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Justin Schwartz

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ABSTRACT


JUSTIN SCHWARTZ

Debate about legal and policy reform has been haunted by a pernicious confusion about human nature, the idea that it is a set of rigid dispositions, today generally conceived as genetic, that is manifested the same way in all circumstances. Opponents of egalitarian alternatives argue that we cannot depart far from the status quo because human nature stands in the way. Advocates of such reforms too often deny the existence of human nature because, sharing this conception, they think it would prevent changes they deem desirable. Both views rest on deep errors about what it is to have a nature and how genetics works. Human nature, like the nature of anything else, is a set of potentials to behave certain ways in given environments, not a nonsocial genetic something that inevitably produces the same result in any environment. To say that existing inequalities, are due to our genes, inalterable because heritable, ignores that genetic propensities may be differently manifested in different environments. Heritability has meaning only relative to an environment and a population and implies nothing about inevitability. A better sort of inegalitarian argument is that a proposed reform, given our nature, would be too costly even if possible. However, this sort of argument is too rarely supported by evidence and generally ignores the costs of existing inequalities. But egalitarians err in supposing that, if behavior is unconstrained by biology, the status quo is easily alterable. The environment may be extremely hard to change. Legal and policy debate should adopt a correct understanding of human nature as a set of propensities and ask of any proposed reform agreed to be otherwise desirable what and how alterable are its causes, genetic, environmental, or more accurately both.

JUSTIN SCHWARTZ

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IT AIN’T NECESSARILY SO:
THE MISUSE OF “HUMAN NATURE” IN LAW AND SOCIAL POLICY AND THE BANKRUPTCY OF THE “NATURE-NATURE” DEBATE

JUSTIN SCHWARTZ†

INTRODUCTION: “HUMAN NATURE” AND THE LIMITS OF THE POSSIBLE

The issue of human nature looms in the background of practical policy and legislative proposals for reform of social institutions. It plays an important role in the structure and interpretation of the law itself.1 If we knew what human nature was, then, plausibly, we would know something about the best sort of laws and society to have. At least we would know something about the sorts we might possibly have and whether a proposed reform was in the feasible set of alternatives, whether it could actually be attained, in Rousseau’s phrase, “tak[ing] men as they are and laws as they might be.”2 However, the conception of human nature as it is frequently deployed, expressly or implicitly in policy and legal debate is more often than not profoundly incoherent, involving false and misleading assumptions and leading to grossly fallacious arguments by both opponents and proponents of the proposals at issue. Typically the conception of human nature under discussion is offered in defense of certain aspects of the status quo against proposed changes, and advocates of the changes in question often say that there is no

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† Assistant Professor of Law, The John Marshall Law School, Chicago, IL; J.D., Moritz College of Law, The Ohio State University; Ph.D., M.A., The University of Michigan; M.Phil., The University of Cambridge; A.B., Princeton University. Thanks for helpful discussions and comments are due to Professors Elizabeth Anderson, Richard Garner, Don Herzog, Stuart Ford, Phil Gasher, Peter King, Sam Jones, Pat Mann, Deborah Merritt, Andrew Oldenquist, Steven Orzack, Arlene Saxonhouse, David Scarrow, Juan Carlos Marvizón, Ralph Ruebner, and especially Peter Railton, to Ms. Nina Strohminger, and many individuals too numerous to name who have commented on previous ancestors over .

1 See infra Part II(A)(2).

such thing as “human nature.” My goal here is to identify and critique this conception so that these errors can be avoided and real issues between the parties productively formulated.

I do not argue that there is no such thing as human nature. On the contrary, I aver that there is a human nature and explain what sort of thing it is. I critique a common erroneous conception of human nature and its misuse. My target is the view is that human beings, or some of us, have certain intrinsic universal nonsocial behavioral and psychological traits that will be rigidly manifested in any circumstances. I call this the “abstractive” conception of human nature because, so conceived, the purported traits that constitute this nature always operate the same way in abstraction from the environment. This conception of human nature is related to policy and legal positions through the principle ought implies can: there is no point in advocating the impossible. Some proposed alternatives to the status quo are held to be inescapable or unattainable. It is argued or assumed, therefore, that problematic features of the status quo are justified or excused because of supposed facts about “human nature” due to “nature” rather than “nuture.” A more sophisticated variant has it that proposed reforms might be realized, but given “human nature,” only at an unacceptably high cost. These rhetorical moves have encouraged the equally fallacious rejection of very idea of human nature by some critics of the status quo.

To keep the discussion manageable, I largely restrict this discussion to some of the debates about the way human nature affects around legal maintenance or reform concerning two

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3 Less frequently, the claim is made that certain alternative social and legal arrangements, different from ours, are inevitable, so that change cannot be resisted. Something this like notion can be discerned in the “stagist” conception of historical progress formerly espoused by some traditional Marxists. See, e.g., G.A. Cohen, KARL MARX’S THEORY OF HISTORY: A DEFENSE (2d ed. 2000) (predicting a transition to a post-capitalist society based on the progressive effects of an innate basic human drive to minimize labor). However, the conceptions at issue are more typically deployed as objections to legal changes or social change than as arguments for them, moreso since the collapse of Marxism as an effective social force.

4 See, e.g., Steven Pinker, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 288-89 (2002) (“We are fortunate enough to live in a society that more or less works and our first priority should be not to screw it up, because human nature always leaves us teetering on the brink of barbarism.”); Andrew Oldenquist, THE NONSUICIDAL SOCIETY 176 (1984); E.O. Wilson, ON HUMAN NATURE 81 (1978).
related sets of institutions: first, large class inequalities of wealth and income in a market economy, and second, traditional gender-specific inequality that assigns domestic labor to women at the cost of opportunities available to men. For the purposes of this essay, I call the policies and legal positions buttressed by the argument from nature “inegalitarian” and the contrary positions as “egalitarian.” Purely for the sake of the argument here, we may take these to be exemplified by the propositions that any inequalities of wealth and income should benefit the least well off and that women should not be formally or otherwise limited in their life chances because of their sex. Although equality is a highly contested term, I will not offer further definition, nor do I suggest that equality is more important than, say, freedom, or even than stability. It is merely that a common structure of the argument from nature is a defense of some inequalities, including the ones discussed as examples.

For example, some legal economists contend that a well-functioning market economy requires large inequalities in income and wealth because people will not be productive unless motivated by opportunities for private gain. “Individual self-interest is seen largely as transforming itself into an optimal allocation of resources” An even more extreme version of

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5 This is Rawl’s difference principle as applies to wealth and income, see e.g., John Rawls, A THEORY OF JUSTICE (1st ed. 1971) 75 et passim [hereinafter Rawls, JUSTICE]; I invoke this not to endorse this theory but as an example of one way to realize economic equality.

6 Equality plays an indirect and complex role in the standard positions in political theory, see, e.g., Rawls, JUSTICE supra note 5 (favoring procedural fairness), and John Stuart Mill, UTILITARIANISM (George Sher, ed. 2d. ed. 2002)(1861) (favoring maximization of happiness or well-being), both of which permit substantial departures from equality of treatment or distribution. For examination of aspects of (in)equality and its relation to freedom, see, e.g., Richard Norman, FREE AND EQUAL: A PHILOSOPHICAL EXAMINATION OF POLITICAL VALUES (1987).

7 Sandra K. Miller, Fiduciary Duties in the LLC: Mandatory Core Duties to Protect the Interests of Others Beyond the Contracting Parties, 46 AM. BUS. L.J. 243, 249 (2009). Richard A. Posner has argued that the normative basis of legal rules was, or should be, the maximization of wealth regardless of distributive considerations. See, e.g., Richard A. Posner, The Ethical and Political Basis of Wealth Maximization, in THE ECONOMICS OF JUSTICE 88, 98 (1983) (citing Richard A Posner, THE ECONOMIC ANALYSIS OF THE LAW 404—05 (2d. ed. 1977) (arguing that judicial processes tend to suppress distributive considerations, and should do so to maximize efficiency conceived as wealth maximization). On the more liberal end, Rawls’ Difference Principle, which limits inequalities of wealth and income to differences that would benefit the least well off, is justified by an assumption that greater rewards to some will benefit all because of such incentives. See Rawls, JUSTICE, supra note 5, at 75,78, 151, 157, and 279. Although the argument for the difference principles depends on the imputed motivations of imaginary parties to a
the theory holds that rational choice theory with its egoistic assumptions explains all behavior. It has been argued that a broadly Hobbesian account of this sort means that the common law system is a “natural law system . . . [that] should exhaust the universe of rules [on economic interactions].” Formerly the de jure legal exclusion of women and minorities from opportunities and positions reserved to men and whites was justified by arguments about their “natural” incapacities or social roles. A more sophisticated variation is that while such institutional changes are in fact possible, human nature makes them highly undesirable. On this view, intrinsic features ineradicably rooted in human nature would cause great suffering if society were to implement alternative policies, and that these policies therefore should be opposed.

On the other side, human nature is generally in bad odor among critics of the status quo, who often contend that there is no human nature, and hold the very idea is a fiction designed to justify existing hierarchies. Their underlying rationale often involves the assumption, frequently unstated, that to concede that human nature exists would mean admitting that the defenders of the status quo are right. That is because the critics share the same conception of a rigid human

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8 The theory holds, in brief, that rational behavior involves maximizing the expected value of expected individual preferences of egoistic See, e.g., Donald P. Green & Ian Shapiro, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE 14-17 (1994) (characterizing the elements).
9 See, e.g., Gary S. Becker, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR (1976).
10 Richard Epstein, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 17, 26 (1992) [hereinafter Epstein, FORBIDDEN GROUNDS]. The quote appears in a chapter titled “Human Nature,” and it is in this rather than in a moral sense that Epstein considers the common law to be a “natural law system.” Id. at 26. His view is further developed in Richard Epstein, SIMPLE RULES FOR A COMPLEX WORLD (1995).
11 See infra Part I(A)(2) (citing cases, statutes, and statistics). Although such assumptions are now almost impossible to articulate in public debate, since these groups have won a substantial measure of formal legal equality, the underlying ideas about the nature of women or human motivation and capacities continue to emerge, generally at a more abstract and indirect level, as documented throughout this Essay.
12 See infra Part III.
nature. For this essentially political and erroneous reason, they contend that social arrangements are due purely to “nuture” and not at all to “nature,” and are therefore supposedly alterable.13

For instance, feminist legal critics often contend that traditional gender roles allocating primary responsibility for domestic labor to women or laws based on the assumption of a “natural” female monopoly on childcare can be changed because no human nature stands in their way.14 Postmodern theory, which has played a large role in feminist thought in recent decades, generally rejects “essentialism,” “a universal essence as constituent of human beings . . . [in which] “socially constructed male traits. . . . [are treated as] essentially human . . . ., while women are the other, the subordinate sex.”15 On both sides, the debate is too often cast as a matter of what and how much of our existing institutions are due to nature or nature.

I approach the subject of human nature and the nature-nuture debate in biological, specifically genetic terms, because that is the way these issues are framed in a “scientific” era, by which I mean one in which science, good or bad, provides the model for authoritative claims to knowledge. In this context I discuss sociobiology or evolutionary psychology. I am more

13 In some cases, such that that of Richard Rorty, the denial of human nature, “our glassy essence,” Richard Rorty, PHILOSOPHY AND THE MIRROR OF NATURE 362 (1979) 16, 42-43 [hereinafter Rorty, MIRROR], simply is a rejection of the idea of a fixed, inflexible set of behaviors rigidly manifested in all circumstances – a position differently motivated but based on the same false conception. See Richard Rorty, OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS, VOL. I, 213 (1991) [hereinafter Rorty, OBJECTIVITY], discussed infra notes 92, 93, 100-102 and accompanying text.

14 See, e.g., Patricia S. Mann, MICROPOLITICS: AGENCY IN A POSTFEMINIST ERA 46 (1994) (discussing and rejecting the idea that marriage and motherhood are “natural and necessary); Nancy Chodorow, Mothering, Male Dominance, and Capitalism, in CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM 83 (Zilllah R. Eisenstein ed. 1979) (recognizing female mothering as cultural near-universal but insisting that “[t]he organization of gender and male dominance are . . . historical products.”); Carol Tavris, THE MISMEASURE OF WOMEN (78 (1992) (arguing that the structure of work is a better predictor of gender relations than “explanation as based on male and female ‘nature’”));.

15 Steven Best & Douglas Kellner, POSTMODERN THEORY: CRITICAL INTERROGATIONS 206-07 (1991) (reviewing various postmodern feminist views of pure social construction of gender; see id. at 208 214). In extreme versions of “difference” feminism, not only are femininity and the traits commonly associated by “essentialists” (such as mothering) viewed as pure social construction, but the subject of feminism, presumed in modernist discourse to be ‘women,’ is, in fact, an artifact produced by discourse.” Maxine Eichner, On Postfeminist Legal Theory, 36 HARV. C.R.-C.L. L. REV. 1, 35 (2001) (criticizing this view, but urging that to gender differences be “‘detach[ed] . . . as far as possible from biology,” id. at 31). See infra, Part I(C) for further discussion.
sympathetic in principle to the approaches of these disciplines\textsuperscript{16} than many who share my policy views,\textsuperscript{17} but I come neither to praise nor to bury sociobiology, but to set it on its feet as regards policy and legal debate. If this debate is influenced by sociobiology, the presuppositions and potential consequences of the research should reflect a correct understanding of the concept of human nature and the relationship between nature and nurture.

In Part I, I survey some arguments for the status quo with respect to women’s roles and economic inequality, emphasizing the “scientific” turn these have taken in last century or so. I note the too-quick move from supposed scientific “is’s” to purported policy and legal “oughts” (Part I(B)), and critique some egalitarian objections to the very idea of human nature. (I(C)). Part II argues that the abstractive conception of an unchangeable nonsocial nature underlying these arguments is deeply confused. Whatever behavior we see is a manifestation of potentialities in an environment. Human nature is this set of potentialities. It is not an odd sort of disposition that is rigidly manifested no matter what. The genetic component is never decisive by itself, nor in abstraction from an environment. (II(A)). The Nature-Nature dichotomy is therefore a false one (II(B)), and genetic heritability in particular does not mean unchangeability (II(C)). Further, the historical or cross cultural arguments from universality, taking the environment into consideration, logically do not establish any claim about an unchangeable human nature either (II(D)). In II(E), I remind egalitarians that locating the source of a trait in the environment is no assurance that it is easily changeable. In Part III, I attack the most sophisticated inegalitarian arguments, that egalitarian change, if possible would lead to generalized unhappiness or impose

\textsuperscript{16} See, e.g., Philip Kitcher, VAULTING AMBITION (1985) (sorting out bad sociobiology from good in great detail).

\textsuperscript{17} Like almost everyone else, I have policy and legal views about these questions, which are, as will become evident, egalitarian and liberal, but my particular views on these topics are not the subject of this essay. Here I rather whether any views on these or similar are usefully discussed in terms of the abstractive conception of human nature and the nature dichotomy. I would make precisely the same point in very nearly the same words if my substantive positions on the institutions, policies, and law here deployed as illustrative were the opposite of what they are.
other unacceptable costs. Part V sketches plausible alternative explanations for the kinds of inequalities discussed that de-emphasize biology without retreating from the potentialities conception of human nature or waxing Panglossian about their susceptibility to change.

I do not regard this Essay as developing any startlingly novel theses. Most of my main claims, especially about biology and its implications, are fairly elementary and given at least lip service by advocates or critics of certain social arrangements, even if these precatory admissions are thereafter ignored by those who make them. But it is valuable to clarify the significance of some elementary points in philosophy of science and biology for important questions in law and policy. My excuse for saying things that ought to be obvious is that it is manifest that they are not. Time after time, literally for millennia, the same sort of bad arguments, with appropriate changes for intellectual context, are trotted out again, more recently, with the rise of a secular democratic culture, in the face of repeated refutation, often with the same sorts of bad responses. One paper cannot inter these errors for good, but may help in sorting out their deep


19 See Richard Herrnstein & Charles Murray, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994) (“We are resolutely agnostic on [what the mix between genes and environment might be.]; see similar statements from “nature” theorists quoted in Pinker, supra note 4, at vii-vii (2002) (another example of a lip-service “nature” theorist; Matt Ridley, NATURE VIA NATURE: GENES, EXPERIENCE, AND WHAT MAKES US HUMAN 3 (2003) (“ . . . Human behavior has to be explained by both nature and nuture . . . no longer is it nature versus nature but nature via nature.”).)

20 Plato characterized his own version of his argument for the need for social hierarchy, according to which social class is determined by metallic content (the philosopher kings contain gold, the warrior elite or guardians, silver, the artisanal and peasant mass, lead), as a “lie,” albeit, he thought, a noble and necessary one. Plato, THE REPUBLIC (Paul Shorey, trans.), in PLATO: THE COLLECTED DIALOGUES 414cff, at 658-659 (Edith Hamilton & Huntington Cairns, ed., Princeton University Press 1961). Aristotle unblushingly put forward natural inferiority as the true ground for the justification of slavery and the subordination of women. See Aristotle, POLITICS (Benjamin Jowett, trans.) in BASIC WORKS, supra note 7, 1259b1-5, at 1143; 1260b1, at 1145.

21 Until the rise of liberal democracy with widespread freedom of speech, overt criticism of the status quo and its defenses was more often than not flatly unlawful.
structure clearly. My hope is to further constructive debate on the real issues about the obstacles and prospects that human nature poses for the possibilities and limits of alterations in policy and law regarding, here economic labor and women’s work, and, by extension, other social arrangements.

I. THE ARGUMENT FROM HUMAN NATURE

A. A Brief Survey of the History of the Argument.

1. The Argument in Philosophy, Religion, and Science

Appeals to human nature are often made to support hierarchical status quo arrangements, such as the traditional gender roles and class inequalities I discuss here. Aristotle claimed that some people are slaves by nature and that “the male is by nature fitter for command than the female.” Before the nineteenth century, social and legal theory was virtually unanimous on the naturalness and inevitability of women’s subordination. Despite the encroachments of liberalism with its commitment to at least formal egalitarianism, class inequalities have been explained and justified in the same way. And the law has, until recently, followed suit. Locke wrote that “a great part of mankind are, by the natural and inevitable state of things in this world,

\[22\] Assessment of particular sociobiological and hereditarian claims in detail requires a good deal of mathematics. For this sort of treatment, see, e.g., Kitcher, supra note 16. But the underlying philosophy of science is in fact quite simple and nontechnical. The technical insights are necessary, but they remain politically idle if they cannot be expressed in accessible terms.

\[23\] Aristotle, supra note 20, 1260b1, at 1145 (slaves); 1259b5 at 1143 (women). With regard to women, he conceded that “there may be exceptions to the order of nature.” Id. Plato was less absolute in his assertion of male supremacy. While “[m]any women . . . are better than many men in many things,” still, “the masculine sex does . . . surpass the female,” but Plato would not have denied capable women a share in the administration of the Republic. Plato, The Republic, supra note 20, 455c–456a, at 694-695. For Plato’s “noble lie” about class, see supra note 20, not sex.


and the constitution of human affairs, unavoidably given over to invincible ignorance," and are therefore doomed to be hewers of wood and drawers of water. While theoretically holding that all persons are naturally equal, Locke assumed that the man is “Master of a family” and the woman is in a “subordinate relation,” a “Wife,” grouped together with “Children, Servants, and Slaves.” Since “the Rule should be placed somewhere, it naturally falls to the Man’s share, as being the abler and the stronger.” Rousseau, insisting on equality among men both in nature and civil society, notoriously embraced a gynecological justification for women’s subordination:

When woman complains . . . of the unjust man-made inequality, she is wrong. This inequality is not a human institution--or at least it is not the work of prejudice but of reason. It is up to the sex that nature has charged with the bearing of children to be responsible for them to the other sex.

The bases of such claims in defense of subordination and inequality of women and working people, virtually universal until the last two centuries or less, have varied. The ancients often appealed baldly to “nature.” From the middle ages through the early 19th century, Scripture was a favored ground. In many cases, theological justifications of the status quo were, or included,

26 Locke, 2 AN ESSAY CONCERNING THE HUMAN UNDERSTANDING 443 (Alexander Campbell Fraser, ed. Dover Publications 1958) (1690) [hereinafter Locke, ESSAY].
27 See John Locke, 2 TWO TREATISES OF GOVERNMENT, II ¶ 4, at 309 (rev. ed., Peter Laslett, ed., New American Library 1963) (1698) [hereinafter Locke, TWO TREATISES] (“Creatures of the same species and rank promiscuously born to the same advantages of nature should also be equal among one another without subordination or subjection . . . .”).
28 Id. Book II ¶ 86, at 366.
29 See Locke, TWO TREATISES, supra note 27 Book II ¶ 82, at 364 (emphasis added). Locke adds a theological argument, that God has ordained the “Conjugal . . . Power that every Husband hath to . . . have his Will take place before that of his wife. . . .” Id. Book I ¶ 48, at 210 (“Eve’s Subjection”). See infra notes 32-33.
30 Rousseau, Jean-Jacques Rousseau, EMILE, OR ON EDUCATION 361 (Allen Bloom, trans., Basic Books 1979) (1762) [hereinafter Rousseau, EMILE]. For brief discussion of the view, see infra notes 80-82 and accompanying text.
31 See, e.g., Aristotle, supra note 20.
32 See 3 Colossians 22 (“Servants, obey in all things your masters according to the flesh; not with eye service, . . . ; but in singleness of heart, fearing God.”); 1 Corinthians 12 (King James) (parable of the parts of the body) (cited in) Don Herzog, POISONING THE MINDS OF THE LOWER ORDERS 26 et passim (1998) (providing a veritable catalog of late 18th and early 19th century English justifications for subordination of disfavored groups, many based on the Bible). See also Arthur O. Lovejoy, THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA (1934) (1964) (study of medieval scholastic justification for earthly hierarchy based on the Holy Writ).
arguments from nature: God made us thus, and we should therefore obey his commands and act according to our created natures. Nor have theological justifications wholly lost their appeal.\textsuperscript{33} In the last two centuries, such claims have been given a scientific gloss.\textsuperscript{34} Richard Herrnstein explains class structure in a “meritocracy” by saying, “[b]y removing artificial barriers between classes, society has encouraged the creation of biological barriers. When people can take their natural level in society, the upper classes will, by definition, have greater capacity than the lower.”\textsuperscript{35} Herrnstein and Murray’s \textit{The Bell Curve},\textsuperscript{36} a bestselling restatement of inegalitarian doctrines based on claims about human nature with regard to race and class, is a prominent recent instance of this pattern.\textsuperscript{37} Matt Ridley claims that “[g]ender roles are at least partly automatic, blind, and untaught,”\textsuperscript{38} genes make men less “empathetic” and more “systematizing” than women, confirming stereotypes about the sexes.\textsuperscript{39} Steven Pinker claims that “the new sciences of human nature” really do vindicate some version of what he calls the Tragic

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\textsuperscript{33} In a country where the Christian right is a political force of considerable weight, the continued grip of theology can hardly be disputed. See, e.g., Daniel K. Williams, \textit{GOD’S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT} (2010); Gary Wills, \textit{UNDER GOD: RELIGION AND AMERICAN POLITICS} (1990). In the leading study of the struggle over the failure of the Equal Rights Amendment (“[E]quality of rights under the law shall not be denied or abridged . . . on account of sex”), Jayne Mansbridge reports that the core “antis” acted from “a literal belief in the Pauline passages from the Bible [Ephesians 5.22-23; 1 Timothy 2.11-12] stipulating that women should be subject to men.” Jane J. Mansbridge, \textit{WHY WE LOST THE ERA} 1, 175-76 (1986).
\textsuperscript{34} For a discussion of the rise of “scientific” inegalitarianism, see \textit{GOULD, MISMATCH}, supra note 18.
\textsuperscript{35} Richard Herrnstein, \textit{IQ AND THE MERITOCRACY} 221 (1973) (class status caused by inherited differences in intelligence as measured by IQ scores). Herrnstein speaks carelessly when he says that society \textit{creates} biological barriers. These, he thinks, are functions of genetics, not of society. That is his whole point. Should Herrnstein reply that he thinks only that those with “greater capacity” will dominate \textit{in a meritocracy}, the answer is he does think that class stratification of one form or another is ineradicable.
\textsuperscript{36} See Herrnstein \& Murray, \textit{supra} note 19.
\textsuperscript{37} See also Christopher Jencks, \textit{How Much Can We Boost IQ and Scholastic Achievement?} 33 \textit{HARV. ED. REV.} 1 (1969). A writer of an altogether different and higher order is Christopher Jencks. See Christopher Jencks, \textit{et al. INEQUALITY} (1972); Christopher Jencks, \textit{RETHINKING SOCIAL POLICY} (1993). While pessimistic about the possibilities for egalitarian social change, Jencks states his arguments with far more care, precision, and qualification than Herrnstein, Murray, or Jensen, and avoids any cheerful celebration of the inevitability of existing hierarchies. Jencks is without question a superb and serious scholar. Nonetheless I think his pessimism is based on some of the bad arguments criticized in this paper.
\textsuperscript{38} Ridley, \textit{supra} note 19, at 58.
\textsuperscript{39} Id. at 59-62 (People “come into the world” with a “tendency to pick the nature that suits [their] nature,” \textit{id.} at 59; thus boys are born with a predilection to like “toys weapons, competition, and action better than dolls romance, relationship, and families,” \textit{id.})
Vision,\textsuperscript{40} in which “our moral sentiments . . . overlie a deeper bedrock of selfishness,”\textsuperscript{41} “human nature has not changed,”\textsuperscript{42} including the primacy of “family ties,”\textsuperscript{43} and the “partial heritability of intelligence . . . , implying that some degree of inequality will arise even in perfectly fair economic systems.”\textsuperscript{44} Pinker contrasts “the Tragic Vision” to the “Utopian Vision,”\textsuperscript{45} essentially the denial of human nature that I have characterized as the obverse of the abstractive conception. Hence the title of his book, \textit{The Blank Slate}. For Pinker, the slate has been substantially filled in by genetically encoded scripts dictating behavior that make attempts to change social institutions in an egalitarian way or even to eliminate acknowledged evils impossible or dangerous.\textsuperscript{46}

\textsuperscript{40} Pinker, supra note 4, at 293. The term “Tragic Vision is derived from Thomas Sowell, A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES (1987) (cited in Pinker, supra, at 287).

\textsuperscript{41} Pinker, supra note 4, at 288.

\textsuperscript{42} Id.

\textsuperscript{43} Id. at 294. Pinker’s discussion of gender differences is more nuanced than many, for example, those of Steven Goldberg, \textit{WHY MEN RULE: A THEORY OF MALE DOMINANCE} 64-65 (1993) (rev. ed. of \textit{THE INEVITABILITY OF PATRIARCHY} (1974)) (arguing that “males occupying the overwhelming numbers of high status positions” is a result of “manifestations of neuro-endocrinological differences between men and women”), or Michael Levin, \textit{FEMINISM AND FREEDOM} 98-155 (1987) [hereinafter Levin, \textit{FEMINISM}] (vocational and status differences between the sexes explained by biology), summarized in Michael Levin, \textit{Implications of Race and Sex Differences for Compensatory Affirmative Action and the Concept of Discrimination, 15 J. SOC., POL. & ECON. STUD.} (1990) (also arguing that blacks are genetically inferior to whites in intelligence and motivation).

Pinker “opposes sex discrimination” on moral grounds, Pinker, supra, at 341 (citing the neoconservative writer CHRISTINA HOFF SOMMERS, \textit{WHO STOLE FEMINISM?: HOW WOMEN HAVE BETRAYED WOMEN} (1994)), while denying that “women “continue to be enslaved by a pervasive system of male dominance, . . . destined to obey [men],” Pinker, supra at 341. While admitting that the gap in employment opportunities “favors men,” \textit{id}. at 255, he says that the biological evidence he cites for sex differences bearing on life chances does not “impl[y] that women will end up on the short end of the stick.” \textit{Id.}

However he does think that (possibly biologically related) “preferences may set the sexes on different paths,” \textit{id}. at 356 (emphasis in original), e.g., men, he says are greater risk takers, \textit{id}. (compare EEOC v. Sears, Roebuck & Co., 839 F.2d. 302 (7th Cir. 1988)), supra notes 59-60), and are universally more attached to their children and more likely to make life choices that “allow them to spend more time with their children . . . in exchange for lower wages or prestige,” Pinker, supra note 4, at 357. In short, Pinker thinks that biologically based or at any rate culturally universal sex differences will keep women, on average, happily on the short end of stick, home with the children while working lower paid, less prestigious jobs, without formal discrimination.

\textsuperscript{44} Id. Pinker’s express support for this proposition is, essentially, the assertion that all human traits are heritable, \textit{id}. at 373 and the effect of being raised in the same family is less than the effect of the genes, \textit{id}. at 378. I address the issue of heritability infra Parts II(C)(1)&(2), but the reader may notice that the stated conclusion about the inevitability of inequality even in a fair economic system (whatever Pinker may think that might be) does not follow from the premises. Herrnstein, supra note 35, makes the argument with more care and thoroughness, although in the end without avoiding the abstractive error that is the target of this paper, as well as a number of other fallacies, a few of which are manifest in the statement quoted supra.

\textsuperscript{45} Id. at 287

\textsuperscript{46} Similar doctrines are expressed in some versions of “pop” sociobiology. \textit{See} Desmond Morris, \textit{THE NAKED APE} (1967); Robert Ardrey, \textit{THE TERRITORIAL IMPERATIVE} (1966); Lionel Tiger & Robin Fox, \textit{THE IMPERIAL ANIMAL} (1971); David Barash, \textit{THE WHISPERINGS WITHIN} (1979); as well as of and the more scientifically respectable
Without a doubt there is a biological basis for or contribution to many important human behaviors and social institutions and practices. We are organisms, whatever else were are, and it is extremely unlikely that this fact is irrelevant to how we act and organize our lives. Any biological phenomenon will have a genetic component; the genes contain the key information about the range and scope of the manifestation of biological traits. But biological inegalitarians often hold that important features of current societies are “genetically determined” and so, they say or imply, inalterable. “Biological constraints exist that define zones of improbable or forbidden entry.”47 Candidates have included class and racial hierarchies, the subordination of women, egoism, competitiveness, and aggression. However, many sociobiologists, some with decidedly egalitarian views in law and policy allow for biologically based forms of altruism.48

2. Society, Policy, and Law

The grip of inegalitarianism on the basis of the argument from nature is not just a fact about the history of ideas. It is widespread practical influence in society and law.49 In modern America, the official legal and political ideology is today generally set against such views, as befits a republic that proclaimed at its inception, if somewhat prematurely, “all men are created

47 Wilson, supra note 4, at 8.
48 Among the inegalitarian sociobiologists who support or offer biological explanations of (limited) altruism are Dawkins, supra note 46, and Pinker, supra note 4, at 241-47, himself: more egalitarian sociobiologists of ethics include the authors in EVOLUTIONARY ETHICS AND CONTEMPORARY BIOLOGY (Giovanni Boniolo & Gabriele de Anna eds. 2009); Eliot Sober, et al., DO UNTO OTHERS: THE EVOLUTION AND PSYCHOLOGY OF UNSELFISH BEHAVIOR (1999); Peter Singer, THE EXPANDING CIRCLE: ETHICS AND SOCIOBIOLOGY (1981).
49 Some confirmation may be found in the rapidity with which almost any interlocutor will invoke human nature as an objection to proposals for egalitarian change or take arguments about the variability of human nature at least in principle as a denial that there is any such thing as human nature.
equal.”

But inegalitarian policies and practices find support in the law in ways that draw upon, among other sources, the argument from nature, expressly or implicitly. Property qualifications for male suffrage, predicated on the Lockean identification of “the people” with “the propertied,” were eliminated over the seventy five years following the Revolution, although slavery was only abolished after the Civil War, and women’s suffrage instituted only in 1920.

Today, government policies disfavoring women receive a moderately searching “intermediate scrutiny” under the Equal Protection Clause of the Fourteenth Amendment, although classifications based on wealth receive only deferential “rational basis” scrutiny. Statutory law protects women from sex discrimination in various areas. It also offers some very limited protection for workers’ interests, whereof more shortly.

Nonetheless, while grossly stereotypical state policy or blatant private sex discrimination is now disfavored and often unlawful, widespread discrimination persists, and the argument

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50 The Declaration of Independence, para. 1 (U.S. 1776).
51 For Locke, “the preservation of Property being the end . . . for which Men enter into society, it necessarily supposes and requires, that the People should have property . . . .” Locke, Two Treatises, supra note 27, Book. II ¶ 138, at 406. Those without property are not, therefore, among “the People.”
53 U.S. Const. Amend 13 (prohibiting slavery) & 19 (proving for women’s suffrage).
57 This is a recent development, beginning in the mid-1960s. Earlier, the law generally saw women as naturally subordinate. See, e.g., Muller v. Oregon, 208 U.S. 412 (1908). Here the Lochner Court upheld for women the sort of working hours limitations it had stricken for men because of “the difference of the sexes,” notably “women’s physical structure and the performance of maternal functions.” Id. at 420-421. “Woman . . . need[s] especial care that her rights may be preserved. . . . [S]he is properly placed in a class by herself and legislation designed for her protection may be sustained, even when like legislation . . . for men . . . could not . . . .” Id. at 421. See also Hoyt v. Florida, 368 U.S. 62 (1961) (upholding a law granting women exemption from jury duty so that they could discharge their maternal functions); Goesart v. Cleary, 335 U.S. 464 (1948) (upholding Michigan law barring women from tending bar); and Bradwell v. State, 83 U.S. 130 (1873) (upholding Illinois law barring women from practicing law).
58 Women still receive only 70 cents for every male dollar in wages and salaries. Deborah L. Rhode, Justice and Gender 162-63 (1989). Three fifths of all women in the workforce in the late 1980s were in occupations comprised of at least 75 percent female workers. Id. Women’s representation in law, management, and academia grew from three to seven percent in the early 1960s to 20 to 40 percent in the late 1980s, but women were only half as likely as
from nature haunts even the interpretation of antidiscrimination law. For example, in *EEOC v. Sears, Roebuck & Co.*, the Seventh Circuit approved a “lack of interest” defense to sex discrimination, legitimating what a dissenting judge called the “proposition that women are *by nature* happier cooking, doing the laundry, and chauffeuring the children to softball games than arguing appeals or selling stocks.” In *Dothard v. Rawlinson*, the Supreme Court allowed sex as a defense in the case of a women denied a position as a prison guard. The “employee’s very womanhood” undermined her ability to do the job because she might be sexually assaulted by rapists and “inmates[] deprived of a normal heterosexual environment.”

If sex discrimination is now disfavored in law, the same cannot be said about discrimination based upon wealth or in general about public law and private policy towards working people. Private property is expressly protected in the Constitution, but there is no constitutional or statutory right to employment, much less at above-poverty wages. Neither is there any constitutional right to welfare, and the federal statutory “guarantee” of welfare has

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59 839 F.2d. 302 (7th Cir. 1988). See supra note 43 (discussing Pinker on the persistence of economic inequalities by sex and the female monopoly on childcare.)
60 Id. at 361 (Cudahy, J., concurring in part and dissenting in part) (emphasis added). Compare supra note 43.
62 Id. at 335-36. Justice Marshall, in dissent, objected that this decision “perpetuates one of the most insidious of the old myths about women--that [they] . . . are seductive sexual objects.” Id. at 345. The Court here oddly echoes Brownmiller’s radical feminist theory of rape: “By anatomical fit--the inescapable construction the genital organs--the human male was a natural predator and the human female served as his natural prey.” Susan Brownmiller, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 6 (1975).
63 See U.S. CONST. amend V, cl. 5 (“[N]or shall private property be taken for public use, without just compensation.”); amend XIV, cl. 3 (“[N]or shall any State deprive any person of . . . property, without due process of law.”). It is of course true that the Takings Clause has not been given the expansive interpretation urged by some, see e.g., Richard A. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985), and that the extremes of economic substantive due process have been disavowed since the New Deal Court.
64 The federal minimum wage is currently $7.25 an hour, 29 U.S.C. 26(a)(c), coming to $20,706 a year pretax (51 weeks of eight hour days); the federal poverty line for a family of four is $22,350. Notice, Annual Update of the HSS Poverty Guidelines 76 Fed. Reg. 3637-02 (January 20, 2011).
65 See supra note 40.
been abolished.\textsuperscript{66} The public and legislative debate around welfare policy is cast in the stereotypical language of the “undeserving poor.”\textsuperscript{67} This traces back to Locke’s view doctrine that property is the due of “the Industrious and the Rational.”\textsuperscript{68} The propertyless are neither; if they were, they would have property. These debates reflect Herrnsteinian views about the natural sources of class divisions in the “greater capacity” of the upper classes.\textsuperscript{69}

Assumptions about the natural subordination of workers also lurk in employment and labor law. In the common law, employees (“servants”) were grouped with wives and children, in what Blackstone called “the three great relations in private life,”\textsuperscript{70} employment, marriage, and parenthood, which were for him “relations of formal inequality.”\textsuperscript{71} The law now regards employees as formally equal, but licenses substantive inequalities that are difficult to justify on the whole as fair, utility-maximizing, or even efficient (say, \textit{e.g.}, Pareto Optimal) on any grounds except by the most complacent.\textsuperscript{72} This has many sources, but hidden presuppositions of natural inequality undoubtedly contribute to the law’s toleration of the asymmetries.

\textsuperscript{66} The “guarantee” provided by Aid to Families with Dependent Children (AFDC), was in fact only a guarantee for states participating in AFDC and did not apply to childless persons. It has been replaced with the “workfare” program Temporary Assistance to Needy Families (TANF), which has a five year lifetime cap on benefits. See 42 U.S.C. § 607-608. See Kathleen A. Kost & Frank W. Munger, \textit{Fooling All of the People Some of the Time: 1990’s Welfare Reform and the Exploitation of American Values}, 4 VA. J. SOC. POL’Y & L. 3 (1996).

\textsuperscript{67} Contemporary discussion, resulting in the abolition of “welfare as we know it,” that is, the replacement of AFDC by TANF, was epitomized in President Clinton’s contrast of those who “work hard and play by the rules” with welfare recipients, who presumably did not. See Sylvia A. Law, \textit{Ending Welfare As We Know It}, 49 STAN. L. REV. 471 (1997) (review essay attacking these myths). This echoes the language around early poor relief in America, which was intended to “compel lazy vagabonds to work”; and insisted on strict means-testing and work requirements lest the recipient spend “days in idleness and her nights in debauchery.”’’ David Montgomery, \textit{Citizen Worker: The Experience of Workers in the United States with Democracy and the Free Market During the Nineteenth Century} 77 (1993) (internal citations omitted).

\textsuperscript{68} Locke, \textit{Two Treatises}, supra note 27, Book II ¶ 34, at 333.

\textsuperscript{69} See Herrnstein, supra note 35.

\textsuperscript{70} Blackstone, \textit{supra} note 25, at 410.

\textsuperscript{71} Duncan Kennedy, \textit{The Structure of Blackstone’s Commentaries}, 28 BUFF. L. REV. 205 (1979).

\textsuperscript{72} For example, the wealthiest 1% of households averaged 125 times the wealth of the median household in 1962, a gap that has grew to 190 times in 2004. Lawrence Mishel, \textit{et al.}, \textit{The State of Working America 2008/2009}, 269 Fig. 5C (2009). The collective net worth of the Forbes 400 richest individuals was $1.5 trillion in 2007, 11 percent of the GDP at year. \textit{Id.} at 26-70, Fig. 5D., while 17 percent of households had zero or negative net worth and 29.6 percent had net worth of less than $12,000 (combined, almost half of all households). \textit{Id.} at 270, Table 5.4. The wealthiest 5% of households had 59 percent of total net worth, while the bottom 80 percent had 15.3 percent. \textit{Id.} at 273 Table 5.6. Meanwhile top marginal income tax rate (married filing jointly) was 35 percent in 2011, down from
Up through the 1920s, blatant racist appeals to natural inferiority of immigrant workers as well as blacks played an unembarassed role in lawmaking. Happily that is no longer the case, but a more subtle argument from nature has carried over to the present day. Sunstein calls the assumption of the naturalness of common law property rights and market results one finds, for example, in Blackstone, “status quo neutrality.” Class hierarchy, differential ownership, and the consequent subordinate status of workers reflects the market’s reward to the naturally “industrious and rational.” Blackstonean assumptions may be discerned in the rule of employment at will, on which workers may be fired for any reason or none, which effectively codifies inequalities of power underwritten by disparities of wealth, or in the principle that employees owe their employers a duty of loyalty that controls over their statutory rights to organize for mutual aid and protection, while employers owe their employees no corresponding duty. Respect for “the prerogatives of private business management” has been held to require an interpretation of the employer’s duty to bargain collectively which excludes “managerial

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73 In the nineteenth and early twentieth centuries, immigrant workers in particular were regarded as “‘animals’ [the Irish] . . . , ‘depraved beasts’ [Slavs] . . . , [who pass through] ‘their brute-like existence [while] the rich and more intelligent classes are obliged to guard them with police . . . ’ [immigrant workers generally].” Herbert G. Gutman, WORK, CULTURE, AND SOCIETY IN INDUSTRIALIZING AMERICA 71-3 (1976) (internal citations omitted). Such attitudes informed the early development of IQ testing and helped rationalize laws restricting immigration in the early and mid-1920s. See Gould, MISMEASURE, supra note 18, at 222-32. Few would use this rhetoric today about persons of European descent, but it persists in more sterilize and muted form, more in the context of welfare than employment policy, with respect to blacks and Hispanics. See, e.g., Herrnstein & Murray, supra note 29.

74 Cass Sunstein, THE PARTIAL CONSTITUTION 45 (1993). He believes that it was the core of the economic substantive due process jurisprudence of the Lochner era, id. at 45-51, 62-67, rejected in the New Deal and since. Id. at 51-61. But while the modern regulatory state has made inroads on status quo neutrality, Sunstein overstates the degree to which it has been overthrown as a basis of law and policy.

75 The rule is now so established that judicial use of it involves little express justification, but older statements make clear that under the formal equality lay a concern for the employer’s superior prerogatives.  “May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if not my domestic, why not my farm-hand, or my mechanic or teamster? And if one of them, why not all four? And if all four, why not a hundred or a thousand of them?” Payne v. Western & Atlantic Ry. Co., 81 Tenn. 507, 518 (1884).

76 See, e.g., NLRB v. Local 1229, IBEW, 346 U.S. 464 (1953) (upholding firing striking unionized workers who attacked the quality of the employer’s broadcasting); Elk Lumber Co., 91 NLRB 333, 337 (1950).
decisions[] which lie at the heart of entrepreneurial control.” The differential distribution of powers, rights, and functions under “the traditional principles of a free enterprise economy” are treated as a creation of nature rather than law, of the way natural capacities play out in the market against a background of common law property rights, where these institutions themselves are implicitly treated as natural, not as policy choices embodied in positive law. The inegalitarian arguments from nature, then, have played an important role, sometimes open, sometimes hidden, in shaping social consciousness, policy, and the law itself.

B. Justifications and Excuses

The argument from nature has a slightly different force depending on how it is put. To say that something is “natural” in the moral and political context often involves a commendation, as it does in advertising “natural foods.” Calling something, e.g., homosexuality, “unnatural” is often intended as a criticism, as if heterosexuality would be good if it was natural. But to say that something is “human nature” is often more invoked as an excuse than a commendation, generally offered to explain why we do not institute some -- typically egalitarian--changes which might otherwise seem attractive. Selfishness or competitiveness, for example, are “human nature,” and that may be too bad, but there is nothing we can do about it.

The commendation too often involves the crude naturalistic fallacy of supposing that “natural,” in something like the sense of “not deliberately altered by human intervention,” means “good” or “right,” or at any rate is a reason that something is good or right. For example, the philosopher Elizabeth Wolgast argues that a “good society should take [the differences between

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78 Id. at 226.
79 That [bedrock] selfishness is not the cruelty . . . of a psychopath, but a concern for our well-being that is so much a part of our nature that we . . . would waste our time lamenting it or trying to erase it.” Pinker, supra note 4, at 288.
the sexes] into account, and probably must do so.”80 Perhaps, but we note that the “difference” she has in mind is the female monopoly on childcare. “Society, in its need to recognize someone as responsible for a child, rightly makes use of this fact of reproduction, the in utero pregnancy, so it can identify one parent with reasonable certainty.”81 The leap from in utero pregnancy to the rightness of traditional division of gender roles is breathtaking, although regrettably common.

But, as is often noted, hurricanes and plagues are “natural” in the specified sense, and houses or medicines are “unnatural” in just that sense.82 It is thus “natural” that women bear children, but nothing follows about who, as matter of policy, should bear the main burdens of raising them, particularly to the exclusion of other social opportunities, even if society must make someone legally responsible for the child. Why the biological parents?83 Why, if the biological parents, the mother, merely because her relationship to the child can be identified with some certainty?84 Pace Rousseau, this inequality is indeed man-made, and if it is rational, nothing about in utero birth bears on the matter. I set this mistake aside and address the justificatory uses of “natural” involved in the claims about impossibility or unacceptable costs.

My target is the excuse rather than the commendation.

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81 Id. at 26 (emphasis added). See supra note 30 (Rousseau’s statement of the argument).
82 I do not suggest that mothering is on the order of a plague or a hurricane, although a case could be made that, for women, the traditional female monopoly of childcare, confining women to that role or even allocating them exclusive responsibility for it, is at the basis of women’s subordination. See Dorothy Dinnerstein, THE MERMAID AND THE MINOTAUR (1976) and Nancy Chodorow, THE REPRODUCTION OF MOTHERING (1978).
83 Elsewhere I have argued that in our society the assignment of responsibility to the biological parents is an unavoidable outcome, but throughout much of human history it has not been the norm, see Justin Schwartz, Rights of Inequality: Rawlsian Justice, Equal Opportunity, and the Status of the Family, 7 LEGAL THEORY 83, 93 & n.7, 106-07 (2001), and therefore is not “natural” in the abstractive sense under criticism here.
84 Wolgast’s (1980) rationale for the policy and legal use of the biological fact of has been called into doubt by “scientific advances in DNA testing which can now determine, with an extremely high degree of accuracy, whether or not a particular man is genetically related to a particular child.” Jana Singer, Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption, 65 MD. L. REV. 246, 252 (2006).
C. Egalitarian Objections to Human Nature

Since appeal to human nature as an excuse is often inegalitarian, feminists, liberals, and other egalitarians have often been hostile even to the very idea of human nature. Many Marxists claim that there is no such thing.\(^{85}\) Marx himself is sometimes attributed this view this on the basis of the Sixth Thesis on Feuerbach: “The essence of man is no abstraction inherent in the single individual. In reality it is the ensemble of social relations.”\(^{86}\) But this does not say that there is no such thing as human nature. It rather states that there is a human nature and what it is, an “ensemble of social relations.”\(^{87}\) It is only if we insist that the human nature is by definition the notion of a nonsocial abstraction, a “something” all individuals have in common apart from all social relations, that the thesis can be read to deny that human nature exists. The proposition that human nature is social is old and widely acknowledged. Aristotle observed long ago that “man is by nature a zoön politikon,”\(^{88}\) an animal who lives in society.

Some feminists and postmodern theorists tend towards extreme environmentalism or social constructionism, attributing any gender roles or differences in behavior between men and women to socialization.\(^{89}\) To talk about human nature, they say, is to commit the sin of “essentialism.”\(^{90}\) This is a term of art in postmodern theory. Sometimes it seems to mean “a

\(^{85}\) See Norman Geras, MARX AND HUMAN NATURE: THE REFUTATION OF A LEGEND 50-54 & nn.11-12 (1983) (citing many writers who understand Marx this way).

\(^{86}\) Karl Marx, Theses on Feuerbach, in 5 COLLECTED WORKS 3, 4 (International Publishers 1976) (1845).

\(^{87}\) See Geras, supra note 85, at 46-50, 54-58 (criticizing the no-human-nature reading and suggesting alternative readings.)

\(^{88}\) Aristotle, supra note 20, 1253a1, at 1129. Jowett gives the standard but misleading translation, “political animal.”

\(^{89}\) See Levin, FEMINISM, supra note 43, at 16-54 (a useful if hostile survey of feminist environmentalism). See also Richard A. Posner, SEX AND REASON 23-36 (1992) (a clear, brief, and more sympathetic look at social constructionism that, however tentatively embraces a weak version of sociobiology). See also supra notes 14-15 and accompanying text, and infra note 90. Not all feminists agree. For a thoughtful and comprehensive account of various feminist views of human nature circa the early 1980s, see Jaggar, FEMINIST POLITICS, supra note 18.

\(^{90}\) See, e.g., Nancy Chodorow, Gender, Relation, and Difference in Psychoanalytic Perspective, in GENDER, supra note 19, at 25, 25; Ann Ferguson, A Feminist Aspect Theory of the Self, in GENDER, supra, at 66, 70, 83; Ruth Ginsberg, Audre Lorde’s (Nonessentialist) Lesbian Eros, in GENDER, supra, at 128, 131-34.
pregiven, unified subject or unchanging human essence that precedes all social operations,“91 which would appear to correspond to the notion I criticize, that there is a universal nonsocial human nature. But sometimes “essentialism” seems to mean something like the view that there is an objective (even if socially contingent) human nature apart from how we describe ourselves. The philosopher Richard Rorty says, “There is no human nature which was once, or still is, in chains. Rather our species has -- ever since it developed language -- been making up a nature for itself . . . .”92 We should “abandon[] the notion of ‘essence’ altogether” because:

the descriptions of ourselves we find in . . . the [sciences are] on a par with the various alternative descriptions offered by poets . . . , sculptors, . . . and mystics. [They] are not privileged representations in virtue of . . . [the greater degree of ] consensus in the sciences . . . [Given] the relativity of descriptive vocabularies to periods, traditions, and historical accidents. . . ., we cannot take the notion of ‘essence’ seriously.93

Laclau and Mouffe reject the “essentialist perspective” in “the anthropological assumption of a ‘human nature’ . . . .”94 “‘Man,’” they assert, “is a discursively constructed subject position” with an “infinite” range of possible articulations.95 They insist on “the openness and indeterminacy of the social.”96 The play of “discursive practices” is free of “any a priori class [or other] character of struggles or demands.”97

These formulations are not transparent, and their full exploration would lead us afield. If they imply that any account of how we are is as valid as any other, except those on which there is

91 Best & Kellner, supra note 15 at 51 (a conception of essentialism is attributed by the authors to Michel Foucault).
92 Rorty, OBJECTIVITY, supra note 13, at 213 (1991) (citing Rousseau, SOCIAL CONTRACT, in Cress, supra note 2, at 141 (“Man is born free, and everywhere he is in chains.”)). Rorty misses Rousseau’s point, which was that human nature must be transformed. He thought it was men and not their nature which was to be emancipated. See supra note 2.
93 Rorty, MIRROR, supra note 13, at 362-63.
95 Id. at 116.
96Id. at 144-45.
97Id. at 86.
a fact of the matter about us, social or otherwise, they are incoherent. If anything goes, why not naturalism? Even if such a view could be made coherent, however, nothing as exciting as the abandonment of objectivity is required by the fact that any concept of human nature must be conceived in some particular way (“discursively constructed”) or by the fact that there are different ways of conceiving it (“alternative descriptions”). Some of the different particular ways nonetheless be true, and since some of them are mutually inconsistent, some of them must be false. Nor does the fact that art or religion may offer insights into human nature undermine the idea that science may as well, or that it might be right where they are, in some sense, wrong.

But, happily, we can avoid the metaphysics here. Even Rorty or Laclau and Mouffe do not really believe anything such thing in any concrete context where it matters. Laclau and Mouffe profess a sort of democratic feminism and socialism. Rorty advocates a “reformist left”; he holds that “women . . . are capable of more than . . . males had thought [and] that property is not sacred,” although he would drop “the revolutionary rhetoric of emancipation . . . in favor of a reformist rhetoric about increased toleration and decreased suffering.” But they must believe that people really do have the potential to behave as they would wish in an environment changed in the ways that they recommend. “Essentialism” in this sense cannot really be coherently denied.

Why do egalitarians have such a strong resistance to the notion of human nature? I suspect it because the rhetoric of human nature has been so consistently invoked by

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98 For such criticisms, see, e.g., Bernard Williams, Auto-da-Fé: Consequences of Pragmatism, in READING RORTY 26 (Alan Malachowski, ed. 1990); Norman Geras, Post-Marxism?, in DISCOURSES OF EXTREMITY: RADICAL ETHICS AND POST-MARXIST EXTRAVAGANCES 127 For replies by Rorty and Laclau & Mouffe to such criticisms, see, e.g., Richard Rorty, Pragmatism, Relativism, and Irrationalism, in CONSEQUENCES OF PRAGMATISM 160 (1982); Ernesto Laclau & Chantal Mouffe, Post-Marxism without Apologies, 166 NEW LEFT REVIEW 92 (1987).

99 See Laclau & Mouffe, supra note 74, at 182.


102 Rorty, OBJECTIVITY, supra note 13, at 213.
inegalitarians as an obstacle to the sort of policy and legal reforms they advocate. Rather than contesting the asserted monopoly on the concept of human nature, egalitarians have tended to concede the point while denying that this bit of intellectual property has value. They implicitly grant that if there were a human nature, it would frustrate their goals, and conclude, therefore that there is no such thing. This political objection is, however, a mistake for at least two reasons.

First, it does not follow from the fact that talk of human nature is often deployed in an intellectually disreputable way for arguably suspect purposes that the concept is itself tainted. A more plausible notion of human nature is in principle consistent with egalitarian goals and purposes. If human nature is a set of potentials for a range of behaviors that may be realized differently in different environments, there is no a priori reason to doubt that the behavior required by egalitarian ideals might be realizable in an attainable range of environments.

Second, it is a fallacy to assert that, e.g., the female monopoly on childcare or class inequality are not due to human nature because it would be awful if these things were true. Perhaps things are awful from an egalitarian perspective. It does not follow that the argument from nature is wrong simply because its wrongness is necessary for egalitarian goals. Politically motivated environmentalism is to be resisted. It is an empirical question what possibilities human nature allows. I think that the inegalitarians are not, in general, right, but their conclusions might be right.103 Once the necessary clarifications are made about what is involved in having a nature, egalitarians and their opponents should be arguing about what human nature is and whether and at what price it allows for the changes they want, not whether there is such a thing.

103 The argument based on the abstractive conception, see infra Part II, is incoherent. The unacceptable costs argument, see infra Part III, is another story. Whether particular inegalitarian arguments are defensible depends on the argument and the claim asserted. No useful generalizations can be made without considering the specific issues and evidence offered in favor or against a particular view.
II. THE ABSTRACTIVE CONCEPTION AND UNCHANGEABILITY

A. The Incoherence of the Abstractive Conception

If it is widely thought that knowing what human nature is would tell us what would count as a good society, it is also, and oddly, widely thought that to know what human nature is we must know what people would be like in abstraction from society. The abstractive conception of human nature is the idea that human nature is the set of dispositions humans have to act apart from any society or social influences. If we know this, the reasoning runs, we can construct the appropriate sort of society for creatures like that. In many cases, the “appropriate sort of society” turns out to be a lot like the one we have. The plausibility of this argument derives from the notion that those characteristics are what we have to work with and so constrain what we can do. An old version of this argument goes back to the social contract myths of Hobbes and, to some degree, Rousseau. Among the purpose of these myths was to find the best sort of society, “tak[ing] men as they are [outside of society] and laws as they might be.” For Rousseau, human nature can be changed by social arrangements. Hobbes, however, offers a fairly pure instance of the abstractive conception. He thinks that without social institutions of a specific sort, individual rational self-interest would leave us prone to conflict in a struggle for scarce resources. He argues that given this nonsocial nature, the best alternative to a “state of war” is

104 Garfinkel calls this extraordinary, correspondence of (biological) nature with the needs of a given form of social organization “[t]he Immaculate Conception of Social Roles.” Alan Garfinkel, FORMS OF EXPLANATION 111 (1981).
105 It is implicit in the structure of Hobbes’ argument that human nature is fixed. Entry into the civil state does not alter the “restless desire for power in all men,” HOBSES, supra note 24, at 80, but merely overawes its manifestation. See id. at 100.
106 Rousseau, SOCIAL CONTRACT, supra note 2, in Cress at 141.
107 For Rousseau, the founder of society can “change human nature.” Rousseau, SOCIAL CONTRACT, in Cress, supra note 2, at 163. “The passage from the state of nature into civil society produces quite a remarkable change in man . . . . [It transforms him] from a stupid, limited animal into a man.” Id. at 150-151. Part I of Rousseau’s DISCOURSE ON THE ORIGINS AND FOUNDATION OF INEQUALITY AMONG MEN, in Cress, supra note 2, at 39-60, is an account of the transformation of human nature.
108 See Hobbes, supra note 24, at 100.
political absolutism\textsuperscript{109} in his day, the dominant, though contested, form of political society.\textsuperscript{110} Modern incarnations of the abstractive conception are provided by the biological determinists mentioned above.\textsuperscript{111} Some more liberal sociobiologists argue for certain social changes on these grounds.\textsuperscript{112} Wilson urges increased tolerance for homosexuality because it is, he thinks, genetically determined, so gays and lesbians cannot choose their sexual preference, and ought not be blamed for it; besides, it evolved because it was adaptive.\textsuperscript{113} But egalitarian biological determinism is no less a mistake than the inegalitarian sort. I do not of course mean that egalitarian or for that matter, inegalitarian invocations of our biological nature are erroneous, merely the ones that commit the fallacies critiqued here.

The abstractive move is deeply problematic. The most important social behaviors cannot even be described abstractly. Class hierarchy, gender subjection, and other traits that describe social interactions can, as a matter of logic, only occur in a social context. The hereditarians, however, suppose that they are based on biological--specifically genetic--factors that are not themselves social and which limit the scope of social change. “Biological constraints exist that

\textsuperscript{109} Id. at 142-150.

\textsuperscript{110} Arguments that a correct understanding of human nature shows that the status quo is the best or only possible alternative vary mainly with whatever happens to the status quo at the time. See Garfinkel, supra note 104.

\textsuperscript{111} See, e.g., supra notes 4, 19, 35 and accompanying text. It is not my intention to offer detailed discussion of arguments of particular writers. My strategy will be rather to analyze a common patterns of argument, citing only exemplary statements for illustrative purposes.

\textsuperscript{112} The anthropologist Ashley Montagu once argued that feminist changes were in order because women were biologically superior to men on a number of dimensions--they were more loving, nurturing, etc. See Ashley Montagu, THE NATURAL SUPERIORITY OF WOMEN (1968). A number of cultural feminists have maintained such views more recently.

\textsuperscript{113} See WILSON, supra note 4, at 142-147. This view has been given some renewed impetus from dubious scientific studies which have been received with mistaken enthusiasm in some sections of the gay and lesbian community. See Simon LeVay, THE SEXUAL BRAIN (1996) (arguing that homosexuality is inherited). One quick way to see that enthusiasm is mistaken, and Wilson’s hope baseless, that, if homosexuality were shown to be genetically determined, increased tolerance would result, is to reflect on the fact that racial differences, as normally understood, are known to be far more genetically determined than homosexuality; but this has not promoted interracial harmony in the slightest. On the contrary, it is often used to argue that certain races are genetically inferior. See Herrnstein & Murray, supra note 19. Moreover, the argument has the flavor of an excuse, as if homosexuality were something regrettable but inalterable, a notion that defenders of gay and lesbian liberation ought to be slow to concede.
define zones of improbable or forbidden entry,” Wilson asserts. For both Hobbes and the biological determinists, the implications for change are generally pessimistic. The iron hand of nature bars the route, typically, to egalitarian destinations. Two questions arise here: (1) why accept such a view of human nature? (2) Why think it tells us what sort of society is best?

As to the first question, abstraction from society is a curious move. Why think that what makes, say, an ant an ant is something independent of what it has in common with actual ants, namely its social or group character? Many ants are after all all social insects. The thought is that there is something nonsocial, perhaps biological, which explains why it has that character. Even if so, though, why think that nonsocial something is its nature in a way that its social character is not? Turn the point around: take what an ant in a social context has in common with one which is not in such a context. Call that common trait $P_1$. Now $P_1$ is no more the nature of an ant than are the features $P_2 \ldots P_n$, which all ants share in a social context. Neither is $P_1$ ant nature in a way that the features $P_m \ldots P_n$, which an ant shares only with more restricted groups, such as its species or its kin, are not. All these traits are equally ant nature in the sense that they are potentialities manifested in environments.

I have identified the nature of anything that has one with the notion of a potentiality. When I say a trait of an ant (or anything else) is a potentiality, propensity, or disposition, I mean that there are certain properties $P_1 \ldots P_n$ that the thing has in virtue of which it behaves in a certain way, $B_1$, whenever the ant (or whatever) is exposed to appropriate triggering conditions $C_1 \ldots C_n$ in the environment $E_1$. These properties may be physical or biological, but in the

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114 Wilson, supra note 4, at 81.
115 To call ant “social” is a potentially misleading anthropomorphism, but I shall use this convention to refer to ants that live and cooperate in groups, with the caveat that ant “society” is not much like that of humans. I use the example of ants because Wilson is entomologist.
case of sentient organisms like humans, also psychological and social.\textsuperscript{117} Conditions $C_1 \ldots C_n$ are causally relevant to manifestation of $B_1$ in that environment. Together with the physical or biological properties of the ant underlying $B_1$, they produce, \textit{ceteris paribus}, the behavior in the ant when they occur together. They are jointly determinative of its manifestation.\textsuperscript{118} The total set of such dispositional properties that anything has is its nature.\textsuperscript{119}

The kernel of truth in the abstractive conception is that what all ants share in any context, if there is any such thing, may restrict the range of potential behaviors. “People change their attitudes consciously . . . ,” says Wilson. “Nevertheless this flexibility is not endless.”\textsuperscript{120} Fair enough. We cannot simply will, for instance, that men should bear children. But knowing what we, or ants, will do in abstraction from their social context does not necessarily tell us what they will do when we put them in real social contexts. This brings us to the second question.

Why think whatever we are like in a nonsocial state bears on the proper sort of society for us, as Hobbes and contemporary biological determinists claim? The idea that it does depends on the view that human nature is the nonsocial core around which society is built, which nature is

\textsuperscript{117} Even if psychological or social properties are also physical or biological, they are nonetheless still psychological or social properties, just as water is still water even though it is also H$_2$O.
\textsuperscript{118} The term “determinative” should not be taken to mean that if the dispositional properties $P_1 \ldots P_n$ and the triggering conditions $C_1 \ldots C_n$ do jointly occur then the behavior $B_1$ necessarily occurs. Dispositions are notoriously probabilistic, and in many important cases, perhaps inherently and irreducibly so. See Peter Railton, \textit{A Deductive-Nomological Model of Probabilistic Explanation, in THEORIES OF EXPLANATION} 119 (Joseph C. Pitt, ed. 1988). Hence the expression “causally relevant.” See id. at 125-26; Peter Railton, \textit{Probability, Information, and Explanation}, 48 \textit{Synthese} 233, 239-44 (1981) (causal relevance as a matter of providing explanatory information). One need not accept Railton’s quasi-empiricist theory of explanation to invoke this notion. Even where the manifestation is strictly deterministic \textit{ceteris paribus}, \textit{ceteris} may not be \textit{paribus}. See Mills & Beatty, \textit{supra} note 116, at 43.
\textsuperscript{119} Here I follow the view of the early Putnam, who identifies the “nature” of anything (gold, water, lemons) with its “hidden structure” or “essence” rather than its “superficial characteristics,” that is, its manifested traits. See Hilary Putnam, \textit{The Meaning of “Meaning”}, in \textit{Mind, Language, and Reality: Philosophical Papers, vol. 2}, 215, 235-41 (1975). This scientific realist account is inconsistent with that of the empiricists, who reject talk of underlying essences and prefer to speak merely of the language of lawlike generalizations which explain events when their antecedents are true. This is not the place to defend realism against empiricism, but see, e.g., Hilary Putnam, \textit{Explanation and Reference, in Mind, Language, and Reality} 196, \textit{supra}.
\textsuperscript{120} \textit{Wilson, supra} note 4, at 125.
either realized or constrained by social arrangements of different sorts. These, it is said, are exogenous to human nature. But more plausibly, they interact with whatever nonsocial nature we have in any setting or alone in ways that affect the appropriate sort of society for us. As ant nature is group, human nature is social. This is the norm in most circumstances, which raises doubts about the informativeness of abstraction for grasping what is the best sort of society.

Inegalitarians will reply that the relevance of the abstractive view of human nature lies in the issue of *unchangeability* as related to the nature-nurture controversy. The view is that our nature is what we have in abstraction from the social environment and is *therefore* unchangeable, so it unavoidably constrains any possible social arrangements. That “therefore” does a lot of work. Should arguments from unchangeability fail, or in the alternative, inegalitarians will fall back on arguments that the changes egalitarians want, while perhaps possible, would create immense unhappiness or impose unacceptable costs upon us. Consider these arguments in turn.

B. Nature or Nurture: A False Dichotomy.

There is a tendency to ask, if we consider any human phenomenon, such as women’s subordination or economic inequality: is it nature or nurture? This is a false dichotomy. Explanations do not divide neatly into natural or nurtural, although we may emphasize one aspect or the other depending on our pragmatic concerns. Are the characteristics of a tomato the product of a plant or of soil, water, and sunlight? They are obviously the product of both. To explain a feature of tomatoes, we need to refer to both plant and environment. We cannot do without either. Now, someone might grant this, but want to know which is more important. This invokes the image of an explanatory continuum:

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| nature (plant) | nurture (sunlight, soil, water) |
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If the question amounts to an inquiry about what percentage of each we need for a tomato to manifest some trait that interests us, the reply must be that we cannot sensibly ask this. There is no explanatory question to which we could identify an answer on which there is a proportion. We cannot even say that the answer is equal proportions. There is just a necessary contribution from each. In view of this, it should also be obvious that how tomatoes behave will depend upon the circumstances. It is their nature to grow and reproduce if planted in fertile soil, watered, and given adequate light. Take away the conditions for growth and reproduction by uprooting the plant, failing to provide water, or denying it light, and these phenomena will not occur. It also the nature of tomatoes to die apart from sunlight, soil, and water.

Or if we ask why salt dissolves in water, the answer is because of how its chemical structure, NaCl, reacts when it is immersed in water. What is the relative contribution of the salt and the water to the phenomenon of solubility (propensity to dissolve in water)? This evokes again the imagine of an explanatory continuum:

\[
\text{nature (salt [NaCl])} \quad \longleftrightarrow \quad \text{environment (water)}
\]

Which is more important? Again the question is not sensible. Solubility is a *joint* property, a dispositional property of salt displayed in environmental circumstances, *i.e.*, immersion in water. It is not an incremental result of the nature of salt such that the more water to salt, the more solubility. Like the potential of tomatoes for growth, that of salt for dissolving in water depends on the circumstances, here, the presence or absence of water. Given its chemical structure, salt will be a crystalline solid if kept apart from water, and will dissolve if immersed in it.

The point of these examples is that the nature of any phenomenon or behavior, whether of tomatoes, salt, or human beings, consists in propensities of the thing to manifest itself in certain
specific ways depending on the circumstances. Whatever the manifested behavior, say, growth and reproduction for a tomato or dissolution for a salt, it is a function of the dispositional properties or propensities of the thing, based on its physical, biological or other characteristics, and of the circumstances in which it is found. It makes no sense to ask what is the nature of the thing apart from any circumstances, or even to ask which of these kinds of factors, the propensities or the circumstances, matters more for the manifested behavior.

C. The Fallacies of Genetic Determinism

1. Heritability and the “Contribution of Nature”

But people talk about human nature in this incoherent way, invoking a nature which is rigidly manifested in the same way whatever the circumstances and which cannot be changed however we vary the circumstances. Since the development of genetics in the late nineteenth and early twentieth centuries,121 “nature” in this context has often been identified with genetic nature, the contribution of the information-bearing proteins and amino acids governing the development of the cells of which we are constituted. Since we cannot at present easily change our genetic structure, many inegalitarians now think that it limits our social hopes for egalitarian change. Thus Wilson admonishes, “[t]he consequences of genetic history cannot be chosen by legislators.”122 Claims that genetic structure is itself inalterable by human effort may be becoming outmoded.123 This may ultimately undermine the supposedly scientific basis of

122 Wilson, supra note 4, at 7.
123 See Christopher M. Holman, Copyright for Engineered DNA, an Idea Whose Time has Come, 113 W. Va. L. Rev. 699, 720 –21 (2011) (“Synthetic biologists have made great strides in rationally engineering complex and original genetic sequences, as illustrated by examples such as the development of the GAT gene [a commonly used genetically engineered pesticide]”; and discussing rapid progress in genetic engineering). Synthetic chemicals are not the likely limit to these techniques. Dr. Andrew W. Torrance writes, “The ability of human parents to select genetic traits for their children is now more a question of when rather than if.” Andrew W. Torrance, Open Source Human Evolution, 30 Wash. U. J.L. & Pol’y 93, 108 (2009). If so, this poses important ethical, policy, and
inegalitarian claims based on an inalterable genetic nature in a far more direct way than mere arguments. However, today neither legislators nor scientists can choose the consequences of genetic history, and, noting that science may yet moot the question, I proceed with that caveat.

Wilson’s way of talking, repeated by more recent writers like Pinker, presupposes that we could segregate and quantify the relative contributions of nature and nurture to human behavior. One way to understand the confusion involved here turns on grasping the misuse of the distinction between genotype and phenotype. Intelligence, selfishness, or nurturance, or any trait that might bear on the debate over the limitations our genetic nature may impose on ambitions for social reform, will be a phenotypic trait. That means it is the manifestation in given environment of the genetic possibilities encoded in the genotype, the naked genetic information, that is, to put it extremely, crudely, inscribed in the DNA. Various phenotypic traits, such as those mentioned, can be manifested from the same genotypes in different ways depending on the environment. Nature or nurture is a false dichotomy because the traits which interest us are necessarily environmentally manifested and vary in their manifestation depending on the environment. Is it nature or nurture? It is always and necessarily both. Neither, in the nature of things, can be more explanatory important.

It is sometimes possible in principle to determine quantitatively the genetic contribution in a given phenotype. Holding an environment constant for a population, we can sometimes specify how much of the variance in the phenotype is explained, statistically, by genetic factors. Surely, it will be said, this measurement tells us the contributions of naked genes and legislative questions as well as more technical judicial ones about intellectual property. See Evans, PLAYING GOD? HUMAN GENETIC ENGINEERING AND THE RATIONALIZATION OF PUBLIC BIOETHICAL DEBATE (2002).

124 In technical statistical terms, the variance is the (mean) average of the squared deviations from the mean of a data distribution. Although we cannot sensibly ask how much of an individual’s height or IQ score is due to genes and how much to environment, we can ask what proportion of the deviation of the individual’s height or IQ score from the mean of its measure in the sample of her population that we study can be ascribed to the deviation of her environment from the average environment and how much can be ascribed to the deviation of this genetic value.
expresses precisely a notion of genetic determination. Even if in practice the determination
cannot be made for many traits given our state of knowledge, for instance, with the genetic
contribution to IQ, because of the extreme scarcity of identical twins raised in appropriate
circumstances necessary for reliable twin studies, still in principle there is a determinate
degree of variance due to the genotype in the case of each phenotypically manifested trait.

Heritability is the proportion of the variation in a trait in a population that is due,
statistically, to the genetic variance. To say that a trait has low or high heritability means that
its manifestation by individuals in the population with the same genetic makeup, or genotype,
varies widely (low heritability) or little (high) from its average manifestation in a population in
an environment. In some cases we can quantify the heritability of a trait in an environment and a
population and determine, more or less precisely, the amount of variance in those circumstances
that correlates with the genetic contribution. The variance of some traits, like speaking English
or practicing law, has virtually no correlation with the genotype in any environment. That of
others, like being a certain height or having eyes of a certain color, has a rather high correlation
with it in most environments. Inegalitarians like to argue that certain traits, like intelligence,
purportedly measured by IQ tests (Herrnstein, Murray), a propensity for nurturing children
(Goldberg, Levin), are highly heritable. These claims are empirically suspect, but here. I
address what heritability means and how it affects claims about unchangeable human nature.

See Richard C. Lewontin. **The Analysis of Variance and the Analyses of Causes, in** The
IQ Controversy (N.J. Block & Gerald Dworkin, eds. 1976 at, 179, 182. An informal treatment is given in Elliot
Sober, **PHILOSOPHY OF BIOLOGY** 188-90 (1993).

See Kamin, supra note 18 (detailed discussion of twin studies); David Layzer, **Science or Superstition? A
Physical Scientist Looks at the IQ Controversy**, in Block & Dworkin, supra note 124, at 210 (“For [heritability]
estimates to be meaningful, the relevant environmental differences between separated twins must be statistically
indistinguishable from those between individuals selected at random from the general population. None of the major
twin studies . . . come close to satisfying this requirement.”).

See Block & Dworkin, **IQ, Heritability, and Inequality**, in Block & Dworkin, supra note 124, at 410, 474
(heritability defined as the variance caused by genetic variance divided by total variance).

For critical appraisals of the claim that IQ is highly heritable, see, e.g., various essays in Block & Dworkin,
supra note 124. These criticisms have even more force against notions like nurturance or selfishness, which resist
2. Heritability Depends on the Environment

High heritability is deployed in inequalitarian arguments as if it meant a larger contribution by nature and therefore greater unchangeability. This argument is a patent fallacy for at least two reasons. First, even where we can determine heritability, doing so tells us nothing about unchangeability in all environments, much less about the contribution of “nature” versus “nurture” abstracted from any environment. Such quantitative determination is possible, when and in the sense it is, viz., through the analysis of variance, only if the environment is held constant and for a given population. Even high heritability for a trait in a population and environment does not reflect on what range of environments is possible and thus on the range of phenotypic manifestations possible in the range of environments, or for different populations.

Whether intelligence is a well-defined characteristic is controversial,128 and the case is even worse for traditional gender roles. Consider height, though, which is uncontroversially clearly defined and highly heritable. What does high heritability tell us about relative contribution of nature and nurture or about changeability? Suppose tall people do not feed their children well. Suppose short people do. The ratios of height of children will differ from cases where we hold diet constant. So the fact that height is 95 percent heritable in some environment for some population does not tell us that it is 95 percent “determined by genes” in all environments for all populations, or that the heritability of height of some population, is unchangeable. Strictly the heritability of height is a meaningless expression. How heritable a trait is depends on the environment and has meaning only with reference to a particular population.

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128 See, e.g., Gould, MISMEASURE, supra note 18, at 234ff (arguing that a correct understanding of factor analysis shows that no psychological quantity answers to IQ).
But suppose that environmental change has reached a saturation point. We improve health and diet as much as possible, but the correlation between parents’ and children’s height remains. Is that not nature? It is nature, in that people have the potential to grow to certain heights given a certain diet. It is not nature bare, because height is phenotypical. When, given such a diet, children do grow to certain heights, we see the operations of a joint disposition manifested in the proper set of conditions in which regularities are sensitive to that genetic component. The genetic nature underlying the regularity, however, admits of variation in different environments, such as those where diet and health are less than optimal.

I make no claim that genes impose no limits whatsoever on our potentials. I could not be eight feet tall even with “proper” food. The potential which I had to grow had certain genetic limits. “So,” says the inegalitarian, “in the end genes enter with their iron hand!” But we might just as well say the environment has “iron limits.” If I had not been fed properly, I would not have grown to 5’10”. If the inegalitarian says, “Good: two iron hands!” we must reply that the issue is not nature versus nurture, the iron hand versus the empty mind, but what variables are in the scope of change and how easily they can be changed. The limits themselves may change depending on how the variables interact.

The interplay between nature and nature is famously illustrated by PKU, a genetic disease that causes severe neurological developmental problems if allowed to run its course. The abnormalities arise from inability to metabolize a particular amino acid (phenylalanine). One gene does in fact cause PKU, a fairly unusual situation. But the developmental pattern associated with PKU is alterable by changing the environment. PKU babies can grow up without problems if they are kept on a diet without the troublesome amino acid. “Nature”-- genetic

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129 See Garfinkel, supra note 104, at 116-117; Wilson, supra note 4, at 57-58. Babies are routinely tested for PKU.
nature, anyway -- does not do all the work. If we ask why a PKU baby is abnormal, the answer that the baby reacted to this amino acid (“nurture”) is just as accurate as the answer as that it has PKU (“nature”). Which answer we give will depend on our explanatory and pragmatic interests. Both are correct.

Heritability, then, tells us little about changeability. That some characteristic is to some degree heritable in a given environment does not tell us what patterns hold if we shift the environment or consider a different population. We should not be asking whether human nature, *qua* potentialities or capacities for behavior, is “determined by genes.” In this way we mislead ourselves into thinking that there is a special genetic determinism which is unlike any other determinism in that it operates without boundary and initial conditions, and is rigidly manifested in all circumstances. Even the laws of physics are not like that. Classical mechanics does not say how matter will behave no matter what, but only how it behaves if the boundary conditions include flat spacetime and relatively low velocities; and to get any particular predictions, we have to specify initial conditions, such and such a distribution of particles with these and such velocities. The heritability of a trait is explicitly defined in terms of its boundary conditions. The point to be emphasized is that heritability has no meaning in the abstract, apart from an environment, and that heritability in an environment conveys little information about unchangeability because it does not take into account the possible range of environments.

### 3. Our Acquired Natures

A second reason the argument from heritability to unchangeability is fallacious is that our genetic nature, while part of our nature, is not the whole of it. Our nature is our full set of potentialities, not just our genetic potentialities.\(^\text{131}\) Acquired capacities such as practicing law,

\(^{131}\) Of course these acquired potentialities are biologically based in the sense that we have a biologically based potential to acquire these capabilities in certain environments.
speaking English, making war, or raising children are no less part of our nature. There are no
genes “for” law, English, war, or childrearing as there are “for” height or PKU (though even if
there were, that would not guarantee that their carriers manifested these traits no matter what).
These traits are based in psychological and social structures instilled in social interaction, that is,
they are learned. But if “nature” is a set of potentialities for behavior in certain circumstances,
they are no less products of our nature for being the result of nurture. Law school, a social
institution, creates the psychological structures that enable the behavior associated with legal
practice, as boot camp does those associated with war. These natures are localized and
nonuniversal, but universality is no criterion for naturalness. Any potentialities shared by all
humans are simply universal natures; those shared by smaller groups (lawyers, soldiers, English
speakers, parents) are local natures. All are dispositions that can be triggered to produce the
characteristic associated behavior in the appropriate circumstances.

The significance of the fact that our nature is not merely genetic, although it is also
genetic, is that even if all of the traits that underwrite hierarchy are highly heritable in most
known human environments and for humanity as a population, we are not necessarily
“determined” to manifest them. We can shape our institutions as best we can to get around the
less desirable parts of our genetic heritage. Should our universal genetic natures dispose us to
sort women into the nursery and men onto the battlefield, we might use our acquired local
natures to counteract these unhappy predilections

In general, locating a trait in the domain of “nature,” or among basic genetic
potentialities, does not mean that it is unchangeable. With sufficient alteration of the
environment, the effects of the genetic contribution, in the sense of a genotype “determining”

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132 The locality of our local natures is in any event contingent. Everyone who could learn a language can learn
English. Everyone capable of a certain minimum of physical activity can be a soldier or a parent. With proper
training, everyone capable of a certain low level of intellectual activity could be, heaven forbid, a lawyer.
any particular phenotypic manifestation, diminish in explanatory power, however much the of the variance they explain in an environment. The color of peppers is as highly heritable a trait as one likes, but if I wish to know why the ones on my table are green, the best answer is that they were picked before they fully ripened. Human nature may be such that there is an attainable range of environments we can pick in which the cooperative characteristics egalitarians require can be manifested even if another range of environments encourages inegalitarian institutions.

D. The Argument from Universality

If our question is why people behave as they do in a given environment and how much this behavior can be changed, the abstractive move means we are comparing incomparable cases. How people would behave in abstraction from history or culture, if that notion is at all coherent, will not tell us much about how they will behave in context. This raises the issue of what would count as evidence for claims about human nature, properly understood as explained above. We must look at the contexts and see how people do behave. One source of evidence is the observed range of human behavior revealed in history. Both advocates and opponents of particular policy and legal reforms quite properly cite history to make their points. Inegalitarians are fond of pointing to the universality of certain behavioral traits. Goldberg, for instance, insists that “all societies are patriarchal.” He wishes to conclude from this that all societies must be patriarchal. His hereditarian argument is intended to provide support for that universal claim. The leap from all observed environments to all possible ones, however, is a large one.

Given the nature of nature, the evidence of history tells in very different ways. Any way that people do behave is natural in that if they do so behave then they can so behave. That is why

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133 Speaking in what were then science fiction terms, some radical feminists urged, genetic engineering and replacement of biology by technology might someday be possible. See, e.g., Shulamith Firestone, THE DIALECTIC OF SEX 273-74 (1970). That day might be much closer to hand, for good or ill, than anyone might have imagined forty years ago. See supra note 123.

134 Goldberg, supra note 43, at 1.
feminists are concerned to produce evidence of societies in which the relations between the sexes are not relations of subjection. Even one such example shows that women’s subordination is not inevitable. Likewise, socialists emphasize the brief time that capitalism has existed to call our attention to the possibility of other forms of economic coordination. But inegalitarians cannot draw the same comfort from the historical record, whatever the facts. If their argument is that some social arrangements are impossible, this cannot be read off the fact, if it is a fact, that they have never been actual. This is a point of logic. Even failing actual evidence of more equal gender or economic relations, they may be possible in circumstances that have not been realized. There is good reason to think the actual range of behavior is far smaller than the possible range. People are capable of a much wider range of behaviors than they have actually shown. Before the seventeenth century, no one would have imagined that capitalism was possible. Before the nineteenth century, few would have supposed that democracy was possible. Before the twentieth century, only a handful of dreamers thought that formal equality for women might be possible.  

So the common inegalitarian argument that all hitherto existing societies have had feature $x$ (traditional gender roles, class inequality) does not provide more than a prima facie reason to think that all possible societies must have $x$. It does provide at least that much. It thus shifts the burden of persuasion to egalitarians to tell an alternative story. However, while the pervasiveness of $x$ gives us reason to seek an explanation of why $x$ is pervasive, it provides no reason to think that the explanation lies in human nature abstractively understood, rather than in some feature(s) of social institutions shared by all actual societies, but not necessarily by all.  

135 One might also reflect on our darker potentials. No one could have imaged Auschwitz or the Gulag before the twentieth century either.  
137 See infra Part IV for some sketches of some alternative explanations.
possible ones.\textsuperscript{138} The feature(s) may have a biological component with higher or lower heritability. As we have seen, high heritability does not imply inalterability. If we find such a feature, it may be easy or hard to change, whatever its explanation.

If all hitherto existing societies do have feature \( x \), a generalized reference to human nature is not a good explanation of this. Such an explanation is on par with that offered by Molière’s physician of why opium produces sleep: because of its “dormative potency.”\textsuperscript{139} Even if such an explanation is true, it is relatively uninformative. Feature \( x \), if actual, \textit{is} human nature in that human nature is the set of potentialities that can be so manifested, in the subordination of women, for instance, or class stratification. But this tells us little about why \( x \) is so widely manifested, nor does it suggest that human nature does not contain other potentialities, \textit{e.g.}, greater women’s or economic equality, realizable under some circumstances. Nor does the actual universality of \( x \) carry any particular normative implication, such as that \( x \) is good or right.

Negatives are hard to prove. Impossibilities are even harder. But inegalitarians, if they rely on the impossibility argument, adopt the burden of proving negatives and impossibilities: that human nature \textit{is not} and \textit{cannot} be a certain way. This can be done, although its application to the case of social change is difficult. Consider ants again. Can they be ten feet tall, as in some science fiction movies? It can be shown that size and physical structure are so related that if an ant were “enlarged” beyond a certain rather small size, it would collapse or be unable to breathe. That ten foot tall ants happen not to exist is no accident. In a strong sense that we can specify, they could not exist. They are opposed by established empirical regularities of structural

\\textsuperscript{138}Marx and Engels observed that “the history of all hitherto existing society is the history of class struggle Karl Marx & Frederick Engels, \textit{The Manifesto of the Communist Party, in 6 Collected Works} 477, 495 (International Publishers 1976) (1848) [hereinafter Marx & Engels, \textit{Manifesto}], but argued that class struggle results from alterable structural characteristics of divided societies. \textit{See}, \textit{e.g.}, \textit{infra} Part IV(B). Hence the “hitherto existing.”

In general, we may say that something may be taken to be impossible if its actualization would violate demonstrated physical, biological, social, or psychological principles. We must specify, however, which principles. And the demonstration must be provided, not merely asserted. In the interesting cases—the social or psychological ones—producing demonstrated principles that do not beg the question will not be easy.

E. Changeability and the Environment

Egalitarianism should refrain from rejoicing here, for two reasons. First, if supposing “natural” means “invariable” is a mistake, supposing that “environmental” or “social” means “easily changeable” is no less an error. How easy is it to improve tomatoes as plants as opposed to giving them more sunlight? Sometimes it is easier to select by breeding. The weather may be less susceptible to control than our ability to crossbreed. In that case it is easier to change the genetic nature of the plant than to alter the environment. In the social cases too, if we are interested in how changeable some trait might be, we should address that issue directly. Even if we can determine how much of the variance in an environment is due to genetic factors, a large biological contribution will not establish unchangeability, nor will a large environmental contribution rule it out.

Women’s subordination illustrates how difficult environmental variables are to change. It is supported by powerful male interests and by the psychological investments of many women whose sense of self-worth is threatened by equality. Changing the legal and social facts that constitute the subjection of women, much less those that contribute to its persistence, is exceedingly difficult. The campaign for women’s suffrage in America took over 70 years, from

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141 See Kirsten Luker, ABORTION AND THE POLITICS OF MOTHERHOOD 197-208 (1984) (Women anti-abortion activists find feminist ideals implicit in pro-choice politics a threat to their sense of identity and self-worth.).
Seneca Falls to the enactment of the Nineteenth Amendment. Women have come farther towards at least formal equality than anyone might have imagined in 1845 or even 1920, but we are still a long distance from the even liberal feminist ideal of equality. Rhode estimates that at current rates of change it will take fifty to 100 years to achieve a sexually balanced workplace.\footnote{Rhode, \textit{supra} note 45, at 163.}

Economic transformations involving reduction in material and social inequality and the too runs up against environmental limits. Speaking of more radical sorts of changes than any contemplated, and setting aside the question of their desirability, Marx thought that the obstacles to socialism were so severe as to require “violent overthrow of the bourgeoisie”\footnote{Marx \& Engels, \textit{MANIFESTO}, in 6 \textit{COLLECTED WORKS}, \textit{supra} note 138, at 477, 495. Marx’s skepticism about the parliamentary road to socialism has been supported by subsequent historical experience. See, e.g., Adam Przeworski, \textit{CAPITALISM AND SOCIAL DEMOCRACY} (1985) (arguing that the pressures of electoral politics undermine the working class militancy necessary for radical social transformation).} and he was fairly clear-eyed about the difficulty of organizing the working class to this end.\footnote{See id. at 492-493 (noting that competition among workers, among other obstacles, impedes working class activity). \textit{See also} Allen Buchanan, \textit{Revolutionary Motivation and Rationality, in MARX AND JUSTICE} 86 (1982) (arguing that socialist organization is a public good involving collective action problems because it is in the interest of each worker that \textit{others} act to bring it about, but not in the individual interest of each that \textit{he} so act).} More modestly, consider the organization of labor unions: “half [of American workers] would like traditional union representation.”\footnote{Richard B. Freeman \& Joel Rogers, \textit{WHAT WORKERS WANT} 147 (1999) (ex. 7.2).} In 2010, private union density was 6.9 percent,\footnote{Stephen Greenhouse, \textit{Union Membership in U.S. Fell to a 70-Year Low Last Year, THE NEW YORK TIMES} (Jan. 21, 2011).} down from about a third in the 1950s.\footnote{Samuel Bowles, \textit{et. al.}, \textit{UNDERSTANDING CAPITALISM: COMPETITION, COMMAND, AND CHANGE} 121 -46, 226-311 (3d ed. 2005) [hereinafter Bowles, \textit{UNDERSTANDING CAPITALISM}]. 166-66 (Figure 7.1) (citing U.S. Bureau of Labor Statistics (BLS), \textit{Historical Data Series}, available at http://data.bls.gov).} The causes are complex, including globalization\footnote{See, e.g., Katherine V.W. Stone, \textit{Flexibilization, Globalization, and Privatization: Three Challenges to Labour Rights in Our Time}, 44 \textit{OS戈OEDE HALL L.J.} 77, 83-84 (2006) (stating that investment location is negatively correlated with levels of unionization).} and harsh
employer opposition to unions, but not least is, as Stephen Befort states, that U.S. “labor law is not kind to employees who desire union representation. . . .”

Befort continues:

the most significant impediment to the ability of employees to [unionize] flows from employer participation in the election process. Given management's natural economic leverage . . . . . . employer opposition activities is not lost on the employee electorate. . . . [These] tactics, moreover, frequently spill over to include illegal conduct, and the NLRA's tepid remedies fail to deter such illegal tactics as the discharge of union supporters.

The difficulties of organizing under such conditions and of the weaker party implementing legislative reform underline that “socially constructed” does not imply “easily changed.”

Second, the genetic variables may not interact with the environment in the way we might like. Consider a feminist ideal advocated by, e.g., Dinnerstein or Chodorow--equal male parental care and increased female sexual freedom. Under some environments, men may become loving parents; under others, women may develop dispositions to greater sexual freedom. But if the two sets of environments do not overlap, these desiderata may be mutually inconsistent. It may be that in the environments where women have greater sexual freedom, men will not be loving parents, and vice versa. If we evolved a propensity for maternal nurturance that was adaptive in a wide range of environments which our hominid ancestors encountered, it may be that “small fluctuations in the environment will not modify the behavior. An environment that allows us to reach states in which [it] is absent would have to be radically different from those for which selection has fashioned us. Ill-equipped by evolution for our new surroundings, we

149 See, e.g., James B. Atleson, Law and Union Power: Thoughts on the United States and Canada, 42 BUFF. L. REV. 463, 490 (1994) (discussing “the continued and often vehement opposition of American employers to unions


151 Id.
shall suffer much unhappiness.” We have no evidence for this particular pessimistic conclusion. It does, however, suggest a more sophisticated inegalitarian argument.

III. UNACCEPTABLE COSTS AND THE LIMITS OF NATURE

A. Tradeoffs and Benefits

A more sophisticated kind of inegalitarianism acknowledges the sorts of arguments I have advanced about the nature of nature, and urges instead that human nature is such that the costs of certain possible changes are likely to be higher than we are willing to pay. This is the argument from unacceptable costs. We can attain egalitarian aims, but only at such an extraordinary price that they would not seem desirable, all things considered. For instance, Wilson admits that “[s]ocieties can probably cancel the modest genetic differences [between the sexes] entirely by careful planning,” but warns that “there is a cost, which no one has yet measured, awaiting the society that moves either from juridical equality of opportunity between the sexes to a statistical equality of their performance in the professions or back to deliberate discrimination.” Without explaining why it should be so or how he knows this, Wilson cautions that “[t]he amount of regulation required [for such changes] would certainly place some personal freedoms in jeopardy . . . .” Oldenquist likewise becomes vague when he discusses increased sexual freedom. “That there is almost always a price to pay seems beyond doubt, although it is not easy to understand why this is or even what the exact nature of that price is.” Pinker claims that the unchangeability of human nature and the unpredictability of the effect of social change means that “we should not attempt to solve social problems like crime or poverty,

152 Kitcher, supra note 16, at 129. Kitcher does not think that this has been established. He mentions it as a possibility that egalitarians must face even if they insist on the potentials view of human nature.
153 See infra notes 137-38 and accompanying text.
154 Wilson, supra note 4, at 129.
155 Id. at 147. Wilson seems to assume that deliberate discrimination against women is a thing of the past.
156 Id. at 133. See also Levin, FEMINISM, supra note 43 (arguing more strongly that feminism and freedom are incompatible).
157 Oldenquist, supra note 4, at 176.
because in a world of competing individuals, one person’s gain may be another’ person’s loss. The best we can do is trade off one cost against another [while making incremental changes].”

Talk of immeasurable or unmeasured costs is not decisive, particularly when the costs of discriminatory and oppressive practices are measurable and high. Perhaps certain otherwise desirable changes would incur too great a cost, creating “an invitation to calamity,” but we need to have precise arguments which link roughly plausible estimates of the costs to particular features of human nature as realized in particular circumstances, and which balance these against the costs of the alternatives. Sometimes these arguments are available: the wreckage of Soviet Communism, for example, has taken that sort of attempt at realizing egalitarian ideals off the table, although the extent and way its failures might be related to human nature is highly uncertain and debatable. However, many egalitarian reforms, including those mainly discussed as exemplary here, face no such decisive resolution; and as we shall see, inegalitarians often paint their critique with a very broad brush. Two versions of the unacceptable costs argument might be called the self-realization argument and the benefits argument.

B. Would Egalitarianism Make Us Miserable?

The self-realization argument is that women’s subordination, class inequality, or whatever unpleasant feature of society we might care to consider, expresses deep human needs which can be frustrated, but only at the price of misery. Perhaps we can build a society in which men and equal equally share social benefits and burdens or where any economic inequalities are to the benefit of the least well off, are society, but perhaps such changes would only make us unsatisfied and neurotic. “[O]ur Pleistocene genes have become our secret . . . . inheritance,”

158 Pinker, supra note 4, at 289 (emphasis in original) (Pinker then proceeds to quote Edmund Burke on the French Revolution.).
159 Id. at 290.
Andrew Oldenquist writes; “[w]e experiment with social schemes and when we go too far, what makes us miserable is not the natural environment, which we have largely mastered, but the emotional needs and aversions we carry out of our tribal past.”\(^{161}\) Traditional heterosexual marriage is one of his primary examples; homosexuality is tolerated at a risk to the happiness of our children,\(^{162}\) and “nonpossessive sexual relations” or the “liberated, permissive family” would frustrate our deepest inherited instincts.\(^{163}\) Likewise, territorial instincts underlie the institution of private property, which with we tamper at our peril.\(^{164}\)

We have no particular reason to think so. As Mill argued, it is not as if we are so certain about what conditions must hold for people to be happy that we can dispense with experimentation.\(^{165}\) But even if egalitarian changes would make us unhappy in these ways, we must balance the costs of neurosis and dissatisfaction against those of oppression. Freud argued in a different way that civilization was precisely a matter of repressing basic human drives and inherently involved \textit{das Unbehagen}, discontent.\(^{166}\) Expressing all the aspects of our nature might not be the best thing for us. And since our nature includes potentials for horror and oppression, expression of all its aspects would not be the best thing for \textit{others}, a fact reflected in the criminal laws, which exist just to repress the uglier manifestations of our nature.

Suppose we could only be satisfied if we raped, murdered, and plundered even more than we already do. Then it might be best that we were dissatisfied. Likewise, if the alternative to

\(^{161}\) Oldenquist, supra note 4, at 173.
\(^{162}\) \textit{Id.} at 177-79.
\(^{163}\) \textit{Id.} at 195, 197.
\(^{164}\) \textit{Id.} at 191. Oldenquist is rather guarded about this claim, unlike Hirschliefer, who derives the entire structure of capitalist relations of production and distribution from evolutionary biology. \textit{See} J. Hirschliefer, \textit{Economics from a Biological Viewpoint}, 20 J. L. & ECON. 1 (1977). He does not explain, if so, why it took so long for humans to get around to capitalism.
\(^{165}\) \textit{See} John Stuart Mill, \textit{ON LIBERTY} 54 (Elizabeth Rapaport, ed., Hackett Publishing 1978) (1859) (“[I]t is useful that while mankind are imperfect, . . . there should be different experiments in living; . . . and that the worth of different modes of life should be proved practically, when anyone thinks fit to try them.”).
\(^{166}\) \textit{See} Sigmund Freud, \textit{CIVILIZATION AND ITS DISCONTENTS} (James Strachey, trans. 1930).
misery and neurosis were subordination and oppression, we might reasonably choose to be unhappy but free and equal. If we had to choose between to expressing the hierarchical and domineering aspects of our nature as we do or living in a Hobbesean state of nature, with “continual fear, and danger of violent death, and the life of man, solitary, poor, nasty, brutish, and short,”167 we would choose what we have. That was, after all, Hobbes’ point. But before we give up the struggle for something better, it would be irrational not to determine that a better balance of discontents is impossible, or that the alternative to what we have is really as grim as all that.

Traditional gender roles and women’s subordination do not make us, or at least (a good many) women, happy -- or we would not have feminism. Not all women are feminists by a long chalk, and not all feminists are women. But if traditional gender roles did not cause substantial dissatisfaction among women, there would be no organized and systematic criticism of these roles.168 Class stratification too has caused a certain amount of dissatisfaction.169 Sometimes the dissatisfactions of class society have led to open conflict and even revolution. Although workers in the capitalist democracies have resisted the appeals of social revolution, there is abundant evidence that class divisions promote humiliation, resentment, anger, and other injury.170

C. Would the Costs of Egalitarianism Be too High?

The benefits argument is that unpleasant features of our society produce benefits we are unwilling to give up--for example that acquisitiveness and class domination produces material

167 Hobbes, supra note 24, at 100.
168 The reverse is not necessarily true, although it would be some evidence that it was true.
wealth which cannot be produced without these things.\textsuperscript{171} High productivity requires the incentive of private gain, it is said, because people would not work hard unless there is something in it for them--profit for capitalists, avoiding starvation for workers.\textsuperscript{172} To give them up would produce universal poverty. Such claims might be disputed, for example, by observing that the particular distribution of incentives is not the only possible one. In one alternative arrangement, where the workers managed the enterprises, everyone might get the profits and no one need face the threat of starvation.\textsuperscript{173}

Or consider equal care in childrearing. Perhaps this is possible only where parents care very little for children, so care is equal, but at a very low level. Consider the Ik, a people in East Central Africa whose society was devastated by persistent famine. The results were a terrifying Hobbesean system in which food was the only good; and children were “put out” of the family at three or four years old and not cared for by either parent.\textsuperscript{174} Here, though, the very low concern for children is more likely a result of extreme scarcity than of equal parenting.\textsuperscript{175}

\textsuperscript{171}David Ramsay Steele, FROM MARX TO MISES: POST-CAPITALIST SOCIETY AND THE CHALLENGE OF ECONOMIC CALCULATION 336, 333 (1992), for example, argues that the failure of worker’s self-managed enterprises or cooperatives to proliferate in a market economy shows that the “package” of hierarchical management and wage labor with the material advantages of an advanced capitalist economy shows that “the loss in utility to external consumers, which would [he thinks] arise from self-management, is not fully compensated by the concomitant gain in work-satisfaction.” I do not endorse this view.

\textsuperscript{172}Many who think that hard work requires material incentives also expect women to do the hard work of childrearing and homemaking without them. Perhaps the theory that women are genetically wired for nurturance is supposed to reconcile these propositions..

\textsuperscript{173}See David Schweickart, AGAINST CAPITALISM (1993) (develops a model of economic democracy in which enterprises are collectively managed by workers as cooperators); see also John Stuart Mill, PRINCIPLES OF POLITICAL ECONOMY, BOOKS IV AND V, 118-43, 349-67 (Donald Winch, ed., Penguin 1970) (1848, 1871) (a similar model, without collective ownership).

\textsuperscript{174}Colin Turnbull, THE MOUNTAIN PEOPLE 121 (1972).

\textsuperscript{175}A better example addressing this topic, although one best classified as a self-realization rather than a benefits argument, involves the reversion to disproportionate maternal care among second generation kibbutzniks who were raised in a more equal-care setting by parents who were ideologically committed to this goal. “Kin selection triumphs after half a century of ineffective suppression,” says van den Berghe, emphasizing that “the reversion to standard family groups was overwhelmingly a response to the mounting dissatisfaction of women.” Pierre L. van den Berghe, HUMAN FAMILY SYSTEMS: AN EVOLUTIONARY VIEW 74 (1979). But as Wilson himself notes, “this reversion merely [may] represent[] the influence of the strong patriarchal tradition that persists in the remainder of Israeli society.” Wilson, supra note 4, at 134. It is not as if the only influences on these women were their genes and their parents.
Or, again, a common view is that our identities are so deeply bound up with traditional gender roles that abolishing these roles would involve an unattractive move to a society of sexless disencumbered selves, beings for whom, for example, Homer or Shakespeare -- or indeed Lady Murasaki or Jane Austen, had no resonance or echo in experience. We could do it, perhaps, but given what it would cost us in view of the full range of things we care about now, we would not want to if we understood the net losses. Sommers says, “The androgynous society has always been a boring feminist fairy tale with no roots in psychological or social reality.” This argument tends to confuse the abolition of traditional gender roles that assign benefits and burden unequally on the basis of sex with the abolition of all sex or gender difference.177

Assessing any particular claims of excessive cost is beyond my scope. I have done no more than indicate lines on which answers might proceed. But the need to balance costs still applies. The inegalitarian objections from cost require that the costs must be plausibly estimated and causally linked to particular policy or legal proposals that purportedly would produce or require them. Given the costs of existing oppressions, the costs of eliminating them would have to be high to warrant reconciliation to them. If more economic equality would produce universal poverty or feminism were realizable only in a society like the that of the Ik or one utterly desexed, those would be good reasons to eschew those changes. That this would be so remains to

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176 Sommers, supra note 43, at 265. The artistic expression of which Sommers would miss our appreciation in an androgynous society is the “idea of ravishment,” as suggested in the movie Gone with the Wind. Id. at 262-64. Speaking just for myself, I do not think that an inability to understand the appeal of rape fantasies would be much of a loss. But inability to grasp, for example, the expression of the emotion of jealousy in Othello would be a real cost, even if the loss of jealousy as an emotion might not. Still we can grasp ideals and emotions that we can no longer really share, such as honor. See, e.g., James Bowman, HONOR: A HISTORY (2006) (arguing that honor has declined as an ideal in Western culture and we live in a largely post-honor culture).

177 The confusion is furthered by the adherence to the latter, androgynous ideal, far less common in recent decades with the increasing influence of postmodern “difference” feminisms. See, e.g., FIRESTONE, supra note 106, at 217; Alison Jaggar, ON SEXUAL EQUALITY, 84 ETHICS (1974); Richard Wasserstrom, RACISM, SEXISM, AND PREFERENTIAL TREATMENT: AN APPROACH TO THE TOPICS, 24 UCLA L. REV. 581 (1977); ANN FERGUSON, SEXUAL DEMOCRACY: WOMEN, OPPRESSION, AND REVOLUTION 207 (1991) (a more recent expression of the androgynous ideal).
be shown. Inegalitarian arguments of this sort, however, must be taken seriously if properly articulated.

IV. ALTERNATIVE EXPLANATIONS

A. The Need for Comparative Analysis.

Like the unchangeability argument, unacceptable cost arguments tend to underestimate the actual range of human behavior and to overestimate the costs and time necessary for transformation. This is a natural error considering our tendency to generalize from our own circumstances. Both versions of the argument also tend to locate the source of resistance to change in human nature rather than social structure when this is not necessarily indicated. If some behavior is pervasive, the question is, why it is pervasive? To show that inegalitarian arrangements are demanded by biological limits on our potentials, either because no alternatives are feasible or because no feasible alternatives would be tolerable, it must be shown that such explanations are better than ones which account for inegalitarian arrangements in terms of other factors, or, indeed, of biological ones that need not be manifested in all attainable environments.

B. Hobbesean Behavior and Market Society

With regard to the aggressive and competitive behaviors characteristic of capitalist societies, and which help, in those societies, to reproduce class divisions, we can look at the anthropological literature on the range of human behavior in some hunter-gatherer societies. From their circumstances we might expect people in such societies to be Hobbesean, perhaps Ik-like. Their members live under conditions of what we would call extreme scarcity, low technology, and relatively simple culture--“no commodious buildings; no instruments of moving and removing . . . no arts, no letters.”178 They lack a government. Hobbes would have predicted

178 Hobbes, supra note 24, at 100.
that they live a state of war. But the anthropologist Marshall Sahlins found societies under these
circumstances in which people are not competitive, aggressive, or suspicious. They spend three
to five hours a day gathering food and the rest of their time telling stories and sleeping.  

I do not mean to romanticize such societies or suggest that they provide feasible or even attractive alternatives for us. I invoke them only as evidence that we do not have to be Hobbesean, or to choose between destitution and mutual terror and wealth for some and poverty for many with frenetic and ceaseless labor for all. The sort of behavior Hobbes invokes to illustrate his proposition about abstractive human nature tending towards a state of war is in fact based on human behavior in certain social contexts -- fear of impoverishment or starvation, violence, civil war. 179 In a world without certain sorts of threats to our physical or economic security, our capacities allow us to be quite different from the way we are today. 180

We are too familiar with the more Hobbesean response to scarcity. A quite different account of this behavior is possible. Rousseau accused Hobbes of reading back into the state of nature the conditions of a particular sort of civil society. 182 The charge is fair. 183 Under capitalism, 184 the incentive structure is such that capitalists must make profits or go out

180 HOBBES, supra note 24, at 100-101. For Hobbes these examples were not “evidence” but illustrations. Hobbes did not argue from observed reality but from first principles. Nonetheless their social context is telling counter-evidence to Hobbes’ deductions.
181 William Morris presented a powerful picture of such a world, quite different from a hunter-gatherer subsistence society, in his utopian novel News from Nowhere, in which the inhabitants of his ideal society devote themselves with a great deal of discipline and concentration to cultural pursuits. This world is no more fantastic than Hobbes’ dystopian state of war. William Morris, NEWS FROM NOWHERE, in THREE WORKS OF WILLIAM MORRIS 179 (A.L. Morton, ed. International Publishers 1968) (1888).
182 Rousseau, DISCOURSE, in Cress, supra note 2, at 53.
183 A similar charge can be leveled against the pop sociobiologists. Here the intellectual history is revealing. Darwin drew inspiration for the theory of natural selection from Malthus, whose political economy justified inequality based on a “struggle for existence” over inherently scarce food resources in a world of increasing population. Charles Darwin, THE AUTOBIOGRAPHY OF CHARLES DARWIN AND SELECTED LETTERS 42 (Francis Darwin, ed., Dover 1958) (1892). Darwin thus read into nature, as it happens correctly, Malthus’ specious apology for the class hierarchies of late eighteenth century England. Like the “Social Darwinists” of the generation following Darwin himself (e.g., Herbert Spencer), the pop sociobiologists of our own time read back into society as the rule of nature something what like Malthus supposed to obtain in his society.
184 Bowles, UNDERSTANDING CAPITALISM, supra note 147, at 121-46, 226-311.
of business, even if they are not personally greedy. Workers must compete with each other for jobs or starve, even if they are not personally competitive. Capitalists and workers must compete with each other for shares of the surplus and for political power for fear that other will get a dominating share and dictate terms of coexistence. They are forced to strive for “power after power,” as Hobbes put it. In this story the incentive structure does almost all the work. Given a fairly free market in goods and services, including labor, productive assets controlled privately, workers with nothing to sell except their ability to work, the characteristic Hobbesian behavior results. This incentive structure practically guarantees inequality, competitiveness, and aggression. This is a plausible hypothesis competitive with any abstractive account that any inegalitarian invoking the argument from nature must address.

But people created this sort of environment--does that not show human nature is to behave in a Hobbesian way? It does, just as the nature of salt is to dissolve in water. But for salt to dissolve, we need water. Unusual social circumstances create Hobbesian people. They are untypical in history and uncharacteristic of humans generally. Capitalism is less than 400 years old, perhaps less than 100 years old globally. As Polanyi said of the market conception of human nature associated with Adam Smith, “no misreading of the past ever proved more prophetic of the future.” Capitalist conditions are not the only ones which provide incentives for Hobbesian behavior; but they do provide such incentives. Other conditions, like those Sahlins discusses, do not. Arrangements more commodious than those of Sahlins’ stone-age societies but which incorporate some of their attractive features are not foreclosed by our genes, whatever other problems they might face.

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185 Hobbes, supra note 24, at 80.
C. Women’s Subordination in the Commonwealth of Men

The subjection of women is much older than capitalism and nearly universal in historical societies.\footnote{See TOWARD AN ANTHROPOLOGY OF WOMEN (Rayna Reiter Rapp, ed. 1975) [hereinafter Reiter Rapp]; Goldberg, supra note 43, at 31-35.} Explanations for this are far less articulated than explanations for Hobbesean behavior in a market society. Based on the anthropological research of his day,\footnote{Anthropology has advanced a great deal since then. But see Kathleen Gough, The Origin of the Family, in Reiter Rapp, supra note 149, at 51 (suggesting that new data supports Engels in part); Karen Sacks, Engels Revisited: Women, the Organization of Production, and Private Property, in Reiter Rapp, supra, at 211 (defending Engels’ conclusions as the best explanation of new data).} Engels suggested that the “world historical defeat of the female sex”\footnote{Frederick Engels, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE IN LIGHT OF THE RESEARCHES BY LEWIS H. MORGAN, in 26 COLLECTED WORKS 129, 165 (International Publishers 1990) (1884).} is explained by the male overthrow of matrilineal inheritance and imposition of patrilineality in order to ensure male control over the new wealth created by the invention of agriculture.\footnote{See id. at 162-66.} Catherine MacKinnon subjects Engels’ account to a sharp critique, the gravamen of which is that for Engels, male domination “is present before it is supposed to have happened.”\footnote{Catherine MacKinnon, TOWARDS A FEMINIST THEORY OF THE STATE 28 (1st ed. 1989).} This objection is fair, since Engels assumed, probably correctly, that men controlled the new agricultural wealth to start with. MacKinnon does not herself attempt to explain the origins of patriarchy. She urges that the question, “‘How did it happen that women were first subordinated to men?’”\footnote{We may speculate on the origins of the subjection of women. One common hypothesis is that men originally seized dominance in virtue of their greater physical strength. See e.g., John Stuart Mill, THE SUBJECTION OF WOMEN 5 (Susan Moller Okin, ed., Hackett Publishing 1988)(1869) [hereinafter Mill, SUBJECTION OF WOMEN]. This conclusion is supported by Gough, supra note 152, at 70. Other theories emphasize on the psychological effects on the social division of labor of the early dependence of infants on their mothers. See Dinnerstein, supra note 82, and Chodorow, supra note 82. This theory has roots in Rousseau. See Rousseau, EMILE, supra note 30, at 361, while rejecting Rousseau’s approval of the supposed results. These explanations refer to biological factors which are in themselves in fact hard to change, but which carry little implication of any inevitability of male dominance.} is distinct from, and less pressing than, the question, “‘Why are women oppressed and how can we change it?’”\footnote{Id. at 21.}
MacKinnon’s seems the sounder approach here. To account for the persistence of
patriarchy as opposed to its origin, we might start with Hobbes’ observation that, however male
domination was established, its reproduction is explained by the fact that men made the laws:

And whereas some have attributed the dominion to the man only, as being of the more
excellent sex, they misreckon in it. For there is not always that difference of strength, or
prudence between the man and woman . . . . In commonwealths, this controversy is
decided by civil law, and for the most part . . . , in favor of the father; because for the
most part commonwealths have been erected by the fathers . . . .

For Hobbes, then, the institutions of patriarchy persist because are convenient to those with the
power to maintain it, namely men, however this power was attained. This explanation
suggests that the persistence and universality of women’s subordination is due not to “human
nature” as some sort of genetically imposed constraint on human behavior in all circumstances,
but rather, as with market-driven selfishness and competitiveness in divided societies, by the
incentives people, with their biological propensities, have in certain social relations. Whatever
biology may contribute to women’s subordination, its causal efficacy might be undermined were
the incentive structure changed such that men had no unequal power over women to maintain.
The unprecedented advance of women’s rights in our own time suggests that this might be so.
Clearly our biology admits of the subjection of women, or we would not have it. But it does not
follow that biology demands patriarchy come what may, or would exact from us an intolerable
price if we were to abolish it.

Inegalitarian defenses of the class hierarchies characteristic of capitalism and of the
gender ones that define patriarchy are in tension. Market society is in many ways a corrosive

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194 See Hobbes, supra note 24, at 152; see also Mill, SUBJECTION OF WOMEN, supra note 192, at 5.
195 This account does not address how women’s consent to laws and other norms that often frustrate their interests is
maintained See, e.g., MacKinnon, supra note 191, at 83-105, 171-83 (arguing that women are socialized into
feminine subordination). A deeper and more nuanced approach is developed by Bartky, treating femininity as a sort
of alienation. See, e.g., Sandra Lee Bartky, FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF
force with respect to the subordination of women. In liberal democracies, women can be wage workers, soldiers, employers, judges, and Secretaries of State. The market drives women into the workplace, and the formal equality of liberal democracy allows them to pursue their interests by seeking power as well as influence. Perhaps there is a context where traditional gender roles that make women primarily mothers at the loss of other opportunities can be transcended without assimilating women to the traditionally male roles available in liberal capitalism. It is not as if this has been systematically attempted. It barely been tried at all.

CONCLUSION

It is widely held that “we cannot picture . . . , a world that is essentially different from the present one, and at the same time better.” Law and legislative policy cannot depart very far from the status quo because human nature stands in the way. Today this argument comes in scientific garb: our genetic inheritance, it is said, has barred with its iron hand any significantly different arrangements in any feasible circumstances, or imposed so high a cost on them that we would not want them at that price. Egalitarian critics of the status quo too often respond by denying that there is any such thing as human nature; our behavior, they say, is only due to nuture. We are blank slates for reformist proposals. Both sides depend on a fundamentally flawed conception of human nature, the “abstractive” conception it is a set of dispositions rooted in nonsocial fact (typically biological) rigidly manifested the same way in every environment.

This misconstrues what it is for something to have a nature at all. A nature is a propensity to behave in a given way in a given context: the nature of salt includes solubility, but salt

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196 See Epstein, FORBIDDEN GROUNDS, supra note 10, at 42 (arguing that employment discrimination is inefficient because the market disadvantages employers with a taste for discrimination; see however id. at 59–62 (suggesting that discrimination may be rational because decision making is less costly are in homogeneous groups); Milton Friedman, CAPITALISM AND FREEDOM 16-21 (similar, using example of discrimination on ideological grounds).
197 Francis Fukayama, THE END OF HISTORY AND THE LAST MAN 46 (1992). (Fukayama’s argument for this status quo proposition is very different from the sort discussed here.)
dissolves only in water. In air it is naturally a solid. Human nature includes propensities for inegalitarian behavior – in certain social environments. In others different behaviors occur or might be possible. To say that inequality is inscribed in our DNA, inalterable because genetically heritable, is a version of this error. Our genetic natures are not the whole of our natures nor do they dictate a single outcome in all environments. Nature and nature are inextricably intertwined. The heritability of a trait and degree to which it can be attributed to genetics can be determined only relative to a given population in a given environment, and so says nothing about the degree of genetic contribution or alterability of the trait in different populations and other environments.

Less confused but generally no better supported is the argument that our human nature means that egalitarian law or policy reform would impose unacceptable costs, because the interaction of genes and environment might mean that, e.g., ending the female monopoly on childcare would intolerably lower the amount of care children receive or that greater economic equality would condemn us to universal poverty. While some such claims appear to be true, it is usually ignored how costly are existing inequalities. Particular arguments of the sort discussed here must provide evidence of the balance of costs, and to count as arguments from nature, tie the specific natural features (properly understand as propensities for certain behaviors in given environments) to the manifestation of traits tipping the balance. Handwaving will not do.

If the real question is how alterable by law and policy are arrangements (egalitarian or other) some propose as subjects for reform, that is what we should address. Egalitarians who deny that there is a human nature mistakenly concede the abstractive conception and the validity of fallacious arguments based on it, some of which I have canvassed in this essay. They need and should not do so. The abstractive conception is wrong, but not because it is politically inconvenient, but because it is scientifically incoherent. Moreover, the propensity conception of
human nature based in a genuinely scientific understanding of genetics will not by itself give a green light to egalitarian reform. It may in some instances be possible to determine the relative contributions of genetics and environment. In some case like those we have discussed, economic inequality and women’s subordination, it might also be plausibly argued, that environmental factors to do most of the explanatory work -- although there exist no reliable studies of the heritability of, or even the agreement on the nature of, the traits producing these arrangements. Nonetheless, even if the causes could be linked (in a arrange of environments and for a range of populations) primarily the environment, that offers no assurance that the environmental explanations identify factors that are easily changeable. The blank slate may be a brick wall. The environment may be less alterable than biology. Nonetheless, if we consider what legal and policy changes are attainable by identifying the source and degree of alterability of all the explanatory factors that bear on it, rather than being sidetracked into the venerable but discredited argument from nature, we will have made considerable intellectual progress. A correct understanding of human nature is essential for this purpose.