The Cross Contributions of Spouses to Human Capital Creation within Families: What Economic Rights Should Outlast Marriage

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I. Introduction

The laws of most American states require consideration of the contributions of each marital partner to the marital property of the family in the division of property and allocation of maintenance and child support that occur in the event of divorce. In most marriages, however, the most important form of property possessed by the marital unit exists in the form of human capital. Individuals bring to their marriages both labor market and nonmarket service forms of human capital, which then becomes incorporated within the marriage to produce both external income and nonmarket services for the marital unit. During marriages, major new investments in human capital of the marital partners may be made and the couple may also produce new human capital agents in the form of children. In the process, based on the best interests of families, human capital investments possessed before marriage by the marital partners may also be allowed to atrophy. These human capital changes that occur during marriages become very important in divorce circumstances. Becker [1981], Pollack [1985], Blau and Ferber [1986], Parkman [1992], Peters [1993], Rios-Rull [1993], Gronau [1997] and others have provided an adequate theoretical explanation of the efficiency rationale for marriage and divorce in these terms. What has not been provided is careful consideration of ownership issues involved in the

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human capital creation and destruction that goes on within marriages and the mechanisms by which courts have tried to deal with those ownership issues in divorce contexts.

In divorces, courts are called upon to divide the assets of families into component parts that are less valuable as separate components than when they were part of functioning families, just as the termination of businesses in the commercial world would reduce the value of physical components of business that had been profitable before its dissolution. Courts are called upon to consider the economic contributions of the partners, the needs of both adult and minor members of families, and, in some venues, various fault issues which may be treated as analogous to punitive damage questions in tort law [Pollack, 1985]. The issues of concern here are those that relate to economic contributions of the partners. The particular focus lies in the fact that in some marriages, one of the most important economic contributions of one marital partner is the contributions made by that partner to the separable human capital of the other partner.

This paper refers to such contributions by one marital partner to the separable human capital of the other as “cross contributions to human capital” (the precise meaning of “separable” is explained in the next section, but the general meaning is “human capital that is not marriage specific”). In some marriages, separable “cross contributions” are made in reasonably equal proportions between both marital partners, so that there is no equity problem if each partner simply leaves the marriage with his and her own separable human capital, with all marital obligations dissolved. But it is more common for marriages to result in a circumstance in which one marital partner gains significantly and the other partner losses significantly in terms of cross contributions to human capital. In the more common situation, it is usually (but not always) the wife who makes contributions, directly or indirectly, to the separable human capital of her

husband at the expense of having her own separable human capital significantly reduced relative to her position at the beginning of the marriage. In other words, he leaves the marriage able to earn more in the labor market than he would have been able if the marriage had not taken place, and she leaves the marriage with a significant reduction in her labor market earning capacity, relative to her position before the marriage. For convenience, these opposed consequences will be referred to as "enhancement" and "forbearance" of earning capacity within marriages.

The courts have evolved two general approaches for dealing with the equity problems by circumstances involving enhancement and forbearance of earning capacity within marriages. The first, which is unique to the state of New York and quite controversial even within New York, is to treat professional licenses and other occupational credentials of a primary wage earner, as a marital property in which both partners have financial interests which outlast marriage. In effect, this solution is to treat the human capital of the husband as a continuing joint property of the divorcing spouses. The second type of solution focuses on adequately rewarding the disadvantaged spouse for her "forbearance" of earning capacity, but with only indirect regard to the enhanced earning capacity of her husband. Neither of these solutions provides a full consideration of the human capital issues posed by the divorce process. The purpose of this paper is to consider the full range of human capital issues posed by divorce and to assess the two approaches taken by the courts in that context.

The purpose of the paper is to consider four different types of human capital issues that may exist at the time of divorce: (1) The issue that a husband may leave a marriage with enhanced labor market earning capacity, while the wife leaves with significantly reduced earning capacity; (2) The issue of how to divide pension rights of a primary wage earner at the time of

divorce, given that his retirement income was also her retirement income up to that point; (3) The issue that the value of children, as new human capital creations of the marriage, may be significantly reduced for the parent not receiving primary custody of the children; and (4) The issue that the potential to form new permanent relationships after the marriage may be significantly affected by differences in earning capacity and by custody arrangements for minor children. After reviewing those four considerations, the paper will consider the adequacies and inadequacies of the two approaches taken by the courts, as discussed above, and will offer concluding remarks about marital rights to human capital that should survive divorces.

II. Enhancement and Forbearance of Human Capital Development within Marriages

Marriage is likely to result in a circumstance such that if a divorce occurs, the husband will leave a marriage with no reduction in his labor market human capital or an enhanced labor market human capital. The wife is likely to leave the marriage with substantially reduced labor market human capital. The husband's nonmarket human capital is likely to have been relatively unaffected by the marriage. The wife will have developed greater nonmarket human capital than when she entered the marriage, but the market equivalent value of this nonmarket human capital is likely to be significantly reduced by two factors: (1) Much of her nonmarket human capital will be in marriage-specific forms that could not be transferred to a new marriage; and (2) Her potential for the reemployment of her non-market human capital in a new marriage with internal exchanges of value equal to her old marriage is much more limited than her husband's potential to do so. This second factor will be considered in Section IV.

One of the most important effects of marriage is to increase the likelihood that the marital union will function to maximize its joint advantage by specialization in tasks and the

corresponding development of human capital appropriate to that specialization. As Becker and others have clearly established, it is in the joint interest of marital partners to specialize in the joint family production process in such a way as to maximize the output of family "goods" such as "children, prestige and esteem, health, altruism, envy and pleasures of the senses" [Becker 1981]. These family goods require inputs of goods of the more conventional market variety and time.

The most common form of such specialization is for the wife to specialize in the production of nonmarket services, including possible child production, and for the husband to specialize in developing his own career [Becker, 1981] within the market sector of the economy. This specialization takes the form of the wife investing primarily in human capital of the kind appropriate to best producing goods directly in the nonmarket sector while the husband invests primarily in human capital of the type most useful for income generation in the marketplace. The wife's primary specialization in household focused human capital investment can be the maximizing strategy for the family even if she is working in full-time market employment. She may, for example, take lower paid full time employment that gives her the opportunity to take time off when needed by her children, elderly parents, or her husband's career. She may also take employment that has lower demand on her energy or requires less extra-work investment in knowledge or skill development in her job area. With child rearing, it is common for a wife to stay home or work part time during the period when children are very young, but then to resume a limited labor market career at lower pay when these intense periods have passed.

With this traditional division of labor and specialization in human capital development, the wife becomes increasingly vulnerable to opportunism on the part of the husband as the

marriage proceeds while the husband becomes decreasingly vulnerable to opportunism by the wife, depending on the nature of decisions made within the judicial system. While each partner is contributing benefits to the marriage of approximately equal value and each partner is acquiring new human capital that is of equal worth for the production of utility by the family, the consequences of potential divorce become more and more heavily weighted against the wife. Since the husband has been relatively free to pursue his career and develop his human capital within the market sector, he would be able to leave the marriage with either the same or more marketable labor market human capital than if he had remained single. The wife, on the other hand, would leave the marriage with a significantly reduced labor market human capital compared with what she would have had if she had remained single and focused primarily on her own career development.

This is especially true in one type of special case that has been a special focus of the judicial system. In most traditional marriages, the primary form of spousal contribution by the wife has consisted of her specialization in nonmarket human capital, particularly in the form of child rearing and occasionally elder care for the elderly parents of the couple. This can facilitate the husband's ability to concentrate on the development of his labor market human capital, but child rearing activities by many fathers may largely offset any reduced requirement to cook, do laundry and so forth for oneself as a single male. Thus, at least with families engaged in child rearing activities, the argument that males actually have more free time to develop labor market human capital may lack validity. It is widely known that married men earn higher pay than single men (the so-called "marriage premium") [Hayghe and Haugen, 1987]. However, Cornwell and Rupert [1997] have shown that much of the premium that is normally attributed to marriage

are actually the results of differences in other characteristics in married men. In other words, married men have qualities that both make them more likely to be married and to earn higher incomes, but causation does not flow from marriage to higher incomes.

However, there are special types of cases in which wives have made direct investments in the labor market human capital of their husbands. There are two types of circumstances in which this is likely to occur. The first involves wives working in the labor market to help put their husbands through graduate school, often accompanied by helping with term paper research and direct writing and typing assistance with term papers. The second involves “corporate wife” circumstances in which the husband and wife function as a team in handling the corporate management responsibilities for which the husband was ostensibly hired. In both circumstances, the equity of distribution problems posed by divorce are even greater than those in traditional marriages.

The primary focus of existing literature dealing with this matter has been cases involving the acquisition of formal education and/or professional licenses by the husband as a consequence of efforts of the wife [Krauskopf 1980; Loeb and McCann 1983]. There have been glaring cases in which graduate student husbands married wives who worked and provided household services for these husbands throughout graduate school. The husbands then divorced their wives shortly before beginning the lucrative careers made possible by the effort and investment of their wives. Since the family units in these cases had not yet accumulated wealth in the form of non-human capital assets, the cases have revolved around the question of whether wives had any rights to the human capital assets residing in the form of a professional license or graduate educational degree now possessed by the husband.

"Corporate wife" circumstances are similar to those involved with graduate education in that corporate wives (and political wives) are often effectively part of husband-wife "teams" who work together to promote the career interests of the husbands in families [Grossbard-Shechtman, Izraeli and Neuman, 1994]. Such wives engage in direct unpaid work to promote the career interest of the husband, with rewards coming in the form of an ability to share the income and prestige earned by husbands. The nature of the impact of this effort lies in the husband being able to be guided into social activities that would best facilitate his own promotions; being counseled into not making hasty personal decisions that would be harmful to his employment; being advised to make moves that he might be too cautious to make; and into having quality social contacts with persons who might offer him career improvement opportunities. As a practical matter, however, divorces involving "corporate wife" circumstances typically come much later in the course of marriages, when children are grown and substantial family financial wealth exists. As a result, the general predisposition of the courts to divide non-human capital forms of marital wealth equally between the partners prevents the type of glaring financial inequities found in younger families. Correspondingly, this circumstance has received relatively little attention and will be ignored during the remainder of this paper as well.

How the courts have considered the issues of enhancement and forbearance of human capital development in traditional marriages, and in cases involving direct investments by wives (and occasionally husbands) in graduate education of their spouses will be further considered in Section V, below.

III. Division of Pensions of Primary Wage Earners and Related Insurance Issues

Pensions, which are defined benefit annuities to be paid upon retirement, represent a

special type of family based human capital asset that has now been recognized by federal law. Divorcing wives must be given credit for pension benefits acquired by husbands during marriages unless they specifically sign waivers to the contrary. The logic behind this requirement is that in traditional families, pensions are a major part of retirement income, along with social security retirement benefits. If a wife stays at home, her husband's pension is intended for the purpose of retirement benefits for both halves of the married couple. Thus, if wives who had not been in the labor market were cut off from husband's benefits at the time of divorce, they would be bereft of a basis for financial support during retirement years. And even if some amount of time remains before normal retirement years, the period for many wives, working at low labor market reentry wages would not provide sufficient retirement income. Thus, the requirement that wives without their own retirement funds could not be cut off from pension rights of their husbands was included in the ERISA act that defines modern pension requirements. That aspect of family human capital at the time of divorce is now fairly well defined, is efficient, and requires no explication here.

What is somewhat less obvious lies in the areas of related issues involving insurance aspects of two family incomes. In a family unit that is working effectively, the ability to work a greater than anticipated number of years effectively provides a type of insurance for the family. One aspect of this insurance has been recognized in the literature as the "added worker effect," involving wives taking employment in the labor market when husbands face extended periods of unemployment [Spletzer, 1997; Cullen and Gruber, 1997]. But an even more important aspect of this same "two earner risk-pooling" effect relates to financial exigencies late in life [Kotlikoff, Shoven and Spivak, 1986]. If financial exigencies occur, intentions to retire at a given age can be

postponed to increase available financial resources. However, with the uneven distribution of labor market income in traditional families, the financial value of the husband's extended ability to earn income is much greater than that of the wife. Divorce means that both husband and wife lose the insurance value of the other spouse's extended earning capacity, but this difference imposes a greater burden on wives than on husbands. Since the wife's extended earning capacity is much smaller than her husband's, his loss of insurance earnings potential is small, whereas her loss of his extended earning capacity is large. Compared with other issues at the time of divorce, this issue is not a major issue, but it is another human capital issue that has some economic consequence [Dwyer and Mitchell, 1997]

IV. Children as New Human Capital Assets of Marriages

Children are one of the major purposes motivating marriages, though clearly children can be and are produced without marriages. In effect, children represent the creation of new human capital assets, requiring great investments of both financial resources and time if those assets are going to generate significant value to their parents. Marriage has the potential advantage to fathers of cementing the father's legal ties to the children in whom he invests. To the mother, it provides a higher level of security that the father will continue to make investments in the children, even if her relationship with the father terminates for some reason. The economics of child production is closely tied to the economics of marriage, but focuses on a determination of the number of children to be produced, and on the quantity-quality issue inherently involved in that choice [Turchi, 1975; Becker, 1981]. However, the nature of the human capital asset represented by children in this literature has not been adequately described.

Ultimately, custody arrangements are ownership rights in minor children. The term

"ownership" carries emotive overtones, such that it is considered inappropriate for parents to use that term with respect to their children in the same way they would with a pet or other form of animal property. However, the adjectival "my" and "our" terms that parents attach to their children implies the ownership relationship that exists. In turn, the "my" terms a child uses with his or her parents (and siblings) also implies a type of ownership relationship. Control rights, however, exist in the parental relationship with minor children. This is the simple reason for the fact that relationships between adult children and their parents are never a legal issue in dispute in divorces. Ownership exists whenever a human (or other) relationship has value to an individual. Control rights relating to minor children create human capital issues that must be resolved at times of divorce.

As a practical matter, the traditional specialization of the family guarantees that the wife will typically have the most involved relationship with minor children. She is the person who has invested more of her time and effort developing her human capital skills in child rearing. She will also have invested more of her time in direct contact with the children, given her primary responsibilities in that area. As such, it is much more likely that she will receive primary custody and that she will have more actual custody even in joint custody arrangements. While many exceptions certainly exist, the typical circumstance is that she will continue to have more obligations after divorce, but will also receive more benefits in the form of interaction with the children.

A key flaw in the economics literature relating to child production is the presumption that parents and children have identical interests as it relates to investment by parents in the human capital of those children. Parents are not perfect agents for their children and that becomes self

evident at the time of divorce. Parents do not have children to promote the best interests of their children, but for the benefits the children may hopefully bestow on the parents. Those benefits depend on relationships between the children and the parents, not some objective criterion such as maximization of lifetime income by the child. Most parents would prefer a child who earned less money, but spent more time with his or her parents. What is at issue between the parents at the time of divorce is the value of the relationships between both parents and how divorce arrangements are likely to foster those relationships. The value of the relationships themselves are the really critical human capital assets in contention in divorces [Weiss and Willis, 1985].

Here again, it is easy to see why relationships with adult children are not an issue. Under existing law, the parent with primary custody of minor children is generally able to move to another part of the country to promote her labor market interests (as long as the purpose is not to frustrate the rights of her ex spouse to have relationships with their children). If she does so, the contacts of the children with their father will necessarily decline and, in the process, the value of the relationship of the father with the children will also decline. Further, when the children grow up, it is likely that the children will tend to locate in the new area chosen by the mother, so that the adult relationships of the mother with the children will continue to generate more benefits to the mother than to the father. If the children are already grown and the mother relocates, the children will probably see more of their father, whose benefits from the relationships with the children may actually improve because of the mother's relocation.

Many aspects of the parent-child relationships are not obvious. Normally, it would seem that fathers who lose primary custody automatically lose benefits from the children, while perhaps reducing their time costs for child rearing somewhat. For the non-custodial father who

escapes many of the daily marital interruptions and responsibilities involved with his children, but has high quality interactions with those children as a divorced father at preferred time periods on weekends, however, the results may be exactly the opposite. Likewise, the disappearance of the husband may create problems in the home that make relationships between the mother and her children much more problematic, even though she now has more time with her children. The important point here is simply that relationships with minor children are important human capital assets that may be very much at stake in divorces.

V. Marriage Market Potential as a Human Capital Asset

At times of divorce, the potential to form new important interpersonal relationships is also an important human capital issue. It may seem peculiar to view it in this manner, but a marital partner may make cross contributions to the separable future marriage potential of his or her spouse. The importance of marital potential in spouse selection is considered specifically by Allen [1992]. This form of human capital may become very important to the marital partners as divorce is considered [Becker 1981; BLM 1977; and particularly Cohen 1987]. Cohen addressed this problem in terms of the sacrifice of marital potential by a wife:

> Being a husband or a wife is not coextensive with being a man or woman. It is useful to conceive of husbands and wives as a capital asset. In the same way that a man can sell his services in the labor market, so too he can offer his services as a husband on the marriage market. Some of the characteristics that add to one's value on the marriage market can be deliberately acquired, such as wealth and status . . . . Still others wax and wane with the passage of years, such as fertility and beauty. In addition, age itself is a factor in one's value on the marriage market.
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> Since the capital asset of a wife is different from that of a husband, there is no reason *a priori* why they should be characterized by the same time profile of growth and depreciation. I will argue that women in general are of relatively higher value as wives at younger ages and depreciate much more rapidly than do men (p. 278).

Cohen is trying to address the problem of possible compensation for wives for this relative loss of marriage market potential. Cohen's argument, however, relates to physical age and the relative advantage of males in marriage markets at older ages because of shorter life expectancies of males in general. This is simply an argument based on supply and demand for prospective spouses at various different ages, though Cohen is raising the question of whether wives should be compensated in some manner for having sacrificed their most marketable years in terms of marriage potential, whereas husbands have moved into age categories where their marriage market potential has increased over time, rather than declining. In fact, however, the course of marriages may have influenced the marriage market potential of the divorcing spouses in ways that go well beyond simple market ratios. What has happened within the marriages may have made the divorcing spouses more or less attractive relative to other persons in the marriage market with whom the divorcing spouses must compete in post-divorce circumstances. And generally, the impact of cross contributions of human capital between marital partners has been to make husbands more attractive and wives less attractive in post-divorce circumstances.

This cross investment in potential future marital attractiveness is typically a bi-product of other investments in human capital. The investment a wife makes in her husband's career to maximize the family flow of psychic income is an investment that increases her husband's attractiveness in the marriage market. Marital attractiveness is a function of a number of variables including age, race, health, physical appearance, wealth, income, sense of humor, self confidence and social grace. These same variables often determine the potential for advancement along career tracks so that wives have an incentive, if focusing on a husband's career, to invest time and effort in improving these qualities in her husband. She may teach him how to select flattering clothing,

encourage him to maintain top physical condition, help him develop social grace and build self esteem as a part of promoting his career. All of these personal developments will increase his marriage potential.

At the same time, in order to facilitate his social standing in the community, she has an incentive to develop in herself a type of sexless, but responsible demeanor as a good mother and wife who reflects well on his value as a good citizen. Her own sexual attractiveness may be a detriment to her husband's advancement if it leads to socially compromising offers from his superiors or co-employees. Thus, it may be in her interest to invest her own efforts in such a way that her husband's attractiveness in a future marriage market is enhanced and her own is reduced.

This may also be compounded by the reality that the wife has a major advantage in obtaining custody of minor children. While both spouses might wish to have primary custody, the spouse obtaining custody is acquiring this benefit at the expense of becoming potentially less attractive to prospective future marital partners. From the standpoint of a prospective new husband, marrying someone with primary custody of minor children from a prior marriage requires a great deal more adjustment than marrying someone who has regular visitation with minor children from a prior marriage. Likewise, for the ex-wife herself, finding time to spend in the development of new relationships is made significantly more difficult by the time requirements of custodial minor children. Thus, in effect, the human capital advantage of wives in obtaining primary custody of children creates a disadvantage in the form of a human capital disadvantage in marriage market potential.

VI. Court Approaches to Human Capital Issues

Courts and legislatures have taken a very mixed approach to human capital issues

involved in divorces. Decisions are usually based on a confused mixture of “needs” and “merits” in determining the distribution of wealth, income and child support. “Needs” and “merits” parallel “benefits received” and “ability to pay” theories of taxation [Holcombe, 1996]. With a “needs” focus, the parent most able to pay is effectively “taxed” from his earnings to bring financial support of his former wife and children up to a level that is considered to have met some acceptable standard that also considers the standard of living left to the husband. With a “merits” approach, fault issues leading to the divorce may be considered, but the primary focus is on the value of the contributions each marital partner made to the marriage prior to the divorce. One strong basis for a “needs” approach lies in the interests of any minor children who might be involved in the divorce. Regardless of any fault issues or the size of the contributions of the two adult marital partners, the partners together have made an implied commitment to support their minor children. And since the mother of those minor children cannot support the children at any given income level without supporting herself in an approximately corresponding manner, the financial needs of the custodial parent becomes a part of any general “needs” assessment by the courts. A good summary of some of the problems stemming from a mixed approach is found in Peters [1993].

Fault issues aside, a “merits” approach is far more amenable to economic analysis, though an equiproportionate determination of the “needs” of all members of families would probably produce divisions of wealth and income that would be reasonably similar to a “merits” approach, at least if the implied contract between parents and their minor children are treated as a “merit” claim on wealth and income. The reason for this similarity lies in the fact that assortive mating in the marriage market tends to result in partner selections in which the marriage market

potentials are reasonably equal. Thus, *a priori*, one would expect that the values of the contributions of the marital partners, fault issues excluded, would be reasonably equal between the partners. If, during the marriage, both contributions and rewards of the marriage were evenly shared, a division based on needs or contributions, should be reasonably similar. However, mixing the two standards can result in outcomes that would not be reasonable from either a "needs" or "merits" standpoint, since the two criteria may be used selectively to the unequal benefit of one party or the other. It is unlikely, however, that any disoptimality would result, given that the divorced parties could privately recontract any disoptimal components decisions of the court divorcing them. From the point of view of this paper, a consistent focus on "merits," including the merits of the claims of minor children through implied contract with both parents, would be preferable. That preference is directly tied to the human capital considerations discussed above and is based on ease of determination rather than any ethical superiority over a "needs" based system that was properly and consistently developed.

With respect to the labor market human capital issues of forebearance and enhancement, the state of New York has been engaged in a unique experiment since 1985, starting with *O'Brien v. O'Brien*. The experiment actually began in California with *In re Marriage of Sullivan* in 1982, but that case was overturned by the California Supreme Court. Interestingly, a short paper by Tetrault in 1983 compares the *Sullivan* case in California to *Lesman v. Lesman*, a 1982 New York case that reached an opinion opposite to that in *Sullivan* and to what was to become the *O'Brien* standard in New York. In *O'Brien* and subsequent cases on appeal, New York courts have held that a spouse's professional license constituted marital property subject to equitable distribution under New York law. This ruling follows the straightforward logic that if a

spouse may have contributed to the creation of a professional license, she should retain property rights in that license following divorce. As mentioned earlier, this case focused on a circumstance in which a wife supported her family while her husband obtained a medical degree, upon the completion of which, he sought divorce. This circumstance was commented upon before the Sullivan decision by Krauskopf [1980], Moore [1982] and Burke and Rosen [1982], after *Sullivan* but before *O'Brien* by Fitzpatrick and Doucette [1983] and by Tetrault [1983], and after *O'Brien* by Klebanoff [1985], Egge and Bunting [1985], Willoughby [1987], Borenstein and Courant [1989], Burns and Grauer [1990], Polsby and Zelder [1994] and Stoller [1996]. It is also a subject of a continuing series of stories in the *New York Law Journal* in 1996, suggesting that the *O'Brien* decision is a source of continuing controversy within the state of New York, and is an intended object of reform in many circles.

In other states, the law is clear that professional licenses are not marital property, but some states allow the contributions of the wife toward her husband's degree to be taken into account as a part of forbearance of income earning opportunity. Ireland [1991] cites relevant cases in the state of Missouri, but the papers cited above in conjunction with *O'Brien* also give the flavor of spousal rights in states other than New York. The *Family Law Quarterly* [1985] provided a review of law affecting this issue in all of the fifty states as of 1985.

The forbearance approach outlined by Ireland [1991] calculates the lost earning capacity of the spouse who has sacrificed her ability to fully develop career labor market human capital. In effect, this approach calculates lost earnings in a manner similar to how an earnings loss would be determined in a personal injury tort analysis. The difference between what a divorcing wife can earn today and what she could have earned if she had continued to develop her labor

market career as a single career woman is determined, usually with the assistance of a vocational expert. The economist then projects the growth of earnings in her current condition and for the condition she would enjoy if she had fully developed her labor market potential for the remainder of her expected worklife. The value of this stream of differentials is reduced to present value and thus represents a sum of money sufficient to offset the loss of earning potential as a result of the marriage. This figure is then presented to the deciding judge as a fact to consider, along with other facts about the wealth, income and financial needs of the family being dissolved through divorce. If the family wealth is not sufficient to equitably compensate the wife for her reduction in earning capacity, a schedule of future payments can be mandated by the court, with or without the trappings of being called alimony.

With a forbearance approach, there is no need to make a distinction between special cases in which wives have made direct cross contributions to the human capital of their husbands and more tradition cases in which wives have specialized in family-specific nonmarket human capital. In both instances, the value of the wife's contribution is measured by her forbearance of earning capacity and her claim on family wealth and income is based on that same consideration, along with child support issues. The inadequacy of this approach stems from its failure to account for the riskiness of the husband's professional aspirations. If the husband's eventual success in completing a graduate degree is largely a foregone conclusion at the time of a wife's decision to make direct investments in her husband's education, the degree of risk is low and an award of property with a value equal to the present value of the wife's investment in her husband's education would adequately compensate her for her time and effort. If, however, the husband's success is much more speculative, the wife's investment, if brought to present value

by a “safe” rate of return on her investment would be inadequate to match the return on similarly risky non-human capital investment. The wife might be signficantly under compensated in that instance. Likewise, if the husband’s professional achievements have been meager, the wealth necessary to compensate the wife for her investment simply would not exist. Nevertheless this is the general approach favored by the majority of state laws, even in their mixed and confusing language, and the one favored by this author.

VII. Economic Rights That “Should” Survive Marriage

It is the basic perspective of this paper that all cross contributions to human capital should be considered in the division of marital assets and responsibilities. In the case of divorce, what is efficient is also equitable. As this paper has been shaped, it appears to lead to arguments far more supportive of wives than husbands in typical divorce cases. However, when looked at on an *ex ante* basis, it is in the interest of both wives and husbands for all marital contributions to be considered at the time of divorce [Brown, 1992]. More effectively considering such contributions at the time of divorce would reduce moral hazard and free rider problems that are overcome by effective contract law in the financial marketplace. What keeps them from being handled fairly and efficiently in divorce cases is an inadequacy in how such contributions are understood and valued. This is not surprising given the complex human capital considerations involved. Hopefully, this paper will contribute to further illumination of those complexities.

All financial aspects involved in divorce settlements can be evaluated in a framework that considers gains and losses of human capital values as the basis for an equitable settlement. This is quite different from the existing evaluation procedure which considers non-human capital as divisible property in terms of gains and losses of capital value during the marriage, but considers

human capital issues in terms of a complicated and conceptually conflicting mix of "merit" and "need" factors. "Need" is the mechanism used by the courts to consider many of the factors introduced here as human capital issues. If a woman has spent her life specializing in household and mothering human capital investments, she will not be able to earn a high level of current income. This will be considered as a "need" factor in property settlements, child support awards, and alimony or maintenance awards. However, "need" is normally determined by an arbitrary standard, rather as a financial claim of right based on the wife's forbearances in developing her own market and marriage market directed human capital and enhancements of her husband's market and marriage market human capital. The common measure of such need is "financial support necessary to maintain the standard of living to which the wife has become accustomed," which implies that the "need" of wives is a function of their husbands' previously established abilities to pay support payments.

To base such need on the arbitrary standard of "financial support necessary to maintain the standard of living to which the wife has become accustomed" is to have only a relative standard based on a husband's income and a wife's potential earnings in future job markets. The moral hazard this creates is for wives facing divorces to obtain low paying jobs as evidence of earnings losses and for husbands to attempt to temporarily lower their own incomes so that "need" will be as high or low as possible. And therein lies the real inefficiency [Zelder, 1993]. Neither party to a marriage knows what kind of settlement will come out of a divorce at the time they marry or at the time they consider dissolution.

Facing such a state of uncertainty, both marital partners have incentives to strategically restrict their full development of marital resources because the possibilities of effective

opportunism are very great if they do not. In fact, many marital partners do not follow such self protective strategies and the feminization of poverty in our society is one consequence. Women do take the biggest risks in the development of human capital within marriages and they are the most injured when divorces occur, with the exception that they are frequently given presumptive rights to child custody of minor children in a manner that inefficiently encourages fathers not to fulfill child support obligations [Cohen 1987; Krauskopf 1980; Pollack 1985].

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