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GOODWILL AND THE IDEAL OF EQUALITY: MARITAL PROPERTY AT THE CROSSROADS

Michael G. Heyman*

I. INTRODUCTION

The 1970s saw substantial, if not dramatic changes in American divorce law, changes some call the divorce revolution.¹ Not only did legislatures inaugurate various forms of no-fault divorce, they also enacted marital property schemes to mitigate the unfairness of prior law. To many, these changes presaged a break with the parochial and unrealistic notions undergirding fault systems,² and furthered the vindication of women's rights begun by the passage of married women's property acts during the nineteenth century.³ Any elation was premature.

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¹ See generally, Lenore J. Weitzman, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985).

² Indeed, fault-based divorce was not only myopic to the true reasons why marriage failed, but it existed more as a cultural ideal than an actual norm, for divorce was often based on fraud and collusion. See Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 93 (1991) (discussing desire to eliminate fraud and collusion as one of several rationales for adoption of modern no-fault divorce grounds).

³ The effect of the Married Women's Property Acts was to enhance women's separate legal existence during marriage. HOMER H. CLARK, JR. AND CAROL GLOWINSKY, *CASES AND PROBLEMS ON DOMESTIC RELATIONS* 9 (1990). This effect was achieved by the Acts' placing married women on equal footing with their husbands with respect to contracts, earnings, the ownership of property and the right to sue or to be sued. *Id.*

Until the onset of marital property schemes, divorce economics was simple: the needy spouse received alimony and property was distributed according to title.⁴ Thus, typically under such schemes, women received alimony and little more. Adding to this the real cost of being the custodial parent,⁵ divorce law was cruelly unfair to women.

The passage of The Uniform Marriage and Divorce Act⁶ changed this basic scheme by basing marital property rights on contributions made to the marriage.⁷ The Act constituted a major break with the past, especially in its recognition of the equivalence of pecuniary and non-pecuniary contributions to the marriage. Reformers hoped that this would produce an equality in divorce thus far absent from the American legal landscape. They were wrong.

Instead, we have substantially abandoned the alimony system⁸ with appalling results. The very theory of reform seems to have turned insidiously on the reformers, creating widening economic gaps between

⁴ Indeed, commenting on the slow movement toward a marital property system, one commentator said:

James Bryce advanced the thesis that most patriarchal societies demonstrate an evolution from a system of subordination of women to the principle of equality. Once women secure equality as to property rights, other legal rights fall into place, although there may be a time lag before the egalitarian principle is fully implemented by law.

IAN F.G. BAKER, *MARITAL PROPERTY v* (1973) (citations omitted).

⁵ Though it is generally assumed that child support payments adequately meet the costs of parenthood, Professor Mary Ann Glendon has pointed out that the real costs of raising children after divorce fall disproportionately on the custodial parent, usually the mother. See, MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* (1987).

⁶ UNIF. MARRIAGE AND DIVORCE ACT §§ 101-506, 9A U.L.A. 156 (1973).

⁷ Section 307 of the UMDA embodies this idea. UNIF. MARRIAGE AND DIVORCE ACT § 307, 9A U.L.A. 238-39 (1973). One of the co-reporters of the Act, Professor Robert Levy, described the premise of this section as follows: "the wife who spends almost all her married life in home-making and childrearing contributes significantly to the family's economic welfare by making it possible for the husband to earn income and amass property during the marriage." ROBERT LEVY, *UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS* 165-66 (1969). See also, the prefatory note to the Act: "[t]he distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership." UNIF. MARRIAGE AND DIVORCE ACT, National Conference of Commissioners on Uniform State Laws' Prefatory Note, 9A U.L.A. 149 (1973).

⁸ Indeed, even the change in nomenclature is significant. Alimony is now customarily referred to as maintenance, and is statutorily subordinated to property division in the economics of divorce. See, e.g., ILL. REV. STAT. ch. 40, para. 504 (1989); UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 347-48 (1973).

men and women of divorce. Though the problem is even worse when children are present, it exists in any event.⁹ Thus, many now repudiate our marital property system and call for profound change.¹⁰

While recognizing what some see as the American fixation on individualism and apotheosis of individual rights,¹¹ I think we can mitigate some of the hardships of divorce without enacting new, far-reaching changes. Marital property schemes have not created economic inequality; they simply expose them more vividly. However, we can partially counteract this inequality through a more faithful, scrupulous applica-

* Professor Weitzman's book, *supra* note 1, represents the most widely cited source in this area. There, Professor Weitzman reports that in the first year after divorce, women suffered a 73% decrease in their standard of living, while men experienced a 42% increase. WEITZMAN, *supra* note 1, at 323.

While Weitzman's book is still the seminal work in this area, others have continued this research. See, e.g., James B. McLindon, *Separate but Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351 (1987) (which argues, based on New Haven County study, that women and children of divorce are entitled to the same standard of living as the men of divorce). See also, Joan Pennington, *The Economic Implications of Divorce for Older Women*, CLEARINGHOUSE REV. 488 (Summer 1989). For more localized studies, see Barbara R. Rowe & Jean M. Lown, *The Economics of Divorce and Remarriage for Rural Utah Families*, 16 J. CONTEMP. L. 301 (1990) and Barbara R. Rowe & Alice M. Morrow, *The Economic Consequences of Divorce in Oregon After Ten or More Years of Marriage*, 24 WILLAMETTE L. REV. 463 (1988).

But see, Herbert Jacob, *Another Look at No-Fault Divorce and the Post-Divorce Finances of Women*, 23 LAW & SOC'Y REV. 95 (1989) (criticizing Weitzman's methodology and conclusions about role of no-fault's contribution to post-divorce finances).

Although these, and other works take into account the plight of the children of divorce, Chief Justice Richard Neely of West Virginia specifically addressed the relationship between custody standards and the economic consequences of divorce. Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984).

¹⁰ MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991) (recommending a recognition that divorce reform has failed and advocating a return to a more just system grounded on need, not contribution); Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REVIEW 539 (1990) (income sharing at divorce because the contract and partnership paradigms have failed); Bea A. Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689 (1990) (imposing a kind of enterprise liability on men to foot the real and continuing costs of divorce).

¹¹ See generally, MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* (1987). Professor Glendon provides a fine examination of the relationship between our proud individualism, and what she sees as our failure to see man in his social context, one in which he bears not only rights, but also social responsibilities. Here, she questions the wisdom of a system that allows people to exit marriage as a matter of right, while bearing few of the economic costs produced by divorce. See *id.* at 133.

For a more general exposition of communitarian thought, see MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

Although communitarian thinkers could provide a social justification for the abandonment of our divorce laws, however right they may be, we need not make that move now.

tion of current doctrine. Nowhere is this more necessary than in the area of professional goodwill.¹²

Marital property has failed frequently because courts have failed or refused to vindicate its underlying purpose. Courts have failed to recognize that marital property is unique and constitutes an enlargement of what we often consider property.¹³ Thus, when first confronted by claims that seemed to defy the conventional notions of property law, many courts resolutely rejected them.¹⁴ Goodwill decisions are particularly confounding, spawning some of the most bizarre, glaringly inconsistent opinions in marital property law. Such decisions worked grave economic injustice.

Despite the vision created by famous divorce cases,¹⁵ most people have little conventional property to divide at the time of divorce.¹⁶ However, in the marriage in which the wife abandons career opportunities to devote her efforts to the home and family, her husband may continue to develop professionally and leave the marriage with substantially enhanced earning capacity. In the case of the professional, much of the potential may consist of goodwill.¹⁷ This goodwill may be a major asset with which one party leaves the marriage, while the other faces the grim reality of subsisting on short-term maintenance and child support. The failure to divide that goodwill thus magnifies the

¹² Naturally, this is not to say that the division of goodwill at divorce will correct all disparities produced by divorce. However, this is an area in which change can be achieved and produce salutary results. While other areas also need reform, they are not the topic of this Article.

¹³ That is, the very existence of marital property schemes eventually forced courts to rethink what is meant by property rights. Since marital property exists without reference to title, and since it implicitly recognizes a variety of intangibles as property, these schemes themselves embody a more sophisticated notion of property rights than is embraced by conventional common law thinking.

¹⁴ For example, for some time many courts refused to recognize that the marital home could be divisible as marital property, if the closing took place prior to marriage and title was held individually. For an early case exemplary of this, see *Cain v. Cain*, 536 S.W.2d 866 (Mo. Ct. App. 1976).

Similarly, only after a decade of steady litigation did most courts recognize that pensions were indeed divisible property, regardless of their inchoate status and regardless of whether vesting took place. There, the breakthrough opinion was *Brown v. Brown*, 544 P.2d 561 (Cal. 1976).

¹⁵ See, e.g., *Record Divorce Ruling Issued by Judge on Coast*, N.Y. TIMES, Apr. 1, 1983, at A10 (discussing record-setting divorce action between Sheik Mohammed S.A. al-Fassi and his wife, Sheika Dena al-Fassi).

¹⁶ See Lenore J. Weitzman, *supra* note 1, at 61-69.

¹⁷ This is not to say that goodwill and enhanced earning capacity are the same. Rather, earning capacity may be enhanced because of the goodwill developed during the marriage.

economic disparity of the parties after divorce. This Article will determine the legitimacy of not dividing goodwill.

Because this Article focuses on the divisibility of professional goodwill, it will first analyze this concept, noting the distinction frequently drawn between commercial and professional goodwill. It will demonstrate the falsity of this dichotomy as a property notion and demonstrate where this dichotomy works particular injustice in the area of marital property.

Next, this Article will enlarge our notion of marital property, pointing out the unnecessary restraints imposed by traditional property notions, marital property's expansion of these notions and the implicit endorsement of the notion of the new property. Further, it will demonstrate that marital property does not force us to abandon questions of need, but rather wraps them within itself.¹⁸

The next section will analyze case law rejecting the divisibility of goodwill, noting the identifiable rationales for these decisions. Indeed, while most courts permit the division of goodwill, the focus here is on those cases that fall within the rather substantial minority denying division.

Although the rationales for denying division are quite varied, some discernible bases have emerged. Cases have rejected division by claiming that: income from goodwill is speculative;¹⁹ any division involves double dipping or double counting of the same asset;²⁰ goodwill does not exist if it cannot directly be sold;²¹ and goodwill does not exist per

¹⁸ Indeed, the factors that provide the basis for the court's actual division often sound in need. For example, THE ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT explicitly includes need-based criteria to be used in the division of the marital property. These factors include the economic circumstances of the parties at the time of the property division, the opportunity of each party for the future acquisition of capital and income, as well as others. ILL. REV. STAT., ch. 40, para. 503 (1984).

Naturally, marital property division is limited to the amount of marital property present. Thus, some may argue that enlarging the share of the pie for the needy spouse is inadequate if the pie itself is too small.

¹⁹ See, e.g., *Roth v. Roth*, 406 N.W.2d 77 (Minn. Ct. App. 1987) (trial court finding goodwill too speculative to assign value not clearly erroneous); *Casey v. Casey*, 362 S.E.2d 6 (S.C. 1987) (when goodwill in business dependent upon owner's future earnings, it is too speculative for inclusion in marital estate).

²⁰ See, e.g., *Holbrook v. Holbrook*, 309 N.W.2d 343 (Wis. Ct. App. 1981) (treating goodwill as separate asset constitutes double counting).

²¹ See, e.g., *Miles v. Miles*, 816 P.2d 129 (Alaska 1991) (if goodwill is unmarketable, then no value is assigned when dividing marital assets); *Richmond v. Richmond*, 779 P.2d 1211 (Alaska 1989) (court will not divide goodwill that cannot be sold); *Prahinski v. Prahinski*, 582

se, but is confused with human capital.²² This Article will show the flaws in each of these rationales. It will also show how they either confuse the logistics of division with the merits of the substantive claim, or how they otherwise betray the essential purposes of marital property division.

Finally, this Article will conclude that this case law has betrayed the ideal of equality upon which marital property rests. It will show how this ideal has been thwarted not only by social and economic reality, but by the law that was designed to act as a check on those forces. It will argue that we do indeed stand at a crossroads in family law, but that our present system, when applied properly, can remove this obstacle to equality.

II. THE NATURE OF GOODWILL

Commercial success is elusive. Just as it is difficult to achieve, it is frequently difficult to explain just why some businesses succeed while others fail. Surely the work habits of business people play a large role in their success. Similarly, education, skill and ability also figure prominently. Sometimes business location, visibility and various market factors²³ also contribute significantly to the success or failure of a business. Depending on the nature of the business being analyzed, some factors may be more important than others.

One factor is obvious, though. Success begets success. Once a business establishes itself positively, its image plays a role in its continued success. Though the importance of that image may depend on a variety of factors, image itself produces business. Thus, if consumers²⁴ believe they can trust in the "product" offered by a business, that may well provide the basis for patronizing that business rather than going to a competitor. At its core, then, this is what we mean by goodwill: the

A.2d 784 (Md. App. 1990) (fact that lawyer's goodwill could not be sold is determinative of finding goodwill not divisible marital property).

²² *In re Zells*, 572 N.E.2d 944 (Ill. 1991) (court refused to acknowledge independent value of goodwill on grounds it was already reflected in consideration of income potential; any independent consideration would be duplicative).

²³ For example, whether like businesses are scarce at the location of the business in question, or whether the market is glutted.

²⁴ This term is used in the broadest possible sense to include those who patronize businesses to purchase a product, as well as those who seek out people who provide services.

advantage one business has over its competition because of its favorable image for providing a good product.²⁵

However, goodwill is not the invariable concomitant of business success. Thus, though goodwill acts as a kind of magnetic force in attracting business, the mere presence of business is not necessarily attributable to goodwill. Goodwill is a form of property, although intangible and elusive. In principle, it produces business, but a business can succeed for other reasons.

Assume, for example, two successful businesses in our universe under discussion. Assume also the presence of many marginal businesses providing the same product. Theoretically, one business may succeed because of goodwill, and the other because of the long hours worked by key employees and sheer volume of business done. The first business may rely on goodwill for patronage, while the second simply works harder. The first business may be able to command a higher price or fee for its product, but the second may do more business. By this view, goodwill exists in the first business, but not in the second.

Goodwill and excess earnings compared vis-a-vis the competition are simply not equivalent. It is commonplace to attribute success to the presence of goodwill, but clearly success can exist in its absence. Because of the frequent misconceptions engendered by the notion of goodwill, two elements became indissolubly linked to it: a commercial enterprise and an actual transfer or sale of that business. That is, until recently, something could not count as goodwill unless it inhered in a commercial business that was the subject of a sale.

These former requirements are understandable because of the context in which goodwill frequently arose. Goodwill was often only a relevant concern when a sale was proposed of a commercial business that produced tangible products. Thus, the question arose of what the purchaser or successor should have to pay above the value of the tangible assets of the business. It was a value concept of substantial economic concern to vendor and vendee alike. For example, Judge Cardozo de-

²⁵ Goodwill has been defined in various ways, but the constant element is the reputation of the business that is expected to provide future economic advantage. Thus, in the classic formulation, Story defined it as "[t]he advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity" JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP § 99, at 139 (William S. Hein & Co. 1980) (1841).

scribed goodwill in the following terms: “[M]en will pay for any privilege that gives a reasonable expectancy of preference in the race of competition. Such expectancy may come from succession in place or name or otherwise to a business that has won the favor of its customers. It is then known as good will.”²⁶ However, though the requirements of a sale of a commercial enterprise make sense historically, they are irrelevant to the existence of the goodwill itself.

Presumably, a purchaser will pay for goodwill because it exists; it does not exist because someone will pay for it. Thus, if a business enjoys a good reputation and its transfer can be effected without defrauding the public, the purchaser will pay for that economic advantage over the competition. Accordingly, a sale confirms the existence of goodwill; however, it does not create it. Though this may seem entirely evident, this confusion has reappeared in marital property cases, and some courts have denied division unless a sale was imminent or otherwise feasible.²⁷

These cases are almost exclusively confined to the divisibility of professional goodwill, however. Thus, as the argument would go, professional goodwill is not saleable, and absent proof to the contrary, it does not even exist. Rather, any so-called professional goodwill is really a function of the unique attributes of the professional and does not exist as property at all. Since this argument misconceives the nature of goodwill by falsely dividing it into commercial and professional, that distinction or, better, misconception, must be explored.

This division of goodwill into commercial (or mercantile) and professional was most resilient.²⁸ Presumably, it was based on the belief that the success of the professional was attributable to personal quali-

²⁶ *In re Brown*, 150 N.E. 581, 582 (N.Y. 1926).

²⁷ *See, e.g., Hanson v. Hanson*, 738 S.W.2d 429 (Mo. 1987) (en banc). There the court said that:

Because of the difficulties inherent in separating the reputation of the professional from that of his enterprise, evidence that other professionals are willing to pay for goodwill when acquiring a practice is, in our view, the only acceptable evidence of the existence of goodwill. Thus, as a matter of proof, the existence of goodwill is shown only when there is evidence of a recent actual sale of a similarly situated professional practice, an offer to purchase such a practice, or expert testimony and testimony of members of the subject profession as to the existence of goodwill in a similar practice in the relevant geographic and professional market. Absent such evidence, one can only speculate as to the existence of goodwill. Divisions of marital property may not be based on speculation as to the very existence of the property being divided.

Id. at 435 (footnote omitted).

²⁸ Arguably, it still persists in the marital property area.

ties and skills. Thus, it was unlike the commercial enterprise that relied on more technical skills to succeed. Accordingly, as one court put it, “[T]he general rule is that a professional partnership, the reputation of which depends on the individual skill of the members, such as partnerships of attorneys or physicians, has no good will to be distributed as a firm asset on its dissolution.”²⁹ Thus, that decision was based on the distinction between “commercial or trade partnerships” and professional partnerships.³⁰

Indeed, totally ignoring the realities of the marketplace, even the Internal Revenue Service embraced this notion.³¹ But its strength could not withstand the battering it absorbed as courts became increasingly aware of the reality that professionals did indeed sell practices and that goodwill accounted for some of the value.³² Courts increasingly recognized goodwill as a value concept, realizing that the commercial-professional dichotomy, though flattering to professionals, was simply misguided.

The distinction was misguided because of its myopia about the source of goodwill itself. While commercial businesses often operate in a highly regimented or even automated manner, the quality of the product derives from human effort. People habitually make their purchases based on their judgment about the quality of the products; similarly, they frequent professionals because of the apparent quality of their services. In each case, it is personal skill, knowledge and ability that initially created the reputation which draws in the business. True, it may be that a commercial enterprise, once successfully established, can thrive based on its successful record. However, unless it keeps pace with the competition, it will ultimately fail. The same is true for the professional.

Indeed, over sixty years ago, Professor Herbert Laube recognized this, noting:

Many courts, however, have failed to perceive that in origin good will is largely personal. They have confused the result with the means. The rigid classification of good will into local and personal has obscured the issue in

²⁹ Cook v. Lauten, 117 N.E.2d 414, 416 (Ill. App. Ct. 1954).

³⁰ *Id.*

³¹ See ALAN R. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP § 84, at 478 (1968) (Bromberg criticizes this short-sighted approach).

³² See generally, HAROLD G. REUSCHLEIN AND WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 226, at 341 (2d ed. 1990) (providing a discussion of the erosion of this distinction).

many cases. The question is not: Is the good will personal? The solution of any controversy regarding good will seems to be dependent upon two questions: 1. Does good will in fact exist? 2. May the benefit of it, under the circumstances, be made available to the vendee without fraud upon the public? If these two questions can be answered in the affirmative, what the source of the good will was, would appear to be of no consequence. If the law is to be consonant with fact, the court must recognize good will as far as is effectively possible. To the extent that it fails, it fails as an instrument of justice.³³

The law has, then, advanced during the last few decades, recognizing that a sale is not indispensable to the existence of goodwill. Similarly, it recognized that the nature of the business is irrelevant to the existence of goodwill. It may exist in a commercial or professional business. Yet, family law does not invariably share this growth. Though some courts posit a major difference between the commercial law of goodwill and its family law counterpart, that distinction is as insidious as it is specious. If anything, family law calls for a greater recognition of goodwill so that courts do not become the unwitting instruments of an injustice that punishes the spouse with less power and poorer access to the marketplace.

III. GOODWILL AND THE NEW PROPERTY: A PATH OUT OF POVERTY?

Over twenty-five years ago, Charles Reich published his article entitled *The New Property*.³⁴ While dealing principally with the individual and government largess,³⁵ his observations about intangible sources of wealth prompted substantial rethinking of conventional property law. While recognizing that things³⁶ clearly represent property, he saw property as a relational concept, seeing a host of intangible benefits as being a major, if not dominant, source of wealth. He noted:

³³ Herbert D. Laube, *Good Will in Professional Partnerships*, 12 CORNELL L.Q. 303, 326 (1927).

³⁴ Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

³⁵ *Id.*

³⁶ One writer refers to the narrow view that property consists of things as the "physicalist conception of property." See, Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 331 (1980). Mr. Vandavelde argued that the development of the notion of business goodwill contributed to the transformation of property law. Thus, "Blackstone's conception of property as absolute dominion over things had become fatally anachronistic, and was supplanted by a new form of property. This new property had been dephysicalized and thus consisted not of rights over things, but of any valuable right." *Id.* at 357.

Changes in the forms of wealth are not remarkable in themselves; the forms are constantly changing and differ in every culture. But today more and more of our wealth takes the form of rights or status rather than of tangible goods. An individual's profession or occupation is a prime example. To many others, a job with a particular employer is the principal form of wealth. A profession or a job is frequently far more valuable than a house or bank account, for a new house can be bought, and a new bank account created, once a profession or job is secure.³⁷

This concept of the new property applies with a particular aptness to marital property schemes generally, and to goodwill particularly. Indeed, those schemes may represent the virtual paradigm for Reich in that marital property represents a right to have rights in property. The interest does not ordinarily exist during the marriage,³⁸ nor is it predicated on the manner in which title is held. Rather, recognizing the economic utility of the marital relationship, marital property schemes compensate the non-titled spouse for her contributions to the joint economic success at divorce.³⁹

Thus, marital property is a kind of inchoate interest, one vindicated by the judge who divides the property. Moreover, since goodwill is an enormously valuable asset to the professional, one which engenders future income, its possession vastly enriches that professional. Because that kind of wealth fits squarely within Reich's notion of the new

³⁷ Reich, *supra* note 34 at 738.

³⁸ Marital property ordinarily arises only after the filing of a petition for dissolution of marriage and prior to a judgment of dissolution of marriage. As a purely marital property scheme, it provides the rules for the liquidation of the assets of the marital partnership. However, it does not, in itself, confer any rights over the property acquired by the parties during the subsistence of the marriage. Of course, that may be created by a community property scheme.

Thus, because of this limitation of marital property, the Commissioners on Uniform State Laws promulgated the Uniform Marital Property Act. UNIF. MARITAL PROPERTY ACT §§ 1-26, 9A U.L.A. 103 (1983). In its prefatory note, the reporter explained that "[r]ather than an evanescent hope, the idea of sharing implicit in viewing property as 'ours' becomes reality as a result of a present, vested ownership right which each spouse has in all property acquired by the personal efforts of either during the marriage." UNIF. MARITAL PROPERTY ACT, National Conference of Commissions on Uniform State Laws' Prefatory Note, 9A U.L.A. 99-100 (1983) (referring to UNIF. MARITAL PROPERTY ACT § 4, 9A U.L.A. 109-10 (1983)).

³⁹ Naturally, all property acquired during marriage (except for inherited property, and the like), is divided between the parties. This is done so without reference to how title is held. However, in its explicit recognition of the homemaker contribution, the Uniform Marriage and Divorce Act acknowledges the importance of non-pecuniary contributions to the success of the marital partnership. UNIF. MARRIAGE AND DIVORCE ACT § 307(L), 9A U.L.A. 239 (1973).

property,⁴⁰ denial of division is particularly inimical to the notion of marital property.

Crucial to an understanding of marital property is the recognition that efforts which benefit the partnership should translate into asset ownership. The spouse who maintains the home and allows the wage earner to work and enjoy the benefits of a nurturing family should share in the material acquisitions of the family. Yet, generally, this ideal of equality is more illusion than reality. Rarely is the homemaker compensated appropriately for her services,⁴¹ and because of her lost career opportunities, divorce is particularly devastating for her.⁴² Therefore, despite the appeal and obvious applicability of Reich's thought, many now lament the divorce revolution and doubt that Reich's noble ideas can be translated into an economically equitable reality for divorced women. But it is not entirely clear whether the problem is intractable, inhering in today's economic reality, or whether this inequity represents a misapplication of marital property law.

Focusing on the economic disparities of men and women after divorce, some have suggested that marital property schemes undermine, rather than help, the majority of divorced women. For example, Professor Martha Fineman has distinguished between equality of treatment (what she refers to as rule-equality) and equality of result.⁴³ She contends that the feminists who argued for divorce reform by categorically insisting on gender neutrality failed to account for deep, entrenched differences between the status of men and women in society.

Concluding that marital property schemes, as structured, are essentially misguided, she wrote:

I am not convinced, however, that the circumstances that generated arguments for a distribution system focused on needs that no longer exist. Further, I am concerned that the material circumstances of divorcing women and chil-

⁴⁰ By its nature, the new property is a malleable concept that does not lend itself to precise definition. Accordingly, it is silly to think that items demonstrably do or do not fall within its coverage. However, inclusion of goodwill within it seems particularly appropriate, since, quite ironically, it represents a value that endures, unlike the evanescence of much tangible property.

⁴¹ Professor Rutherford has discussed the economic choices and plight faced by the homemaker spouse. Whereas her contribution is worth anywhere between \$13,000 and \$46,000 per year, it is highly unlikely that she will be adequately compensated through the division of marital property. Thus, even after setting aside both her expectation of a better life, and the sacrifice she may have made to her career by acting as a homemaker, she is still usually an economic loser. See Rutherford, *supra* note 10, at 561.

⁴² *Id.*

⁴³ See FINEMAN, *supra* note 10, at 20.

dren are being detrimentally ignored by supplanting a focus on needs with a focus on contribution as the primary distributive concept. The ascendancy of contribution may present a nice, neat instance of conceptual progress to legal academics and law reformers, but for many divorcing spouses, as well as for the practicing professionals to whom they turn for advice, adverse material circumstances and the needs they generate have not been left behind.⁴⁴

Focusing squarely on the divisibility of degrees and goodwill, while admitting the plausibility of this property-based solution,⁴⁵ she nevertheless concludes that it is still a disguised need argument wrapped within the notion of contributions.⁴⁶ Similarly, other commentators believe that our laws have disserved the interests of the women and children of divorce.⁴⁷ While this is undoubtedly true, my task here is to determine the divisibility of goodwill as marital property. If it falls within the context of new property and does not otherwise defy division, then those courts that have opposed division are simply wrong.

If this is true, then current doctrine, properly applied, can solve the dilemma of how to treat professional goodwill. However, need and contribution may dovetail if the nonprofessional spouse has helped the other acquire goodwill. It would be unjust enrichment to let the professional keep this asset exclusively.⁴⁸ Moreover, recognition of this asset

⁴⁴ *Id.* at 42.

⁴⁵ That is, she admitted that the solution might lie in the application of current law. *Id.* at 174.

⁴⁶ *Id.* at 178.

⁴⁷ Professor Glendon feels this is rooted in the American preoccupation with individualism, to the exclusion of the reality that people exist in a social, cooperative context. Thus, she wrote: In the continuing cultural conversation about marriage and family life, American law has weighed in heavily on the side of individual self-fulfillment. It tells us that if a marriage no longer suits our needs or if the continuation of a pregnancy would not fit in with our plans just now, we can choose to sever the relationship.

GLENDON, *supra* note 5, at 108. Thus, she concluded that, especially in a marriage with children, the idea of a divorce as a clean break is nonsense and these divorces "should be subject to a new, separate system of regulation."

Id. at 93.

⁴⁸ Professor Deborah Batts has made a similar suggestion in discussing "enhanced spouse/other spouse divorces." See, Deborah A. Batts, *Remedy Refocus: In Search of Equity in 'Enhanced Spouse/Other Spouse' Divorces*, 63 N.Y.U. L. REV. 751 (1988).

Professor Batts concluded that,

If the courts can recognize, as most do, that the enhanced spouse is better off with the 'object' than without it, and that the other spouse helped attain that 'object' at some cost, then many of the problems the courts have experienced can be eliminated. If the other spouse is compensated for all contributions, financial and nonfinancial, then the relevant interests have been recognized.

Id. at 798.

and its division at least begin to eliminate the economic gap between the parties to divorce. It begins to counter the progressive feminization of poverty⁴⁹ that is so rampant by providing the nonprofessional with her fair share of a valuable asset acquired during marriage. By sharing this goodwill, she will be compensated for her contributions and her economic plight will be lessened. They are inextricably intertwined. Yet, sadly, those courts that have refused to recognize the property—or new property—status of professional goodwill have only deepened the economic plight of the nonprofessional spouse.

However, since goodwill fits neatly within even conventional concepts of property, and since it unquestionably is a recognizable form of new—and marital—property, it remains to be seen whether any plausible argument justifies denying its division at divorce.

IV. GOODWILL AND MARITAL PROPERTY

A. *What's all the Fuss About?*

By now, goodwill is an understandable commercial concept of substantial legal maturity. As noted, though it proceeded through a tortuous path, it is now readily understood and accepted. Any ragged edges have been refined. Yet this is not so in family law. On the contrary, the cases represent a hideous cacophony of angry rhetoric and invective; each court addressing the issue of the divisibility of professional goodwill does so piously, while pointing out the frightful distortions created by courts elsewhere.⁵⁰ Scholarly commentators are also at loggerheads

⁴⁹ The concept of "feminization of poverty" comes from the notion that, whether as widows, divorcees or unmarried mothers, women have always experienced more poverty than men. Diana Pearce, *Welfare is Not for Women: Toward a Model of Advocacy to Meet the Needs of Women in Poverty*, 19 CLEARINGHOUSE REV. 412 (Summer 1985). Indeed, approximately 50% of all poor families are maintained by women alone. *Id.* (citing U.S. BUREAU OF THE CENSUS, MONEY INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES: 1983 (1984)).

⁵⁰ See, e.g., *Holbrook v. Holbrook*, 309 N.W.2d 343 (Wis. App. 1981). There, the court noted that "[w]ith an apparent lack of deliberativeness, the California courts have developed the view that the goodwill of a professional practice is an asset which must be accounted for upon dissolution of marriage." *Id.* at 352 (citation omitted). Later, the court said, "[t]he California approach has been deservedly criticized as a 'confusion of rules and methods of valuation, compounded by inconsistencies in logic and application and conceptual problems over possible duplication of spousal support and denial of equal protection.'" *Id.* at 353. (citation omitted).

Even courts within the same state have reached different results. For example, for over a decade, Illinois appellate courts assumed radically different views on the divisibility of professional goodwill. For opinions approving the division of goodwill, see *In re Rubenstein*, 495 N.E.2d 659 (Ill. App. Ct. 1986); *In re White*, 424 N.E.2d 421 (Ill. App. Ct. 1981); *In re Leon*, 399 N.E.2d

over the application of goodwill to marital property.⁵¹ Even casebook editors have leaped into the fray.⁵² What is it about family law that has created such confusion and controversy?

Surely some answers are evident. Marital property schemes were designed to divide the property accumulated during the marriage. If a division of goodwill—or something called that—were to reach the earnings of one spouse indefinitely into the future, that would seem to frustrate the notion of marital property, because marital property is all property acquired subsequent to marriage and before divorce. Future assets would seem to be beyond its reach.

While some assets can only be enjoyed in the future,⁵³ they may have a demonstrable present value. Thus, members of a pension plan receive periodic statements, indicating how much has accrued in the plan. Even though this is not necessarily indicative of just how much will be received at retirement, it does show the present value of an asset. Goodwill is much more elusive.

Since goodwill presumably bears a present value based on future events, and since professional earnings seem different from projected sales of a product, many believe that it cannot fit within the marital property paradigm. Its value, indeed its very existence, is so easily de-

1006 (Ill. App. Ct. 1980); *But see, In re Courtright*, 507 N.E.2d 891 (Ill. App. Ct. 1987); *In re Wilder*, 461 N.E.2d 447 (Ill. App. Ct. 1983).

Although the Illinois Supreme Court ultimately decided that professional goodwill is not divisible, that opinion itself rests on uncertain, and perhaps conflicting, rationales. *In re Zells*, 572 N.E.2d 944 (Ill. 1991).

⁵¹ In a noteworthy article, Allen Parkman bemoaned the conceptual confusion running throughout this area. Allen M. Parkman, *The Treatment of Professional Goodwill in Divorce Proceedings*, 18 FAM. L. Q. 213 (1984). Parkman believed that the courts have hopelessly confused economic, accounting and legal notions in their treatment of goodwill. Thus he said:

[i]f the courts say that there is goodwill in a sole practice, when there is none from an accounting or economic perspective, a problem of evaluation is created. It is like saying that an apple is an orange and then, even in the face of protests from an agricultural expert, asking for an analysis of the apple's citrus content.

Id. at 216 (emphasis added).

⁵² Of course, relying exclusively on the market value of goodwill, as does *Hanson*, is only one way to avoid these valuation difficulties. Another way is to divide earning capacity as well as goodwill, thus eliminating the need to distinguish the two. Under such a rule, the court would simply look at the professional's entire projected income over his lifetime, capitalize it and divide it. But most courts agree that earning capacity itself should not be considered divisible property. If we start from that premise, it is difficult to see how any approach other than *Hanson's* can ultimately be sustained, although currently many courts do not follow it. IRA M. ELLMAN, ET AL., *FAMILY LAW: CASES TEXT, PROBLEMS* 320 (2d ed. 1991).

⁵³ The classic example here is a pension or other retirement interest.

feated or dependent on uncontrollable events, that many argue that its division should be disallowed. And, even were the professional to continue successfully, others argue that this success does not result from goodwill, but from personal skill and knowledge, elements hardly traceable to the marriage. By that view, a division would represent a misguided effort to correct social ills at the expense of the successful professional.

The division of one spouse's success could represent compensation to the other for opportunities lost. Perhaps some courts, either rightly or not, have perceived the division of professional goodwill as doing just that. Indeed, it may well be that the valuation schemes approved by some courts will accomplish that dubious result.⁵⁴

It may be that some courts have, however benignly motivated, expressly chosen to accomplish that end. Perhaps these courts, faced by the gross social and economic disparities confronted by men and women, have tried to smuggle in some measure of equality through a misapplication of marital property law. But that is not the question here. Instead, the question is whether professional goodwill is a form of property which lends itself to division. The task here is to determine whether the categorical denial of division is intellectually justified. If it is not, the motives of the courts that have recommended division are irrelevant.

Though the reasons given for denying division are many (and frequently overlapping), as previously noted they basically fall into four categories. Some courts resist division because any money earned through goodwill is entirely speculative. Thus, to divide it would represent a division of something which may never arise.

Other courts think that any consideration of goodwill involves double counting. That is, since courts consider a party's future earning capacity when deciding maintenance questions,⁵⁵ any additional consideration of goodwill in the division of property would allow the nonprofessional to take twice.

⁵⁴ For a good judicial discussion of the problems in valuing professional goodwill, see *Dugan v. Dugan*, 457 A.2d 1 (N.J. 1983). *Dugan* is one of the most frequently cited cases supporting the divisibility of professional goodwill.

For an interesting critique of various valuation schemes, see Jerald H. Udinsky, *Goodwill Depreciation: A New Method for Valuing Professional Practices in a Marital Dissolution*, 9 COMMUNITY PROP. J. 307 (1982).

⁵⁵ See, e.g., ILL. REV. STAT. ch. 40, para. 504(b) (1989).

Yet other courts have denied division unless a sale was pending or if a sale's practicability could otherwise be shown. Thus, if no sale were possible, and none could be shown, nothing existed that could be divided. Implicitly, this seemed to endorse the notion that goodwill that is so personal as not to be saleable is not property at all, but simply a function of the professional's skills, habits, ambition or even good fortune.

Thus, the last, and perhaps most fundamental objection lodged against the division of goodwill is that the very word is perhaps a misnomer.⁶⁶ Proponents here have argued that unless goodwill exists as an asset of a business, wholly independent of the practitioner, it is a mistake to even call it goodwill. Rather, it is human capital, and its division would be wrong, leading to the division of literally anything that is a function of a person's skills and knowledge. That would leave all future income subject to division, which is surely an objectionable result.

As a result, though these arguments are somewhat interdependent, it remains to be seen which if any has persuasive force. If none does, then family law is not somehow different and denial of division is not only wrong, but also frustrates major objectives of marital property law generally.

B. Rationales for Denying Division

1. Any Income From Goodwill is Speculative

Many courts flatly deny the existence of professional goodwill.⁶⁷ Others wrangle over the accounting method used to value it.⁶⁸ However, still other courts claim that since the value of the goodwill itself may not be realized, it is not a marital asset subject to division. Thus, virtually conceding the existence of a potentially valuable asset, these courts nonetheless deny division. This position is best exemplified by the Texas Supreme Court's decision in *Nail v. Nail*.⁶⁹

⁶⁶ See Parkman, *supra* note 51.

⁶⁷ See cases discussed *infra*.

⁶⁸ See, e.g., the cases discussed in the following annotations: Martin J. McMahon, Annotation, *Valuation of Goodwill in Accounting Practice for Purposes of Divorce Court's Property Distribution*, 77 A.L.R. 4th 609 (1990); Martin J. McMahon, Annotation, *Valuation of Goodwill in Law Practice for Purposes of Divorce Courts Property Distribution*, 77 A.L.R. 4th 683 (1990); Martin J. McMahon, Annotation, *Valuation of Goodwill in Medical or Dental Practice for Purposes of Divorce Court's Property Distribution*, 78 A.L.R. 4th 853 (1990).

⁶⁹ 486 S.W.2d 761 (Tex. 1972).

The *Nail* court confronted a situation in which a couple had been married for over twenty-five years⁶⁰ and the husband was a successful physician who had a medical practice with modest tangible assets, but with goodwill valued at over \$130,000.⁶¹ Though the trial court had ordered a division, the manner in which the supreme court framed the issue clearly foreshadowed its reversal. The court viewed the issue as whether "the accrued good will of the medical practice of the husband . . . based 'as it is' on his personal skill, experience and reputation, as well as upon his continuing in the practice, constitutes property that is subject to division as part of the estate of the parties."⁶² The court answered this question in the negative, implicitly recognizing the existence of this asset, but denying its division because its value had not vested.

Although the court discussed other theories used to deny the division of goodwill,⁶³ it evidently confused the existence of goodwill with whether it would realize future earnings. That is, although the court found that goodwill existed, its refusal to divide it turned on the possibility that future events might thwart its production of future income. Thus, referring to a legal encyclopedia, it noted that "as good will must adhere to some principal property or right, the extinction of such right operates to extinguish the good will dependent on it."⁶⁴

This is puzzling because goodwill is an asset, which by definition, depends on the operation of a business in the future, and such future success can never be guaranteed. The court seems to have wholly eliminated the possibility of ever dividing goodwill, in a marital setting or otherwise. The court was simultaneously positing goodwill as a form of property, but also denying that fact in the most meaningful manner—denying its division.

The confusion deepened as the court muddled between confusion over goodwill's asset status and certainty over whether it would guarantee future earnings. This occurred during the court's discussion of its requirement of vesting. In contrasting goodwill and military retirement benefits, the court noted that:

⁶⁰ *Id.*

⁶¹ *Id.* at 762.

⁶² *Id.* at 761.

⁶³ *Id.* at 763. The court referred to several legal encyclopedias in arguing that goodwill does not adhere to a business which is dependent upon an individual's personal skills. *Id.*

⁶⁴ *Id.*

The crucial consideration was the vesting of a right when the husband reached the requisite qualifications for retirement benefits; the fact that the benefits were subject to divestment under certain conditions did not reduce the right to a mere expectancy. The good will of the husband's medical practice here, on the other hand, may not be characterized as an earned or vested right or one which fixes any benefit in any sum at any future time. That it would have value in the future is no more than an expectancy wholly dependent upon the continuation of existing circumstances.⁶⁶

Thereafter, the court specifically noted that it was not concerned with "good will as an asset incident to the sale of a professional practice"⁶⁶

Thus, the existence of a divisible asset turns on whether a sale has taken place. This produces the anomalous result that were there a sale, division would result, yet without a sale the same property remains in the exclusive control of the professional. Indeed, that very result occurred nine years later in Texas, when an accounting practice was sold and the nonprofessional spouse shared in the proceeds from the sale of the goodwill.⁶⁷ That court distinguished *Nail*, noting that:

[O]nce a professional practice is sold, the goodwill is no longer attached to the person of the professional man or woman. The seller's actions will no longer have significant effect on the goodwill. The value of the goodwill is fixed and it is now property that may be divided as community property.⁶⁸

Despite the oddity of this last statement, this later case confirms the property status of goodwill that is sold. However, it conditions compensation to the nonprofessional on whether a sale has occurred.⁶⁹ Presumably, this was done because a division might divest the professional of property at divorce, after which she may never enjoy any future benefit. If so, the nonprofessional would be sharing in something that never came into being. This necessitated the reliance on vesting.

This is not the only appearance of the concept of vesting in marital property law. On the contrary, for many years it played a determinative role in the divisibility of pensions and other interests which awaited

⁶⁶ *Id.* at 764.

⁶⁷ *Id.*

⁶⁸ *Austin v. Austin*, 619 S.W.2d 290 (Tex. Ct. App. 1981).

⁶⁹ *Id.* at 292 (emphasis added).

⁷⁰ Although the rationale for the denial of division will be discussed *infra*, this case demonstrates the overlapping nature of these various rationales denying division and the confusion in those courts relying on such rationales.

realization.⁷⁰ The difficulties seemingly presented by the notion of vesting were dissolved by the California Supreme Court's opinion in *In re Brown*.⁷¹

There, the court recognized the unfortunate conflation of two notions: the existence of property and difficulties involved in its division. However, it also recognized that since a pension represents an enforceable property interest, courts had been led astray by the possibility that vesting would not occur. However, if it did occur and the nonpensioner was denied any property interest, unjust enrichment took place. Thus, the court concluded that the wife's contribution was not "one whit less"⁷² if the pension were nonvested, and that to predicate division upon vesting would create intolerable, whimsical results turning on facts unrelated to property interests and marital contributions. Accordingly, despite the logistical difficulties that might result from continuing jurisdiction in the trial court to order division upon realization of the benefits, the court accepted that result in order to do justice to the nonpensioner spouse.⁷³ Some have suggested the same treatment of goodwill, advocating a 'pay as it comes in' system.⁷⁴

The key notion here is that, as an economic concept, goodwill is a present asset which yields future returns. Thus, one commentator analogized it to a half-exhausted gold mine, noting that future earnings attributable to goodwill "are merely the future collections of the present value of the goodwill existing at the date of divorce."⁷⁵ Any other approach entirely eviscerates the very concept of goodwill and thoroughly and unjustly undercuts the principles of sharing upon which marital property schemes rest by denying a division of something that was acquired as a result of marital contributions.

⁷⁰ See *supra* notes 10 and 45 and accompanying text.

⁷¹ 544 P.2d 561 (Cal. 1976).

⁷² *Id.* at 570.

⁷³ *Id.* at 567-68.

⁷⁴ See, e.g., Jill Adams, Note, *Community Property—Valuation of Professional Goodwill*, 11 N.M. L. REV. 435, 444 (1981).

⁷⁵ Alan S. Zipp, *Divorce Valuation of Business Interests: A Capitalization of Earnings Approach*, 23 FAM. L.Q. 89, 104 (1989).

Other commentators have made similar points. See e.g., Bryan Mauldin, Comment, *Identifying, Valuing, and Dividing Professional Goodwill as Community Property at Dissolution of the Marital Community*, 56 TUL. L. REV. 313, 321 (1981); Carmen V. Patel, Note, *Treating Professional Goodwill as Marital Property in Equitable Distribution States*, 58 N.Y.U. L. REV. 554, 567-68 (1983).

Thus, *Nail* is an unfortunate relic of the past⁷⁶ which, when followed, as it has been, only works an injustice upon the nonprofessional. However, it remains to be seen whether any other rationales support this denial of division.

2. *A Division of Goodwill Would Result in Double Counting*

Texas does not have a maintenance system. Thus, the sole source of support for the spouses at divorce comes from the property division. Were this not so, Texas courts would find themselves in the odd position of refusing to recognize goodwill,⁷⁷ yet considering the professional's earning ability, as enhanced by goodwill, in awarding maintenance. The oddity is manifest, for a court would then be simultaneously denying the value of the goodwill, yet assigning it a value in setting maintenance. Although the Texas requirement of a sale has been criticized as anomalous by some courts,⁷⁸ one analytical anomaly has been replaced by another. Instead of denying division because of difficulty of valuation, many courts have denied division, claiming such division would result in the nonprofessional enjoying the value of the asset twice over.

This view is flawed by a fundamental misconception about the relationship between property division and maintenance. Once a division of marital property occurs, the resulting property is owned by the spouses separately. Then, a court may legitimately look to all income sources of each spouse to determine if maintenance should be paid and, if so, how much.

The myth of double counting apparently rests on the notion that were goodwill divided as property and were the earning capacity of the professional (including goodwill) then considered in setting maintenance, the nonprofessional would benefit twice from goodwill. Though this is true in a Pickwickian sense, there would not be a double sharing in the same asset. In addition, to the extent that goodwill is considered twice, it is justified because it is an asset with a determinable value and it does confer greater income upon the professional possessing it.

⁷⁶ Indeed, to the extent that the notion of vesting has vanished from the legal landscape elsewhere in the marital property area, *Nail* is not good authority in any sense.

⁷⁷ That is, assuming no sale had taken place.

⁷⁸ See, e.g., *Holbrook v. Holbrook*, 309 N.W.2d 343, 354 (Wis. Ct. App. 1981) ("The inconsistencies and inequity of the distinctions of *Nail* and *Geesbreght* have been noted and criticized.") *Id.*

However, as with previous logistical rationales used for denying division, double counting works insidiously. Though apparently grounded in the notion that the nonprofessional would be unjustly enriched, this procedural rule has become ossified into a rule of substance. Regardless of whether double counting could occur, it has become a basis for declaring goodwill an indivisible asset. This confuses marital property and maintenance alike.

Maintenance awards are increasingly disfavored.⁷⁹ Therefore, it is quite possible that maintenance may either be denied outright, or it may be short-lived merely to serve rehabilitative purposes. If maintenance is denied outright, a substantive rule denying goodwill division rests on the incorrect premise that maintenance is necessarily awarded. By the very terms of this flawed rule, then, a division of goodwill would be warranted were maintenance not awarded. However, because it serves as a basis for never dividing goodwill, it prevents that result.

Were maintenance awarded, though, it is simply mistaken to think that a division of goodwill would result in one party enjoying that asset twice over. For example, in a recent case involving a Connecticut radiologist,⁸⁰ the wife's expert witness valued the goodwill of the medical practice at between \$679,000 and \$800,000.⁸¹ The trial court awarded the wife a one-half interest in the real property acquired during marriage and \$300,000 in lump sum alimony. Presumably, that alimony award reflected, at least in part, the value of the marital goodwill. Yet, though the Connecticut Supreme Court affirmed the trial court, what if the trial court had divided the goodwill *per se* and then awarded maintenance for a brief period of time? Moreover, what if the wife had remarried after the award, thus terminating her right to receive maintenance?

In neither case would she necessarily have enjoyed the value of the goodwill twice. For example, perhaps the goodwill would have increased her maintenance by \$20,000 a year for three or four years.

⁷⁹ UNIF. MARRIAGE AND DIVORCE ACT, National Conference of Commissioners on Uniform State Laws' Prefatory Note, 9A U.L.A. 149 (1987). As a reflection of this disfavor, the note states that the Act was designed to ignore maintenance in that marital property is the primary means for providing for the future financial needs of the spouses. *Id.* Only when such property is insufficient to satisfy needs does the Act provide for maintenance awards. *Id.* As a result of its provisions, the Act specifically rejects the traditional reliance upon maintenance as the primary means of support.

⁸⁰ *Eslami v. Eslami*, 591 A.2d 411 (Conn. 1991).

⁸¹ *Id.* at 416-17.

Under those facts, she might have received half the value of the goodwill at divorce (at the most, \$400,000), plus a maximum of \$80,000 in maintenance attributable to that goodwill. Even though she would have benefitted twice from the goodwill, the extent of her benefit would not be double. Moreover, as previously mentioned, not only is it possible that no maintenance will be awarded, but remarriage terminates the maintenance as a matter of law.

But the double counting argument is even more fundamentally flawed. Although the possibility of receipt of \$480,000 based on marital goodwill may seem offensive, it is not. Those cases that have denied division altogether on the basis misunderstood both marital property and this double counting notion. The Wisconsin case of *Holbrook v. Holbrook*⁸² is such a case.

There the trial court divided the assets of the marriage, including in its list of assets \$161,330 for the value of the goodwill in Mr. Holbrook's law practice. In reversing, the appellate court stated that: "the goodwill or reputation of Quarles & Brady is reflected in John's substantial salary. This salary was considered in setting the family support award. To also treat the goodwill of the law firm as a separate divisible asset, would constitute double counting."⁸³

Similarly, the Supreme Court of Illinois recently reached the same result, refusing to divide the goodwill of a law practice. Quoting from a prior appellate case, it noted that "[A]lthough good will was not considered in the court's valuation of the business itself, it was a factor in examining [the husband's] income potential. To figure goodwill in both facets of the practice would be to double count and reach an erroneous valuation."⁸⁴ Thus, the court denied division, because by its thinking, "[T]he goodwill value is then reflected in the maintenance and support

⁸² *Holbrook v. Holbrook*, 309 N.W.2d 343 (Wis. Ct. App. 1981).

⁸³ *Id.* at 355. This did not appear to be the sole basis for this decision. Expressing a generalized disenchantment with the notion of dividing goodwill, the court noted that:

The concept of professional goodwill evanesces when one attempts to distinguish it from future earning capacity. Although a professional business's good reputation, which is essentially what its goodwill consists of, is certainly a thing of value, we do not believe that it bestows on those who have an ownership interest in the business, an actual, separate property interest.

Id. at 354.

⁸⁴ *In re Zells*, 572 N.E.2d 944, 946 (Ill. 1991).

awards. Any additional consideration of goodwill value is duplicative and improper."⁸⁵ These courts are flatly wrong.

Once a division of marital property has taken place and the parties are divorced, what was formerly marital now becomes the separate property of each party. To the extent that the property has, by its nature, future earning potential, those earnings should be considered in making the maintenance award. It is no less property and its future income is no less income simply because it represents property divided upon divorce. Thus, discussing this double counting argument in a pension setting, the Supreme Court of California concluded that:

[E]ven if a future award of spousal support must come from husband's half of the community property there is no requirement excluding such property as a source of that support. As the Court of Appeal below noted, in every case where one spouse receives permanent spousal support from the other spouse, the source is from the separate property of the paying spouse, including . . . earnings or property which were once the community property of both spouses.⁸⁶

By this view, double counting would occur only when jurisdiction to divide the pension is reserved, and only if the court considers the totality of the pension in setting the maintenance award. The award would then be based on twice the property the pensioner would likely enjoy.⁸⁷ Naturally, the same is true for goodwill. However, it is sheer nonsense to deny the fact of income simply because it derives from the current share of that which was once jointly owned property. Its character as income is not one whit less merely because it represents the proceeds from a property division.⁸⁸

⁸⁵ *Id.* In the same vein see *Travis v. Travis*, 795 P.2d 96 (Okla. 1990), in which the Supreme Court of Oklahoma said:

The goodwill of a sole proprietorship is related only to his future earnings, since an actual sale produces no value. To assess a value on future productivity and to award a proportionate amount to the spouse is akin to making a lump sum alimony payment since it is based on future earnings of the paying spouse. If, in addition to this payment, alimony is awarded, there is, in effect, a double charge on the future income of the paying spouse. Even without an alimony award, a fixed sum, not having the designation as alimony, carries none of the flexibility of an alimony award derived from its modifiability and, therefore, may penalize the payor if he suffers reverses, unemployment or dies.

Travis, 795 P.2d at 946.

⁸⁶ *In re Epstein*, 592 P.2d 1165, 1174 n.14 (Cal. 1979).

⁸⁷ See, e.g., *In re White*, 192 Cal. App. 3d 1022, 1027 (1987).

⁸⁸ Professor Grace Blumberg has examined this issue, reaching the same result:

A number of courts and commentators have raised the question of 'double counting,' that is, treating goodwill or, indeed, any other asset as marital property subject to divi-

Viewed correctly, those courts denying division because of double counting have created a pseudo-problem, resulting in substantial injustice. By its nature, goodwill is income-producing property, consisting of a present property interest in what will be future income. This does not mean that double counting cannot take place. It only means that the possibility should not be the basis for categorically refusing to divide professional goodwill.

Double counting can take place under certain limited circumstances. Since goodwill does represent a future income stream flowing from a present interest, it would be wrong to consider the totality of a professional's future income, including that attributable to marital goodwill, in setting maintenance. Thus, assume that a professional can expect to earn \$50,000 each year for the next four years from marital goodwill. Assume further that in addition to dividing the goodwill, the court provides maintenance for the nonprofessional. That maintenance award should not be based on the entire income of the professional.

Rather, the award should be based on the professional's expected income less the goodwill, plus income based on the goodwill the professional retained after the property division. Assuming the figure above, and assuming a one-half division of the goodwill, maintenance should be based on the projected future income for that four-year period, less the \$25,000 per year which represents the property division. To calculate maintenance based on the entire projected income would give the nonprofessional half the value of the goodwill-generated income as property and a maintenance award based on the total income. That would be double counting and should not be permitted.

Resisting the tendency to invoke the double-counting shibboleth, an Ohio appellate court recently isolated the problem, noting the inability of many commentators to conceptualize properly the process of property division.⁸⁹ First, the court noted that Ohio had already ap-

sion and then considering it again as a source of spousal support. In many instances, discussion is misleading and incorrect. There is nothing improper about treating an asset as marital property, assigning it to one spouse pursuant to a property division and then, if the asset is income-producing, counting it again for support purposes when assessing both spouses' needs and ability to pay spousal support.

2 JOHN P. McCAHEY ET AL., VALUATION & DISTRIBUTION OF MARITAL PROPERTY, ch. 23, §23.05(d) (1984).

⁸⁹ Kahn v. Kahn, 536 N.E.2d 678 (Ohio Ct. App. 1987). The court noted that:

The problem results from the inability of many commentators to conceptualize the property division process as containing two steps. First, place a value on the property to be able to divide it and, second, distribute the property fairly based on the statutory

proved the division of professional goodwill in a purely commercial setting.⁹⁰ Then, it considered the question of whether goodwill is likewise divisible in a marital dissolution. Concluding that it was, it went on to affirm the trial court's division of the goodwill of a physician's practice.

Although this case broke no new ground, it did demonstrate the ease with which a court can avoid the conceptual morass into which so many others have fallen. By piercing the empty rhetoric of double counting, the court isolated the real problems, thus paving the way for handling property division and maintenance more effectively in the future. If a court can segregate that portion of future earnings which has already been "credited" to the nonprofessional, it can then go about the process of deciding maintenance questions more intelligently and precisely.

However, though courts have frequently denied division because of these misguided accounting-based reasons, many of these courts have also noted the inherently elusive nature of goodwill. Thus, even though they have been wrong in their accounting, they may still be correct in not dividing what is, by some views, the very essence of the professional—those characteristics and attributes that result in success.

3. *The Requirement of a Sale and Human Capital: Two Problems or One?*

The conflict between the Texas cases of *Nail* and *Austin*⁹¹ underscores the confusion about the divisibility of goodwill. As noted here previously,⁹² a sale confirms the existence of goodwill; it does not create it. Thus, although the salability of the professional's goodwill would be evidence of its value, the nonsale should not be a substantive bar to its division. Yet that is precisely what distinguished these two Texas cases. Other cases have similarly denied the division of goodwill in the ab-

considerations. In the first step, goodwill is treated as any other asset of the practice in giving the practice a monetary value. In the second step, all income-producing assets are considered, along with all other statutory considerations, to decide which assets should be given to which party.

Id. at 682.

⁹⁰ *Id.* at 681.

⁹¹ See *supra* notes 59-68 and accompanying text.

⁹² See *supra* note 27 and accompanying text.

sence of an imminent sale of the practice in question or the sale of a similarly situated practice in the recent past.⁹³

Although it seems odd to posit simultaneously the existence of goodwill yet deny its divisibility, perhaps courts have done just that because of the belief that goodwill simply cannot be separated from the professional. As a result, unless someone is willing to pay for it, its value should not be shared at divorce. As the *Hanson* court noted, “[t]he difficulty is a product of the fact that the reputation of the individual practitioner and the goodwill of his enterprise are often inextricably interwoven.”⁹⁴ Viewed that way, a transfer of goodwill cannot take place for the simple reason that the professional cannot transfer his identity or his reputation to another.

However, courts that have adopted this view are not so much concerned with the evidentiary questions of the pendency or possibility of a sale as with the substantive question of whether goodwill can be sold at all. If it cannot, then that would seem to end the argument. However, the fact is that goodwill is commonly sold. Thus, these courts seem to be at once resisting the reality of these sales and denying to spouses the economic benefits of their professional spouses’ success. It is this latter position that is probably at the core of the resistance provided by these courts. Something seems offensive about dividing up success as property; success that is a function of the individual’s skills and knowledge. But is it?

Clearly, many courts and commentators think it is. James Friedman⁹⁵ distinguished between what he called personal goodwill and enterprise goodwill.⁹⁶ For him, goodwill is “that portion of total compensation (including ‘perks’) that an owner derives from the business enterprise in a given year which exceeds the value of that owner’s personal efforts and financial contributions to the business.”⁹⁷ However, and this is crucial, since the prospective purchaser can only benefit from the enterprise goodwill and because the professional is entitled to

⁹³ See, e.g., *Hanson v. Hanson*, 738 S.W.2d 429 (Mo. 1987) (en banc). See also, *Moffitt v. Moffitt*, 749 P.2d 343, 347 (Alaska 1988).

⁹⁴ *Hanson*, 738 S.W.2d at 435.

⁹⁵ James T. Friedman, *Professional Practice Goodwill: An Abused Value Concept*, 2 J. AM. ACAD. MATRIM. LAW. 23 (1986).

⁹⁶ *Id.* at 24-25.

⁹⁷ *Id.* at 24.

be compensated fairly for his efforts, personal goodwill will rarely be divided.⁹⁸

This thinking makes some sense. Even though practices are frequently sold, nagging doubts remain about just what benefits the purchaser can receive. Indeed, doubts persist about just what can be sold. Although the outgoing professional may stay on for a period, introducing former patients or clients to the new practitioner,⁹⁹ the continued success of the practice would eventually depend upon the professional qualities of the successor. If that is true, a sale would be something of a sham, for the current reputation of the practice cannot assure continued success. However, placing emphasis on the feasibility or real practicability of a sale misses the point in addressing the issue of whether divisible property exists. Friedman misses the point in two ways: he casts doubt on the very existence of personal goodwill as property and he clearly denies its divisibility.

Property should not be defined only as something susceptible to a sale or transfer. That is too niggardly and confining. If Professor Reich is correct,¹⁰⁰ then much that is of enormous value cannot be trans-

⁹⁸ [Personal goodwill] is only the excess earnings that in fact result from these personal efforts that can be valued for marital division purposes. It is ironic that the greater one's personal goodwill, i.e., the more experienced and the more in demand the services of a given professional, the less likely that there will be measurable goodwill in his or her professional enterprise. Why? Because in calculating *excess* compensation, you must first deduct *fair* compensation for the individual whose practice you are valuing. The more valuable that individual's contribution, the higher will be the compensation entitlement or 'replacement cost.' As a result, professional partners with the most measurable enterprise goodwill are likely to be those who contribute the least to the partnership. The hardworking, highly-skilled specialist probably 'earns' his or her total compensation and derives little excess from the enterprise. (emphasis in original) (footnote omitted).

Id. at 25-26.

⁹⁹ Naturally, this ignores any ethical impediments to the sale of a law practice. See HENRY S. DRINKER, LEGAL ETHICS 161 (1953) ("[a] lawyer's practice and good will may not be offered for sale.").

¹⁰⁰ Commenting recently on his seminal article, Professor Reich expressed a belief that the new property should be an elastic concept, one not adhering to a mechanistic model of private ownership. He said:

As I look back on *The New Property and Individual Rights and Social Welfare* today there is nothing of importance that I regret (except the use of the masculine pronoun), but much that I would expand. Instead of an exclusive focus on economic interests deriving from government, I would now place equal emphasis on private employment and interests deriving from private corporations.

Fred R. Shapiro, *The Most-Cited Articles from The Yale Law Journal*, 100 YALE L.J. 1449, 1467 (1991) (comments from Professor Reich).

Professor Reich went on to note that:

ferred. However, the inability to transfer it does not detract from its value to its owner. And, that is the key concept: property is something of value. Even though that value may only inure to the individual enjoying it, so long as it remains valuable to her, its worth is established and it constitutes property. That is where Friedman and others go wrong.

Friedman first erroneously focuses on the transferability of goodwill as if that ends the debate on whether it is property, and then asks the wrong question. The question is not whether the professional is economically entitled to be compensated for the full value of the services provided. Of course he is. No, the question is whether he should retain that value exclusively. And, the answer is no. He should not, for his silent partner is his spouse, and she has a vested interest in that property. This is his second error.

Marital property schemes exist to provide both spouses with a *quid pro quo* for their efforts. Presumably, those efforts resulted in the acquisition of property. However, to define property (as here, goodwill) so as to exclude assets that result in earning ability is unfair if not incoherent. In Friedman's case, he excluded the excess earnings of the professional who was in great demand because that excess represents fair—and thus by his thinking, indivisible—compensation. Such thinking presumes that only he can claim credit for his success. Thus, it is his only and it is indivisible.

But that thinking makes a shambles of marital property schemes. It confuses the existence of goodwill with its source, harkening back to the dated notion that professional goodwill simply could not exist and resurrecting the false distinction between commercial and professional goodwill. That thinking entirely confuses the concepts of goodwill and human capital, conflating the two. Thus, assuming, as we must, that professional goodwill is property,¹⁰¹ the remaining question is whether

[1] continue to insist that property is not merely a technical concept but an essential support of constitutional liberty. To the Framers, property was equivalent to economic independence, which in turn was the foundation of all other freedoms. I think it was a mistake to separate economic and personal liberty into unrelated categories governed by different rules, as the Supreme Court has done since the New Deal I believe it is better social policy to allow and encourage the concept of property to evolve as society changes, keeping the *function* of the property alive whatever the form.

Id. at 1468.

¹⁰¹ This is not meant as *ipse dixit*. Rather, although the questions of the existence and divisibility of goodwill are frequently blurred, modern views of property seem to support its status as property. Properly viewed, the criticism of Friedman and others is that it should not be divided,

divisibility is improper because it is so intimately connected with the professional as to be inseparable from him.

Economic thought recognizes the concept of human capital as property. Human capital has been defined as "the capitalized value of the increased stream of earnings that will flow to an individual who has been the recipient of an investment in skills or knowledge. In other words, human capital is an asset owned by an individual."¹⁰² Thus, despite society's emphasis on things as property, often to the exclusion of intangible forms of property,¹⁰³ this fixation on physical property is not shared by economists.

Nobel Laureate Theodore W. Schultz noted that much of our wealth consists not of the things we own, but of our productive capacity.¹⁰⁴ Now, if this is so, then not only should goodwill be divisible, but the human capital that produces it should likewise be divisible.¹⁰⁵ However, that is not the argument here.¹⁰⁶ Rather, those courts that have misguidedly denied division, must have done so based on one of several

for the successful professional owes his success to his gifts, grit and perhaps good fortune. Any success he enjoys which exceeds that of his counterparts results from these factors and not the marital relationship.

¹⁰² Allen M. Parkman, *The Recognition of Human Capital as Property in Divorce Settlements*, 40 ARK. L. REV. 439, 440 (1987) (footnote omitted).

¹⁰³ Note the resistance of the *Zells* court to the division of goodwill and the frankly disparaging remarks made by the *Holbrook* court about the California decisions approving the division of professional goodwill. See *In re Zells*, 572 N.E.2d 944 (Ill. 1991); *Holbrook v. Holbrook*, 309 N.W.2d 343 (Wis. Ct. App. 1981).

Indeed, the *Holbrook* court concluded that "[t]he concept of professional goodwill evanesces when one attempts to distinguish it from future earning capacity." *Holbrook*, 309 N.W.2d at 354.

¹⁰⁴ [T]he productive capacity of human beings is now vastly larger than all other forms of wealth taken together. What economists have not stressed is the simple truth that people invest in themselves and that these investments are very large. . . . This knowledge and skill are in great part the product of investment and, combined with other human investment, predominantly account for the productive superiority of the technically advanced countries.

THEODORE W. SCHULTZ, *INVESTMENT IN HUMAN CAPITAL* 25, 28 (1971).

¹⁰⁵ See Batts, *supra* note 48. This is precisely the argument made by a number of commentators who support the division of enhanced earning capacity. By this thinking, this would not be an act of charity, but one of economic entitlement.

¹⁰⁶ Although Professor Parkman makes that argument, its discussion is deferred. See Allen M. Parkman, *The Economic Approach to Valuing a Sacrificed Career in Divorce Proceedings*, 2 J. AM. ACAD. MATRIM. LAW, 45 (1986).

Nevertheless, in a related context Professor Joan Krauskopf has relied on human capital as the basis for dividing the value of a spouse's education. See Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379 (1980).

rationales. Though they are not clearly stated, they are evident nonetheless, and vary in complexity and persuasiveness.

At the simplest level, courts may have denied division because of the belief that the income from goodwill cannot be separated from the total income of the professional. Thus, if you cannot isolate the goodwill income because it is inseparably connected with the professional and cannot exist without him, professional goodwill cannot be divided.¹⁰⁷ But that argument is plainly belied by divisions of non-marital professional goodwill. If the valuation process can proceed in other commercial contexts, no reason justifies exclusion of this property as marital property.¹⁰⁸ While valuation may be inherently imprecise, this Article has already shown why courts should not deny the division of professional goodwill simply because its value cannot be determined with ultimate precision.

The next feasible rationale would be that something which is a function of an individual's skills and knowledge cannot be divided. Because goodwill is a product of human capital, it should not be shared at divorce because that would, at least metaphorically, cut into the professional himself. This argument is flawed, for it ignores a fundamental fact of all marital property division.

In reality, all acquisition of property is traceable to personal skills and knowledge. Surely great economic variances exist in society and some people are vastly more successful than others. However, courts do not establish a baseline of ability and afford or deny property division based on how the parties relate to that standard. Simply put, the fruits of business success are shared at divorce, and spouses of particularly successful professionals fare better than spouses of those who are less successful. The only predicate for a marital property division is that the

¹⁰⁷ Indeed, the Texas cases and the others dealing with either the speculative nature of future income or the requirement of a sale implicitly endorse this notion.

¹⁰⁸ Professor Grace Blumberg neatly deflated this argument by stating:

It is an economic truism that the value of any income-producing asset is its capacity to produce future income. In this regard, goodwill is just like any other asset. Goodwill differs only insofar as, unlike a stock or bond, it will not produce income by itself. Postcoverture labor must therefore be conceptualized as having two different components, a goodwill component, which represents a return on prior investment, and a labor component, which represents rewards for labor to the extent that they are not based on marital goodwill investment. The fact that goodwill is related to future earnings has tended to obscure some case law discussion on the topic, even though judicial grasp of the underlying economic principles has to reach correct results.

McCahey, *supra* note 88 at ch. 23, § 23.05[2].

property was acquired subsequent to marriage and prior to divorce. If professional goodwill satisfies that predicate, its source in personal attributes is irrelevant to its divisibility.¹⁰⁹

At this level, then, this argument against divisibility is quite simple. It represents a *per se* view that something which results from personal attributes cannot be divided. It denies property status to the products of those attributes. But the argument has a much subtler variation. At a higher level of abstraction, it might seem that the division of goodwill involves the division of a separate asset of the professional. If that is so, then marital distribution schemes should prevent this division.

If human capital represents the stream of future income expected to result from the application of one's skills and knowledge, then the professional who possesses this asset at the onset of the marriage would appear to own it as separate property. If the division of goodwill is simply a camouflaged division of this nonmarital asset of the professional, then it falls outside most systems of marital property¹¹⁰ and should be prohibited.

This argument, though forceful, embraces a static notion of property—one plainly belied by reality, and fails for two reasons. First, it endorses the notion of human capital as invariably constant. It conceptualizes it as fixed and implicitly denies the possibility of investment in it. Second, it fails to recognize that human capital and goodwill are distinct, and that goodwill is not the inevitable result of human capital.

Although human capital cannot be measured precisely, the growing consensus is that it exists. But that does not mean it remains fixed, resisting growth. Thus, though a physician who finished his basic medical training prior to marriage has acquired substantial human capital as separate property, as those skills and knowledge expand, so does human capital. If, then, this growth occurs during marriage, that human capital is marital property.

Moreover, if we should treat human capital as an asset, it is something in which investments may be made. These investments should

¹⁰⁹ As indicated previously, the fact that it anticipates future income is irrelevant because goodwill is a form of property.

¹¹⁰ Most schemes rely on the notion of the dual system of ownership, i.e., separate property and marital property are distinct and only property acquired after marriage is subject to division. UNIF. MARRIAGE AND DIVORCE ACT, National Conference of Commissioners on Uniform State Laws' Prefatory Note, 9A U.L.A. 149 (1973).

yield a marital property interest if they are made during marriage.¹¹¹ As a purely economic matter we have an adequate basis for dividing the human capital acquired during marriage and for compensating the other spouse for investments made in it. Those courts reaching different results are simply mistaken.

However, that is not the issue here. Though human capital is a dynamic concept, its divisibility is not the topic being considered. Instead, the question is the divisibility of professional goodwill. The two concepts, while related, are distinguishable.

Though human capital may provide a necessary condition for the development of goodwill, it is by no means sufficient. Yes, skill and knowledge are indispensable to the successful professional, but they do not guarantee success. In ignoring this fact, courts denying the division of goodwill have worked the cruelest injustice.

Though perhaps many professionals would succeed whether married or single, marital property law is premised on the notion that through marriage people achieve objectives not otherwise realizable. The joys of family and home permit people to realize potentials and goals otherwise beyond reach. Ability is no guarantor of success, and often the gratification and support provided by marriage help transform mere potential into reality. The support and nurturing provided by a loving family help the professional bridge this gap. Indeed, that provides the *raison d'être* for marital property.

Since that is so, that added measure of success represented by goodwill is a by-product of the marriage. It represents what is, rather than what might have been. That being the case, both parties should

¹¹¹ For example, Professor Parkman, *supra* note 102, at 467, argued that:

Human capital is created through a process of investment. Recognition of an individual's human capital at the time of marriage as a separate asset would reduce the confusion courts have created by attempting to place a value on a license, degree, or professional goodwill. If a spouse can expect to earn an income after a divorce similar to that which could have been anticipated at the time of her marriage, the spouse is leaving the marriage with her separate asset intact Meanwhile, if her anticipated income fell during the marriage, the present value of the decrease should be viewed as a contribution of separate property to the marriage.

Professor Parkman goes on to conclude that this sacrifice, this investment in human capital, simply must be recognized at divorce.

By that thinking, the issues of need, resulting from career sacrifices, and property entitlement do dovetail. This notion of investment in human capital demonstrates that marital property schemes need not simply provide the obvious *quid pro quo* for contributions, but can also take into account forsaken opportunities.

have a legally recognized interest in that goodwill, an interest divisible as marital property. Requiring a sale as a precondition to division probably reveals either total conceptual confusion, or represents a judicial aversion to dividing human capital. In either event, it is unacceptable.

Accordingly, those courts that have insisted on a sale as a precondition to property division have confused the salability of the practice with its value to the professional, thus blurring the notions of salability and human capital beyond recognition. While groping for a rationale for denying the division of the goodwill produced by skill and knowledge, they have wholly forgotten the most basic rationales underlying marital property, thus betraying them. In this, they have marred the law and unwittingly contributed to social and economic injustice.

IV. FINAL THOUGHTS AND CONCLUSION

Most courts divide professional goodwill as marital property.¹¹² This Article simply explores the reasoning for the contrary position. Since no justification for denial is persuasive, that denial cannot be accepted. Not only does it represent a failure to carry out the mandate of marital property schemes by dividing all marital property, it ignores a most significant asset. Since this asset is emblematic of the social and economic disparities of men and women at divorce, denying its status as marital property is unconscionable.¹¹³

However, this is not to say that the task of dividing professional goodwill is an easy one. However, difficulty of valuation should not justify total disallowance of the item as marital property. Courts denying division have, perhaps, been leery of dividing something that may dis-

¹¹² Even in some states in which division has been resisted, courts have not been uniform. For example, a Maryland appeals court recently upheld the division of a dental practice in the face of seemingly contrary authority. *Hollander v. Hollander*, 597 A.2d 1012 (Md. Ct. Spec. App. 1991).

Similarly, a Wisconsin court recently distinguished *Holbrook* and approved the division of the goodwill of a dental practice. *Peerenboom v. Peerenboom*, 433 N.W.2d 282 (Wis. Ct. App. 1988). It did so by unpersuasively characterizing the *Holbrook* result as being based on the ethical prohibitions against selling a law practice. Despite that, or perhaps even because of that, it represents a significant departure from *Holbrook*.

¹¹³ Recently, the Supreme Court of Alaska denied the division of a lawyer's practice. In an extraordinary dissent, Justice Rabinowitz not only dismantled the reasoning of the majority, but took particular offense at the majority's characterization of the property as "Robert's" goodwill. For him, the goodwill was possessed by the law practice and should have been divided as an item of marital property. This case rather vividly, even poignantly, portrays the situation of the spouse left behind by divorce and the legal insult of refusing to divide the professional goodwill for which she is so responsible. *Richmond v. Richmond*, 779 P.2d 1211, 1221 n.12 (Alaska 1991) (Rabinowitz, J., dissenting).

solve if not refurbished. But goodwill valuation cannot be so simple-minded.

Expert witnesses and the trial courts must grapple with the nuances of the division of goodwill. They must recognize that goodwill has no set duration. In some businesses, it may dissipate swiftly if services deteriorate.¹¹⁴ Just as its duration may depend on the likely return rate of clients, it may also depend on the frequency with which clients consult the professional. Thus, someone to whom one goes frequently may have a shorter-lived marital goodwill than someone who provides only infrequent service.¹¹⁵ These and other valuation problems must be resolved carefully at the trial level.

Clearly, marital property law cannot be the sole, or even a major, instrument for social change. Inequalities persist that cannot be easily eradicated. However, marriage is a unique institution, providing enormous benefits, but producing losses as well. This is most poignantly revealed in the case of the spouse who forsakes economic opportunities because of marriage, yet is denied a part of the benefits she created for her spouse. Because of the prevalence of divorce, the feminization of poverty is an urgent problem commanding our serious attention.

It is fanciful to think that we can return to a bygone era in which fault and alimony dominated divorce. Divorce law will not, and should not, revert to that old paradigm. Perhaps those who lament the passage of a need-based system identify the wrong target, blaming the divorce revolution for social and economic inequities for which it is simply not responsible.¹¹⁶

¹¹⁴ Jerald Udinsky refers to this phenomenon as recidivism. By that he means the tendency of clients to return to the same place for service. See Jerald H. Udinsky, *The Application of Goodwill Depreciation to Family Law*, 11 COMMUNITY PROP. J. 219, 224 (1984).

¹¹⁵ This may be so if continued patronage depends on the quality of services provided by the professional, rather than on the professional's existing reputation. By this view, goodwill dissipates over time and continued success results from excellence of services. By that view, goodwill may account for some of the professional's income after divorce, but the successful operation of the practice ultimately depends on continued excellence of service.

¹¹⁶ Professor Annamay Sheppard has made this point, noting the need for systemic changes before men and women can remotely achieve social and economic parity. As she said:

If we are to make up for the economic shortfall that comes in the wake of divorce, it is imperative that we increase the earning power of women. We can only do that by taking dead aim at the deep structures of gender discrimination and segregation that still exist for all women in the wider society.

Annamay T. Sheppard, *Women, Families & Equality: Was Divorce Reform a Mistake?*, 12 WOMEN'S RTS. L. REP. 143, 149 (1990).

But just as divorce law is not the source of all gender-based inequality, neither is it entirely blameless. Whenever a court refuses to divide goodwill that was generated during the marriage, it becomes an instrument of injustice. It consigns the nonprofessional to a subordinate and unjust status, thus plainly defying marital property schemes. Courts simply cannot countenance this inequality. The law does indeed stand at a crossroads, and our courts will be judged by the choices they make.

Professor Sheppard noted, most importantly, that the shortfall following divorce has a different impact on different sub-groups of divorced women. Accordingly, she suggested that we must adjust our responses to the needs of these groups appropriately. For example, women in the job market who do not have children have different needs than working women with children of preschool and school age in their custody. Similarly, older women who have not been in the job market for some years have different needs than unemployed or underemployed mothers dependent on public assistance.

Her point is not that we need to do less for any of these groups, but only that our responses should vary depending on the sub-group we are addressing.