

Chicago-Kent College of Law

From the Selected Works of Katharine K. Baker

February, 2002

Gender, Genes, and Choice: A Comparative Look at Feminism, Evolution, and Economics

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GENDER, GENES, AND CHOICE: A COMPARATIVE LOOK AT FEMINISM, EVOLUTION, AND ECONOMICS

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This Article compares the methodological similarities between evolutionary biology and conventional law and economics. It shows how these methodologies diverge, in critical and parallel ways, from what has come to be known as feminist method. In doing so, the Article suggests that feminists in the legal academy should be suspicious of the parsimonious models upon which both conventional evolutionary biologists and conventional law and economics scholars rely. Biological and economic models employ analogous concepts of maximization (including theories of autonomy, choice, and measurement) and stable equilibria (usually produced by stable preferences) to make predictions and proscriptions for law. The simplicity of each discipline's assumptions about maximization and stability make these models particularly inapposite for feminism. The last section of the Article explores how the models have failed feminists in one area of particular import to women, the legal treatment of domestic labor.

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* Associate Professor of Law, Chicago-Kent College of Law. I would like to thank Kathryn Abrams, Ian Ayres, Sita Balthazar-Thomas, Naomi Cahn, Sherry Colb, E. Donald Elliott, William Eskridge, Anne Goldstein, Harold Krent, Christopher Leslie, Richard McAdams, Michelle Oberman, Judith Resnik, Carol Rose, Tanina Rostain, Joan Williams, Jennifer Wriggins and faculty workshop participants at Yale, Rutgers-Newark, and Boston University law schools. Ms. Balthazar-Thomas also provided excellent research assistance.

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Notwithstanding the efforts of some state education boards,¹ evolution is big news these days.² The findings of evolutionary biology, also known as evolutionary psychology or sociobiology, are repeatedly finding their way into both the popular press and contemporary legal scholarship.³ Although there may be several reasons for biology's popularity in law, its close affinity with law and economics is surely one of them.⁴ Biology helps explain what

1. On August 11, 1999, the Kansas Board of Education voted to delete virtually any mention of evolution from the state's science curriculum. Larry Witham, *Evolution Takes a Hit in Kansas Schools: "Creation" View to Get Classroom Respect*, WASH. TIMES, Aug. 12, 1999, at A1. Although Kansas has the most thorough removal of evolution and its underlying concepts, it is not the only state to have faced the debate in recent years. The decision by Kansas to drop the teaching of evolution from its required curriculum was followed by a similar move in Kentucky. Ed Golder, *Scientist Rips Attacks on Teaching of Evolution*, GRAND RAPIDS PRESS, Oct. 12, 1999, at B4, available at 1999 WL 22971840. Alabama, Illinois, and Nebraska have diluted evolution in their new standards. Witham, *supra*.

2. See Erica Goode, *Human Nature: Born or Made? Evolutionary Theorists Provoke an Uproar*, N.Y. TIMES, Mar. 14, 2000, at F1.

3. A Nexus search of "sociobiology" and "evolutionary psychology" gave 377 hits from June 1999 to June 2000. Articles and symposia integrating biology and law have proliferated in the last several years. See Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971, 984 (1995) (offering biological reasons for what has been seen as sex discrimination); Lawrence A. Frolik, *The Biological Roots of the Undue Influence Doctrine: What's Love Got to Do With It?*, 57 U. PITT. L. REV. 841, 871-75 (1996) (using biology to evaluate the undue influence doctrine in probate); Owen D. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 CAL. L. REV. 827, 853-57 (1999) (describing biological reasons for rape). See generally Symposium, *Law, Human Behavior and Evolution*, 8 J. CONTEMP. LEGAL ISSUES (1997) (containing a variety of articles on different ways in which evolutionary biology can be applied to law); Symposium on *Biology and Sexual Aggression: Parts I and II*, 39 JURIMETRICS J. 113, 113-346 (1999) (compiling a variety of articles on biological reasons for rape and on how the law might respond).

4. Richard Posner is a particularly strong advocate of evolutionary biology. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 472 (1995) ("It is no longer easy to distinguish a sociologist from an anthropologist, or a classicist from either, or a literary theorist from a philosopher, or even an *economist from an evolutionary biologist*.") (emphasis added); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 14 (1999) ("Economic theory is closely related to the theory of evolution; concepts of maximization, competition, unconscious rationality, cost, investment, self-interest, survival, and equilibrium play parallel roles in both theories. Evolution deals with unconscious maximizers, the genes; economics with conscious maximizers, persons.") [hereinafter

economics has always assumed, namely, preferences. Thus, biological analysis can explain, among other things, why we developed the ability to love (because it helped bind us to spouses and children in a way that ultimately enhanced our evolutionary success);⁵ why we developed a sense of fairness (so that we could reap the benefits of cooperation without being taken advantage of by those who would exploit our cooperation);⁶ and why men and women might differ in their sexual habits (the different degrees of parental investment necessary to reproduce successfully make it more likely that women will value quality of partner, while men will value quantity).⁷

With these kinds of explanations in tow, economists can feel better about their starting place, which has always been one where preferences are given.⁸ Taken together, biology tells us why we want what we want and economics tells us the most efficient way to get what we want. Both assume that the actor, be it a gene that wants to reproduce or a person with a utility function, maximizes its self-interest by pursuing the best strategy to attain its ends. Competition and interactions between these strategies often render stable equilibria.

To date, many people have noted this affinity between economics and evolutionary biology,⁹ but only a few have noted the

POSNER, PROBLEMATICS]; see also Mark F. Grady & Michael T. McGuire, *A Theory of the Origin of Natural Law*, 8 J. CONTEMP. LEGAL ISSUES 87, 88 (1997) ("Economic Theory posits that institutions result from individual human decisions to maximize individual welfare. Biological theory assumes that animal cooperation results from individual behavior that maximizes fitness.").

5. ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* 54 (1988).

6. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 88-105 (1984) (explaining why it may be evolutionarily advantageous to cooperate); Robert Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. OF BIOL. 35 (1971) (explaining the reproductive benefits of unselfish behavior).

7. Bruce Ellis & Donald Symons, *Sex Differences in Sexual Fantasy: An Evolutionary Psychological Approach*, 27 J. SEX RES. 527, 551 (1990) (reporting data indicating that men tend to have sexual fantasies about a variety of women); Barbara Smuts, *The Evolutionary Origins of Patriarchy*, 6 HUM. NATURE 1, 11 (1995).

8. See Robert D. Cooter, *Comment on Article by Professor Jones*, 8 J. CONTEMP. LEGAL ISSUES 209, 210 (1997) ("In economics . . . conventional theorists take 'tastes' as given.").

9. RICHARD A. POSNER, *SEX AND REASON* 88 (1992) ("[T]here are illuminating analytical parallels between the biological and the economic approaches, and . . . the two approaches are mutually reinforcing and may in combination constitute a more powerful theory than either by itself."); J. Hirshleifer, *Economics from a Biological Viewpoint*, 20 J.L. & ECON. 1, 1-2 (1977) ("There is . . . a special link between economics and sociobiology over and above the mere fact that economics studies a subset of the social behavior of one of the higher mammals. *The fundamental organizing concepts of the dominant analytical structures employed in economics and in sociobiology are strikingly*

affinity between evolutionary biology and feminism.¹⁰ Yet evolutionary biology provides for feminists just what it provides for economists: an explanation for why people behave the way they do. Economics purports to show us how markets operate. Feminism purports to tell us how patriarchy operates. Both explain how the world works in light of given assumptions about, respectively, preferences and male dominance. Biology tells us why both preferences and male dominance exist. Moreover, biology provides for feminism a description of the world that reinforces claims of male dominance.

Why, then, do we not see the overlap between feminism and biology that we see between economics and biology?¹¹ The answer, I will suggest, is methodological. The affinity between economics and evolutionary biology stems not only from the tongue-in-groove fit between preferences and their rational expression, but also from core

parallel. What biologists study can be regarded as 'Nature's Economy.' "); Ulrich Witt, *Economics, Sociobiology, and Behavioral Psychology on Preferences*, 12 J. OF ECON. PSYCHOL. 557, 559 (1991) ("[T]here are significant similarities between economics and biology and, sometimes, even modest forms of mutual inspiration in particular with regard to the theory of natural selection. . . . Both sociobiology and economics are interested in explaining observable behavior in terms of the obvious or, in case of genetic fitness, latent competition induced by scarcity."); Amy L. Wax, *Against Nature: On Robert Wright's The Moral Animal*, 63 U. CHI. L. REV. 307, 307 (1996) (book review) ("If sociobiology is the answer, what is the question? For one thing, economics.").

10. Among the exceptions are David Buss and Neil Malamuth, who have put together a collection of writings highlighting the intersections between feminism and biology as it pertains to rape. See *SEX, POWER, CONFLICT: EVOLUTIONARY AND FEMINIST PERSPECTIVES* (David M. Buss & Neil M. Malamuth eds., 1996) [hereinafter *SEX, POWER, CONFLICT*]. Patricia Gowaty organized a seminar of biologists to look at the intersections between biology and feminism. The works are collected in *FEMINISM AND EVOLUTIONARY BIOLOGY: BOUNDARIES, INTERSECTIONS, AND FRONTIERS* (Patricia Gowaty ed., 1997) [hereinafter *FEMINISM AND EVOLUTIONARY BIOLOGY*]. In addition, feminist evolutionary biologists have, for years, been arguing that it is possible and important to do evolutionary biology from a feminist perspective. See SARAH BLAFFER HRDY, *MOTHER NATURE: A HISTORY OF MOTHERS, INFANTS, AND NATURAL SELECTION* 22 (2000); SARAH BLAFFER HRDY, *THE WOMAN THAT NEVER EVOLVED* 1-3 (1981) [hereinafter *HRDY, NEVER EVOLVED*]; Barbara Smuts, *Male Aggression Against Women: An Evolutionary Perspective*, 3 HUM. NATURE 1 (1992). It is the legal academy that has done little to address the intersection, despite extensive discussions of both biology and feminism. One exception to this is Mary Anne Case's response to Richard Epstein in Mary Anne Case, *Of Richard Epstein and Other Radical Feminists*, 18 HARV. J.L. & PUB. POL'Y 369 (1995).

In a more recent attempt to force the intersection, Arizona State University brought together several feminist legal scholars who had written on rape and many of the most prominent biologists who study rape. It was quite a contentious weekend, the written results of which can be found in 39 JURIMETRICS J. 113, *supra* note 3.

11. For a discussion of what might be gained by looking at the overlap, see generally Katharine K. Baker, *Biology for Feminists*, 75 CHI-KENT L. REV. 805 (2000).

methodological tools that underlie each discipline.¹² The key similarities are the use of maximization (which includes notions of self-interest, choice, and measurement) and the presumption of optimality from equilibria (which usually requires assumptions about stable preferences). This Article will explore how the concepts of maximization and optimal equilibria are, in and of themselves, problematic for feminist jurisprudence.

Before starting, a note on essentialization is in order. In explaining how a biologist or an economist would describe or analyze an issue, I do not mean to suggest that all biologists or all economists think in a uniform manner prescribed by their discipline. Obviously, significant depth and variety exist within each field.¹³ What I am analyzing is the prototypical biological and economic models that are usually applied to law. The prototypical biological model commonly applied to law is one in which human activity, particularly behavior as it pertains to sex and relationships between the sexes, is explained by genes maximizing their reproductive success. The prototypical economic model commonly applied to law is the neoclassical one in which people are rational maximizers whose preferences are exogenous and stable, and whose choices, as revealed through action, are reflective of those preferences.¹⁴ Some refer to this model of law and economics as “the Chicago School,”¹⁵ others as “conventional law

12. See Hirshleifer, *supra* note 9, at 1–2. Feminists, no doubt, resist biology because they fear that arguments or descriptions rooted in biology necessarily imply that what is biological is inevitable. This fear is unwarranted, *see infra* notes 89–91 and accompanying text (explaining that biologists recognize that culture has a strong effect on biological predisposition).

13. In biology, some scholars emphasize the interaction between genetic predisposition and cultural conditioning to explain behaviors, *see* ROBERT BOYD & PETER J. RICHESON, *CULTURE AND THE EVOLUTIONARY PROCESS* 202 (1985), while others root certain behaviors almost exclusively in biology, *see generally* RANDY THORNHILL & CRAIG T. PALMER, *A NATURAL HISTORY OF RAPE* (2000) (arguing that rape is rooted in evolution). In economics, as Amartya Sen wrote several years ago, “[I]f today you were to poll economists of different schools, you would almost certainly find the coexistence of beliefs (i) that the rational behaviour theory is unfalsifiable, (ii) that it is falsifiable and so far unfalsified, and (ii) [sic] that it is falsifiable and indeed patently false.” AMARTYA SEN, *CHOICE, WELFARE, AND MEASUREMENT* 91 (1982).

14. See Kenneth G. Dau-Schmidt, *Economics and Sociology: The Prospects for an Interdisciplinary Discourse on Law*, 1997 WIS. L. REV. 389, 394–96 (asserting that the core assumptions of the neoclassical model involve rationally maximizing people, whose preferences are exogenous and stable); Christine Jolls, Cass Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1545 (1998) (“Traditional law and economics is largely based on the standard assumptions of neoclassical economics.”).

15. For a discussion of the differences between the Chicago School of law and economics and a “progressive approach,” *see* SUSAN ROSE-ACKERMAN, *RETHINKING*

and economics”¹⁶ or “the common understanding of normative economic analysis.”¹⁷ Anyone familiar with the depth of work in either biology or economics can recognize that these models are particularly simplistic.¹⁸ They have been challenged by many within the respective disciplines.¹⁹ My purpose is to broaden that challenge and reveal how the prototypical models of both biology and economics suffer from the same flaws.

This Article begins in Part I with a brief primer on evolutionary biology. Part I explains what feminism has to gain from biology, notwithstanding the fear of inevitability that many associate with biological arguments: Biological models reinforce feminist claims with regard to male dominance and sexual exploitation. Biology says nothing about what should be, however, and most people familiar with the biological paradigm readily concede that some sort of normative civil structure is required to overcome the harshness of a world governed by genetic predisposition.²⁰ Part II analyzes what economics has to gain from biology, notwithstanding the harshness of the biological model: Biological models reinforce economic claims with regard to the ubiquity of maximization and the relevance of stability. Although economics and biology employ different (arguably opposite) theories of autonomy and choice, both disciplines rely on unitary metrics and cost-benefit analyses to determine the maximization effects of any given action. Both disciplines also rely on the stability of equilibria to make predictions about behavior. These similar methodologies diverge from feminist method and analysis in parallel and critical ways. The simplicity of the maximization models and the presumptions about stable preferences (which produce stable equilibria) are inconsistent with women’s experiences and feminism’s normative commitments. Part III elaborates on the problems with the law employing either the economic or the biological models of

THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE 14-27 (1992).

16. Jolls, Sunstein, & Thaler, *supra* note 14, at 1481-84 (referring repeatedly to “conventional law and economics”).

17. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 966, 968 (2001) (“Under a common understanding of normative economic analysis, legal rules are assessed by reference to wealth maximization or efficiency . . .”).

18. The tendency to rely on oversimplified models may well be an inevitable result of trying to incorporate biology or economics into law. The more complex the model, the better it is at capturing reality, but the less useful it is to law. As variables and outcomes multiply, it is increasingly difficult to incorporate predictions from those models into legal policy.

19. See *infra* notes 205-06, 226-36 and accompanying text.

20. See generally RICHARD DAWKINS, *THE SELFISH GENE* (1976).

human behavior in one area of particular import to women: the legal treatment of domestic labor.

This Article does not call on feminism to reject everything that biology and economics have to offer. Each discipline provides much that can help explain why and how women are treated unfairly. Feminism may well be able to use insights from each area to help determine how best to formulate its normative commitments.²¹ This Article does argue, however, that feminism must be suspicious of the parsimonious models on which both biology and economics tend to rely. A world in which maximization is the only way of thinking about behavior and stable equilibria is the only way of thinking about optimality is a world of limited potential for both men and women. Unless we want to accept these limitations, the law must be wary of the models that reinforce them.

I. BIOLOGY AND FEMINISM

This part presents evolutionary biology's basic, albeit essentialized, explanation for why human sexuality looks the way it does. For an evolutionary biologist, just about everything boils down to the size of our sex cells, or gametes, all of which have only one purpose, to reproduce. Together, male and female gametes reproduce their own genetic material by creating new life. Female gametes, unlike the bodies that house them, are much bigger than their male counterparts. The larger size of the female gamete allows it to do much more than just contribute genetic material. It allows the female gamete to provide the food reserves that an embryo needs to grow. By providing those food reserves, the female is limited in the number of gametes she can provide because each female gamete demands more resources and requires more time to develop than does a male gamete. This means any one male can produce many more gametes and beget many more offspring than can any one female. As Richard Dawkins comments, "[I]t is possible to interpret all the other differences between the sexes as stemming from this one basic difference."²²

21. For instance, I have recently argued that biology's premises can lead us to question the law's constructions of rape, marriage, and parenthood. If what biologists say is right, the law's treatment of these areas is bound to have very deleterious effects on women. Recognizing these effects can force us to focus on what we actually want the law to say and accomplish. "By laying bare the harsh reality of nature, [biology] forces [feminists] to embrace [their] normative convictions." Baker, *supra* note 11, at 806.

22. DAWKINS, *supra* note 20, at 152.

The disparity in gamete size is just the beginning of vastly different male and female investment in offspring. Because human beings reproduce by fertilizing internally and giving birth to live offspring after a lengthy gestation period, the parent who carries and nurtures the embryo must invest uniquely and substantially in that embryo after it is fertilized, but before it is born.²³ This parent is the female. Moreover, because for most of our evolutionary history offspring were dependent on maternal lactation, females had to invest more than males once the child was born.²⁴ A female cannot do anything about this investment imbalance. If she is to reproduce, she must invest in her offspring, and the only way for a gene that is inside a female body to reproduce is to compel that body to undergo the trials and tribulations of pregnancy. Her genes compel her to do so because they are singularly selfish. All they want to do is replicate, as much and as well as they can.²⁵

Men's genes compel them to reproduce also, of course, but this requires relatively little effort. Males are much less likely to invest heavily in embryos once fertilized. This is true for several reasons. First, males can do only a limited amount while the embryo is growing inside the female, though he can protect a pregnant female as a way of protecting his offspring. Second, a male is never 100 percent sure that a child is in fact his own.²⁶ Females have no doubt. Thus, a male's incentive to care for a child must be discounted by the chances that the child is not comprised of his genes.²⁷ Third, even if he is

23. The term "parental investment" was first coined by Robert Trivers. See Robert L. Trivers, *Parental Investment and Sexual Selection*, in *SEXUAL SELECTION AND THE DESCENT OF MAN* 136, 139 (Bernard Campbell ed., 1972). Trivers defined "parental investment" as "any investment by the parent in an individual offspring that increases the offspring's chance of surviving (and hence [the offspring's] reproductive success) at the cost of the parent's ability to invest in other offspring." *Id.*

24. Human offspring remain dependent on adult care long after the parent has stopped lactating. This means that, in general, parental investment is higher in humans than in almost all other mammals. However, no biological requirement dictates that the parental investment necessary after lactation be from the female.

25. "We can . . . assume that each individual body is a selfish machine, trying to do the best for all its genes." DAWKINS, *supra* note 20, at 145-46.

26. David M. Buss, *Sexual Conflict: Evolutionary Insights into Feminism and the "Battle of the Sexes,"* in *SEX, POWER, CONFLICT*, *supra* note 10, at 296, 302 ("Because fertilization occurs internally within women, men are always less than 100% 'certain' . . . that their putative children are genetically their own. Some cultures have phrases to describe this, such as 'mama's baby, papa's maybe.'"). Reproductive technologies and DNA testing greatly improve our ability to know paternity for certain, but these technologies are only available to a very small number of men.

27. See ROBERT WRIGHT, *THE MORAL ANIMAL* 66 (1994) ("Whereas the woman's natural fear is the withdrawal of his investment, his natural fear is that the investment is misplaced.").

almost certain the child is his, he may well be able to rely on the mother to provide the necessary care. This is what Robert Trivers labels the “cruel bind.”²⁸ As long as one parent can be assured that the other parent will care for the offspring, the first parent, who cares only about reproducing, can take the opportunity to go make other offspring. Why overinvest in one, when you could make two? Because the male cannot do the initial work of reproduction, the female parent has less opportunity to abandon child-rearing work; she knows that the male will not (indeed, for a while cannot) do the work if she walks away. She will be dooming her own genetic material if she leaves him to do a job he cannot do. The opportunistic male, on the other hand, often capitalizes on his ability to leave and thereby increase his chances of fertilizing another egg from another female.

The likelihood that a female will be abandoned tends to make her very, very careful in her mate choice.²⁹ She wants to mate with someone who will not leave her, despite his incentives to do so. She wants someone who is going to help her during the periods when she will be less able to help herself (such as pregnancy and maybe lactation) and who will help the offspring after it is born, but still dependent. Thus, she will try to mate only with a male who is able and willing to provide resources.

Females ascertain which males are best able to provide resources by determining the male’s status within the male community.³⁰ He who has the most prestige vis-a-vis his male cohorts is most likely to be able to provide for her and most likely to fend off attacks from other males. Males meanwhile vie for the most desirous female mates³¹ by competing with each other to gain status. Through displays of relative wealth and solicitude, males try to convince

28. DAWKINS, *supra* note 20, at 160 (“As Trivers puts it, the partner who is left behind is placed in a cruel bind.”).

29. See JOHN ALCOCK, *ANIMAL BEHAVIOR: AN EVOLUTIONARY APPROACH* 454–55 (2d ed. 1979) (explaining that in a society where males provide maternal resources for their children, females select partners who will make a large parental investment in their progeny); MATT RIDLEY, *THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE* 218–19 (1993) (noting that females value males who do not divide child-rearing efforts among multiple families); ROBERT TRIVERS, *SOCIAL EVOLUTION* 215–19 (1985) (discussing examples that support the theory that sex differences are caused by relative parental investment).

30. See generally David M. Buss, *Sex Differences in Human Mate Preferences: Evolutionary Hypotheses Tested in 37 Cultures*, 12 *BEHAV. & BRAIN SCI.* 1 (1989) (concluding that females prefer to mate with males who are financially secure and ambitious).

31. “Desirous” should be defined as likely to be able to reproduce successfully. Young healthy females, or at least females that appear to be young and healthy, are likely to be the most popular. See WRIGHT, *supra* note 27, at 65.

females that they are willing to provide the resources that the female and the offspring will need. Females, in turn, wary of being duped by potentially phony displays of resources or solicitude, will often make males demonstrate considerable commitment before voluntarily copulating. This is why, in many species, females appear coy.³² They play “hard to get” in order to ensure that the male has the perseverance and desire to remain with them. In birds this manifests itself in the tradition of males building nests for the females whom they court.³³ Female birds have also developed a strategy of feigning helplessness, so that they can discern which males respond positively to conditions of dependence (and hence are likely to be good fathers).³⁴

The good news for human females is that because human offspring were particularly likely to need male investment, it became evolutionarily advantageous for men to want to stick around.³⁵ Offspring whose fathers provided resources and care stood a better chance of surviving to reproductive age. Thus, evolution favored men who grew attached to their children. The need for more male parental investment explains why human males are much more likely to know and care for their children than are chimps or bonobos to whom humans are closely related.³⁶ It also explains the phenomenon that we know as paternal love. Love has a purpose. It binds fathers

32. “Feminine coyness is in fact very common among animals, and so are prolonged courtship or engagement periods.” DAWKINS, *supra* note 20, at 161. Feminist biologist Sarah Blaffer Hrdy argues that females are not nearly as coy as traditional biology has presumed them to be and that modern evolutionary biologists assume female coyness far too readily. Sarah Blaffer Hrdy, *Empathy, Polyandry, and the Myth of the Coy Female*, in FEMINIST APPROACHES TO SCIENCE 119, 119–20 (Ruth Bleier ed., 1986) [hereinafter Hrdy, *Empathy*]. She also suggests that Darwin and his latter-day progeny let contemporary cultural understandings influence their interpretation of the behavior they see in animals. Sarah Blaffer Hrdy, *Raising Darwin’s Consciousness*, 8 HUM. NATURE 1, 8 (1997) [hereinafter Hrdy, *Darwin’s Consciousness*].

33. DAWKINS, *supra* note 20, at 165–66. Birds are an important example for humans because bird offspring, like human offspring, appear to require significant male investment. See *infra* text accompanying notes 34–36.

34. DAWKINS, *supra* note 20, at 166 (“In birds this has usually been regarded as a kind of regression to juvenile behaviour on the part of the female. She begs from the male, using the same gestures as a young bird would use.”).

35. WRIGHT, *supra* note 27, at 57. This does not mean, however, that men do not also have an incentive to leave. Evolution favors some tendency for males to invest in children, but they still have less incentive to do so than females, who sacrifice more for and incur greater opportunity costs with each child. See *infra* note 44.

36. WRIGHT, *supra* note 27, at 57 (“Fathers everywhere feel love for their children, and that’s a lot more than you can say for chimp fathers and bonobo fathers, who don’t seem to have much of a clue as to which youngsters are theirs. This love leads fathers to help feed and defend their children, and teach them useful things.”).

to children even though from the father's genes' perspective using his resources to produce another offspring might seem more advantageous. Love also binds mates to each other because staying together often is the best way for both male and female genes to ensure reproductive success.³⁷ Robert Frank suggests that emotions act like commitment devices "when it is in a person's interest to make a binding commitment to behavior that will later seem contrary to self-interest."³⁸ Emotions like marital love evolved because it can be evolutionarily advantageous for a male to feel a spousal commitment that transcends reproductive attraction. The emergence and survival of love suggests that a male may actually experience more reproductive success if he sticks by his spouse than if he continually explores potentially more fertile opportunities.

The relatively high degree of male parental investment also explains another universal human phenomenon: male sexual jealousy.³⁹ If a man invests in his mate's offspring, he wants assurance that her offspring are also his offspring.⁴⁰ One way to ensure that he is not supporting someone else's genes is to maintain rigid control over his mate's sexual behavior. As biologist David Buss reports, "[I]n a cross-cultural perspective, the ways in which men attempt to control women's sexuality is staggering."⁴¹ This control, which often co-exists with self-expressed feelings of love on the male's part,⁴² includes, in humans, everything from female veiling to mutilation of female genitalia.⁴³

To sum up so far, men have an incentive to engage in frequent sex with as many women as they can find who will bear and care for the offspring produced. Women want supportive men who will help them care for the relatively fewer offspring to whom they have given their own genetic material. Under a biological view, each sex will do what it can to maximize its desired outcome. Sometimes the best way

37. *Id.* at 59.

38. FRANK, *supra* note 5, at 47.

39. Buss, *supra* note 26, at 305.

40. If a man invests in another man's offspring, he is helping to perpetuate that other man's, not his own, genes. "Not long for this world are the genes of a man who spends his time rearing children who aren't his." WRIGHT, *supra* note 27, at 66.

41. Buss, *supra* note 26, at 298.

42. For the male, "love and need are [often] bound up with fear and envy." ALLAN G. JOHNSON, *THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY* 41 (1997).

43. Buss, *supra* note 26, at 298. Among primates, the attempts include: in baboons, attacking females that seem interested in other baboons; in gorillas, kidnapping females and removing them from the troupe; and, among a variety of different primates, infanticide. *See Smuts, supra* note 7, at 6.

to maximize reproduction is to enter into an agreement whereby the female agrees to reproduce the male's genes and the male agrees to help. Love makes honoring this agreement easier. Even with love, however, paternal uncertainty and the many potentially fertile options elsewhere create "evolutionary pressure on males to invest a little bit less in each child and to have more children by different wives."⁴⁴

Moreover, the love strategy is not always the most reproductively beneficial. It is just one strategy among many. Game theory helps explain why this is so.⁴⁵ If one assumes that players (that is, males and females) try to maximize their outcomes (that is, their reproductive success) by adopting certain strategies or patterns of behavior, and if one assumes that the success of any given player's strategy will depend on the strategy chosen by the other player, one can model the mating dilemma described above. Richard Dawkins did precisely that.

Dawkins hypothesized two female strategies, coy and fast, and two male strategies, faithful and philanderer.⁴⁶ Coy females will not mate until a male has proven himself able and willing to provide. As suggested above, ascertaining these qualities requires time and energy—i.e., resources. A fast female will mate immediately with any male, thus avoiding any expenditure of resources on courtship. She will mate with either a faithful male or a philanderer male. A faithful male will court, stay mostly faithful to, and provide for his mate and her children. He will spend considerable resources and forego other potentially reproductive experiences in doing so. A philanderer male will try to maximize his reproductive success by refusing to waste time either courting potential mates or caring for offspring. He will mate with as many women as will mate with him.

As is the norm with game theory, Dawkins then applied arbitrary hypothetical values to the outcomes.⁴⁷ A successful child counted +15; the cost of rearing a child was -20; and the cost of courtship was -3. With these numbers, in an ideal monogamous society in which all the females are coy and all the males are faithful, each male and

44. DAWKINS, *supra* note 20, at 158; *see also* TRIVERS, *supra* note 29, at 260–62 (observing that male and female reproductive strategies differ given paternal uncertainty and the relative costlessness with which men can produce offspring).

45. John Maynard Smith pioneered the application of game theory to evolutionary science. *See generally* JOHN MAYNARD SMITH, *EVOLUTION AND THE THEORY OF GAMES* (1982).

46. DAWKINS, *supra* note 20, at 162–64.

47. *Id.* at 163.

female will successfully reproduce. With each child, they will each gain 15 and each lose 13 (the cost of courtship (-3) plus half the cost of rearing the child (-10)), for a net value of +2.⁴⁸ But suppose a fast female wanders into that society. She will spend less time courting and therefore have more time to reproduce. Because the males are faithful, she can rely on them to support her children. Indeed, as long as she finds just one man who is faithful, she can rely on him to support all the children that might be the products of her midnight dalliances.⁴⁹ Each child will benefit her +5 instead of +2 (+15 less half of the shared cost of rearing, but nothing lost to courtship). Her higher score indicates that her genes will do very well over time. She will produce more than the coy female because she will have wasted less time courting and she will likely be able to “dupe” her co-parent into providing for more of her genetic material than he otherwise would.⁵⁰ Fast female behavior will thrive because it will produce more offspring.

Introduce a philanderer male into the fast female environment, though, and the situation changes drastically. Once fast female genes become prevalent, philanderer males stand a much better chance of succeeding. They can easily find mates who do not require them to engage in the pedantics of courtship. Philanderer males and fast females produce many offspring very quickly. The problem for the fast female is that she is left alone to do all of the child bearing and

48. Dawkins assumes that males and females split the cost of child-rearing (-20) equally. *Id.* Many feminists and much empirical research refutes the idea that men and women actually invest equally in child-rearing. Mary E. Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 167 (1992) (“[R]egardless of whether we should make equal parenting our primary goal, it is not occurring. Women continue to be the primary caretakers physically and emotionally even in dual-wage families. Women continue to invest more emotionally in children than men. We continue to socialize our daughters to do so.”). Numerous studies documenting how partners allocate domestic chores indicate that women do vastly more caretaking and other domestic work than do men. For a summary of these studies, see ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 271–78 (1989). Hochschild concludes that women who work outside the home work approximately one full month a year more than their wage-earning spouse. *Id.* at 3. Men do tend to invest more financially in their children than women do, but as explained *infra*, text accompanying notes 258–59, in doing so, men do not incur nearly the same opportunity costs as women do. Thus, Dawkins’ assumption that men and women share the -20 cost of child rearing equally may be mistaken.

49. If, after reproducing with her primary mate, Mr. Nice Guy, Ms. Fast finds some other mate, Mr. Phil, Fast and Phil can mate without bearing any of the costs of courtship and both can rely on Mr. Nice Guy to provide for any offspring.

50. This may be important to her if males other than her primary partner have desirable qualities (strength or intelligence perhaps) that her primary partner lacks but that she wants her offspring to absorb.

rearing. While the fast female thrived in an environment with faithful men (her payoff per child was +5), she suffers badly in an environment with philanderers (her payoff per child is -5, the sum of +15 and -20). Without any help, the task of child rearing is too onerous. At this point, the coy female, who by learning how to detect male faithfulness ensures a gain of +2, regains the evolutionary advantage.

After a while, the emergence and decline of these varying strategies converge into a stable state. This is what biologists refer to as an evolutionarily stable strategy, or ESS. An ESS is a "strategy which, if most members of a population adopt it, cannot be bettered by an alternative strategy."⁵¹ Some strategy or set of strategies exists that will produce an equilibrium.⁵² In the male/female game described above, equilibrium will be reached if most of the men are faithful and most of the women are coy. A few fast women will be able to survive, but once they become too plentiful, philanderers will prosper and that will, in turn, give the advantage to female coyness. With Dawkins's numbers, the equilibrium works out at 5/6 coy females and 5/8 faithful males. If more than 1/6 of the females adopt fast strategies, it becomes advantageous for males to increase the portion of philanderers to above 5/8. Coyness then becomes more attractive again, and an equilibrium emerges.

The equilibrium analysis can explain various reproductive strategies, but several important caveats merit mention. First, the fractions themselves are arbitrary because they are based on Dawkins's original arbitrary numbers.⁵³ Second, the game theory scenario does not require that there actually be two different kinds of males and females, only that there be two different kinds of male and female behavior. Thus, the same equilibrium would work itself out if individual females were coy 5/6 of the time, but fast 1/6 of the time, or if half the women were coy 11/12 of the time but the other half only 9/12 of the time. Third, though Dawkins's game did work out to an

51. DAWKINS, *supra* note 20, at 74.

52. *See id.* Stable states like this one are known as Nash equilibria in game theory. *See* ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY 33 (1989).

53. As suggested *supra* note 48, Dawkins's allocation of relative costs between the sexes does not correspond with more recent empirical data on the division of child-rearing labor.

equilibrium, not all evolutionary behaviors do. Sometimes no ESS exists, and the best strategy to choose is one of randomness.⁵⁴

Fourth, and possibly most important, the mating strategies described above are not the only means of procreation. Males and females often develop other strategies and counterstrategies. For instance, it is not uncommon for males to simply force females to copulate. Sexual coercion, some forms of which are called rape in human law, is common among primates and can be a successful reproductive strategy for males.⁵⁵ Male orangutans routinely force females to have sex, often after violent resistance on the female's part.⁵⁶ Captive male chimpanzees and lowland gorillas "use[] aggression to force females to copulate throughout the estrous cycle."⁵⁷ Male Hamadryas baboons are famous for retaliating with neck bites against a female mate when they notice her eye wandering off in the direction of another male.⁵⁸ Jane Goodall has noticed male chimpanzees using comparable kinds of intimidation,⁵⁹ and suggests that, unless crippled or very old, an adult male can almost always coerce an unwilling female to copulate.⁶⁰

Females respond to these coercive behaviors with their own strategies. Sometimes they fight back, though this is not usually successful.⁶¹ Sometimes they try to mate early with a high-status male and thereby secure his protection.⁶² After a coercive copulation, females also can try to mate quickly with a male who will provide resources and hope that he does not realize that he is providing for

54. See Linda Mealey, *The Multiplicity of Rape: From Life History Strategies to Prevention Strategies*, 39 JURIMETRICS J. 217, 219 (1999) (explaining how randomness can be the best strategy if one player can take advantage of another player's predictability).

55. See Jones, *supra* note 3, at 855 (observing that forced copulations may be the best reproductive strategy for some males).

56. Barbara B. Smuts & Robert W. Smuts, *Male Aggression and Sexual Coercion of Females in Nonhuman Primate and Other Mammals: Evidence and Theoretical Implications*, 22 ADVANCES IN THE STUDY OF BEHAV. 1, 6 (1993).

57. *Id.*

58. See HANS KUMMER, SOCIAL ORGANIZATION OF HAMADRYAS BABOONS 36-37 (1968); Smuts, *supra* note 7, at 7.

59. JANE GOODALL, THE CHIMPANZEES OF GOMBE: PATTERNS OF BEHAVIOR 443-53 (1986).

60. *Id.* at 481.

61. The Smuts explain that "female resistance is usually futile, and resistant females risk severe injury." Smuts & Smuts, *supra* note 56, at 11.

62. Sarah L. Mesnick, *Sexual Alliances: Evidence and Evolutionary Implications*, in FEMINISM AND EVOLUTIONARY BIOLOGY, *supra* note 10, at 207, 217-20; see also Smuts & Smuts, *supra* note 56, at 13-15.

other than his own offspring.⁶³ Some females also bond with other females, in the hope that a single male will not be able to coerce them if they can help each other.⁶⁴ Barbara Smuts concludes that two factors play a particularly important role in determining whether female strategies will work: proximity to kin and female community. Female dispersement away from their birthplace⁶⁵ and solitary female travel⁶⁶ reduce the potential number of allies females will have to protect them from male aggression. As a result, patrilocal societies and solitary female lifestyles increase female vulnerability.

At least one of these factors, patrilocality, is a common characteristic of human society⁶⁷ and thus may explain part of the reason that human females are left so vulnerable to human male aggression. Smuts goes on to suggest, though, that other factors unique to human evolutionary history have rendered human females particularly vulnerable. For instance, in order to improve our ability to compete against other groups of humans, it was evolutionarily advantageous for males to learn how to bond with each other.⁶⁸ In other primates, male-male alliances usually break down in competition over females, but by learning how to control this competition, male humans were better able to fight off offensive attacks.⁶⁹ This bonding also made it easier for human males to collectively control women.⁷⁰

63. "Best of all for her would be to try to deceive another male into adopting her child, 'thinking' it is his own. This might not be too difficult if it is still a fetus, not yet born." DAWKINS, *supra* note 20, at 158. If he does realize that the offspring is not his own, he is likely to kill it. Infanticide is very common in most animal populations. See, e.g., Jane Boggess, *Infant Killing and Male Reproductive Strategies in Langurs*, in *INFANTICIDE: COMPARATIVE AND EVOLUTIONARY PERSPECTIVE* 283, 286 (Glenn Hausfater & Sarah Blaffer Hrdy eds., 1984) (discussing infanticide as a basic reproductive strategy) [hereinafter *INFANTICIDE*].

64. See Smuts, *supra* note 7, at 11; see also Amy R. Parish, *Female Relationships in Bonobos: Evidence for Bonding, Cooperation, and Female Dominance in a Male-Philopatric Species*, 7 *HUM. NATURE* 61-66 (1996).

65. For instance, female hamadryas baboons, unlike most other monkeys, disperse from their female kin and are much more likely to be attacked by males than are other female monkeys. Smuts, *supra* note 7, at 12.

66. *Id.* Female orangutans travel alone with their infants most of the time and are often attacked by males. Female bonobos, who spend most of their time with other non-kin females, are rarely victims of male sexual aggression. *Id.* at 11-12.

67. Lars Rodseth et al., *The Human Community as a Primate Society*, 32 *CURRENT ANTHROPOLOGY* 221, 229 (1991); Smuts, *supra* note 7, at 12-13 (citing C.R. Ember, *Myths about Hunter-Gatherers*, 17 *ETHNOLOGY* 439, 439-48 (1978)).

68. Smuts, *supra* note 7, at 14.

69. *Id.*

70. See generally LIONEL TIGER, *MEN IN GROUPS* (1970) (describing a universal tendency of men to bond by excluding women).

Humans are also uniquely interdependent. Individual women and their children cannot survive on their own; they must rely on others for what they need.⁷¹ All female primates want resource help from males, but human females absolutely depend on some form of assistance. This means that if males can control resources, they can then control females. Smuts argues that:

[M]ale-male alliances and male control over resources interacted in a positive feedback loop over the course of human evolution. The prior existence of male cooperation . . . facilitated male cooperation in hunting and in controlling the results of the hunt. The possibility of controlling resources, in turn, probably increased the benefits to males of forming alliances with other males . . .⁷²

This abbreviated biological account of human development, which starts with a recognition of the differences in gamete size and then proceeds to explain disparate investment in child rearing, courtship rituals, male jealousy, male violence against women, male bonding, and female vulnerability, is not a particularly pleasant story, but its themes are all too familiar to feminists. As Catharine MacKinnon has been saying for two decades, “[W]omen’s sexuality largely defines women in this society.”⁷³ Biology confirms that men’s desire and ability to control sexuality explains many of the norms, institutions, and laws that define human culture. As Andrea Dworkin has suggested and as biologists document, local customs reveal an extraordinary and horrific variety of ways to restrict women’s sexual

71. Smuts, *supra* note 7, at 15–17; HRDY, NEVER EVOLVED, *supra* note 10, at 8–9 (“Among humans there is a universal reliance on shared or bartered food. In many societies, a woman without a man to hunt or earn income, or a man without a wife to do the cooking, is at considerable disadvantage. By contrast, among all nonhuman primates each adult is entirely responsible for supplying his or her own food.”). Martha Fineman documents this interdependence for modern times. “The very process of assuming caretaking responsibilities creates dependency in the caretaker—she needs some social structure to provide the means to care for others.” MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 163 (1995).

72. Smuts, *supra* note 7, at 15–16. Smuts also suggests that the human development of language enabled the development of ideologies that greatly facilitated men’s efforts to control female sexuality. As Smuts puts it, the male use of language and ideology is an “extension and elaboration” on prelinguistic forms of male control. Smuts, *supra* note 7, at 19; see also Hrdy, *Darwin’s Consciousness*, *supra* note 32, at 5 (“I am convinced that male control over productive resources needed by women to reproduce lies at the heart of the transformation from male-dominated[,] male-philopatric primate societies to full-fledged patriarchy.”).

73. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 174 (1979) (asserting that women, but not men, are seen primarily as sexual objects; therefore, sexuality in the workplace has a discriminatory impact on women).

agency.⁷⁴ As Mary Becker has explained, patriarchy glosses over the extent to which men's and women's interests conflict.⁷⁵ Biologists assume this conflict⁷⁶ and base virtually all of their predictions on it. As feminist Allan Johnson recently noted, status contests among men play a primary role in patriarchal systems.⁷⁷ Biologists wholeheartedly concur, suggesting that women choose high-status men not only because they can provide resources,⁷⁸ but also because, as Cynthia Bowman has written, a woman who aligns herself with a male helps ensure against sexual aggression from other males.⁷⁹ As Susan Brownmiller suggested to much male resistance, males also use sexual aggression—i.e., rape—as a way of subordinating females.⁸⁰ Some biologists pillory Brownmiller for suggesting that rape is more a crime of violence than a crime of sex,⁸¹ but the fact that any given

74. Compare ANDREA DWORKIN, *WOMAN HATING* 95–150 (1974) (citing Chinese footbinding and European witch hunts as examples of local customs that are designed to restrict women's sexual agency), with Buss, *supra* note 26, at 298 (“In a cross-cultural perspective, the ways in which men attempt to control women's sexuality is nothing short of bewildering.”).

75. Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 29 (“In a patriarchal culture, there is a strong tendency to deny conflicts of interest between women and men despite obvious inequalities”) [hereinafter Becker, *Patriarchy and Inequality*]; Mary Becker, *Politics, Differences and Economic Rights*, 1989 U. CHI. LEGAL F. 169, 183–85 (“Both women and men tend to suppress the struggle between the sexes for a number of reasons. Men have an obvious incentive to suppress conflict to preserve the status quo [W]omen suppress conflict [if] they have decided to achieve security through economic dependence on a man.”).

76. Robert Trivers writes, “[O]ne can, in effect, treat the sexes as if they were different species, the opposite sex being a resource relevant to producing maximum surviving offspring.” Trivers, *supra* note 23, at 153.

77. See JOHNSON, *supra* note 42, at 31 (“[T]he cycle of control and fear that drives patriarchy has more to do with relations among men than with women, for it's men who control men's standing as men.”).

78. See Buss, *supra* note 26, at 307–08 (asserting that, universally, females are attracted to men who have more resources relative to other men).

79. Walking with a man is a way of protecting oneself from the assaults of other men. See Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 540 (1993) (“[S]treet harassment both increases women's dependence on men and contributes to distrust and hostility between the sexes. For example, street harassment, and the related danger of sexual assault, encourage women to seek male escorts in public—men to protect them from harassment by other men”). For the biological counterpart, see Mesnick, *supra* note 62, at 207–08 (describing female alliances with “protective males”).

80. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 15 (1975) (“[Rape] is nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear.”); Susan Brownmiller & Barbara Mehrhof, *A Feminist Response to Rape as an Adaptation in Men*, 15 BEHAV. & BRAIN SCI. 381, 382 (1992) (“The central insight of the feminist theory of rape identifies the act as a crime of violence committed against women as a demonstration of male domination and power.”).

rape may be reproductively beneficial does not preclude it from also being used as a tool for subordination. Biological accounts of violence among primates demonstrate that males use a variety of strategies to keep females in positions from which they can not reject men's sexual access.⁸²

Moreover, the entire system of gender, a field that is now commanding its own academic departments, can be explained by the biological desire to discern favorable reproductive characteristics. Masculinity centers on competition, status, resources, and virility⁸³ so that females can discern who could best protect and provide for them. Femininity is defined around notions of coyness, physical beauty (as a sign of health), youth (as a sign of fertility), and weakness (as a way of ensuring deference to a possessive spouse) so that males can discern with whom they want to mate.⁸⁴ The Dawkins game theory analysis also explains the existence of the Madonna/whore dichotomy,⁸⁵ which feminists have spent years trying to explain and eradicate.⁸⁶ There is some evolutionarily stable state in which a certain portion of females are coy Madonnas and a certain portion are fast whores. The fast female can start the process of disrupting this equilibrium, and thus it makes sense that original sin was laid at women's feet.⁸⁷

81. Craig T. Palmer et al., *Is it Sex Yet? Theoretical and Practical Implications of the Debate over Rapists' Motives*, 39 JURIMETRICS J. 271, 273, 279-82 (1999) (criticizing Brownmiller and others by quoting John Hartung, *Getting Real About Rape*, 15 BEHAV. & BRAIN SCI. 390, 392 (1992) ("[I]f those who think that rape is not a sexual act . . . were only a danger to themselves, we could let them play. But this is not the case, and rape is not a game.")).

82. Hrdy, *Darwin's Consciousness*, *supra* note 32, at 24 (noting that males ensure female compliance by regularly treating them violently); Smuts & Smuts, *supra* note 56, at 7 ("[M]ale aggression that has no obvious sexual significance may nevertheless function to increase female sexual cooperation in the future . . .").

83. See JOHNSON, *supra* note 42, at 61 ("[M]en are aggressive, daring, rational, emotionally inexpressive, strong, cool-headed, in control of themselves, independent, active, objective, dominant, decisive, self-confident, and unnurturing.").

84. See SANDRA LIPSITZ BEM, *THE LENSES OF GENDER* 103 (1993) (describing early gender tests in which femininity points were given for deferring to others, caring about appearance, and being easily frightened).

85. See DAWKINS, *supra* note 20, at 85-105.

86. See generally KAREN ARMSTRONG, *THE GOSPEL ACCORDING TO WOMAN: CHRISTIANITY'S CREATION OF THE SEX WAR IN THE WEST* 52-87 (1986) (explaining the importance to Christian thought of the juxtaposition of the Virgin Mary and Eve).

87. *Ecclesiasticus* 25:24, in *THE NEW ENGLISH BIBLE WITH THE APOCRYPHA* (1970) ("Woman is the origin of sin, and it is through her that we all die."); *Genesis* 3:12, 3:16 (King James) ("And the man said, The woman whom thou gavest to be with me, she gave me of the tree, and I did eat. . . . Unto the women he said, I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thy desire shall be to thy husband, and he shall rule over thee.").

If feminists and biologists present such comparable descriptions of the world, then why do so many legal feminists shudder when they hear biological descriptions of the world? Some, no doubt, shudder because of their tendency to assume that when biologists describe genetic behavior the description of what is or what was necessarily becomes a prediction of what will be. This assumption is wrong and unfair to many biologists. Biologists recognize that environmental factors play a huge role in affecting behavior.⁸⁸ Many believe that natural selection favored those who were able to adapt to different social environments because of the “extremely diverse and variable conditions in which humans live.”⁸⁹ Even if a behavior may be evolutionarily beneficial in some contexts, it will not thrive in all contexts, and adapting to different social customs may be evolutionarily advantageous. Evolutionary biology and genetic determinism are not one and the same.⁹⁰

Nonetheless, the work of evolutionary biologists—even feminist evolutionary biologists—differs in several key respects from that done by most feminists in the legal academy. The reason feminist jurisprudence is and should be wary of evolutionary biology has to do not so much with the world that biologists describe as the methods biologists use to draw their conclusions. The next section will focus on two critical components of both economic and evolutionary methodology: the presumption of maximization and the significance of equilibria, and explain why they are problematic for legal feminism.

88. See DAWKINS, *supra* note 20, at 3 (“[I]t is a fallacy—incidentally a very common one—to suppose that genetically inherited traits are by definition fixed and unmodifiable. Our genes may instruct us to be selfish, but we are not necessarily compelled to obey them all our lives. . . . [H]uman society based simply on the gene’s law of universal ruthless selfishness would be a very nasty society in which to live.”); Timothy H. Goldsmith & Owen D. Jones, *Evolutionary Biology and Behavior: A Brief Overview and Some Important Concepts*, 39 JURIMETRICS J. 131, 135 (1999) (“[A]ttempting to apportion the causes of behavior, or indeed any feature of an organism, between nature and nurture, between genes and environment, is a meaningless endeavor. Genes and environment are inexorably linked. Understanding one, without understanding its relationship to the other, obscures a rich and sophisticated understanding of behavior.”).

89. Smuts, *supra* note 7, at 4.

90. *Id.* at 5 (“[M]any people incorrectly assume that to attribute an evolutionary explanation to a behavior is equivalent to concluding that the behavior is fixed and cannot be changed. . . . [E]volutionary analysis does not imply behavioral immutability.”).

II. ECONOMICS AND BIOLOGY

A. Maximization

Both economics and biology rely on the idea that actors, be they individuals or genes, maximize their self-interest. For an economist, this maximization process is about people choosing courses that will best accommodate their needs and desires. For a biologist, this maximization process is about genes leading people to demonstrate certain behaviors. Those behaviors will come to dominate if they end up reproducing more offspring than other kinds of behaviors. Economists explain their maximization process as one in which individuals choose to maximize their own utility. Biologists explain their maximization process as one in which genes produce certain reproductively successful behaviors. Both systems are considered rational in that the actor adopts the best means of achieving its ends.⁹¹ Both systems also rely on unitary metrics to determine whether those ends have been achieved. This subpart explores the similarities and differences in each of these maximization processes and explains why their simplicity, and almost perfect reciprocity, limits them in comparable ways.

1. Selves, Preferences, and Choice

In *The Economic Approach to Human Behavior*, Gary Becker famously explains that “all human behavior can be viewed as involving participants who maximize their utility from a stable set of preferences.”⁹² Several assumptions lie within that half-sentence, most of which have already been well-critiqued in legal scholarship. For instance, to suggest that individuals maximize their own utility from a set of given preferences is to suggest that there is (1) an autonomous self with (2) a discernable utility function who (3) chooses among options. The idea that all human beings are independent selves who make choices based on their own utility functions or preferences has been questioned by many, particularly feminists. First, the notion of self appears to be highly gendered. As Carrie Menkel-Meadow summarizes, “The common theme that unites [the] body of work by [feminist] psychologists . . . is that

91. Richard Posner defines “rational” as “choosing the best means to the chooser’s ends.” Richard Posner, *Rational Choice, Behavioral Economics and the Law*, 50 STAN. L. REV. 1551, 1551 (1998).

92. GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976).

women experience themselves through connections and relationship to others while men see themselves as separately identified individuals.”⁹³ In other words, many women feel less boundaried and self-defining than many men, and thus are less likely to feel like autonomous selves. Second, much scholarly work suggests that preferences are not given or exogenous in each individual, but are instead a function of cultural norms,⁹⁴ an individual’s relative cultural standing,⁹⁵ and cultural expectations about, among other things, fairness.⁹⁶ Thus, the self and the culture in which that self lives cannot be easily distinguished. The same culture that provides the options helps define the self. Hence, third, individual choice is much more a function of culture than Becker’s maxim seems to suggest. This is particularly problematic because, as Joan Williams has suggested in the area of childcare⁹⁷ and Vicki Schultz has suggested in the realm of work,⁹⁸ theories that seek to justify or explain the status quo based on

93. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39, 43 (1985); see also CAROL GILLIGAN, IN A DIFFERENT VOICE 160 (1982) (finding that her subjects defined their identity in the context of relationships); Robert A. Josephs et al., *Gender and Self-Esteem*, 63 J. PERSONALITY & SOC. PSYCHOL. 391, 391 (1992) (finding that women are more likely to have a “collectivist, ensembled, or connected schema for the self” whereas men are more likely to have “an individualist, independent, or autonomous schema”). None of these authors suggests that all women experience a less autonomous sense of self. The collective work of these authors nonetheless suggests that it is fair to say that, in general, women tend to define themselves more in relation to others than men do. This may well be because, in part, social constructions of gender encourage women to feel this way. See JOAN WILLIAMS, UNBENDING GENDER 180–82 (2000) (discussing the ideology of domesticity).

94. See Dan M. Kahan, *Social Influence, Social Meaning and Deterrence*, 83 VA. L. REV. 349, 359 (1997) (“[I]ndividuals’ assessments of both the value and the price of criminal activity are endogenously related to their beliefs about the attitudes and intentions of others.”).

95. See Richard H. McAdams, *The Origin, Development and Regulation of Norms*, 96 MICH. L. REV. 338, 355–57 (1997) (describing the process of seeking esteem); see also Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 4 (1992).

96. Jolls, Sunstein, & Thaler, *supra* note 14, at 1479–80 (noting that people often sacrifice their own self-gain in order to prevent someone else from taking more than her share). In response to Jolls, Sunstein, & Thaler, Richard Posner seems to suggest that because notions of fairness may have evolutionary origins, they serve individuals’ self-interest. Posner, *supra* note 91, at 1561–64. This may be true in the abstract, but social norms clearly structure our concrete notion of fairness, whatever our biological inclinations toward fairness are.

97. See Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 822–23 (1989) (arguing that women choose to take care of children because the social construction of gender makes them so choose) [hereinafter Williams, *Deconstructing Gender*]; Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1607–08 (1991) [hereinafter Williams, *Gender Wars*].

98. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in the Title VII Cases Raising the Lack of Interest*

evidence that people choose their current situation tend to ignore the implicit coercion and potentially restrictive social contexts within which women “choose.”⁹⁹ Therefore, the fact that someone chooses a given behavior does not ineluctably mean that he or she benefits from that behavior.¹⁰⁰

To an economist who is at all stung by these feminist criticisms of selves and choice, evolutionary biology provides a convenient haven. Evolutionary theory retains Becker’s concept of rational maximization without subjecting itself to the critiques of self or choice. Biologists do not incorporate a notion of a self. A self is nothing other than a temporary home for a gene trying to survive. It may be that killing the self (so as to enable other selves who share the gene to live) is perfectly consistent with reproductive success.¹⁰¹ Instead of the economist’s conscious self rationally choosing among options,¹⁰² the actor for evolutionary biologists is a gene

Argument, 103 HARV. L. REV. 1749, 1815–32 (1990) (arguing that women choose less lucrative, “feminine” jobs because social norms steer them toward those choices).

99. See Becker, *Patriarchy and Inequality*, *supra* note 75, at 29 (“[I]t is easy to deny conflicts of interest because patriarchy justifies inequalities and injustices, even violence, in terms of women’s choices”); Robin West, *Liberalism and Abortion*, 87 GEO. L.J. 2117, 2137 (1999) (describing the problems with assuming that because a course of action is chosen, it is automatically legitimate).

100. As Robin West explains, economists and others who emphasize the importance of choice often ignore the need to evaluate normatively the content of that choice. Robin West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 388–91 (1985) (criticizing Posner’s “depiction of the morally legitimizing function of consent”). Consenting to a choice should not necessarily validate that choice ethically, and, in a world with many choices and little normative evaluation, people often crave less choice. *Id.* at 400–04 (refuting claims that consensual transactions necessarily promote autonomy). To illustrate her point, West uses Franz Kafka’s characters, most of whom choose to be in their very unfortunate situations. Richard Posner has criticized West’s analysis, asserting that she has not considered “whether enough people are seriously incompetent at coping with the challenges of life in a free society to justify making society less free.” Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431, 1446 (1985). Posner’s criticism simply begs the question of freedom, however. As the biologists’ findings readily demonstrate, a world in which women are free from state interference is hardly a world in which women are free from male dominance or sexual coercion or economic exploitation.

101. See DAWKINS, *supra* note 20, at 100–01.

102. Richard Posner has expressed somewhat contradictory opinions on the importance of consciousness to economics. In one of his most recent books, he suggests that “[e]volution deals with unconscious maximizers, the genes; economics [deals] with conscious maximizers, persons.” POSNER, *PROBLEMATICS*, *supra* note 4, at 14. In other writings, however, he seems to discount, if not flatly reject, the importance of conscious choice to economics: “Economics is not a theory about consciousness. Behavior is rational when it conforms to the model of rational choice, whatever the state of mind of the chooser” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 4 (5th ed. 1998) [hereinafter POSNER, *ECONOMIC ANALYSIS OF LAW*]; see also Posner, *supra* note 100, at

unconsciously pursuing different patterns of behavior. Robert Wright refers to genes as “puppeteers” and bodies (or selves, in which the genes are housed) as “puppets.”¹⁰³ These puppeteers can lead individuals to display a whole variety of behaviors, from acting altruistically (because altruism, as a strategy, can maximize reproductive potential)¹⁰⁴ to committing infanticide (if they are uncertain about an offspring’s paternity or if resources are too limited).¹⁰⁵ Individuals barely act at all; they react to their genes. How they react may depend on context and social training, but the gene is what initiates action. Nor is choice an active process in the biological scheme because genes do not act consciously. Certain behaviors just exist and prosper, or not, as the case may be. If they prosper, they will come to dominate, or come to exist in some sort of evolutionary stable state. Whatever an individual experiences as the motivation that leads him or her to act is largely irrelevant.¹⁰⁶ The

1431 (“To complain that economics does not paint a realistic picture of the conscious mind is to miss the point of economics . . .”). In *LAW AND LITERATURE*, Posner states: “The concern of economics is not with states of mind but with what people do.” See RICHARD A. POSNER, *LAW AND LITERATURE* 190 (1998) [hereinafter POSNER, *LAW AND LITERATURE*]. In that same book, however, he suggests that conscious choice is an essential component of freedom. See *id.* at 190–205.

103. WRIGHT, *supra* note 27, at 37.

104. See generally ELLIOTT SOBER & DAVID SLOAN WILSON, *UNTO OTHERS: THE EVOLUTION AND PSYCHOLOGY OF UNSELFISH BEHAVIOR* (1998) (discussing the phenomenon of altruism).

105. See Sarah Blaffer Hrdy & Glenn Hausfater, *Comparative and Evolutionary Perspectives on Infanticide: Introduction and Overview*, in *INFANTICIDE*, *supra* note 63, at xiii, xv–xix.

106. Biologists make a critical distinction between what they call ultimate cause and proximate cause. As Owen Jones describes it,

“[P]roximate causes” describe immediate causes, related to the internal mechanisms and development that cause an organism to manifest a particular behavior. They may be defined in terms of physiology and biochemistry, for example, as well as, at times, an organism’s unique developmental-environmental history. “Ultimate causes,” on the other hand, describe evolutionary processes by which the same behavior came to be commonly observable. . . . Proximate and ultimate causes operate together, with all behavior depending on ultimately-shaped proximate mechanisms.

Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117, 1128 (1997). Motivation, as the law usually refers to it, would be considered a proximate cause by biologists. For instance, a stepfather might say that it was frustration with his stepchild’s constant whining that caused him to strike that child. Biologists would call anger or frustration a proximate cause for the abuse. The ultimate cause—and the cause that explains why stepparents are so much more likely than biological parents to abuse their children—is the stepfather’s genes’ drive to increase their own chances for survival by eliminating other genes that might compete for resources. See *id.* at 1212 (using various behavioral theories to explain a higher rate of child abuse among stepparents than biological parents).

action taken and whether it is reproductively successful are what are important to biologists.

Some biologists will no doubt reject the suggestion that evolutionary biology subordinates the importance of choice. After all, one mantra of evolutionary biology is that sexual selection has favored “choosy” women, that is coy women who are careful in mate selection.¹⁰⁷ As Sarah Hrdy has skillfully demonstrated, though, problems arise even within the biologists’ methodological framework when one assumes that women choose.¹⁰⁸ In fact, given the coercion that biologists admit females experience,¹⁰⁹ to suggest that women choose their mates seems internally contradictory and more than a little patronizing. For centuries in Western culture and still extant in many non-Western cultures, a woman’s father or family chose her mate for her.¹¹⁰ Even after fathers stopped making the initial choices, a man routinely had to ask the female’s father for permission before he could marry her.¹¹¹ Men still routinely ask women to mate, not vice versa. Men, not coy women, make the first choice.¹¹² At the margins, women have some say; sometimes they can reject suitors, but it is not at all clear why biologists insist that she who can sometimes decline a request has more choice than he who is able to make the

107. See Jones, *supra* note 3, at 854–55 (“Because indiscriminate copulation is more costly, on average, to females than to males (because males, but not females, can avoid the costs of internal gestation), natural selection has generally favored copulation-partner choosiness in females of internally fertilizing species. Selective females make better use of a limited number of lifetime reproductive episodes.”); see also TRIVERS, *supra* note 29, at 335–39 (discussing examples of preferential mating by females).

108. Hrdy, *Empathy*, *supra* note 32, at 119 (discussing the assumptions underlying theories about sexual selection); Hrdy, *Darwin’s Consciousness*, *supra* note 32, at 22–23 (“Biologists underestimated the full extent and importance of repressive strategies by males [that repressed female choice].”).

109. See generally Buss, *supra* note 26, at 296–315 (describing ways in which men control women’s sexuality).

110. Sara F. Mathews Grieco, *The Body, Appearance and Sexuality*, in A HISTORY OF WOMEN IN THE WEST III: RENAISSANCE AND ENLIGHTENMENT PARADOXES 46, 69 (Natalie Davis & Arlette Farge eds., 1993) (describing parental control over marriages in continental Europe from the Middle Ages through the eighteenth century).

111. See, e.g., JOHN DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY 152–60 (1971) (explaining the laws punishing those who refused to get parental consent and the appeal process (to male authorities) used if a father refused to give consent).

112. Biologists might suggest that making the request is not biologically important for men because they are not harmed by bad choice: They can simply abandon the mate who turns out to be a bad choice. Men still do make the first choice, however, and Hrdy’s research suggests that if women were given the opportunity they would make the first choice also. See Hrdy, *Empathy*, *supra* note 32, at 123–29.

request in the first place.¹¹³ What the biologists' story does make clear is how much power men have to control women's choices.

The bookends of economics and biology thus provide two extremes. At one end is the self who chooses; at the other is the shell that reacts. Neither of these extremes provides much comfort to women. Feminists struggle with the notion of self. For most of the twentieth century, feminists explored the idea of what a female self might be. From the literature of Virginia Woolf,¹¹⁴ to the social theory of Simone DeBeauvoir,¹¹⁵ to the practical politics of consciousness-raising groups,¹¹⁶ one of the primary goals of feminism has been to celebrate and liberate a self-defining female. Feminism has asked women to look inside themselves to find their own wants, fears, and beliefs. It has fought for women to be able to establish autonomous selves. When looking inside, though, women have found that the concept of autonomy is far more malleable than economists presume,¹¹⁷ and scholars have shown how this is particularly true for women.¹¹⁸ The demonstration of that malleability has often carried with it an implicit normative message about self-interest: The less boundaried and contained our notion of self, the more giving and

113. Other cultural practices also belie biologists' theories of female choice. If it is women who choose men, why is it women, not men, who spend millions of dollars every year trying to enhance their sexual appearance so as to be attractive to the opposite sex? Richard Dawkins himself noted this abnormality. See DAWKINS, *supra* note 20, at 178 ("Faced with [the modern emphasis on women's appearance], a biologist would be forced to suspect that he was looking at a society in which females compete for males, rather than vice versa.").

114. See generally, VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* (1929) (suggesting that the reason women had not made more significant contributions to English literature is because they were not allowed the space and time necessary for self-examination).

115. See generally, SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley ed. & trans., Penguin Books 1983) (1949) (writing about the characteristics of a "woman").

116. Catharine MacKinnon has described consciousness-raising as "the major technique of analysis, structure of organization, method of practice, and theory of social change of the women's movement." Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515, 519-20 (1982).

117. Jennifer Nedelsky, *Law, Boundaries, and The Bounded Self*, in *LAW AND THE ORDER OF CULTURE* 162, 168 (Robert Post ed., 1991) (suggesting that the traditional assumption that autonomy is boundaried and must be protected from outside harm is misguided: "[A]utonomy is a capacity, not a static human characteristic . . . [W]hat is essential to the development of autonomy is not protection against intrusion but constructive relationship."); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 11 (1989) (concluding that autonomy originates with self and is conditioned and shaped by social context).

118. Nedelsky, *Law, Boundaries, and The Bounded Self*, *supra* note 117, at 179-81; Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, *supra* note 117, at 9-10; see also GILLIGAN, *supra* note 93, at 160; Menkel-Meadow, *supra* note 93, at 47.

caring we can become.¹¹⁹ However, that normative message does not ineluctably lead to a positive or normative conclusion that there is not, or need not be, any sense of autonomous self.¹²⁰

Feminists also struggle with the idea of choice. Economists emphasize the primacy of choice in determining outcomes,¹²¹ often at the expense of recognizing the role that social context can play in predetermining how a person makes a choice. By reducing choice to the realm of the unconscious, biologists emphasize predetermination and acknowledge, but subordinate, the role of agency.¹²² In critiquing the primacy of choice, however, feminists do not suggest that choice is necessarily bad any more than they suggest that a notion of self is necessarily vacuous. They suggest that choice, like self-definition, is a complicated issue both practically and normatively. To the extent that social norms all but demand that women choose to take care of children¹²³ and choose to work in low-paying jobs,¹²⁴ we have reason to question whether choice means the same thing to women as to men in this culture. Moreover, the idea that we must respect people's choices in the name of autonomy strikes many feminists as hollow when the normative content of those choices often appears deeply troubling. Is it moral, appropriate, or permissible for people to choose subordinating and violent sexual practices?¹²⁵ Is it moral,

119. ROBIN WEST, *CARING FOR JUSTICE* 24 (1997). West suggests that the ethic of care identified in Carol Gilligan's work must be part of an ethic of justice. "'[J]ustice,' as it is generally understood, and 'care,' as it is widely practiced, are each *necessary conditions of the other*." *Id.* Carrie Menkel-Meadow writes that "the growing strength of women's voice . . . may change the adversarial system into a more cooperative, less war-like system of communication between disputants in which solutions are mutually agreed upon rather than dictated by an outsider, won by the victor, and imposed upon the loser." Menkel-Meadow, *supra* note 93, at 54-55.

120. To the extent biology seems to reject a notion of self, feminists have as much reason to reject it as they do to reject the post-modernists who, to paraphrase Robin West, force us to deconstruct our selves before we have had a chance to know what we feel like. WEST, *supra* note 119, at 291.

121. See Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1254 (1998) ("For the economist, human activity is about making choices.").

122. I use the term "agency" here as Kathryn Abrams has in a variety of her insightful writings on the subject. Thus, agency involves both a sense of "knowing self-direction" and an "ability to *develop* and *act on* conceptions of oneself." Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 306 n.11 (1995).

123. See Williams, *Gender Wars*, *supra* note 97, at 1599.

124. See Schultz, *supra* note 98, at 1803.

125. See CATHARINE A. MACKINNON, *Linda's Life and Andrea's Work*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 127, 127-33 (1987) (analyzing the harmful impact of pornography).

appropriate, or permissible that women who work outside the home still choose to do the overwhelming majority of the housework that must be done inside the home?¹²⁶ Is it moral, appropriate, or permissible that some women choose to have sex with their bosses in hopes of securing better jobs?¹²⁷ If the answer to any of these questions is no, then we must continue to ask why women make these choices. Feminism is not suggesting, as the biological paradigm all but does, that choice is irrelevant or unnecessary in people's lives. It is suggesting that women deserve the opportunity to make meaningful and ethically appropriate choices.

Nuanced notions of self and choice are well documented in the feminist dialogue on sexuality. Early writings in the second wave¹²⁸ of twentieth-century feminism focused on how the patriarchal construction of heterosexuality objectified women,¹²⁹ normalized male sexual violence against women,¹³⁰ and eroticized dominance and aggression.¹³¹ Rape was the predominant, indeed overpowering, construct through which many prominent feminists told women to understand their sexuality. Catharine MacKinnon wrote, "[W]omen live in sexual objectification the way fish live in water. . . . The question is, what can life as a woman mean, what can sex mean, to

126. See HOCHSCHILD, *supra* note 48, at 271–78 (discussing research that compares the relative contributions of working women and men to household chores).

127. Katharine K. Baker, *Unwanted Supply, Unwanted Demand*, 3 GREEN BAG 2D SERIES 103, 113 (1999–2000) (questioning the moral propriety of using sex as a bargaining chip).

128. "Second wave" in this sense refers to the feminist movement of the late twentieth century, starting somewhere around 1970. There was, of course, a vast literature on women's sexuality in the early part of the twentieth century also. See CHARLOTTE PERKINS GILMAN, *WOMEN AND ECONOMICS* 5 (1966) ("We are the only animal species in which the female depends upon the male for food, the only animal species in which sex-relation is also an economic relation . . . of economic dependence upon the other sex."); EMMA GOLDMAN, *THE TRAFFIC IN WOMEN AND OTHER ESSAYS ON FEMINISM* 20 (1970) ("Nowhere is woman treated according to the merit of her work, but rather as a sex. It is therefore almost inevitable that she should pay for her right to exist, to keep a position in whatever line, with sex favors."); See generally CRYSTAL EASTMAN, *ON WOMEN AND REVOLUTION* 47 (Blanche W. Cook ed., 1978) ("Whether we are the special followers of Alice Paul, or Ruth Law, or Ellen Key, or Olive Schreiner, we must all be followers of Margaret Sanger. Feminists are not nuns. That should be established.");

129. See MACKINNON, *supra* note 73, at 204; see also Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *BLOOD, BREAD, AND POETRY: SELECTED PROSE 1979–1985*, at 23 (1986) (stating that compulsory heterosexuality is the way men enforce subordinate status on all women).

130. See BROWNMILLER, *supra* note 80, at 309 (arguing that women have "become indoctrinated into a victim mentality").

131. See ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 24 (1981) (linking male power and pornography).

targeted survivors in a rape culture?"¹³² In answering that question, some feminists looked within themselves to find an answer that was not all negative. Thus, Robin West suggested that critiques of sexuality must include an incorporation of what women feel to be pleasurable.¹³³ Sometimes, she suggested, sexual submission can be desirable.¹³⁴ Mary Becker suggested that not all forms of sexual objectification are bad, though many are.¹³⁵ As Katharine Bartlett described it, women knew they were "living on someone else's terms at the same time [they knew] sex [was] exciting."¹³⁶ Those outside of legal scholarship who rejected the dominance feminist account often did so asking, to paraphrase Kathryn Abrams, "[W]hat [are we] supposed to do about sex while [we are] fighting for freedom?"¹³⁷ Implicit in that question is an understanding that women are free to *do* something. They do have some control, some ability to act, to transgress, or to conform to or to alter slightly the paradigms and terms that seem to confine them.¹³⁸ Women, as agents, choose from, among, and sometimes create new, options. Their choices reflect their own desires and those of others. They are constrained by social and patriarchal norms, but they do have selves that recognize and try to capitalize on better options available.¹³⁹ Moreover, as the refusal to sacrifice their sexual activity suggests, being able to capitalize on these better options, being able to experiment with their own

132. CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 149 (1989).

133. See Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 139-45 (1987) (suggesting a normative model for feminist legal criticism that emphasizes women's happiness).

134. *Id.* at 129 ("[S]exual submission has erotic *appeal* and *value* when it is an expression of *trust*; is damaging, injurious and painful when it is an expression of *fear*; and is dangerous because of its *ambiguity* . . .").

135. Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165, 191-203 (1997-98) (distinguishing between autonomy-denying objectification and autonomy-respecting objectification).

136. Katharine T. Bartlett, *MacKinnon's Feminism: Power on Whose Terms?*, 75 CAL. L. REV. 1559, 1563 (1987).

137. Abrams, *supra* note 122, at 311.

138. Kathryn Addelson suggests that various socialization processes are so powerful and so pervasive that no one (man or woman) is capable, as an autonomous agent, of transcending them. Thus, all autonomy or agency is exercised within the confines of socialized restrictions. KATHRYN PYNE ADDELSON, *Autonomy and Respect*, in IMPURE THOUGHTS: ESSAYS ON PHILOSOPHY, FEMINISM AND ETHICS 212, 220 (1991).

139. See Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 832-39 (1999) (exploring how women exercise some autonomy even within profoundly oppressive contexts, like sexual harassment, domestic violence, and forced pornography).

sexuality, even if they are living on someone else's terms, is critical to the female sense of well-being.

The problem with both the economic and biological use of maximization therefore is not a reliance on or rejection of (1) an autonomous notion of self; (2) the existence of an exogenous utility function; or (3) a free agent who chooses. It is instead the simplistic assumption that selves, preferences, and choice are simplistic concepts. Life, particularly female life in a patriarchal culture, is more complex than that. At some reductionist level, both the biological and the economic models are undoubtedly accurate. Some behaviors are, if not absolutely determined genetically, at least very strongly influenced by our genes. Comparably, almost all people, even all women, are able to exercise some agency and make some choices. The question for legal scholarship and policy is whether it is more important to rely on those truisms or to struggle with the more murky reality that defines most people's lives. Feminism suggests that the law must acknowledge and reckon with the muck. In doing so, it becomes necessary to resist another key component of the biological and economic maximization methodologies, that is, cost-benefit analysis. I turn to that next.

2. Cost-Benefit Analysis

In order to maximize, one must measure, and for that measurement to be intellectually accessible there must be a defining metric. For economists, the metric is utility. All choices are and can be measured in terms of subjective utility. For biologists, the metric is reproductive success. All behaviors are and can be measured in terms of reproductive success. Though different metrics, they are both single metrics along which disciples of the respective disciplines measure everything. They are also perfect compliments. Utility is, as one economist explains, "radically subjective,"¹⁴⁰ meaning that interpersonal utility function comparisons are per se impossible. Between two people in a two-party transaction, determining whether

140. Paula England, *The Separate Self: Androcentric Bias in Neoclassical Assumptions*, in BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS 37, 42 (Marianne A. Ferber & Julie A. Nelson eds., 1993) [hereinafter BEYOND ECONOMIC MAN]. Traditional economics assumes that interpersonal utility comparisons are impossible. This restriction is critical to maintaining the simplicity of economics because if one started comparing utility functions, measurements of well-being would become infinitely more complex. The assumption that such comparisons are impossible flows from the economist assumption of a separate self. The more empathy we assume, the more one person is able to measure his own gain in terms of someone else's gain. *Id.*

one person benefits more from the transaction than does the other is impossible because they both voluntarily entered into it.¹⁴¹

Biologists' understanding of reproductive success, on the other hand, is radically objective; it only makes sense as a comparative term. We know that a strategy is successful when it produces more offspring than other strategies against which it is compared. The biological analysis pays no heed to whether (and does not presume that) any given strategy is subjectively beneficial.¹⁴² Strategies are measured without regard to whether they are enjoyed by, good for, or empowering to the actor.

With their respective common metrics in place, economists and biologists can set about determining whether individuals are maximizing by measuring costs and benefits. The simplicity of cost-benefit analysis is what makes it so appealing to some and so false to others.¹⁴³ As Martha Nussbaum writes, cost-benefit analysis "flatten[s] and simplifie[s] things that are usually messy and real."¹⁴⁴ It fails to capture "contradictory truths."¹⁴⁵

Those who defend cost-benefit analysis in the economic area suggest that the messy and contradictory truths that appear to permeate people's lives are irrelevant to methodologies that simply measure what people do, not what they aspire to or represent about their actions.¹⁴⁶ Sarah Hrdy defends evolutionary biology in the same

141. In order to develop more complex notions of Pareto-superiority (one person better off, no one worse off) or Kaldor-Hicks efficiency (more total utility to society even if some people are worse off), one does need to assume some index of comparison against which one can measure and thereby be able to aggregate utility. See JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 100-02 (1988). This rough index need not be particularly precise, however, and, traditionally, economists have shunned comparing interpersonal utilities.

The recent work of Mathew Adler and Eric Posner bucks this tradition, arguing that interpersonal welfare comparisons (though not preference comparisons) are comparable. Their defense of such comparisons is limited to the administrative agency context, however, and it is unclear whether they would defend such comparisons if performed by other legal institutional players (courts or legislatures, for instance). See Mathew D. Adler & Eric A. Posner, *Re-thinking Cost-Benefit Analysis*, 109 *YALE L.J.* 165, 196, 204-09 (1999).

142. As Wright puts it, "[T]he puppeteer [i.e., the gene] seems to have exactly zero regard for the happiness of the puppets." WRIGHT, *supra* note 27, at 37.

143. For a recent array of commentary, see Symposium, *Law and Incommensurability*, 146 *U. PA. L. REV.* 1169 (1998).

144. Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 *U. CHI. L. REV.* 1197, 1200 (1997).

145. Bartlett, *supra* note 136, at 1563 (critiquing MacKinnon's feminism).

146. Eric A. Posner, *The Strategic Basis of Principled Behavior: A Critique of the Incommensurability Thesis*, 146 *U. PA. L. REV.* 1185, 1186 (1998) ("[T]he incommensurability thesis often describes people's *representations* about themselves, it

terms. "Primatologists pay attention to what animals do, not to what they say they do."¹⁴⁷ These defenses condemn to irrelevance people's thoughts, beliefs, and feelings.¹⁴⁸ Feminist legal reformers cannot afford to do this. We learn important lessons about our own strength and enrichment, and we allow people to experience that strength and enrichment, when we describe the world in terms of what people say and feel, as well as in terms of what they do.¹⁴⁹

Those committed to cost-benefit analysis may argue that the economic and biological models do not describe people's inner lives because that is not their goal. Their aim is to predict, in general, what people will do, based on an admittedly artificial construction of the individual. Neither biology nor economics claims to be able to predict what any given person will do, nor does either claim to provide an account of human behavior that explains what gives people meaning or personal fulfillment. Both simply claim to be

does not describe their actual *behavior* [Thus,] [i]ncommensurability claims do not reflect people's interests and values; they conceal them.""); *see also* POSNER, *LAW AND LITERATURE*, *supra* note 102, at 185 ("The concern of economics is not with states of mind but with what people do."). Eric Posner has recently distanced himself considerably from the traditional law and economics defense of cost-benefit analysis, arguing that what is relevant to the cost-benefit equation is not people's expressed preferences, but instead their overall welfare—which he and his co-author take to be a much broader concept than expressed preferences and which might be able to capture thoughts, feelings, and beliefs. *See* Adler & Posner, *supra* note 141, at 196–97.

147. HRDY, *NEVER EVOLVED*, *supra* note 10, at 9. Of course, most animals do not have access to language, so they cannot verbalize desires or beliefs that are inconsistent with their action, but one could well imagine a female ape expressing a desire not to have to capitulate to a male's desire for intercourse, *see supra* text accompanying notes 55–60, despite her ultimate willingness to do so.

148. Some practitioners of law and economics recognize that people's interior thoughts and feelings do matter. *See* Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 603–06 (1998) (stating that the law can induce people to change their internal preferences and altered internal preferences will alter behavior); Peter H. Huang, *Reasons Within Passions: Affects and Attributions in Property Rights Bargaining*, 79 OR. L. REV. 435, 435 (2000) (observing that emotions affect how people behave); Richard H. McAdams, *Eric Posner's Signaling Discount Rates: Law, Norms and Economic Methodology*, 110 YALE L.J. 625, 681 (2001) (book review) (arguing that "normative motivations matter" to any theory of norms).

149. Donald McCloskey suggests that economists' narrow concept of relevance (what people do, not what they say) produces a discipline that misses vast amounts of relevant behavior. Quoting Amelie Oksenberg Rorty, McCloskey explains,

[W]hat is crucial in distinguishing genuine intellectual life from system-building lunacy is "our ability to engage in continuous conversation, testing one another, discovering our hidden presuppositions, changing our minds because we have listened to the voices of our fellows. Lunatics also change their minds, but their minds change with the tides of the moon and not because they have listened, really listened, to their friends' questions and objections."

Donald N. McCloskey, *Some Consequences of a Conjective Economics*, in *BEYOND ECONOMIC MAN*, *supra* note 140, at 69, 85 (citation omitted).

fairly accurate predictors of aggregate human behavior. No other discipline, they might argue, can do better predictively. That may be so, but the problem with making law based on either of these only partially accurate predictive devices is that in constructing their prototypical individuals, biology's normative drawbacks and economics' descriptive drawbacks seem particularly problematic for women.¹⁵⁰ The biological model sees reproductively successful women as inevitably vulnerable and dependent, regardless of what women may subjectively desire. The economic model sees women as autonomous and independent regardless of what women may subjectively feel. For women, whose actions are very much circumscribed by cultural norms and potentially violent men, subjective thoughts, feelings, and desires may well reveal as much or more about their actual lives as any demonstrated action or any model that tries to predict that action.¹⁵¹ The law must appreciate and incorporate those thoughts, feelings, and desires into legal analysis. When it fails to do so and roots analysis in the prototypical parsimonious biological or economic models, the law endorses the legitimacy of the assumptions that go into those models and may perpetuate the social conditions that restrict women's lives.¹⁵²

Feminism's need to reject parsimonious models and embrace people's inner lives may explain why feminist legal scholars have been particularly drawn to literature and narrative. As Patricia Cain has written, "[L]istening to women and believing their stories is central to feminist method."¹⁵³ This method has been controversial precisely because it is messy and does not always render clear prescriptions. Kathryn Abrams explains:

150. Richard McAdams has suggested that the plausibility of a model's assumptions should matter if the model's predictive capacity is unclear. "When the predictive power [of a model] is not known sufficiently to be compared, I think it entirely appropriate to count the plausibility of assumptions in favor of a theory and the implausibility against it." McAdams, *supra* note 148, at 686.

151. See, e.g., Chloe E. Bird, *Gender, Household Labor, and Psychological Distress: The Impact of the Amount and Division of Housework*, 41 J. HEALTH AND SOC. BEHAV. 32, 42-43 (1999) (finding that the majority of women who do more than half the household work are not satisfied with the division of labor).

152. Those who consider themselves law and economics scholars acknowledge that the law can signal the attitudes of a community and affect people's beliefs by doing so. See Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340 (2000). When the law embraces either the economic or the biological models, it perpetuates the assumptions that form them.

153. Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 195 (1989). See generally Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (examining the emergence of feminist narrative scholarship as a distinctive form of critical legal discourse).

[W]hen mainstream legal scholars read experiential narrative scholarship, they look for an abstract framework—a kind of feminist analogue to the Posnerian economic analysis of law—that transforms the raw data provided by experiential narratives into the specific legal rules or proposals. They do not always find what they are looking for.¹⁵⁴

The world of literature incorporates, without apology, contradictory truths, divided selves, active submission, and confused goals. In doing so it reveals a multidimensionality that better describes people's lives than does the single metric of either economics or biology. If we really believed that what was important in life could be measured along a common metric, the world would be a much different place, and all great literature, if it were true to the human condition, would read like a dime store novel. Good literature is good because it is not easy. The characters, their motivations, and their actions cannot be typed, quickly described, or measured along one dimension. Literature is meaningful because it is everything but simple and parsimonious. When we insist on making legal analysis simple and parsimonious, we miss the reality of people's lives.

As an example of how we experience life more like literature and less like economics or biology, consider the institution of marriage. At some level, some women (and some men) know that marriage, or a committed relationship, is neither the simple contract that economists would have us make it,¹⁵⁵ nor the binary negotiation for child-rearing purposes that the biologists describe.¹⁵⁶ Marriage is not just a commitment that the woman or her family extracts from a man through bargaining. It is not only an attempt by her to get some of

154. Kathryn Abrams, *The Narrative and the Normative*, in *LEGAL SCHOLARSHIP IN REPRESENTING WOMEN: LAW, LITERATURE, AND FEMINISM* 44, 47 (Susan Sage Heinzelman & Zipporah Batshaw Wiseman eds., 1994).

155. GARY BECKER, *A TREATISE ON THE FAMILY* 43 (1991) (describing marriage as "a written, oral, or customary long-term contract between a man and a woman to produce children, food, and other commodities"); see also POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 102, at 158 ("Commercial partnerships are voluntary contractual associations, and so, up to a point, are marriages."); ERIC POSNER, *LAW AND SOCIAL NORMS* 76 (2000) (explaining that courtship, gift-giving, and even premarital sex are signaling games in which each party tries to convey that he or she would make a good long-term mate) [hereinafter POSNER, *LAW AND SOCIAL NORMS*]; Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 *IND. L.J.* 453, 464 (1998) (suggesting that all marrying couples should choose between a variety of contracting provisions before marrying).

156. WRIGHT, *supra* note 27, at 86–89.

the surplus he can provide in return for her bearing his children, or an attempt by him to secure quality genes and caretaking skill.¹⁵⁷ When men and women subjectively experience a marriage as such (and some do), it is an inferior and unfortunate one.¹⁵⁸ Intimate connections can and should be experienced as something more meaningful. As Elizabeth Anderson writes, “the reason it is ‘better to have loved and lost than never to have loved’ is not that a lost love on balance delivers more kicks than a loveless life. It often does not. . . . [It is] because love invests life with a meaningfulness and depth that a ‘happy’ but loveless life lacks.”¹⁵⁹ That meaningfulness is what is familiar to us in life and literature. By ignoring or condemning to irrelevance the importance of internally experienced meaning, both the economic and the biological concept of maximization rob women of much of what we know to be most valuable.

Welfare economics has begun to recognize this. In a recent article, Louis Kaplow and Steven Shavell suggest that welfare economics, unlike the conventional view of economics, must incorporate “everything that an individual might value[, including] . . . social and environmental amenities, personally held notions of fulfillment, sympathetic feelings for others, and so forth.”¹⁶⁰ Such a view is perfectly consistent with feminism’s call to listen to women, but it is hard to reconcile with an extensive use of cost-benefit analysis. When that which we value is not traded in any kind of external market,¹⁶¹ when our thoughts, beliefs, and feelings can contradict our demonstrated preferences,¹⁶² and when, in some areas,

157. The law is well aware of this complexity also. Family law scholars have struggled for decades to figure out whether marriage is more like status or contract. See CALEB FOOTE ET AL., CASES AND MATERIALS ON FAMILY LAW 16–23 (A. James Casner et al. eds., 3d ed. 1985). The Supreme Court, try as it might to describe the institution, has been reduced to language which can, at best (and possibly proudly), be described as “mushy.” See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“[Marriage] is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.”).

158. Robert Frank notes that the exchange orientation view of marriage is negatively correlated with marital satisfaction for both men and women. FRANK, *supra* note 5, at 200.

159. ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 126 (1993).

160. Kaplow & Shavell, *supra* note 17, at 980.

161. See *infra* text accompanying notes 266–67 (describing the unique value of family labor).

162. Consider Jolls, Sunstein, & Thaler’s examples of bounded willpower, including, *inter alia*, smokers who continue to smoke even though they would prefer not to and people who prefer to save money but cannot do so without a pre-existing contractual commitment. Jolls, Sunstein, & Thaler, *supra* note 14, at 1479.

we may actually desire to dispense with objective measurements,¹⁶³ cost-benefit analysis fails to provide us any guidance.

Moreover, only by embracing the complexities of different meanings can we effectively combat harmful behavior. Rape is an example of a behavior that can be and has been defined in both economic terms (rape as theft)¹⁶⁴ and biological terms (rape as procreation without having to incur courtship costs).¹⁶⁵ Singular classifications like this ignore the many different kinds of benefits that men get from rape and the different kinds of costs that women rape victims suffer. Rape may be about theft or procreation sometimes, but it can also be about masculinity and thus about male status.¹⁶⁶ It can be about gender power and thus status vis-a-vis women.¹⁶⁷ It can also be about trying to degrade or destroy other men by raping "their" women.¹⁶⁸ All rapes are not the same to the men who commit them, to the women who suffer them, or to the societies that judge them. To treat them as monolithic harms and ignore the multiplicity of meanings that rape can involve may help make rape fit into a model, but it seriously detracts from our ability to combat rape for all that it is.

163. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 345-53 (1986) (observing that monetization can be intrinsically disvaluable if placing a monetary value on a good is inconsistent with partaking of that good); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 805 (1994) ("[I]ncommensurability . . . is desirable as a means of maintaining attitudes and relationships that are parts of good lives."). Matthew Adler argues that such arguments are not strong arguments against cost-benefit analysis because in many cases where incommensurability does seem to be disvaluable, accurate cost-benefit analysis is highly unlikely to be reliable anyway. Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371, 1410-12 (1998). Adler thus recognizes that cost-benefit analysis will not always be an appropriate form of measurement.

164. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 202 (3d ed. 1986); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1125-27 (1972); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1786 (1992). Calabresi has since rethought the applicability of the theft analogy. See Guido Calabresi, *Thoughts on the Future of Economics in Legal Education*, 33 J. LEGAL EDUC. 359, 363-64 (1983) (commenting that the property analogy may be too simplistic).

165. See THORNHILL & PALMER, *supra* note 13, at 190; Jones, *supra* note 3, at 855.

166. See Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 673-75 (1999).

167. See Katharine K. Baker, *Sexism, Racism and Rape: A Comment on Rape: Racism*, ___ NAT'L BLACK L.J. ___ (forthcoming ___) (describing men who rape out of a desire to avenge the sense of powerlessness they feel when confronted with women's sexuality).

168. See Katharine K. Baker, *Once a Rapist?: Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 607-08 (1997) (describing the use of rape in war).

3. Summary

In sum, then, the conventional economic model of maximization requires a boundaried, self-interested, rational actor, while the biological model requires a gene, temporarily housed in a human shell, whose only goal is to perpetuate itself in other shells. The economic model also requires individuals to exercise their own agency and actively choose life courses, while in the biological model, individuals barely act at all; they react to the dictates of the genes within them. Despite the different, almost opposite, emphasis that economics and biology place on the roles of self and choice, both retain the core principle of maximization. Selves maximize utility. Behavior choices (and the genes that produce them) maximize reproductive success. Neither paradigm rings true with the feminist literature that suggests that women experience a self that is neither exogenously defined nor empty and a concept of choice that is neither free nor meaningless. Moreover, many women (and more than a few men) experience wealth, not as an accumulation of subjective utils or objective success, but as a connection with emotion and others that is at once objective and subjective and does not manifest itself in one metric.

B. *Equilibria*

The similarities between evolutionary biology and the economic approach to law are not limited to their parallel reliance on maximization. Both disciplines also draw critical assumptions about the meaning of stability. For both biology and economics, stability suggests equilibria. More important, though, equilibria suggest optimality.¹⁶⁹ As Mark Roe has explained, the notion that competition breeds equilibria that are presumptively efficient or optimal maintains a strong hold on both biology and economics.¹⁷⁰

This section explains why the inference of optimality from stability is pernicious. First, this inference ignores the role that the law can play in shaping preferences. Second, it ignores how path

169. I will use the term "optimal" to incorporate both the economic understanding of efficiency and the biological understanding of evolutionary advantage.

170. Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 641 (1996) ("The classical evolutionary paradigm has a strong grip on law and economics scholarship. What survives is presumptively efficient . . ."). The strength of the classical evolutionary paradigm's grip may depend on the kind of law and economics scholarship. Price theory strongly suggests the optimality of equilibria, but much of game theory questions the existence of stable equilibria. See *infra* text accompanying notes 208–09.

dependence can readily explain stability. Once one accepts either the fluidity of preferences or the prevalence of path dependence, the utility of both economics and biology dissipates. Traditional economic models have little predictive power when preferences fluctuate. Biology has little explanatory power if politics, not genetics, can just as readily account for the facts as we know them.¹⁷¹

1. Norms and Preferences

The law helps shape preferences by reinforcing and/or creating and/or undermining social norms. Law and economics scholarship has recognized the importance of norms for some time, but often this scholarship has focused on norms that exist to supplant law, not norms that the law itself helps to create.¹⁷² *The New Palgrave Dictionary of Economics and the Law* describes three kinds of norms: equilibrium-selection norms, rationality-limiting norms, and preference-changing norms.¹⁷³ The social norms of driving on the right side of the road in the United States and on the left in Britain are examples of equilibrium-selection norms. These are norms that develop in response to situations in which some equilibria are necessary for efficiency reasons, but no rational reason exists for people to prefer one norm over another. Conforming to an equilibrium-selection norm is perfectly compatible with self-interest. Rationality-limiting norms, on the other hand, are norms that keep people from doing what would be in their interest simply because society tells us that “it is not done.” Norms setting expectations of politeness or norms requiring men to wear neckties would be examples of rationality-limiting norms. Preference-changing norms are norms that actually change people’s preferences. One can start getting to work at 8:00 a.m. merely because everyone else does so, but then come to prefer the 8:00 a.m. arrival time.

The economic account of human interaction suggests that most norms are equilibrium-selection norms.¹⁷⁴ They are norms that

171. For a discussion of whether a theory’s success should be marked by its ability to predict or its ability to explain, see David Luban, *The Posner Variations (Twenty-Seven Variations on a Theme by Holmes)*, 48 STAN. L. REV. 1001, 1011–12 (1996).

172. One of the classic accounts in the legal scholarship is ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

173. Kaushik Basu, *Social Norms and the Law*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* VOL. 3, at 476, 476–77 (Peter Newman ed., 1998).

174. *Id.* at 477 (reporting that the equilibrium-selection norm “is currently in vogue in economics and has generated a lot of literature, to the extent that economists tend to forget about the other kinds of norms—conveniently so, since the equilibrium-selection norm is the one which is most compatible with conventional economics”). For examples

develop to facilitate interaction or overall welfare-maximization.¹⁷⁵ Thus, an economist might well suggest that the norms surrounding gender are equilibrium-selection norms. Social norms may encourage women to be intuitive, relationship-oriented, and communitarian, while they encourage men to be rational, independent, and hierarchical, because this division of behavioral characteristics facilitates many aspects of social interaction, including (probably most importantly, but not exclusively) mating behavior. According to this account, women are better off acting feminine and doing the work that women are supposed to do and then getting rewarded by men (with resources), while men are better off competing with each other and establishing their own autonomy so that they can garner maximum resources and get the most desirable women.¹⁷⁶ Conforming to gender norms is thus perfectly compatible with each individual's self-interest.

A feminist account of patriarchy, though, suggests that many gender norms are rationality-limiting norms. They are norms enforced by those that benefit from them,¹⁷⁷ and they are not necessarily compatible with everyone's self-interest. Thus, a feminist would argue that those who have a stake in the status quo of gender prefer adherence to gender norms. Gender norms give men more access to social power, resources, and even reproductive opportunity.¹⁷⁸ Women who try to transgress these norms by being

of economists' explication of equilibrium-selection norms, see generally ELLICKSON, *supra* note 172 (describing norms that allow ranchers and farmers in Shasta County, California, to co-exist with little litigation or constant dispute); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) (describing norms that facilitate efficient operations among merchants).

175. For instance, Eric Posner suggests that many norms that appear to be rationality limiting may actually be signaling norms, meaning that complying with them is a way of signaling to other people. See generally POSNER, *LAW AND SOCIAL NORMS*, *supra* note 155 (stating that people act in accordance with certain norms as a means of communicating their intent to cooperate and honor agreements). If rationality-limiting norms are really signaling norms, then they are not contrary to one's self-interest.

176. Ellickson might describe the gendered division of labor as a kind of specialized labor game. See ELLICKSON, *supra* note 172, at 162–64.

177. Ellickson readily concedes that some norms that “add to the welfare of the members of a certain group commonly impoverish, to a greater extent, outsiders to that group.” *Id.* at 169. Ellickson uses the example of Jim Crow laws to demonstrate this operation of norms.

178. Norms tend to be much more forgiving of the philanderer male than the philanderer female and, notwithstanding the biological theory of female choice, see *supra* text accompanying notes 29–30, they give men the role of choosing a female sexual partner. See BEM, *supra* note 84, at 163 (“[B]oth women and men see it as normal and

assertive, autonomous, or “malelike” in any way are often scorned because those with social power try to ensure that everyone comes to internalize an allegiance to gender norms, even if those norms are rationality-limiting for some.¹⁷⁹

Meanwhile, the feminist normative agenda suggests that the law’s role is to encourage preference-changing norms. Norms of equality and attempts to implement those norms legally, with laws like Title VII of the Civil Rights Act of 1964¹⁸⁰ and Title IX of the Education Amendments of 1970,¹⁸¹ are examples of preference-changing norms. Consider the example of Title IX. One could argue, as Richard Posner has about the Virginia Military Institute case,¹⁸² that the failure of women to express an interest in a given activity all but answers the question as to whether it is important for the law to afford them the opportunity to pursue that activity.¹⁸³ Under a traditional economic approach, the question becomes whether women’s demonstrated preferences prove that they are being denied something that they want.¹⁸⁴ This approach ignores the ability of

natural for the male to play a more dominant or assertive role in a heterosexual encounter . . .”).

179. In the late nineteenth century, sexologists and psychologists claimed that feminists suffered from sexual inversion because they expressed a desire to have that which was associated with men and masculinity. See BEM, *supra* note 84, at 82–86. Today, social norms still clearly encourage people to conform to gender norms. *Id.* at 148. Given that masculinity seems to be associated with those qualities that make individuals most capable of garnering resources, including material wealth and political power, it would seem to be clearly advantageous to men to instill an aversion to gender transgression.

180. 42 U.S.C. § 2000e-17 (1994).

181. 20 U.S.C. § 1681 (1994).

182. *United States v. Virginia*, 518 U.S. 515 (1996).

183. POSNER, PROBLEMATICS, *supra* note 4, at 171 (“The entire harm to women was the difference between the value of a VMI education and that of the education in the substitute program that the state had created for women, multiplied by the very small number of women who would like to attend VMI.”).

184. *Id.* Posner argues that because Virginia provided a scantily attended alternative military school for women, women were able to get military training if they wanted it. According to his analysis, no rationality-limiting norms inhibited women’s participation in military training because the attendance at the all-female school indicated that only a few women’s interests would be served by providing a VMI education. Posner’s argument here is similar to one made by Richard Epstein, several years earlier, justifying the statutory schemes at issue in *Fronteiro v. Richardson*, 411 U.S. 677 (1973) and *Califano v. Goldfarb*, 430 U.S. 199 (1977) (both of which assumed that wives were dependent on their husbands but made husbands prove that they were dependent on their wives), by noting how relatively uncommon it was for husbands to be dependent on their wives. See Richard A. Epstein, *Two Challenges for Feminist Thought*, 18 HARV. J.L. & PUB. POL’Y 331, 342 (1995).

The tendency to try to maximize people’s utility as measured through their revealed or demonstrated preferences is a classic component of conventional law and economics. See COLEMAN, *supra* note 141, at 130–32 (1988) (stating that the normative

supply to create its own demand. Laws that afford people new opportunities help alter rationality-limiting norms that previously suggested that those opportunities should not be pursued.¹⁸⁵

In 1972, prior to the passage of Title IX of the Education Amendment Act of 1972, approximately 300,000 girls participated in high school sports. Today, 2.57 million girls participate.¹⁸⁶ Less than ten years after Title IX passed, in the 1981–82 school year, 91,986 women participated in NAIA and NCAA college sports programs. By 1994–95, that number had increased to 129,376, a forty-two percent increase.¹⁸⁷ Anyone awake in the United States in the summer of 1999 was also well aware of the groundswell of support from women, men, boys, and girls for the United States Women's World Cup Soccer Team.¹⁸⁸ The members of that team explicitly credited Title IX with affording them an opportunity to discover that they wanted to pursue soccer seriously.¹⁸⁹ It is hard to imagine a better example of supply creating its own demand, both for the participants and for the fans. Title IX changed people's preferences.¹⁹⁰

component of law and economics suggests that the maximization of people's expressed preferences is a, if not the only, legitimate goal for law to facilitate); Jolls, Sunstein, & Thaler, *supra* note 14, at 1474–75 (asserting that conventional law and economics analysis suggests that “the goal of the legal system is to maximize ‘social welfare,’ usually measured by people's revealed preferences”).

185. Another way to think about this phenomenon is as an endowment effect problem. People demand that which they feel entitled to and not that which they do not.

186. Donna Lopiano, *Equity in Women's Sports—A Health and Fairness Perspective*, at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/rightsarticle.html?record=121> (last visited Sept. 22, 2001) (on file with the North Carolina Law Review).

187. GENDER EQUITY IN SPORTS, TITLE IX RESOURCES: RELATED STATISTICS, at <http://bailiwick.lib.uiowa.edu/ge/statistics.htm> (last visited Sept. 22, 2001) (on file with the North Carolina Law Review).

188. The 1999 Women's Soccer World Cup edged out the NBA finals in the Nielsen ratings by 390,000 households. *And Strong TV Ratings, Too*, N.Y. TIMES, July 12, 1999, at D2.

189. Donna de Varona, chair of the 1999 Women's World Cup, said that the U.S. team's success is the result of “the seeds planted 25 years ago.” Josh Peter, *Worth More Than a Million*, NEW ORLEANS TIMES-PICAYUNE, July 12, 1999, at D1, available at 1999 WL 19750720. She explained, “The U.S. women's soccer team represents to me the progress that has been made in women's sports since my time. Our team is made up of Title IX babies. They are the first generation of athletes to benefit from a university and college sports program that supports them.” Donna de Varona, *Women's Standard is Lifted to New Level by World Cup*, USA TODAY, Aug. 5, 1999, at 3E, available at 1999 WL 6849759.

190. Some might argue that Title IX did not change women's preferences, it merely removed the obstacles (i.e., discriminatory funding) that prevented women from acting on their preferences. Although this is possible, it seems unlikely. Campuses that are now hotbeds of women's basketball and soccer (such as the University of Tennessee, the University of Connecticut, and the University of North Carolina) were not hotbeds of

Admittedly, on average women have traditionally expressed less of a taste for athletics than have men, just as, on average, women have demonstrated less of a taste for military training than have men. Biology explains why this would be so. Economics provides the graphs of expressed preferences that demonstrate why we therefore have the sports and military institutions that we have. But the Title IX evidence strongly suggests that whatever biological reason explains the differential in men's and women's tastes, and however our existing institutions reflect those preferences, preferences can change. Once one acknowledges the role that the law can play in changing preferences,¹⁹¹ the importance of the equilibria modeled by existing preferences and the inferences that one can draw from those equilibria decline significantly.¹⁹²

Jonathan Gruber's study of mandatory childbirth benefits¹⁹³ provides another example of how legal mandates may generate preference-changing norms. Gruber's study showed that the imposition of mandatory maternity benefits terms in labor contracts did not lead (as traditional economic theory would predict that it would) to decreased employment or lower wages.¹⁹⁴ As Jolls, Sunstein, and Thaler point out, these findings suggest that mandatory labor terms may do more than simply shift the labor demand curve in

feminist activism. Women at those universities did not demand that discriminatory funding be removed so that they could act on their preferences any more than school-age girls did. Instead, the law's endorsement of more abstract notions of women's equality, as embodied in laws like Title IX, forced schools to provide opportunities that girls had not known they wanted. In other words, the law changed behavior. For an explication of a theory of how the law can affect such change through norms, see generally McAdams, *supra* note 152.

191. The United States Supreme Court has noted the ability of law to change preferences in this way. In *Craig v. Boren*, the Court rejected Oklahoma's argument that statistical evidence legitimated a law imposing different drinking ages on men and women because the statistics demonstrated that males were more likely than females to drink excessively and drive while drunk. 429 U.S. 190, 201-04 (1976) ("[P]roving broad sociological propositions by statistics is a dubious business and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.").

192. Thus, the question in *VMI* cannot be whether the demonstrated preferences of women indicate that exclusion would cause harm, because the exclusionary rule itself dampens preferences.

193. Jonathan Gruber, *The Incidence of Mandated Maternity Benefits*, 84 AM. ECON. REV. 622, 622-41 (1994).

194. *See id.* at 639. The conventional economic argument posits that if workers valued maternity benefits more than employers resisted their costs, they would have been offered in private contracts without any mandate because the parties would have bargained to reach a mutually agreeable outcome. To impose mandatory terms in a situation in which the parties have not previously bargained for them will decrease workers' wages by an amount somewhere between the benefit and the cost of the mandatory term, and it will decrease the demand for workers because the price for workers will rise.

(because the cost of labor rises); they may simultaneously shift the labor supply curve out.¹⁹⁵ In other words, without fully realizing this before the preference-changing norm was mandated, more people were willing to work if they got maternity benefits. Thus, the data suggests that women's preference for maternity benefits, like their preference for sports programs, can be affected by their sense of entitlement.¹⁹⁶

Men's preferences also can be changed. By failing to incorporate normative programs to alter preferences, those using biology to influence law tend to offer policy suggestions that accept, as given, male demand or preference for perverse behaviors. Thus, Randy Thornhill and Craig Palmer, two leading biological researchers on rape, suggest educational programs that teach young women about how "clothing and makeup . . . may influence the likelihood of rape."¹⁹⁷ Owen Jones, who has written on the legal implications of evolutionary analysis for both rape and child abuse, suggests a series of preventative strategies for child abuse, all of which involve subjecting stepparents to special scrutiny.¹⁹⁸ Kingsley Browne argues that sexual harassment law must accept as given the fact that men see situations as "more sexually oriented than women do" because they see the world "through sexual glasses."¹⁹⁹ All of these proposals demonstrate a disturbing willingness to accept men's current inclinations to rape and abuse women and children. By focusing on genetic inclinations as given, biologists methodologically ignore the extent to which the law is capable of changing internalized norms and hence preferences.²⁰⁰

Such a focus is too narrow. If the only goal is reducing abuse, then anyone familiar with statistics on child abuse will readily

195. Jolls, Sunstein, & Thaler, *supra* note 14, at 1507. The authors are careful to point out that Gruber's results do not *necessarily* demonstrate that people's preferences changed, but a changed preference theory is consistent with the data.

196. Some might argue that without the mandatory benefits, women were simply too afraid to ask for childbirth benefits for fear they would not be hired in the first place. Again, this may be so, but research into endowment effects suggests that our preferences can be shaped by our sense of entitlement. Jolls, Sunstein, and Thaler view the mandatory maternity benefits story as an example of the endowment effect. Once people receive maternity benefits automatically, they value them more highly than if they had never received them at all. *See id.*

197. THORNHILL & PALMER, *supra* note 13, at 181.

198. Jones, *supra* note 106, at 1234-35. Jones, unlike Thornhill and Palmer, recognizes that policies that emphasize prevention at the expense of stigmatization may involve costs.

199. Kingsley R. Browne, *An Evolutionary Perspective on Sexual Harassment: Seeking Roots in Biology Rather than Ideology*, 7 J. CONTEMP. LEGAL ISSUES 5, 23 (1997).

200. Or, as Richard McAdams puts it, "[L]aw matters for what it says in addition to what it does." McAdams, *supra* note 152, at 373.

conclude that we should simply keep men away from children.²⁰¹ Reducing abuse isn't the only goal, however. Women and children (and probably more than a few men) want to encourage men to be responsible, loving caretakers for children.²⁰² Similarly, if the only goal is reducing rape, then restricting or regulating men's access to women might be a logical strategy, but the feminist goal to reduce rape is not just rooted in protecting women against potential danger and unwanted offspring. It is also rooted in getting men to respect women's physical and sexual integrity. Feminists do not want to just punish men who are inclined to rape or abuse; they want to alter those inclinations.²⁰³ Feminist legal reformers, like most people alive, have multiple ends.²⁰⁴ Some of these ends involve changing preferences as given, even if these preferences have a biological origin.

Game theory, upon which both economics and biology have come to rely, can exacerbate this tendency to accept preferences as given.²⁰⁵ By focusing on strategies that individual players can use to achieve the best available end, game theorists focus on which available options are best, not on what options could possibly be. Preference-changing norms try to change or multiply the options available in games. Sometimes these new options lead to more

201. Ninety-seven percent of the offenders in jail for child abuse are men. LAWRENCE A. GREENFIELD, U.S. DEP'T OF JUSTICE, CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS, at iv (1996). This statistic is particularly alarming given how much more time women spend with children. See Becker, *supra* note 48, at 166.

202. See Katharine K. Baker, *Taking Care of Our Daughters*, 18 CARDOZO L. REV. 1495, 1519 (1997) (reviewing MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995)) ("What [many] women most want is an opportunity to share the job of caretaking with other people.").

203. This is also a classic problem in the domestic abuse area when women victims are unwilling to simply abandon their relationships even if that were the most likely way to get the abuser to stop. They want their partners to stop abusing them *and* they want the relationship to survive. "Many women victims want their abusers to change more than they want the relationship to end." Katharine K. Baker, *Dialectics and Domestic Abuse*, 110 YALE L.J. 1459, 1490 (2001).

204. Martha Nussbaum argues that the failure of the law and economics movement to incorporate the existence of a plurality of ends is one of its main shortcomings. Nussbaum, *supra* note 144, at 1202-05.

205. For some extensive examples of the economic use of game theory, see DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW passim* (1994); *HANDBOOK OF EXPERIMENTAL ECONOMICS passim* (John Kase & Alvin Roth eds., 1994). For examples of the biological use, see DAWKINS, *supra* note 20, SMITH, *supra* note 45; Mealey, *supra* note 54, at 228 ("One of the most important theoretical advances in the life sciences during the last few decades is the introduction of mathematical game theory into evolutionary biology and the social sciences."); and text accompanying *supra* notes 46-54.

desirable (though imagined) equilibria. Sometimes new options just render the games too complex to produce any predominant equilibria. This can be a problem for game theorists because for game theory to be a useful predictive device, it must produce an equilibrium from which one can draw conclusions. As others have analyzed, the more that games incorporate the complex, imperfect lives and options of real-life players, the greater the potential for multiple equilibria.²⁰⁶ Multiple equilibria do not provide simple and parsimonious answers; they often fail to provide any “answer” at all.²⁰⁷

In fairness, much of the work being done in game theory undercuts, rather than reinforces, the presumption of optimality from equilibria. “Game theoretic analysis demonstrates rigorously that under at least certain assumptions markets can fail to promote social welfare.”²⁰⁸ When people act strategically, markets often fail to produce efficient equilibria. This means that advocates of nonintervention must find some reason besides optimality to support the status quo.²⁰⁹ Thus, rigorous use of game theory can reinforce feminist calls to change rather than to accept the status quo. Comparably, rigorous analysis of endowments can help reveal the ways in which people’s preferences are shaped by their sense of entitlement and thus reinforce feminist calls to increase women’s entitlements. The point is not that economics can never help feminism, but that the biological and economic tendency to rely on equilibria resulting from demonstrated preferences seriously detracts from feminist needs to alter preferences.

By definition, preference-changing norms change preferences. Therefore, by definition, they shift utility functions, which in turn shift equilibria. Traditional economic models show how equilibria emerge by focusing on preferences as given. Biological models explain why those preferences would have emerged and converged at

206. See Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291, 1298–1304 (1990) (reviewing ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* (1989)).

207. Game theory also confronts the problems with unitary metrics discussed *supra* Part II.A.2. Recall Dawkins’s game theoretic explanation of mating strategies. See *supra* text accompanying notes 46–54. The only way Dawkins’s game could have any predictive potential was for him to assign cost-benefit numbers to possibilities that many people are not accustomed to commodifying and comparing. Thus, it strikes some as odd to compare the benefits of raising a child (and commodify it at +15) with financial and temporal costs of dating (-3). One cannot play the game without assumptions about comparability, even if the real life players never think in terms of that comparability.

208. Ayres, *supra* note 206, at 1315–16.

209. *Id.*

that equilibria. Neither of these theories is necessarily bad in the sense of being wrong, but to the extent that both theories' modeling power depends on stable preferences, they tend to ignore how preferences can change. This may be particularly problematic when considering issues of gender, because if one accepts, at a minimum, that women have been deprived of access to social, political, and resource power, then their preferences, even if evolved somewhat, are not likely to reflect what their preferences could be in a world in which they had more power.²¹⁰ Thus, feminists who start from a baseline assumption that the world could be a more just and safe place for women have limited use for these equilibria. The purpose of feminism and feminist legal reforms is to institute laws and practices that act as preference-changing norms so that we can move those equilibria in or out in a way that better protects women's interests.

2. Paths and Politics

The second reason why modeling the equilibria produced by demonstrated behavior is of little use to feminist law reform is that these models tend to discount the potential role of path dependence. Path dependence is the tendency to follow a path, not because it is a more efficient or more desirable or a more rewarding means of getting from point A to point B, but because it exists. Mark Roe uses the example of a path formed by a fur trader who pioneers a circuitous route in order to avoid wolves' dens and other natural dangers.²¹¹ Future travelers follow the trader's path with wagons and carriages because taking the worn path is easier. The more the path gets worn, the greater its advantage, relative to a never-worn route. Eventually, factories, homes, and towns grow up along the path even though the dangers that originally determined its route have long since disappeared.

A circuitous fur-trade-path-turned-highway suggests that the paths we take may not be optimally efficient. Instead of presuming, therefore, that given the opportunity to choose, individuals will gravitate toward optimally efficient behavior, it behooves us to analyze the potential for path dependence. According to Roe, there are three reasons why path dependence often withstands competitive

210. As Part II.A suggests, though, neither can one assume that women's preferences and choices will be the same as those of men who have had access to power. The self that men experience does not appear to be the same self that women experience.

211. See Roe, *supra* note 170, at 643.

pressure. The first problem is one of “imagination, of which we never have enough.”²¹² The second reason is that the path taken simply did not matter that much to success, so sufficient incentive to change paths never emerged, even if an alternative might be marginally more successful.²¹³ Energies were better spent elsewhere. The third reason is that various laws prohibit deviation from the standard path.²¹⁴ All three of these explanations could explain why various women’s movements and the simple evolutionary course have failed to significantly undermine our system of gender.

First, when women imagine a different world, they are often ridiculed. For instance, Richard Posner, in discussing Victoria Woodhull’s nineteenth-century idea of free love, suggested that it “was not progressive or prophetic; given the conditions of life at the time, it was daft, because there was no social safety net to break the fall of women abandoned by their husbands.”²¹⁵ Roe writes that “[i]f the climate of opinion about a system does not admit the possibility of radical alternatives, even small-scale evolution might not emerge.”²¹⁶ Feminists readily concur in the need for these alternative visions. Martha Nussbaum writes: “[W]e make progress by comparing our present set of options (unfavorably) with another imaginable set”²¹⁷ Robin West suggests that “[t]he future of community depends not just upon political or even revolutionary action. It also depends upon our imaginative . . . freedom to break free of our present, and to conceive of other ideal worlds.”²¹⁸ If prominent economic thinkers like Richard Posner still dismiss as daft the ideas of (now seemingly) visionary women of 100 years ago, it is hard to believe we have a climate of opinion that allows even small-scale evolution to emerge.

Second, given the costs of undermining our gender system, women may not have had sufficient incentive to alter the path. To fully challenge a system of gender, even one that clearly subordinates women, women must confront, alienate, and take power from men. In doing so, they must put at risk that which they value tremendously. For instance, until very recently, challenging gender roles meant

212. *Id.* at 659.

213. *Id.*

214. *Id.* at 660.

215. POSNER, *PROBLEMATICS*, *supra* note 4, at 166.

216. Roe, *supra* note 170, at 659–60.

217. Nussbaum, *supra* note 144, at 1203.

218. Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145, 202 (1985).

putting at risk one's opportunity to have children.²¹⁹ It still means risking the opportunity to raise a child with someone genetically related to the child. It means jeopardizing one's chances of having a meaningful, potentially rewarding emotional relationship with a man. For some, it means subordinating or ignoring a desire for heterosexual sex.

Political power, economic opportunity, physical strength, freedom to express oneself—all these things are very important to women, but it is possible, perhaps even likely, that cumulatively they are not as important as that which women put in jeopardy by challenging the system of gender. This recognition does not prove that the status quo is either optimal or efficient, nor does it suggest that feminists are wrong when they detail the extent of male dominance. But it does suggest that the stakes in this game are so high that women may be willing to live in a world that is, to say the least, suboptimal. Given the costs of challenging the system, women may lack sufficient incentive to do so, even if they strongly suspect that they would benefit from a successful challenge.

Finally, of course, Roe's third idea for why competition may not produce more efficient forms—that laws prohibit the development of alternatives—is so patently applicable to women's situation that it hardly needs explication.²²⁰ A myriad of laws has prevented women from deviating from the standard gender paths. Married women were not allowed to own property until, at the earliest, 1839.²²¹ Women were not allowed to practice law in federal courts until 1879.²²² They were not allowed to vote until 1920.²²³ Girls could not play Little League until 1974.²²⁴ In a world with this many proscriptions on women displaying non-feminine behavior, that women have followed traditionally feminine paths is no surprise.

The strong potential for path dependence with regard to gender suggests that although genetics may be able to explain our gender

219. The availability of artificial insemination services is changing this for people who can afford them.

220. Roe, *supra* note 170, at 659–60.

221. The first Married Women's Property acts were passed in Mississippi in 1839 and New York in 1848. See BETH MILLSTEIN & JEANNE BODIN, *WE THE AMERICAN WOMEN: A DOCUMENTARY HISTORY* 113–15 (1977).

222. See *WOMEN IN AMERICAN LAW: FROM COLONIAL TIMES TO THE NEW DEAL* 259–65 (Marlene Stein Wortman ed., 1985).

223. See U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

224. Little League Baseball, Inc. amended its national charter in 1974 to allow girls to play. Little League Baseball Historical Timeline, at <http://www.littleleague.org/history/index.htm> (last visited November 4, 2001) (on file with the North Carolina Law Review).

preferences, it does not necessarily do so. Much of evolutionary biology and neoclassical economics, and particularly the disciplines' claims with regard to gender, are unfalsifiable.²²⁵ Path dependence explanations are comparably unfalsifiable, but that just means that one must be careful to explore all potential explanations before relying too much on either economics or biology.

Again, in fairness, it must be noted that many biologists readily concede that culture can play as large a role as genetics in shaping our preferences and steering us toward particular paths. Some biologists studying the interrelationship between genes and culture suggest that although certain behaviors are probably best explained by the biological model, others are better explained by cultural conditioning.²²⁶ These same biologists point out that "our inability to make precise measurements of the [] influence of culture, genes, and learning" makes identifying exactly which behaviors are the result of biological predisposition difficult.²²⁷ This conclusion undermines the normative propriety and practical use of making policy based on theories of biological predisposition. Moreover, a good deal of environmental literature suggests that traditional ideas about stasis and equilibria are inaccurate.²²⁸ Any kind of equilibria we see in nature is temporary because change is an inevitable part of nature.²²⁹ The idea that our biological predispositions would work themselves into constant behavioral patterns from which we can presume optimality is undermined by the now well-established nonequilibrium paradigm.²³⁰

Thus, literature within biology refutes the presumption of optimality from equilibria just as literature within economics

225. Jolls, Sunstein, & Thaler, *supra* note 14, at 1600. See generally KARL R. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (2d ed. 1965) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability.").

226. BOYD & RICHESON, *supra* note 13, at 202.

227. *Id.* at 39. That "inability to make precise measurements" is also what makes cost-benefit analysis so problematic.

228. See generally First Annual Cummings Colloquium on Environmental Law, *Beyond the Balance of Nature: Environmental Law Faces the New Ecology*, 7 DUKE ENVTL. L. & POL'Y F. 1 (1996) (featuring a variety of articles describing the inaccuracies of previous assumptions about balances and equilibria in nature).

229. See generally DANIEL B. BOTKIN, DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY 188-92 (1990) (observing that natural environmental conditions are constantly evolving).

230. For more on the nonequilibrium paradigm, see A. Dan Tarlock, *The Nonequilibrium Paradigm in Ecology and the Partial Unraveling of Environmental Law*, 27 LOY. L.A. L. REV. 1121, 1128-31 (1994) (describing and endorsing movement toward a nonequilibrium paradigm in environmental law).

undermines the same presumption.²³¹ Nonetheless, many practitioners of each discipline continue to make such presumptions.²³² When made with regard to gender roles, those presumptions are particularly dangerous. Gender roles are universal, prevalent, and resilient. Many economists and biologists see this universal stability and they see answers. They offer policy solutions based on the stability that they see. Feminists observe that stability and see questions because feminists, *a priori*, question the legitimacy of that stability. Feminists question that stability because they see too much positive potential in a world in which social roles, goods, and preferences are distributed differently. Thus, stability seems to be as much an obstacle as an answer. The next section explores one area in which it is particularly important for the law to overcome stable gender norms. In doing so, the law must also incorporate nuanced notions of self and choice and reject the utility of a common metric.

III. BIOLOGY, ECONOMICS, AND THE LAW: THE CASE STUDY OF DOMESTIC LABOR

The above analysis makes clear that much of the legal critique of sociobiology is the legal critique of law and economics. The extensive criticisms of both unitary metrics²³³ and presumptions of optimality²³⁴ apply to sociobiology just as easily as they apply to traditional law and economics. Moreover, both disciplines diverge from feminist method in parallel ways. Neither discipline can provide women with what they need from the law, which is not a simple or parsimonious model, but is instead an acceptance of the complexity of self and choice and a rejection of unitary metrics.²³⁵ This section

231. See, e.g., DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 94–95 (1990); W. Brian Arthur, *Self-Reinforcing Mechanisms in Economics*, 5 SANTA FE INST. STUD. IN THE SCI. OF COMPLEXITY: THE ECON. AS AN EVOLVING COMPLEX SYS. 9, 10–11 (Philip W. Anderson et al. eds., 1988); Ayres, *supra* note 207, at 1315–18.

232. For the biologists, see generally THORNHILL & PALMER, *supra* note 13; Browne, *supra* notes 3 and 199; and Jones, *supra* notes 3 and 106. For the economists, see *supra* note 184 and accompanying text.

233. See, e.g., ANDERSON, *supra* note 159, at 126, and accompanying text; Nussbaum, *supra* note 144, at 1200, and accompanying text.

234. See *supra* note 231.

235. Donald McCloskey makes this point about rigor somewhat differently.

I am not suggesting . . . that there is some error in the proofs that civil society can be derived from axioms of selfishness. They are “right” when they are right. But they are right in such a narrow sense, so removed from the concerns of a community that already has approximate equilibrium and already has a semblance of civility, that someone not half in love with easeful narrowness would wonder what the fuss is all about.

explores the limitations of both the biological and the economic model as they apply to one legal area of special import to women: domestic labor.

A. *Selves and Choice*

Legal solutions offered by those well-versed in the biological paradigm tend, not surprisingly, to assume little agency and minimal choice. Accordingly, their policies emphasize restricting social context, not empowering individuals. Thus, one gets proposals like restricting women's dress as a means of rape prevention,²³⁶ restricting stepfathers' access to children as a means of child-abuse prevention,²³⁷ and limiting the integration of the armed forces as a means of reducing sexual harassment.²³⁸ All of these proposals subordinate any normative desire to promote autonomy and choice. This fits the avidly non-normative biological paradigm, but it should seem particularly unfortunate to economists who tend to endorse the normative propriety of autonomy and choice.²³⁹ On the other hand, if one assumes, as economists tend to, both autonomy and choice, one ignores the relevance of social context.²⁴⁰ Given the powerful biological account of just how restricted and sexually violent the world is for females, this strategy seems comparably unacceptable. What women need is respect for and encouragement of their potential autonomy and agency, with an acknowledgment of the coercive conditions that often rob their choices of much meaning.

For years, the legal model of womanhood was the biological model. The law treated women as reproductive vessels, motivated by a desire to reproduce and care for children, and dependent on men for resources. Thus, the Supreme Court case of *Bradwell v. Illinois*²⁴¹ stated:

McCloskey, *supra* note 149, at 86.

236. See THORNHILL & PALMER, *supra* note 13, at 181.

237. See Jones, *supra* note 106, at 1234-35.

238. See Lionel Tiger, *Comment on Article by Professor Browne*, 8 J. CONTEMP. LEGAL ISSUES 79, 81 (1997) ("In effect I am suggesting that the creation of a hostile environment is precisely not the responsibility of those who engage in wholly predictable human behavior, but of those who cause them to exist in [integrated] conditions . . .").

239. See Posner, *supra* note 100, at 1446 (implying strongly that the freedom experienced by being able to make choices is well worth whatever costs may come from enabling many choices).

240. See *supra* notes 183-84 and accompanying text (Epstein and Posner making legal policy suggestions based on women's expressed preferences).

241. 83 U.S. (16 Wall.) 130 (1872).

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.²⁴²

It made sense, with this biological model, that women were not allowed to own property or vote and, for the most part, that their legal status was subsumed into that of their father or husband. Women were also prevented from entering into binding contracts with the people on whom they depended most, their husbands.²⁴³

The situation today is quite different, of course. Women can vote and own property. They can enter into most contracts with their spouses.²⁴⁴ Employers are not permitted to discriminate against women simply because women might get pregnant, nor are they allowed to fire women who become pregnant.²⁴⁵ At divorce, women are treated as individuals, capable of surviving on their own and responsible for any past choices that might render them less economically productive. To the extent that divorced women are still dependent on their spouses, the expressed goal of modern spousal support programs is to allow the woman to "rehabilitate" her dependent self into a state of independence.²⁴⁶ In other words, there has been a shift from biology to economics. Women are no longer vessels, consigned by nature to the domestic sphere; they are fully

242. *Id.* at 141 (Bradley, J., concurring).

243. The most famous example is *Balfour v. Balfour*, 2 K.B. 571 (1919) (holding that a wife could not enforce a husband's promise that he support her while she stayed in England to recuperate after an illness).

244. E. ALLAN FARNSWORTH, *CONTRACTS* 343 (1982) (stating that both husbands and wives may validly contract for services not essential to the marital relation). *But see* *Borelli v. Brousseau*, 654, 16 Cal. Rptr. 2d 16, 20 (1993) (holding that a contract for care fails for lack of consideration).

245. Congress amended Title VII with the Pregnancy Discrimination Act of 1978. Civil Rights Act of 1964, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (1994)).

246. *See* UNIF. MARRIAGE AND DIVORCE ACT § 308 (amended 1973), 9A U.L.A. 446 (1998) (defining the conditions under which a court may order maintenance to a spouse and the standards for setting the level of support); Katharine K. Baker, *Contracting for Security: Paying Married Women What They've Earned*, 55 U. CHI. L. REV. 1193, 1202-03 (1988).

independent actors, capable of making autonomous decisions and leading independent lives.

The knotty problem, though, is that women routinely make choices that render them dependent. They follow their husband's job instead of their own.²⁴⁷ They spend close to twice as much time as men do performing non-paid household tasks.²⁴⁸ This holds true regardless of whether women work outside the home.²⁴⁹ Often, women sacrifice more or better-paid work in order to do this household labor.²⁵⁰ They sacrifice their own ability to care for themselves financially in order to care for their spouse and children.²⁵¹ They routinely care for their children with such emotional intensity that the boundary between self and other blurs.²⁵² Many women still literally change their legal identity in order to adopt their husband's name once married. Thus, there is an important irony in the law's switch from the biological to the economic model of the female self: Although women are now free to make choices in pursuit of their own independence and self-interest, as a group, women consistently make choices that land them in non-autonomous conditions of dependence.

Not all women make these choices, of course. Some women are primary breadwinners in a two-earner household. Some women parent without any men around, thus tending to sacrifice for their

247. See Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 U. LOUISVILLE J. FAM. L. 791, 845 n.271 (1992-93).

248. See SARAH FENSTERMAKER BERK, *THE GENDER FACTORY: THE APPORTIONMENT OF WORK IN AMERICAN HOUSEHOLDS* 7-9 (1985); VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 77-78 (1988); HOCHSCHILD, *supra* note 48, at 3-10 (1989); BETH ANNE SHELTON, *WOMEN, MEN AND TIME: GENDER DIFFERENCES IN PAID WORK, HOUSEWORK AND LEISURE* 65-66, 73, 79 (1992); David H. Demo & Alan C. Acock, *Family Diversity and the Division of Domestic Labor: How Much Have Things Really Changed?*, 42 FAM. REL. 323, 323-31 (1993).

249. See HOCHSCHILD, *supra* note 48, at 3-10.

250. Jane Waldfogel suggests that household labor accounts for a significant percentage of the wage gap between men and women. Jane Waldfogel, *The Effect of Children on Women's Wages*, 62 AM. SOC. REV. 209, 216 (1997); Jane Waldfogel, *Understanding the Family Gap in Pay for Women with Children*, 12 J. ECON. PERSP. 137, 152-54 (1998).

251. FINEMAN, *supra* note 71, at 163 ("The very process of assuming caretaking responsibilities creates dependency in the caretaker—she needs some social structure to provide the means to care for others. In a traditional family, the caretaker herself, as wife and mother, is dependent on the wage-earning husband to provide for her so she can fulfill her tasks.").

252. As Louise Erdrich writes, "[loving an infant] is uncomfortably close to self-erasure." LOUISE ERDRICH, *THE BLUE JAY'S DANCE* 4 (1995); see also Becker, *supra* note 48, at 142-46 (describing the intensity with which many mothers devote themselves to their children).

children but not for a man. Some women never make sacrifices for a man, and still others negotiate more mutual sacrifices with their partners. The point is not that all women make the same sacrifices and all women render themselves vulnerable. The point is that enough women make these sacrifices for us to be concerned about why they do so and whether we need to redress any harms that follow.

In the biologist's world, women's sacrifice is normal, if not chosen. Embracing vulnerability will often mean reproductive success for women. Thus, the old legal model assumed women's vulnerability in a way that squelched women's potential autonomy. In the economist's world, women's vulnerability is chosen and therefore legitimate, outside the scope of the law's concern. Thus, the new legal model simply lets women continually choose conditions of dependence. In a feminist world, the law helps eradicate women's vulnerability for at least two reasons. First, women may put themselves in positions of dependence mostly because path restrictions and rationality-limiting norms take away any realistic options they have to choose otherwise. Second, regardless of whether women have meaningful opportunities to avoid dependence, women's investment in others creates value for which they should be compensated. The law must be concerned with women's vulnerability because we have strong reasons to question whether that vulnerability is "normal" or "chosen." But even if it is "normal" or "chosen," the failure to compensate for the contributions women make to others is normatively unacceptable.

If women sacrifice their own potential independence because sex discrimination makes that independence seem like a distant dream and everyone's imagination is limited,²⁵³ or because rationality-limiting norms ridicule them for defying gender stereotypes,²⁵⁴ or because by asserting their independence they put too much else in jeopardy,²⁵⁵ then they are making choices that they would not make in a world with different norms and laws. As discussed above, the law can play a role in changing those norms so that women have alternatives to self-sacrifice. To the extent that norms scorn the

253. See *supra* text accompanying notes 212, 215–218.

254. See *supra* text accompanying notes 177–79. Norms that confine people in gender roles may be rationality-limiting for women, but not for men, just as old racial norms were rationality-limiting or impoverishing for African Americans but not for white Americans. See ELLICKSON, *supra* note 172, at 169.

255. See *supra* text accompanying notes 217–18.

woman who may preference her job over her family,²⁵⁶ but scorn the man who takes paternity leave or sacrifices his own career opportunities,²⁵⁷ we encourage women's dependence. Biologists may say that social norms now just replicate what was a matter of evolutionary necessity, but the important point is that social norms are malleable. At present, social constructions of gender give different social meaning to the same acts of parental and marital sacrifice.²⁵⁸ For women, sacrificing their marketability is an expression of love. For men, enhancing their marketability (and thereby providing better for their families) is an expression of love. Social norms give women an incentive to be vulnerable and men an incentive not to be,²⁵⁹ even though women have no biological reason to render themselves vulnerable anymore. The law's job is to undermine those social norms if they reinforce undesired inequality.²⁶⁰

256. As one mother wrote, "When my husband and I walk out the door in the morning and hear a child cry, the reason I want to turn back and he does not is that society tells me I am a bad mother if I work outside the home." Peggy Tarvin, Letter to the Editor, N.Y. TIMES, Aug. 28, 1995, at A14.

257. See Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1077-79 (1994) (describing employer hostility to men who take parental leave).

258. Identical acts can have different social meanings at different times or in different places. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 961-62 (1995). The work of parenting has taken on very different meanings since the Industrial Revolution took the workplace out of the homeplace. Fathers used to be the parent responsible for socializing and comforting children. See MARY FRANCES BERRY, *THE POLITICS OF PARENTHOOD: CHILD CARE, WOMEN'S RIGHTS, AND THE MYTH OF THE GOOD MOTHER* 46-47, 50 (1993). When household production decreased in importance, the cult of domesticity assigned to women the roles of emotionally comforting and socializing children. SARAH EISENSTEIN, *GIVE US BREAD BUT GIVE US ROSES: WORKING WOMEN'S CONSCIOUSNESS IN THE UNITED STATES, 1890 TO THE FIRST WORLD WAR* 55-61 (1983).

259. Thus, though both men and women contribute to marriage and child rearing, women tend to incur huge opportunity costs; men, who continue to attend to their careers as a way of attending to their children's or spouses' needs, do not. PAULA ENGLAND & GEORGE FARKAS, *HOUSEHOLDS, EMPLOYMENT, AND GENDER: A SOCIAL, ECONOMIC AND DEMOGRAPHIC VIEW* 55 (1986) ("Men typically make fewer relationship-specific investments than women, accumulating instead the resources which are as useful outside as within marriage."). This suggests that Dawkins was wrong when he allocated the costs for parental investment in his game theory analysis by dividing the necessary investment in child rearing equally between men and women. See *supra* note 48 and accompanying text.

260. In order to determine whether that inequality is undesired, we must listen to what women say and feel, not just look at what they do. Often, women say and feel that they are frustrated by the division of labor within the household, even as they continue to shoulder a disproportionate share of it. See WILLIAMS, *supra* note 93, at 1 (implying that women would rather be able to both work outside the home and take care of children); Bird, *supra* note 151, at 42 (stating that the majority of women who do more than half the household work are not satisfied with the division of labor).

The second reason why the law must be concerned with why women choose conditions of dependence is that often these conditions of dependence are absolutely essential to the institutions societies tend to hold dear, most significantly, parenting and marriage. If women are disproportionately responsible for holding these institutions together, it is only fair to compensate them for doing so. Biologist Robert Trivers' "cruel bind" analysis²⁶¹ suggests that human females may have *had* to make familial investments once because if they did not, their children would perish. Because men could force women to shoulder a disproportionate share of the burden of parenting, they did. More recent feminist analysis suggests that those evolutionary conditions now replicate themselves through social norms and gender. As Joan Williams writes, "[W]omen know that if *they* do not sacrifice *no one* will, whereas men assume that if *they* do not, *women* will."²⁶² Medical advances now ensure that a child can survive just as easily with male parental investment as with female, but women continually make the sacrifices that men do not. Women may do this because, as a matter of evolutionary adaptation, it was advantageous for them to do so, but there is no reason for their role to now stay static. As Trivers himself acknowledges, the disproportionate burden placed on the investing parent is "cruel."

To be sure, women serve their own ends when they invest in the relationships that they nurture. This is why the radically subjective economists often ignore or deem acceptable women's disproportionate investment. If a woman's familial investment increases her utility (regardless of what her investment is relative to a man's), then the investment is not problematic to the economist. But women generate significant positive communal benefits when they invest in marriage and children. Society in general and families in particular benefit from women's familial investments. These benefits often get lost, however, in the economic and biological accounts that focus on individual, not collective, well-being, and they get subordinated, if not undermined, in analyses that rely on unitary metrics.

B. Cost-Benefit Analysis

As Katharine Silbaugh has thoughtfully explained, one can think about women's nonmonetary contributions to families in terms of

261. See *supra* text accompanying note 28.

262. Williams, *Deconstructing Gender*, *supra* note 97, at 831.

either loss to the individual or gain to the family.²⁶³ Most of the divorce reform work in the past thirty years has presented the nonmonetary contribution problem as one of what women lose by contributing to the family. Thus, the movement has been toward trying to compensate women for the lost opportunity costs that women incur as individuals. One of the advantages of this system is that it looks to external markets to see what a woman would have captured financially if she had been operating in those external markets.²⁶⁴ External markets have objective values that fit nicely into cost-benefit analyses. The problem is that we miss a great deal of the value generated by women's contributions if we focus only on what women give up.

Shifting the focus to the benefit the family receives and away from the costs that women incur helps capture the value that is lost in the individualistic analysis. It creates another problem though: capturing that benefit in any sort of metric.²⁶⁵ Placing a monetary figure on the benefit gained by a household member's (usually a wife's/mother's) unique ability to address the particularized clothing, eating, housing, and planning needs of a family is very difficult. Other household labor is even harder to place a value on: counsel, emotional support, elder and sick care, companionship, and, of course, child care.²⁶⁶ Some of this labor can be purchased in the market, but often what is purchased in the market simply is not the same as what can be produced by family members. That is why children create so much more work for a household, even when parents have around-the-clock caretaking coverage. It is why older people would rather move in with relatives than pay for strangers to take care of them. The unique, nonsubstitutable nature of what a family member offers in providing these services in many ways constitutes our understanding of family. The value that family members provide cannot be provided by anyone else.²⁶⁷ Because the value is unique, it is impossible to quantify. Hence cost-benefit

263. Katharine C. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 94-95 (1998).

264. See, e.g., Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 12, 49-58 (1989) (suggesting that spousal maintenance be determined based on a spouse's lost opportunity costs).

265. See Silbaugh, *supra* note 263, at 100.

266. See *id.* at 102-08.

267. Occasionally, we grow close enough to nonfamily members that we think of them as being able to provide the same services that family members provide. In those situations in which we think of the nonfamily members as unique family, we do not come to view the services provided by that nonfamily member as substitutable.

analysis is impossible. When we insist on the applicability of cost-benefit analysis, we miss much of the unique labor of familial investment, labor that is disproportionately provided by women.

By focusing exclusively on individual motivation, not on gain to others, traditional economic models ignore how one class of people can be encouraged, through social norms, to systematically and disproportionately enrich another. Justice in these situations may well require ignoring the individualistic focus of cost-benefit analysis and instead treating the family as a unit so that all costs and benefits are presumptively shared. Such an approach would dispense with the need to quantify any particular contribution or advantage and would instead simply treat all assets and liabilities as communal. At divorce, each member should be entitled to a pro rata share of the whole, regardless of how the market or property law might otherwise assign value or ownership.²⁶⁸

Income-sharing arrangements like this would also better reflect the autonomy and choice problems discussed in this Article. A woman's investment in domestic labor would not be seen as inevitable such that the woman and only the woman receives alimony at divorce. Each member of the unit would be viewed as equally capable of contributing to and equally entitled to shares of the collective wealth. Within the marriage, a couple could divide all tasks as they saw fit. Certain reforms, like a shorter work week,²⁶⁹ might even operate as preference-changing norms to encourage couples to be more egalitarian in their division of household labor. Regardless of the roles that each individual played in the marriage, however, decisions within the family unit would not be seen by the law as individual choices made independent of social context. People, particularly women, in family units do not perceive themselves as having, and society does not encourage them to exercise, that kind of individual agency. Accordingly, the legal model for distributing property at the end of a marriage should not assume agency and choice, nor should it treat family members as autonomous actors who made independent decisions in the course of the marriage. Income-sharing arrangements neither inhibit nor presume women's autonomy and independence. They recognize the problems that

268. Several feminist scholars have suggested this kind of income-sharing arrangement. See WILLIAMS, *supra* note 93, at 129–31; Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 577–92 (1990).

269. For more on the suggestion that the official work week should be shortened to thirty hours from forty hours, see Williams, *Deconstructing Gender*, *supra* note 97, at 835–36.

interdependence can create and try to alleviate those problems without restricting women's ability to exercise their own agency.

Women's tendency to sacrifice their autonomy in order to take care of others may have biological origins, but it also has extraordinarily high levels of contemporary social reinforcement. If the law manipulated that social reinforcement so as to encourage women to feel more autonomous and assert their own independence, what looks now like biological inevitability (or at least strong biological likelihood) might dissipate. A more independent female self might emerge. One cannot simply create that autonomy by declaring its existence, however. Giving women the right to be independent will not foster that independence unless we are careful to cabin pre-existing constraints. Feminists have already recognized this in a variety of areas. Thus, Kathryn Abrams suggests that encouraging women to realize more sexual agency may require regulating some, but not all, forms of pornography so as to promote sexual autonomy while trying to minimize the potential for male coercion.²⁷⁰ Gillian Hadfield has suggested providing institutional support designed to help women recognize the potential harms of entering into certain contracts (surrogacy and antenuptial agreements) so as to allow women to make decisions free of the traditional norms that encourage them to sacrifice.²⁷¹ I have suggested modifications to adoption and child custody law that preference women's autonomy notwithstanding those women's previous decisions to sacrifice.²⁷² All of these proposals, and no doubt others, might steer women away from continuing to invest so heavily in others.

Even if women's investment in others does not dissipate with altered social norms—that is, even if what the biologist's account suggests is inevitable, is inevitable—women are entitled to compensation for the value that they provide. Biology may provide economists with an answer for why women would “choose” conditions of dependence, but it provides no answer to the normative problem of whether women's disproportionate investment is fair. Indeed, almost everything about the biologist's account of women's reality discussed in Part I of this Article suggests that what is biological is profoundly unjust. Economic attempts to remedy this

270. See Abrams, *supra* note 139, at 836.

271. Gillian K. Hadfield, *The Dilemma of Choice: A Feminist Perspective on The Limits of Freedom of Contract*, 33 OSGOODE HALL L.J. 337, 348–50 (1995).

272. See Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1587–94 (1998).

injustice—by compensating for the previously unrecognized labor that women perform—fail because of a unitary metric's inability to capture the collective and unique value that women's labor generates. Thus despite, and in part because of, the close methodological affinity between evolutionary biology and economics, biology does not provide the answers that the feminist critique of law and economics begs, and economics fails to provide what biology demands, a normative solution to the inequities that nature produces.

The biologist's model descriptively reinforces the feminist account of patriarchy, but normatively, at least as it has been applied to law, it suggests that our struggles for more autonomy and choice are fruitless because we are destined to be governed by the biological imperative. The economic model ignores what feminists know to be true about the ways in which men restrict women's lives, but at least it suggests that some positive normative value can be found in autonomy and choice. Neither model provides an account of self or value that reflects what women experience as true. At this point, the feminist approach does not offer a model. Designing a model that reflects the existing restrictive social context, offers a hopeful future, and incorporates the complexities that permeate women's lives may be possible, but such a model would almost certainly lack the parsimony that biologists and economists prize. Feminist law reformers must be wary of that parsimony. As the dilemma of women's domestic work demonstrates, models that simplify the analytical process run too grave a risk of abandoning either descriptive accuracy or normative commitment.

CONCLUSION

The biological account of the way we are corresponds in many ways to the feminist descriptions of male dominance. It shows the same sexual possessiveness, sexual violence, disproportionate reproductive labor by women, and male control of resources. Despite this affinity with feminism, the biological account is disturbing to many feminists, and it is disturbing to feminists for precisely the same reasons that it is attractive to economists. The biological account suggests rational and stable preferences (though the preferences emanate from a gene, not a person). The biological account also explains how male dominance can render continuing reproductive success. To an economist, this model is attractive because it describes why it is rational for individuals to act in seemingly irrational ways and because the more stable our preferences, the easier they are to model. To a feminist, the biological account is disturbing because the

biological construct of rationality is based on notions of self and choice that fail to reflect either subjective reality or normative desire and because the biological story describes a status quo from which we know we want to evolve.

Feminist writing and experience tells us that we live life as neither completely free agents who choose or as shells that react. The two ill-fitting models, one provided by economics and the other provided by biology, may describe what we could be or what we once were, but neither describes what we are. This does not mean that feminists have no use for biology and economics. Feminists can use biology to reinforce their descriptive claims, and they can use economics to help make visible some of the traditionally female contributions that have gone unrecognized. However, neither discipline is able, by itself, to provide the kind of complete analysis that feminist legal scholarship requires. Biology without normative analysis tells us precious little about what the law should be. Economics without an appreciation of the restrictive contexts in which women live and work is very unlikely to render complete data on which the law can feel comfortable relying. Feminism demands more.

