultimately faces the prospect of complete disinvestment, losing even the figurative assets of social alliances with others or perhaps (more controversially) psychological independence,⁷⁵ or the hostages she was attempting to protect, or ultimately even her own life. Perhaps not surprisingly, our law recently has had to deal with some women's turn to violence to stave off that final retreat.⁷⁶

This is an extremely grim scenario. It presumes not only that Louise is burdened by her concern for some form of hostage, but also that Sam has a taste for domination that is not frequently encountered—or

⁷⁵ For the argument that wife-battering causes or potentially causes psychological impairment, see Ewing, *supra* note 74; Lenore E. Walker, *The Battered Woman* (1979); Lenore E. Walker, *Victimology and the Psychological Perspectives of Battered Women*, 8 *Victimology* 82 (1983) (stating that "battered woman syndrome" includes "learned helplessness"). For criticisms of such psychological-damage theories, see David L. Faigman, *Discerning Justice When Battered Women Kill*, 39 *Hastings L.J.* 207 (1987) (reviewing Ewing, *supra* note 74, and criticizing empirical and moral bases of Ewing's "psychological self-defense"); Stephen J. Morse, *The Misbegotten Marriage of Soft Psychology and Bad Law: Psychological Self-Defense as a Justification for Homicide*, 14 *Law & Hum. Behav.* 595 (1990) (arguing that "psychological self-defense" is neither good policy nor scientifically based); Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 *Women's Rts. L. Rep.* 195, 208-11, 215-17 (1986) (criticizing "syndrome" defense as possibly counterproductive and as reinforcing stereotypes about women's supposed psychological defects).

⁷⁶ See, e.g., *State v. Norman*, 378 S.E.2d 8 (N.C. 1989) (holding that "battered woman's syndrome" defense to homicide charge is inapplicable where assault not imminent). An excellent review of the precedents and theoretical problems concerning battered women's syndrome is Schneider, *supra* note 75.

Ewing notes that factors distinguishing battered women who kill from those who do not include higher incidence of severity (beatings once a week or more often), death threats, threats with a weapon, abuse to children, and sexual abuse. Ewing, *supra* note 74, at 34-36. This analysis suggests that whatever the legal status of these homicides, they come as responses to real or potential "last straws."

at least not noticed—in everyday experience. All the same, it is not an entirely unrecognizable scenario. Quite to the contrary, it is all too recognizable, not only in the worst and most extortionist relationships between men and women, but in the worst and most extortionist relationships between anybody and anybody else—relationships that we think of in the context of kidnaping, enslavement,⁷⁷ and the most lawless forms of imprisonment.

C. Losing Ground: The Weaker Version of Culture and Politics

So far I have been speaking of Louise's disinvestment as a result of her greater taste for cooperation. I have been supposing that this taste reinforces, and is reinforced by, her concern for hostages—a concern that may induce her, step by step, to sacrifice her assets, including the various forms of her human capital. Another way to look at her disinvestment is to make only a weak assumption—not that Louise has a taste for cooperation, from which she derives a concern about hostages, but rather that many people share a cultural belief that she has or should have this taste. Perhaps Louise has no use for cooperation and feels no responsibility for others, perhaps she does not have children, perhaps she acquires nothing else that could be treated as a hostage, perhaps she is, in general, a very cool and calculating character.

All the same, because of the cultural expectations that she will or should cooperate, third parties may punish her if she does not. How do they do so? The easy forms of punishment are gossip about her or charges that she is unpleasant or peculiar. More importantly, she may face social isolation and refusals to deal with her on an equal basis (or perhaps on any basis at all), and those third parties who do deal with her may face similar punishment.

A more formal way in which these cultural expectations may result in her disinvestment once again has to do with a kind of investment, namely, political investment. Let us suppose for the moment that Louise gives up no hostages that put her at risk and that in her dealings she is not losing ground but only is gaining somewhat less than Sam. Even on that relatively mild supposition, if the Louises of the world acquire fewer assets than the Sams, they are not likely to have

⁷⁷ For an explicit analogy of battering to enslavement, see Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 *Yale J.L. & Feminism* (forthcoming 1992).

the political influence that the Sams have because the Louises will be unable to make the same investment in politics that the Sams can.⁷⁸ Incidentally, they cannot make the same investment in influencing culture, either, even when the culture addresses “what women are like” or “what women think,” subjects on which men have had a great deal to say.⁷⁹ Although that is an extremely important subject, I will say more about the political example, which in a way may only augment a cultural regime.

If Louise does not have the assets to make substantial investments in influencing either culture or politics, then in the political arena cultural expectations about her may turn into legal demands that she cooperate. Those legal demands may take the form of denying her the ability to live independently or to make alliances with others who might cooperate with her on a more equal basis. The law, for example, may deny her the capacity to own her own property, to be employed outside of the home, to contract on her own, to obtain an education, or to form associations outside her father's or her husband's family. By the same token, such laws may give her no recourse against her father's or her husband's discipline.⁸⁰

Such laws may leave Louise very few alternatives to a prescribed role. They dramatically increase the cost of Louise's noncooperation in her prescribed role because, where they are in place, she can be punished much more radically for noncooperation. At their most stringent, such laws help to keep Louise in a permanent state of subordination. As a child, she may be expected to undergo such “disinvestments” as crippling physical mutilation or—a more likely scenario—inadequate nutrition.⁸¹ As an adult, her likely role is to

⁷⁸ For an exhaustive treatment of women's political disadvantages, see Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective* (1991) (unpublished manuscript, copy on file with the Virginia Law Review Association).

⁷⁹ Note Virginia Woolf's complaint about the vast number of books men have written about women, see Woolf, *supra* note 1, at 33, 38-45, and Catherine MacKinnon's views on the “sexual politics of the first amendment.” See Catherine A. MacKinnon, *Feminism Unmodified* 208-13 (1987) (arguing that by protecting pornography, the First Amendment lets men speak about women in ways that silence women); see also Mary Ellmann, *Phallic Criticism, in Thinking about Women* 27-54 (1968) (noting sexualization, often dismissive, in criticism of women's writings). For a thoughtful analysis of this phenomenon, see *id.*

⁸⁰ See Winnie Hazou, *The Social and Legal Status of Women 185-86* (1990) (describing earlier Chinese family order).

⁸¹ See Papanek, *supra* note 60, at 170-78 (documenting persistence of providing inadequate nutrition to and mutilating—especially by footbinding—female children in China).

marry into a subservient position in her husband's family.⁸² If she does not cooperate with her husband she may be cast out, but there is nothing "out there" for her. Hence, no matter how much she may hate cooperation, particularly with husband Sam, her lack of alternatives means that she cannot make a credible threat of noncooperation. Moreover, she cannot convince anyone to assist her to escape: It is dangerous for another party to help her or to deal with her, and no one believes she can make it on her own, anyway.⁸³ In short, if she is not playing this game, she is dead—dead because there is no other game for her to play. Of course, even if she is playing this game, she may be dead too, over a slightly longer run.⁸⁴

In a sense, Louise has become a hostage herself. She has no control over her own efforts and cannot turn them into assets independent of Sam; she has no alternatives to his control. Given a sufficiently domineering Sam, she may be faced with the downhill moves of the losing game in which she can only cut her losses at each step, preferring the temporarily lesser losses that come from giving Sam what he wants to the immediate drastic punishments that he and others will inflict on her for defiance.

Obviously, a woman in this position is in a situation comparable to slavery. In slavery, too, defiance is punished and made even less palatable than cooperation. In slavery, too, there may be no game superior to cooperating with an owner's demands, even though cooperating with a master's wishes may be self-disinvesting for the slave.⁸⁵

⁸² See Hazou, *supra* note 80, at 179-80 (describing family ordering in rural India, modified in favor of greater independence in urban settings).

⁸³ For a horrible example, see Mary W. Walsh, *At the Mercy of Men: Pakistan Women Look to Bhutto to Improve a Harsh Existence*, *Wall St. J.*, May 3, 1989, at A1 (reporting that a woman who aided others in divorce was hunted down by own brothers and other women were jailed and mutilated for leaving husbands, and documenting women's lack of education, economic independence, and independent property).

⁸⁴ See Barbara Crossette, *India Studying "Accidental" Deaths of Hindu Wives*, *N.Y. Times*, Jan. 15, 1989, at A10 (reporting growing concern about murder of wives and insufficient legal intervention). Excess mortality among women is a special interest of Sen, 100 *Million Women*, *supra* note 30.

⁸⁵ A rational owner, of course, would attempt to maximize the productive life of a slave, though, as Yoram Barzel points out, the master's perspective on a desirable use of time and effort differs from what the slave's would be if he or she were free. See Yoram Barzel, *An Economic Analysis of Slavery*, 20 *J.L. & Econ.* 87, 87-92, 95 (1977). Over the last generation there has been a considerable debate about the efficiency of slavery, sparked in part by Robert W. Fogel & Stanley L. Engerman, *Time on the Cross: The Economics of American Negro Slavery* (1974). For more recent excursions, see, e.g., Barzel, *supra*; Stefano Fenoaltea, *Slavery*

And in slavery, too, potential helpers of slaves also may be policed, so that, for example, none of the enslaved class members may be emancipated, because the presence of the emancipated could make it more difficult to control those still enslaved.⁸⁶

In slavery, of course, a potent way to enforce cooperation is to deny the slave the ability to own property and to contract on his or her own. Not all slavery systems have had these disabilities; where slaves have been entitled to own property, however difficult their position, at least some have been able to purchase their freedom.⁸⁷ But where the slave—like the subordinated wife—cannot acquire or own property, he or she cannot exit even a losing game with the master, because the property-less or entitlement-less person has no alternative game to play.⁸⁸ One who cannot acquire and own property can have no assets, and the person who has no assets has nothing to bargain with, except perhaps bodily integrity, attachments to friends and family, and, ultimately, independence of spirit.

It often has been noted that the slave's status is that of a person who is also an object of property.⁸⁹ Perhaps less remarked is the sta-

and Supervision in Comparative Perspective: A Model, 44 *J. Econ. Hist.* 635 (1984). For Fogel's later reconsideration of his original thesis, see Robert W. Fogel, *Without Consent or Contract* (1989).

⁸⁶ See, e.g., Barzel, *supra* note 85, at 100. Policing of third parties may apply in less drastic versions of subordination as well. Policing considerations, for example, may illuminate some feminist objections to pornography and to inane cinematic and television presentations of women. Such presentations may be witting or unwitting cultural policing devices, implicitly ridiculing not only women but men who would deal with women seriously. Although First Amendment concerns obviously bear on such issues, the policing perspective illuminates a radical feminist view of the First Amendment itself as a pious reinforcement of hierarchy. See MacKinnon, *supra* note 79, at 210-11.

⁸⁷ Yoram Barzel argues that slaves' ability to own property was associated with policing costs, i.e., in occupational and institutional settings where a slave's productive activities were difficult to police, positive incentives were cheaper—entailing some recognition of slave earnings as property. See Barzel, *supra* note 85, at 99-100. For a similar approach, see Fenoaltea, *supra* note 85 (arguing that pain incentives are more effective at inducing effort whereas reward incentives are more effective in inducing care). Restraints on women's entitlements may challenge this theory, insofar as such restraints imply negative policing rather than positive incentives, even for tasks that are care-intensive and difficult to police, notably child care.

⁸⁸ It was in recognition of this fact that the Reconstruction Congress passed 42 U.S.C. § 1981 (1988), which guarantees the right, *inter alia*, to "make and enforce contracts," and its counterpart, 42 U.S.C. § 1982 (1988), which guarantees the right to "inherit, purchase, lease, sell, hold, and convey real and personal property."

⁸⁹ See, e.g., Patricia J. Williams, *On Being the Object of Property*, 14 *Sigis* 5 (1988).

tus of the slave as a person who can own no property and have no assets. As John Locke noted, however, these persons are one and the same.⁹⁰

IV. SOME LESSONS FOR LOUISE (AND SAM, TOO)

At the outset of this Article, I noted that women are better off with the ability to own property than they would be without that ability. The inability to own property is a guarantor of some version of enslavement, however benevolent it may be in any particular instance. Property and assets generally are the means through which one may make choices about one's interactions with the world, and property at least gives Louise an opportunity to make *some* gains, even if, relatively speaking, she may fall behind Sam in her dealings with him.

A part of this Article has argued that one can see how women fall behind if one assumes a greater "taste for cooperation" on the part of women, but in working through the arguments it seems that a weaker assumption—that women are merely *thought* to have such a taste—is, if anything, an even more powerful determinant of their relative lack of assets. That weaker assumption has to do with culture, and that is both bad news and good. It is bad news because cultural presumptions are hard to change; they present collective action problems to those who would try to break with them. The good news is that cultural change does happen sometimes, through education and conscious effort.

If culture may be changed, what can Louise do about her relatively short shrift on the property front? One encouraging point is that there are others from whom Louise can learn. First, there are other groups, like new immigrants, who also have been in a position in which their needs have required them to accept, at least for a time, lesser gains from their cooperation with more powerful persons.⁹¹ The escape of at least some immigrant groups from this situation should give women some cues.

One cue is that even the short end of the deal is better than no deal at all. Those who get something, even if it is the short end, can save and invest that sum and turn it into something larger so that in their

⁹⁰ See John Locke, *Two Treatises of Government* 402 (Peter Laslett ed., 2d ed. 1960) (1698).

⁹¹ See sources cited *infra* note 92.

future dealings they may not have to accept bad terms from a situation of need. Another cue is that gains can be made by cooperation among others in a like station. Again, get-ahead immigrants have notoriously helped their own; in so doing, they have dramatically illustrated the way in which cooperation may increase a group's wealth: One can look to one's allies for help in dealing with nonallies.⁹² When Louise starts to deal with Sam, then, she may do well to make certain that her alliances with other Louises are intact so that they can give her advice, assistance, and, if necessary, an escape route.

Another group from which Louise can learn may be the participants in some of the traditional women's crafts practices—those oft-deaneaned quilting bees and cookoffs, or, a distinctly modern version of them, the “story trees” that some women science-fiction writers have jointly created.⁹³ Modern feminism has interested the art world in the aesthetic merit of such crafts, suggesting that such cooperative forms of creativity may attain very high levels, despite the often strained circumstances of their creation⁹⁴ and the disdain with which our legal institutions have treated them.⁹⁵ Aside from artistic merit, however, these group activities also might be studied for what we might call their “politics”: If women do have a more capacious taste for cooperation, or even if they are just assumed to have such a taste, they ought to be able to turn that real or purported taste to their own mutual advantage in their joint pursuits. After all, it should be cheaper for such groups to maintain cohesion for common projects than it is for groups with a lesser taste for cooperation.

⁹² See Richard D. Alba, *Italian Americans* 48-51 (1985) (describing pattern of Italian migration to places settled by own hometowners); Humbert S. Nelli, *From Immigrants to Ethnicity* 115-18 (1983) (describing Italian immigrants' mutual aid societies); Takaki, *supra* note 38, at 193, 241, 275-76 (recounting Asian immigrants' mutual assistance, including revolving credit associations). Extensive discussion of rotating credit associations, common to Chinese, Japanese, and African immigrants, is given in Ivan H. Light, *Ethnic Enterprise in America* 22-36, 58-61 (1972).

⁹³ See Camille Bacon-Smith, *Spock Among the Women*, *N.Y. Times*, Nov. 16, 1986, § 7 (Book Reviews), at 1 (describing “story tree” writings among women in *Star Trek* fan magazines, involving groups of plots and subplots developed by different authors).

⁹⁴ See, e.g., June Freeman, *Sewing as a Woman's Art*, in *Women and Craft* 55, 58-60 (Gillian Elinor, Su Richardson, Sue Scott, Angharad Thomas & Kate Walker eds., 1987).

⁹⁵ See Shelley Wright, *The Legal Protection of Art: A Feminist Exploration of Some Issues in Intellectual Property* 21-23 (1991) (unpublished manuscript, copy on file with the Virginia Law Review Association) (recounting historical denial of legal protection to “women's work” of sewing, needlework, other crafts).

I wonder particularly whether these groups might be able to turn their own limited opportunities, and, most particularly, the classic "hostage" problem, into a kind of advantage. The theory of cartels suggests that collusive groups—such as the Organization of Petroleum Exporting Countries or the old railroad cartels—begin to fall apart after the membership rises to what is really a rather low number, perhaps eight at most.⁹⁶ This occurs because the members cannot police one another in larger numbers, so that, in larger groups, any given member can safely cheat. When several do, the cartel collapses.

One way to assure adherence to the cartel—or to some more benevolent cooperative group—is to use "precommitment devices."⁹⁷ For example, the members may post bond, or, as the practice has actually been dubbed, they may exchange "hostages."⁹⁸ Precommitment devices work only if they are credible, however, and this is where women's concern for hostages becomes an advantage. If women are thought to be concerned about others in ways that put them at some risk, especially if their outside opportunities are limited—that is, if each knows of her own and her compatriots' vulnerability and need for the group's support—one might expect such groups to attain a higher level of solidarity (at lower "policing costs") than groups having more outside opportunities and no hostages to exchange.⁹⁹ Hence, if Louise does have a taste for cooperation, or even if people merely think she does, she should be able to turn the real or purported taste to advantage and not just be victimized by it. The taste for cooperation could be an asset itself, insofar as it helps Louise to make alliances with others and stick with them, and insofar as it helps others to recognize her as someone who will hold by her deals.

⁹⁶ See, e.g., Richard A. Posner, *Oligopoly and Antitrust Laws: A Suggested Approach*, 21 *Stan. L. Rev.* 1562, 1570-72, 1601-05 (1969) (stating that cartels face more difficulties with large numbers and that tests for monopolistic market concentration all focus on groups with eight or fewer members).

⁹⁷ See Elster, *supra* note 21, at 69. Elster seems particularly interested in precommitments that make threats credible, though precommitments also may be used to make assurances more credible.

⁹⁸ See, e.g., Oliver E. Williamson, *The Economic Institutions of Capitalism* 167-68 (1985).

⁹⁹ Here again the immigrant experience is instructive, particularly the "revolving credit associations" that built on trust among persons widely disparaged in the larger community, and with no resources except themselves. See Light, *supra* note 92, at 22-36, 58-61.

The issue that may be most difficult for Louise is selective noncooperation: she and the other Louises are going to have to learn to enforce their collective deals and collective interests by occasional threats of noncooperation with nonparticipants. In a world that mixes "testers" with the cooperators, cooperation alone is not enough. One also must be able to police one's deals and to enforce them by exit or even by retaliation. Louises have to learn not to permit, or even give the impression that they will permit, shirking by those with whom they deal. They have to learn as well to punish slanderers, politicians, or others who systematically would cut down on their opportunities to gain "assets," whether financial, educational, or psychological. Even in this unpleasant task of punishment, however, Louise's alliances with other Louises may help. Together they may be able to reinforce each other to do these unpalatable retaliatory tasks collectively, even if they have a difficult time with them individually.

A rather different point is that Louise might well pay attention to alliances that she can make with sympathetic Sams, or even with Sams who are simply indifferent to the local customs that might otherwise short-shrift women. Such indifferent Sams—perhaps newly arrived employers or entrepreneurs—at least are not hostile. Because they do not necessarily share any local expectation that Louise might accept particularly low wages, they might help Louise get a better break than she would have had under established customs.¹⁰⁰

Moreover, Louise should not despair of educating the Sams of the world and then making alliances with them.¹⁰¹ The long history of philanthropy, and indeed the modern civil rights movement and antidiscrimination laws, suggest that *some* elements of a taste for cooperation are, in fact, fairly widely distributed. These historical examples indicate that, whatever the gender differences may be, it would be a great error to think that all Sams are completely indifferent to anything but their own immediate well-being; or that they are all impervious to what used to be called "self-interest rightly understood," that is, an understanding that one's own welfare is tied up in a

¹⁰⁰ For an interesting case of indifferent Sam-employers, see Lim, *supra* note 43, at 101, 115-16, 119 (noting favorably the role of multinational export corporations in hiring local women in less developed countries, and in paying them more than prevailing wages). Lim rejects knee-jerk reactions against these corporations; she sees them in part as an effort to reestablish patriarchy. *Id.* at 119.

¹⁰¹ See Jacobs, *supra* note 40, at 177-78 (viewing women's movement as educational).

common enterprise with others; or that they are all morons empathically, unmoved by the narrations and metaphors of those who are differently situated.¹⁰² We may not think that our own substantial legal changes have resulted in perfect justice, but they are strong evidence of the possibility of cultural learning and change. The married women's property acts, the franchise, the legislation restraining discrimination in employment and education, the laws attempting to enforce child support—all give evidence of cultural learning, no matter how much is left to teach.

Even the "strong" assumption of an uneven gender distribution in cooperative tastes is compatible with the fact that *some* Sams, or even most Sams, share *some* cooperative capacities, and that some are not indifferent to the plight in which women may be caught. Women, in turn, should not be indifferent to this fact and should be encouraged by the very substantial gains that they have made through alliances, at least in the modern West.

Some of the behavior and relationships I have been describing are deplored by most civilized people, and, at least to some degree, are proscribed by our laws, however imperfectly and incompletely. Where the law restrains the exploitation of cooperative moves, it does so, at least in part, because all of us need cooperative activities. All of us, even the Sams, are worse off when the incentives to cooperate are reduced by the punishment and disparagement of cooperators. This is, of course, a generalized problem with letting the cooperative Louises lose out systematically to the uncooperative Sams: such scenarios teach a lesson, too, and tend to drive down the overall level of cooperation in any given social group. If Louise's cooperative or seemingly cooperative traits routinely result in advantage-taking at her expense, we may expect lots of people to get the message that cooperation is personally problematic, and we may expect that many potential gains from wider cooperation will be lost to the fear of exploitation.

¹⁰² See Robin West, *Economic Man and Literary Woman: One Contrast*, 39 *Mercer L. Rev.* 867, 874 & n.28 (1988) (describing narrative as "bridge" to "empathic understanding" and referring to persistent theme in works of James Boyd White).

It has sometimes been noted that more developed societies tend to be characterized by a greater equality for women;¹⁰³ my point is that the correlation is not simply coincidental. From a larger perspective, we must consider the incentive effects of norms and practices that let jerks win systematically and nice people finish last, also systematically.¹⁰⁴ These norms and practices may have ramifications for a larger social well-being in that they discourage the “miceness” that lets cooperative ventures occur. And that, of course, is one of the major reasons why not just the Louises, but the Sams, too, should be interested in figuring out why women do not have much property—and in doing something about it.

¹⁰³ See Frances E. Mascia-Lees, *Toward a Model of Women's Status* 112 (1984) (overall economic development positively related to women's economic status); *id.* at 119 (noting positive contribution of modern industrial development to overall status of women).

¹⁰⁴ Cf. Okin, *supra* note 31, at 17-22 (implications of hierarchical relations within family for understanding of justice).

