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Biology for Feminists

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INTRODUCTION

Sociobiology,[1] evolutionary psychology,[2] biobehavioralism,[3] evolutionary biology,[4] or just biology.[5] Call it what you will, it is as big news at the end of the twentieth century[6] as it was at the end of the nineteenth, when the world was just beginning to appreciate Charles Darwin's *Origin of Species*.[7] In the world of this resurgent discipline, rape is all about sex, marriage is all about one-sided dependence and motherhood is all about exploited labor. Phrased as such, it is not hard to see why many women shun the sociobiologist's world. It is a violent, harsh, and altogether horrific place for women to be. Upon further examination though, it is a world that feminists well recognize. Indeed, it is a world we have been describing for some time now.

There are legitimate reasons to question the method and findings of sociobiology,[8] but in this Essay I will suggest an alternative strategy: embracing biology, at least as a strategic device, so that we may reveal the wholly inadequate job that the law has done in

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1. *See* Amy L. Wax, *Against Nature—On Robert Wright's The Moral Animal*, 63 U. CHI. L. REV. 307 (1996) (book review).

2. *See* ROBERT WRIGHT, THE MORAL ANIMAL (1994).

3. *See* Owen D. Jones, *Sex, Culture and the Biology of Rape: Toward Explanation and Prevention*, 87 CAL. L. REV. 827 (1999).

4. *See* FEMINISM AND EVOLUTIONARY BIOLOGY: BOUNDARIES, INTERSECTIONS, AND FRONTIERS (Patricia Adair Gowaty ed., 1997).

5. *See* Randy Thornhill, *The Biology of Human Rape*, 39 JURIMETRICS 137 (1999).

6. For a list of just some of the recent literature applying biological principles to law, see *Aspects of Biology, Evolution, and Law* (visited Jan. 29, 2000) <http://www.law.asu.edu/jones/UsefulSources.htm#Aspects> (compiled by Owen Jones).

7. CHARLES DARWIN, THE ORIGIN OF SPECIES (1859).

8. *See* Stephen Jay Gould, *Sociobiology and the Theory of Natural Selection*, *in* SOCIOBIOLOGY: BEYOND NATURE/NURTURE? 257 (George W. Barlow & James Silverberg eds., 1980); Zuleyma Tang-Martinez, *The Curious Courtship of Sociobiology and Feminism: A Case of Irreconcilable Differences*, *in* FEMINISM AND EVOLUTIONARY BIOLOGY, *supra* note 4, at 116, 116-43.

controlling nature's horrors.[9] For years feminists have been describing a world in which sexual violence is pervasive, marriage is a Faustian and dangerous bargain for women, and caretaking is a huge amount of usually unrewarded work. This is the world that the biologists describe also. If the biologist's description is more frightening than the feminist one, it is only because of the common but unnecessary presumption that, because the world *is* that way, it must stay that way. No biologist believes this.[10] How we act is a complex function of both genetic composition and social environment. Indeed, prominent evolutionary biologist Timothy Goldsmith suggests that it is meaningless to try to determine the extent to which any given human action is genetically or culturally determined.[11] Richard Dawkins, one of the most important figures in modern evolutionary theory, writes that

> it 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.[12]

Biologists do not tell us that genes necessarily determine our behavior; they tell us how genes can strongly influence our behavior. It is up to social constructions of morality, equality, and justice to provide a counterinfluence that makes the world a place in which we want to live.

Therein lies biology's attraction to feminists. By laying bare the harsh reality of nature, it forces us to embrace our normative convictions. Biology, along with Catharine MacKinnon, belies the assumption that rape is totally different than sex.[13] Biology, along with Mary Becker, refutes the naive presumption that men's and

9. What biologists call nature, feminists tend to call patriarchy. *See infra* text accompanying notes 13-15. The normative and policy prescriptions offered at the end of this Essay can be drawn regardless of which label one chooses. In other words, one can reach feminist conclusions wholly apart from biology. My goal in this Essay is to demonstrate that feminist conclusions can follow whether or not one endorses sociobiology.

10. As Barbara Smuts explains, "[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." Barbara Smuts, *The Evolutionary Origins of Patriarchy*, 6 HUM. NATURE 1, 5 (1995).

11. TIMOTHY H. GOLDSMITH, THE BIOLOGICAL ROOTS OF HUMAN NATURE: FORGING LINKS BETWEEN EVOLUTION AND BEHAVIOR 87 (1991).

12. RICHARD DAWKINS, THE SELFISH GENE 3 (1989).

13. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 174 (1989).

women's interests coincide, even in marriage.[14] Biology, along with Martha Fineman, makes clear that mothering is work; it is work done predominantly by women, and fathering has remarkably little to do with parenting.[15] What feminists call patriarchal culture, biologists call nature, but whatever it is called, anyone with any moral sensitivity can readily see that it is an altogether inferior, unjust, and undesirable place to be. And as biology makes plain, it is up to us to change it.

In the first part of this Essay, I give a brief primer on evolutionary biology. In Part II, I explore how the biological perspective challenges the legal constructions of rape, marriage, and parenthood. The law draws bright lines between rape and sex and between public and private. These lines make no sense to biologists and little sense to most feminists. Meanwhile, the law has (at least recently) refused to draw the line between motherhood and fatherhood that most biologists and many feminists insist exists. In Part III, I explain how the biological perspective both supports feminists' reforms and cries out for stronger normative action.

As written and interpreted now, the law may reflect a normative vision, possibly even a feminist normative vision. We may want it to be obvious that rape is different than sex. We may want marriage to be an interdependence shared by two equals. We may want parenthood to be a nongendered commitment to caregiving. But the law does not effect these changes simply by declaring them so. If our laws are to make sense, we must change the world in which they operate. A biologist's perspective forces us to recognize how much we have to work to (re)construct the world in which we want to live.

I. BIOLOGY'S STORY

To the sociobiologist,[16] a huge amount of what we do, particularly how we behave with regard to the opposite sex, stems from our unconscious desire to reproduce.[17] We are here to

14. Mary E. Becker, *Politics, Differences and Economic Rights*, 1989 U. CHI. LEGAL F. 169, 169-90.

15. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

16. Throughout this Essay, I essentialize "the biologist" and "the sociobiologist." I do this because a complete and nuanced analysis of the various strands of evolutionary biology is well beyond the scope of this Essay. I believe the "essential" version I offer here adequately incorporates those biological findings that are most relevant for feminist legal reformers.

17. *See* DAWKINS, *supra* note 12, at 7. Sometimes people's desire to reproduce is fully conscious, of course, but a crucial component of evolutionary theory is the recognition that

reproduce, and reproduction requires an expenditure of resources. To produce an offspring, an individual must at least do the work necessary to produce the gamete (egg or sperm) that will contribute half of that offspring's genetic material. Unfortunately for human females, offspring are not made by gametes alone.[18]

As with any species that reproduces sexually, fertilizes internally, and produces live young, the parent that carries and nurtures the fertilized embryo must invest substantially even after the embryo is fertilized. The other parent need not so invest. It may be in a nongestating parent's reproductive interest to invest, for instance, if the mother needs food or protection in order to successfully nurture the offspring, but food and protection, unlike in vitro nurture, can be provided by a nonbiological parent.[19] If a man knows that someone else will help provide for the offspring he has already sired, he maximizes his reproductive potential by leaving the first mother and siring other offspring with a different mate.[20] Moreover, because a male, unlike a female, is never 100% sure that a given child is his own, any inclination he has to invest in a child must be discounted by the chance that the child is not his. If he spends his resources investing in some other male's genetic material, he will be contributing to someone else's, not his own, reproductive success.[21] These two factors, the availability of other means of support and paternal uncertainty, make men substantially less likely than women

behavioral predispositions may come to thrive regardless of whether the individuals demonstrating those behaviors are conscious of why they are behaving the way they are. Thus, men may be motivated to rape because they want to reproduce, even if they have no conscious desire for children. *See infra* note 66; *see also* Jones, *supra* note 3, at 827-935. Women may be attracted to high status males because those males will be best able to provide for offspring, but the women may not consciously experience their attraction as having anything to do with offspring. *See* DAVID M. BUSS, THE EVOLUTION OF DESIRE: STRATEGIES FOR HUMAN MATING 25-27 (1994). Behaviors come to thrive because the behaviors themselves are reproductively beneficial, not because the individuals demonstrating those behaviors desire to reproduce.

18. In fairness, some women may not consider gestational labor unfortunate; they may, at least consciously, consider it a privilege. Those women might be pleased to realize that, even if offspring were made by gametes alone, females would invest more than males because females expend more resources in producing one egg than males do in producing one sperm. *See* DAWKINS, *supra* note 12, at 141-42.

19. Reproductive technologies like surrogacy are changing many of these premises as they change the contexts in which evolutionary processes work.

20. *See* DAWKINS, *supra* note 12, at 146-48. Again, consciousness is unnecessary. *See supra* note 17. A man need not be aware that someone else necessarily will provide for his offspring before he abandons them. A predisposition to leave will survive as long as other providers or caretakers come forward, thus allowing the paternally abandoned offspring to survive.

21. *See* WRIGHT, *supra* note 2, at 66 ("Not long for this world are the genes of a man who spends his time rearing children who aren't his.").

to invest in caretaking. They also make men substantially more likely to diversify their mate choice.[22] The reproductive consequences of diversifying are all positive for men. Even if the offspring produced by such dalliances are unlikely to succeed because of a dearth of male support, at least they have some chance, and the male loses almost nothing (one ejaculation) in the reproduction effort.

In contrast, a female who tries to diversify her mate choice is forced to expend considerable resources in the reproduction effort. If her egg is fertilized, she necessarily must invest all of the resources involved in gestation.[23] Because of this greater initial (and minimum) investment,[24] a female sinks much more into each child than does a male. A lost child is therefore more of a loss to a female than it is to a male. Moreover, a female who is left without any male help to support a child is at great risk of losing that child.[25] Therefore, females try very hard to mate with males who will help them in supporting the child.[26]

Most evolutionary biologists believe that it is because of the incentives males have to abandon their young that females choose their mates very carefully.[27] Females want to make sure that they are mating with men who will help provide resources during pregnancy and thereafter. Although recent feminist sociobiology work has

22. *See* DAWKINS, *supra* note 12, at 146-47. There is "evolutionary pressure on males to invest a little bit less in each child, and to try to have more children by different wives." *Id.* at 147; *see also* ROBERT TRIVERS, SOCIAL EVOLUTION 260-62 (1985).

23. The availability of abortion has not been prevalent enough for long enough to have brought about any significant evolutionary change in this regard. *See* Jones, *supra* note 3, at 849 n.75.

24. For more on the differences between male's and female's minimum parental investment, see *id.* at 849-50.

25. She is at risk for two reasons. First, children and pregnant females must have resources and protection if they are to survive. The interdependence that marks human community, *see* Smuts, *supra* note 10, at 15-17, makes human females more dependent on others than are other primate females. Second, in many species, if a female is pregnant with or has just given birth to a child whose father has abandoned them, there is a significant likelihood that another male, who wants to mate with the female, will kill the child so as to free the female up to produce his own offspring. For the extent to which infanticide plays a consistent and pervasive role in reproductive strategies of all animals, including humans, see INFANTICIDE: COMPARATIVE AND EVOLUTIONARY PERSPECTIVES (Glenn Hausfater & Sarah Blaffer Hrdy eds., 1984).

26. If a female is partnered with a male who will provide for any offspring, regardless of that offspring's paternity, then she has an incentive to find a different sexual mate who has desirable qualities that her providing partner does not have (better size, symmetry, etc.). This is a dangerous strategy, though, because, if the male partner discovers that the offspring are not his own, he may abandon her or harm the offspring. *See supra* note 25.

27. *See, e.g.*, JOHN ALCOCK, ANIMAL BEHAVIOR: AN EVOLUTIONARY APPROACH 499-500 (6th ed. 1998); MATT RIDLEY, THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE 180-81 (1993); TRIVERS, *supra* note 22, at 215-19.

questioned the ubiquity of the choosiness model,[28] much research still supports the notion that females will be more discriminating in mate choice than will males.[29] Luckily, female searches for males who are willing and able to contribute resources to their offspring are not usually in vain. Because in some species (including humans) there are reproductive benefits to high male parental investment, males who develop a tendency to provide resources to their offspring meet with more reproductive success than males who do not.[30]

Females benefit from this male parental investment, but it comes with its own cost. The tradeoff to females for having males who provide is having males who insist on safeguarding their investment. Men want to make sure that they are providing for their own, not someone else's children. Men secure their investment by controlling women's sexuality. As evolutionary psychologist David Buss writes, "In a cross-cultural perspective, the ways in which men attempt to control women's sexuality is nothing short of bewildering."[31] In humans, this male control manifests itself in practices ranging in severity from female genital mutilation to who takes whose last name in marriage. In other species, it manifests itself in a variety of different behaviors, including male bank swallows, who never let a fertile female partner out of their sight, and male zebra finches, who attack females who have been exposed to other males.[32] Psychologists Margo Wilson and Martin Daly conclude that, in controlling women's sexuality, human men come to view women as chattel.[33]

> [M]en lay claim to particular women as songbirds lay claim to territories, as lions lay claim to a kill, or as people of both sexes lay claim to valuables. . . . [R]eferring to man's view of woman as "proprietary" is more than a metaphor: Some of the same mental

28. *See* Sarah Blaffer Hrdy, *Empathy, Polyandry, and the Myth of the Coy Female*, *in* FEMINIST APPROACHES TO SCIENCE 119, 119-20 (Ruth Bleier ed., 1986). Hrdy points out that many female primates mate while pregnant and actively solicit males from outside their troop. *Id.* at 140. Based in part on this data, she suggests that mating for many females, particularly females mating with multiple partners, may be about something other than just providing offspring with an optimal mate or securing resources. *Id.* at 128-29. It may be about encouraging a variety of different males to tolerate and invest in all offspring. *See id.* at 129.

29. *See, e.g.*, TRIVERS, *supra* note 22, at 214; David M. Buss, *Sexual Conflict: Evolutionary Insights into Feminism and the "Battle of the Sexes,"* *in* SEX, POWER, CONFLICT 296, 307 (David M. Buss & Neil M. Malamuth eds., 1996); Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117, 1145 (1997).

30. *See* WRIGHT, *supra* note 2, at 58-59.

31. Buss, *supra* note 29, at 298.

32. *See* TRIVERS, *supra* note 22, at 262-65.

33. Margo Wilson & Martin Daly, *The Man Who Mistook His Wife for a Chattel*, *in* THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE 289, 289 (Jerome H. Barkow et al. eds., 1992).

algorithms are apparently activated in the marital and mercantile spheres.[34]

In a variety of primate species, females who are not claimed as property by males are vulnerable to male aggression. Sometimes this male aggression is itself sexual coercion—i.e., rape. "Among wild orangutans, most copulations by subadult males and nearly half of all copulations by adult males occur after the female's fierce resistance has been overcome through aggression."[35] Captive male chimpanzees and lowland gorillas also use aggression to force females to copulate.[36] Other male on female aggression is best described as indirect sexual coercion. Male chimpanzees will often become physically aggressive with females when the female's estrous swelling begins.[37] The male chimp does not need to use force during the sexual act itself because he has already successfully communicated his power to the female.[38] Jane Goodall posits that, unless he is crippled or very old, a male chimp can almost always force a female chimp to mate.[39] Male rhesus monkeys are also physically aggressive towards females in estrous.[40] Male Hamadryas baboons, who live in groups with several other females and offspring, use neckbites to keep their females from wandering off in the direction of other males. These neckbites rarely break the skin, but their symbolic import is not lost on the females.[41]

Females respond to these aggressive displays with a variety of counterstrategies. They can flee. Before the aggression starts, they can try to mate with a high status male who will then protect them from other males.[42] They can try (usually unsuccessfully) to fight off the aggression.[43] If they have been coerced into sex by a male who will not or cannot provide for the prospective offspring, they can try

34. WRIGHT, *supra* note 2, at 72 (quoting Margo Wilson and Martin Daly).

35. Barbara Smuts, *Male Aggression Against Women: An Evolutionary Perspective*, 3 HUM. NATURE 1, 5 (1992).

36. *See* Barbara B. Smuts & Robert W. Smuts, *Male Aggression and Sexual Coercion of Females in Nonhuman Primates and Other Mammals: Evidence and Theoretical Implications*, 22 ADVANCES STUDY HUM. BEHAV. 1, 6 (1993).

37. *See* JANE GOODALL, THE CHIMPANZEES OF GOMBE: PATTERNS OF BEHAVIOR 444-48 (1986).

38. *See id.* at 446-48.

39. *Id.* at 481.

40. *See* Smuts, *supra* note 35, at 4.

41. *See* HANS KUMMER, SOCIAL ORGANIZATION OF HAMADRYAS BABOONS 36-37 (1968).

42. *See* Sarah L. Mesnick, *Sexual Alliances: Evidence and Evolutionary Implications*, *in* FEMINISM AND EVOLUTIONARY BIOLOGY, *supra* note 4, at 207, 217.

43. This is the strategy female orangutans often use. *See* Smuts & Smuts, *supra* note 36, at 11.

to mate again, quickly, with another male whom they hope will provide for the prospective offspring.[44] They can also try to bond with other females.[45] The absence of female bonds renders females vulnerable. Females in patrilocal societies, who live separated from their kin, and females like orangutans, who live solitary lives, are particularly susceptible to male sexual aggression.[46]

The above suggests that the gender-dynamic story for primates (a class to which humans belong) is not a pretty one. It is a story in which physical aggression and sexual coercion are dominant themes. It is a story in which females struggle to do the best they can but are, by nature and physiology, left terribly vulnerable to male selfishness and physical strength. Heterosexual unions in these situations are best seen as arrangements in which a female agrees to relinquish her own autonomy to a male in return for (1) his gamete, (2) resources that help the female and her offspring survive, and (3) protection from aggression by other males. The arrangement has everything to do with children, little to do with privacy, everything to do with female (but not male) fidelity,[47] and nothing to do with a unified and shared identity.[48]

As Barbara Smuts has cogently argued, however, that story alone does not adequately explain the extent of patriarchy in the human species.[49] In other species, male bonding (which is critical to the maintenance of gender hierarchy) usually breaks down in competition over females. Male bonding evolved in human males, however, because it greatly facilitated efforts to compete with other groups of humans. Once men learned how to protect their bonds between each other, even as they competed with each other for sexual access to women, they greatly enhanced their collective ability to control women. In addition, the unique interdependence of humans, which

44. *See id.* at 12-15.

45. *See id.* at 17-18; *see also* Amy Randall Parish, *Female Relationships in Bonobos (Pan Paniscus): Evidence for Bonding, Cooperation, and Female Dominance in a Male-Philopatric Species*, 7 HUM. NATURE 61, 61-66 (1996).

46. *See* Smuts, *supra* note 10, at 11.

47. Evolutionary theory suggests that, to the extent that females care about male infidelity, they do so only out of fear (conscious or not) that the male's involvement with another female will drain resources from her own children. Females therefore are more concerned with their mate's emotional involvement (because it suggests he will really provide for her). *See* Bruce J. Ellis & Donald Symons, *Sex Differences in Sexual Fantasy: An Evolutionary Psychological Approach*, 27 J. SEX. RES. 527, 546-47 (1990). Males are concerned about their mate's sexual involvement (for fear that they will be conned into providing for offspring that is not their own).

48. The shared identity model is an ideal that many propose for human marriage. *See* MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 94-95 (1993).

49. Smuts, *supra* note 10, at 13-15.

requires all of us to rely on each other for resources, allowed men to centralize their power. All female primates want resource help from males, but unlike other female primates, human females (with or without their offspring) cannot survive on their own. Smuts suggests that

> male-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 . . . .[50]

In addition, Smuts argues that the development of language allowed for the creation of ideologies that greatly facilitated the perpetuation of male dominance. Male-centered language systems and ideologies are, according to Smuts, an "extension and elaboration" on prelinguistic forms of male control.[51]

If Smut's hypothesis with regard to the origins of patriarchy is at all accurate, it suggests that patriarchy is natural and remarkably effective. It suggests that men have been able to channel physical power and biological circumstance into social control. With that social control, they have been able to exacerbate the sexual power differential inherent in nature. The law, as an instrument of social control, is likely to play an important role in this scheme. In the next Part, I will focus on the law's relationship to sex, marriage, and parenthood. All are concepts at the core of biology's story and are institutions about which feminists are vitally concerned.

II. LAW'S STORY

Although sex, marriage, and parenthood are subjects of common interest to legal scholars and biologists, the legal and biological understandings of these subjects are quite distinct. Legally, sex and rape are very different; one gets constitutional protection while the other is a crime.[52] In biology, the distinction between rape and sex is far less clear. Legally, marriage is seen as a unity created by two individuals who commit to each other emotionally and financially in

50. *Id.* at 15-16.

51. *Id.* at 19.

52. Throughout this Essay, I use the word "sex" to refer to heterosexual intercourse. This is a very narrow and unrepresentative definition of sex. For the great majority of Americans, sex often involves practices and patterns that have nothing to do with heterosexual intercourse, *see generally* ROBERT T. MICHAEL ET AL., SEX IN AMERICA 132-68 (1994), but it is the potentially procreative aspects of sex that are particularly important to biological analysis.

order to form a separate entity. In biology, pair-bonding is a binary relationship with exchange at its core. Legally, at least in the past twenty years, parents have been parents and their genders have had an insignificant effect on their rights and responsibilities as parents. In biology, motherhood, because it necessarily involves so much more risk and so much labor, is an altogether different endeavor than fatherhood, which requires only a (very inexpensive) genetic contribution.[53] This Part explores each of those distinctions in more depth.

A. Sex and Rape

A voluntary heterosexual encounter is, as far as the law is concerned, an intensely private affair. It cannot happen in public.[54] Decisions regarding its procreative potential, i.e., birth control, cannot be regulated by the state.[55] The Supreme Court has suggested, though never decided, that the law has no place regulating the exact nature of heterosexual activity,[56] and forty-nine states refuse to entertain contract claims in which sexual activity forms any part of the consideration.[57]

Once there is an allegation that a sexual encounter is involuntary, though, privacy disappears. The existence of involuntariness or duress or force or whatever it is that makes sex rape and not sex[58] completely changes the law's relationship to the act. Rape is

53. Compared to many other primates, humans do demonstrate a high level of male parental involvement, but male involvement is still significantly less than female involvement. *See* WRIGHT, *supra* note 2, at 57-59.

54. For a sampling of fornication statutes, see 720 ILL. COMP. STAT. ANN. 5/11-8 (West 1999); MASS. GEN. LAWS ANN. ch. 272, § 18 (West 1999); WISC. STAT. ANN. § 944.15 (West 1998). All of these states prohibit open and notorious sexual activity.

55. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

56. *See* Bowers v. Hardwick, 478 U.S. 186, 190 (1986). The statute at issue in *Bowers* prohibited all forms of sodomy, but the Court chose only to address the question of whether "the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Id.* The Court's focus on the history of homosexual prohibitions leaves open and brings into question the constitutionality of bans on heterosexual sodomy.

57. Prostitution is legal only in Nevada, and all other states refuse to enforce contracts for sexual services. *See, e.g.*, Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976) ("[E]xpress agreements will be enforced *unless* they rest on an unlawful meretricious consideration.") (emphasis added).

58. There are a myriad of definitions for rape and sexual assault. For instance, in Pennsylvania, intercourse "without consent" is "indecent assault," but the statute does not define "consent." *See* 18 PA. CONS. STAT. ANN. §§ 3121, 3126 (West 1996). California has eliminated the "without consent" requirement and instead relies on the presence of "duress" to make the sexual act a crime. *See* CAL. PENAL CODE § 261(7)(b) (West 1999).

not only illegal, "[s]hort of homicide, it is the 'ultimate violation of self.'"[59] As a New York court framed the distinction: "Rape is not simply a sexual act to which one party does not consent. Rather, it is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm."[60] Because it is degrading and violent and causes lasting physical and psychic harm, the law has every right to prohibit it.

But what is it that makes rape degrading, violent, and dangerous? The law calls rape evil and describes why it is evil but never really explains why it is different than sex.[61] The voluntary acts of women who pose for pornography magazines are degrading, as are the jobs of many sanitary and domestic workers. Many voluntary acts of sadomasochism are violent, as is the National Football League. Sexually transmitted diseases have always made sex physically dangerous, and the emotional overlay implicit for most people in all sexual encounters makes sex psychologically dangerous as well. It is not the degradation, violence, and danger that makes certain reproductive acts rape. It is the fact that women do not want to be participating in those acts. So, it is women's voluntary participation that constitutes the distinction between rape and sex.[62]

This is what the biologists tell us also. Biologists say that the reason a woman would not want to take advantage of a potential opportunity to reproduce is because she might be forced to invest in a deal (i.e., a child) that is not likely to succeed, either because of bad genetic stock (the rapist has bad genes) or lack of resources (the

59. Coker v. Georgia, 433 U.S. 584, 597 (1977) (quoting U.S. DEP'T OF JUSTICE, RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FACILITIES, AND CRIMINAL JUSTICE AGENCIES 1 (1975)).

60. People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984).

61. Some scholars have tried to articulate the distinction between rape and sex. Martha Chamallas suggests that sexual contact is sex not rape when it is motivated by mutual desires for procreation, emotional intimacy, or physical pleasure. Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 784 (1988). Lois Pineau argues that sex must be "the practice of a communicative sexuality, one which combines the appropriate knowledge of the other with respect for the dialectics of desire." Lois Pineau, *Date Rape: A Feminist Analysis*, 8 LAW & PHIL. 217, 234-35 (1989). And Stephen Schulhofer suggests that it is coercive interference with sexual autonomy that makes sex injurious. STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 118 (1998).

62. Many rapes are more physically dangerous and terrifying than more routine instances of coercive sex and other forms of assault. I do not want to minimize the danger that many forms of rape pose. Nonetheless, from a legal and biological standpoint, the critical distinction between rape and sex is not physical danger to the woman; it is her lack of consent. *See infra* notes 107-09 and accompanying text.

rapist is poor and unlikely to help out).[63] She also may be sacrificing her ability to "trade sex for material benefits"[64] and receive future protection from the father of her child.[65] The harm of rape is thus all about the risk to women that they will lose their ability to manage and control their endowments and investments.

To the biologist, then, it is the woman's experience that marks the difference between rape and sex. It follows, therefore, that, for men, rape and sex are not fundamentally different, as the law tries to paint them. They are instead surrogates for one another.[66] For males, the essence of the experience is about the reproductive act, regardless of how the female is experiencing that act. In order to maximize their reproductive success, males get access to that act in any way that they can.

As indicated above, male primates use a variety of different tactics to gain sexual access. Together these tactics suggest that most reproductive encounters can actually be placed on a spectrum of sexual coercion. Male orangutans routinely reproduce by raping.[67] Male chimpanzees routinely reproduce by kidnapping, after which the sexual encounter itself does not have to be forced.[68] Male baboons simply keep their females from having access to any other males and thereby secure the females' cooperation.[69] If we were to impose human law on these primates, we would prosecute them all for different things. The orangutans would be in jail for rape, the chimpanzees for kidnapping, and the baboons for assault (domestic violence). To the biologist, these distinctions would seem pointless, though, because all of the male behaviors are about the same thing. They are all about reproduction; they are all about the sexual act. Thus, rape is not that different from sex just as most other acts of male on female aggression are really not that different than rape. Sexual coercion is not only prevalent but also the norm.

63. *See* Thornhill, *supra* note 5, at 142.

64. Nancy Wilmsen Thornhill, *Psychological Adaptation to Sexual Coercion in Victims and Offenders*, *in* SEX, POWER, CONFLICT, *supra* note 29, at 90, 92.

65. *See id.*

66. *See* Thornhill, *supra* note 5, at 145. Evolutionary theory suggests that men may have a variety of rape-specific psychological adaptations including a "mechanism linking the lack of resources (or the associated variable of a lack of sexual access to females) to the use of rape." *Id.* At least one legal scholar has taken this advice to heart: "Contrary to a view held by many feminists, rape appears to be primarily a substitute for consensual sexual intercourse rather than a manifestation of male hostility . . . ." RICHARD A. POSNER, SEX AND REASON 384 (1992).

67. *See supra* note 35 and accompanying text.

68. *See supra* notes 36-37 and accompanying text.

69. *See supra* note 41 and accompanying text.

The pervasiveness of sexual coercion brings into question the ways in which the law has criminalized coercive sex. Despite the U.S. Supreme Court's insistence that "[s]hort of homicide, [rape] is the 'ultimate violation of self,'"[70] the comparison to other primates suggests that "nonviolent" forms of coercion may be just as devastating as violent forms of coercion. It is not clear that the experience of the female orangutan, whose solitary existence leaves her vulnerable to violent sexual attacks by male orangutans, is all that much worse than that of the female baboon, who lives under the constant supervision of a male who bites her every time she so much as glances at another male. A society that places a high value on autonomy might well prefer the world of the female orangutan to that of the female baboon. Who is left with more "self," the female orangutan who spends the great majority of her time away from the male or the female baboon who can never leave his sight?

Biology tells us that the law's construction of rape as fundamentally different from both sex and other forms of assault is misguided. From men's perspective, rape is not that different than sex. From women's perspective, rape is not that different than other forms of assault and coercion through which men routinely acquire sex.

B. Marriage

The law views marriage as "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."[71] Respect for that noble purpose prevents the law from injecting itself into the marital relationship. In order for the married way of life to thrive, the law must leave marriages alone, so that the union born of two individuals may come to exist as a separate entity.[72] In theory, both individuals and society benefit from the law's deference to the marital entity. As Milton Regan explains, "Spouses . . . don't simply help each other construct separate individual identities. . . . [T]hey participate in the creation of a shared reality in which each partner's

70. Coker v. Georgia, 433 U.S. 584, 597 (1977) (quoting U.S. DEP'T OF JUSTICE, *supra* note 59, at 1).

71. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

72. For explication and critique of this legal deference to the marital entity, see Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1529-38, 1549-58 (1998).

identity is dependent in part on interaction with the other."[73] Participation in this shared identity leads to an expanded idea of self, one in which one sacrifices for the other not because that is one's duty but because the other is a part of oneself.[74] Justice and fairness take on different meanings within such relationships. What is fair and just within the family is a question of what is best for the ultimate health of the family, not a question of what is right in terms of individual desert or value. Thus, even if one party may deserve more than the other, if treating the individuals as individuals and not as a part of a unit detracts from the unity, the law eschews individual treatment.[75]

The law incorporates this collectivist vision of the family in various ways. As a matter of common law, it refuses to interfere with ongoing marital relationships, even when one party seems to be assuming an inappropriate amount of control.[76] Several states still prevent spouses from suing one another in tort[77] or testifying against each other in court.[78] The law also refuses to enforce contracts for care between married partners on the theory that a contract to provide such care lacks consideration because duties of care are a part of the marital relationship.[79] Work performed within the marriage is also nontaxable labor.[80] In addition, for years, the law

73. REGAN, *supra* note 49, at 94-95.

74. *See* LAURENCE D. HOULGATE, FAMILY AND STATE 39 (1988).

75. Various moral teachings encourage families to eschew individual treatment also. We are taught to treat all family members equally even though some members behave much better than others and seem to deserve better treatment. *See Luke* 15:11-32 (the lesson of the Prodigal Son).

76. *See* McGuire v. McGuire, 59 N.W.2d 336, 342 (Neb. 1953) (refusing to order the husband to provide more for his wife because "[t]he living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said on his behalf").

77. *See, e.g.*, Hill v. Hill, 415 So. 2d 20, 24 (Fla. 1982) (upholding spousal immunity doctrine in tort).

78. *See, e.g.*, Trammel v. United States, 445 U.S. 40 (1980). *Trammel* held that the testifying spouse holds the privilege not to testify, meaning that unlike other witnesses, a spouse can choose whether or not to testify against another spouse. *Id.* at 52-53. The law also privileges confidential communications between spouses. *See* United States v. Estes, 793 F.2d 465, 467 (2d Cir. 1986). It allows either spouse to keep the other spouse from testifying about the content of communications that were meant to be kept confidential. *See id.* This privilege is thought to promote communication between spouses and thereby solidify the marital relationship. *See id.* at 467-68. Fostering that relationship is thought of as more important than whatever truth-seeking function might be served by getting more information. *See id.*

79. *See* Borelli v. Brusseau, 12 Cal. App. 4th 647, 654 (1993) (holding that a contract for care between two spouses fails for lack of consideration); State v. Bachmann, 521 N.W.2d 886, 888 (Minn. Ct. App. 1994); Hughes v. Lord, 602 P.2d 1030, 1031 (N.M. 1979).

80. *See* Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 44-55 (1996).

hesitated before interfering in violent marital situations, leaving the spouses to work it out on their own.[81]

To a biologist, all of this legal deference must seem quite odd and inefficient. Robert Trivers suggests an altogether opposite approach to the relationship between the sexes: "One can, in effect, treat the sexes as if they were different species, the opposite sex being a resource relevant to producing maximum surviving offspring."[82] Bargaining between the sexes is central to the biological pair-bonding relationship, and it is far from clear why the law should refuse to enforce those bargains. If one party misrepresents his abilities or fails to provide what he should provide, he has clearly breached his obligation. By refusing to provide a remedy for such a breach, the law refuses to enforce the contracts that are the most central to our existence.[83] By viewing the individuals within marriage as one entity, the law allows the economically and physically stronger individuals to coopt the labor of the weaker party.[84] Furthermore, by failing to see caretaking work as labor worthy of legal recognition, the law ignores the female labor that biologists see as central to the pair bond.

Moreover, to suggest that, once married, spouses no longer perceive their interests independently, is to flatly ignore an evolutionary history in which it is clear that both men and women have tried to maximize their reproductive potential by deceiving their primary partner.[85] To fail to get involved in criminal or tortious

81. *See* R. Emerson Dobash & Russell P. Dobash, *Wives: The Appropriate Victims of Marital Violence*, 2 VICTIMOLOGY 426, 426-32 (1978), *cited in* BEVERLY BALOS & MARY LOUISE FELLOWS, LAW AND VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION 185 (1994).

82. WRIGHT, *supra* note 2, at 57.

83. The law traditionally provided a remedy of sorts in the case of divorce when it awarded alimony to a dependent spouse, but divorce was only available in cases of extreme breach. Divorce is now more widely available, but most maintenance awards are now not grounded in a theory of breach or compensation; they are grounded in theories of rehabilitation. *See* Katharine K. Baker, *Contracting for Security: Paying Married Women What They've Earned*, 55 U. CHI. L. REV. 1193, 1200-03 (1988); Silbaugh, *supra* note 80, at 61. The courts still fail to reward women for the work they have done during marriage and the bargain they made upon entering marriage.

84. Lee Teitelbaum writes, "When courts refuse to resolve intra-spousal financial disputes, that decision is founded on the principle of family autonomy.... However, the practical consequence ... is to confer or ratify the power of one family member over others." Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1174.

85. As discussed above, the consequences of diversifying mate choice—i.e., philandering—are all positive for men, and therefore, men are much more likely to stray than are women. Nonetheless, some women have always risked the consequences of infidelity because there can be advantages to doing so. For instance, some women stray in order to secure more resources. *See* MARJORIE SHOSTAK, NISA: THE LIFE AND WORDS OF A !KUNG WOMAN 271 (1981) (quoting a !Kung woman as saying "when you have lovers, one brings you something and another brings you something else"). Other females may stray as a way of making sure that

disputes between spouses is to ignore that, as Robert Wright puts it, "a basic underlying dynamic between men and women is mutual exploitation."[86] If the law recognized the exploitation that seems obvious to most biologists, it would not hesitate to get involved in incidents of family violence. Indeed, it would anticipate and be careful to control them.

C. Parenthood

Advances in reproductive technology and genetic science have thrown the legal definitions of parenthood into some flux. Traditionally, no one (save possibly the mother) was ever completely sure of paternity, and everyone (who saw the pregnancy) was completely sure of maternity. This led to a jurisprudence in which marriage and support, as much as biological connection, determined fatherhood. The husband of the mother was presumed to be the father of the child[87] and both husband and wife were prohibited from testifying to nonaccess.[88] If the mother was unmarried and the putative father did not come forward to claim paternity, the biological father ran the risk of losing parental rights if someone else wanted to adopt the child.[89] The law of motherhood, on the other hand, has always been straightforward: she who gave birth to the child was its legal mother.[90] This is beginning to change as many state parenthood

certain males are not violent toward their offspring. *See* WRIGHT, *supra* note 2, at 69 (If a powerful male thinks that a woman's young may be his young as well, he is less likely to aggress against them.). Finally, other females may stray to tap into a better gene pool. *See id.* at 69-70. Biologists have proposed a whole variety of theories on why women are not monogamous. *See* Hrdy, *supra* note 28, at 128. Whatever women's incentives to stray, human male testes size strongly suggests that women have done so. The greater a male's testes size, the greater his sperm's chance of beating out other sperm for the precious egg. Human male testes are larger than those of males in purely monogamous species, but somewhat smaller than those of males in highly polygynous species. This suggests that human females have mated with multiple partners throughout our evolutionary history. If females had not put sperm in competition with each other, there would have been no reason for the human male testes to evolve to their current size. *See* R. V. Short, *Sexual Selection and Its Component Parts, Somatic and Genital Selection, as Illustrated by Man and the Great Apes*, 9 ADVANCES STUDY BEHAV. 131, 131-38 (Jay S. Rosenblatt et al. eds., 1979).

86. WRIGHT, *supra* note 2, at 58.

87. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989) (upholding, in the face of contrary biological evidence, California's presumption that the husband of the mother is the father of the child); Mary Louise Fellows, *The Law of Legitimacy: An Instrument of Procreative Power*, 3 COLUM. J. GENDER & L. 495, 498 (1993).

88. *See* Fellows, *supra* note 87, at 498-99.

89. This is still the case. *See* Lehr v. Robertson, 463 U.S. 248 (1983).

90. The first surrogate motherhood case decided in this country adopted this framework. *See In re* Baby M., 537 A.2d 1227 (N.J. 1988) (awarding parental rights to the biological father and surrogate mother).

statutes and judicial opinions are starting to incorporate the technological advances that allow us to determine absolutely the genetic father of a child[91] and to separate completely the genetic and gestational work of motherhood.[92] These changes often show an increased willingness to let genetics be the determinant factor in parenthood.[93]

The fact that the law is in flux as a result of scientific advances makes it all the more important to analyze the intersection of legal and biological meanings of parenthood. In law, once maternity and paternity have been decided, they are seen as equivalents. Each parent has an equal right, at birth, to the custody of the child[94] and each parent has an equal right to block the adoption of the child.[95] No distinction is made between mothers and fathers in custody decisions in cases of divorce.[96] States either presume that parents should share custody[97] or that both parents are, at least as a presumptive matter, equally capable of providing for the children's best interest.[98] Once the initial decision regarding custody is made, the noncustodial parent has the right to invoke the state's authority to monitor the parenting

91. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 45/11(a) (West 1999) ("As soon a practicable, the court . . . may . . . and upon request of a party shall, order or direct the mother, child and alleged father to submit to deoxyribonucleic acid (DNA) tests to determine inherited characteristics.").

92. States are not in agreement about what to do once they separate out these concepts. For example, North Dakota defines the mother as the woman who donated genetic material to the child. *See* N.D. CENT. CODE § 14-19-01(6) (1997). In Virginia, the gestational mother is the mother of the child. *See* VA. CODE ANN. § 20-158(1) (Michie 1995). In *Johnson v. Calvert*, the California Supreme Court awarded maternal rights to the biological mother instead of the gestational mother of the child on the theory that it was the biological mother who intended to mother. 851 P.2d 776, 782 (Cal. 1993) (in banc).

93. *See In re* J. W. T., 872 S.W.2d 189, 193 (Tex. 1994). In *In re J. W. T.*, the Texas Supreme Court allowed a biological father to establish paternity notwithstanding the presumption of paternity in the mother's husband. *Id.* at 198. The court noted that science had become "'the supreme arbiter' of paternity." *Id.* at 193 (quoting John J. Sampson, *Title 2. Parent and Child*, 17 TEX. TECH. L. REV. 1065, 1151 (1986)).

94. *See* 2 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 20.4, at 496 (2d ed. 1987).

95. *See* UNIF. ADOPTION ACT § 2-401, 9 U.L.A. 49 (1999) (requiring both mother and father to consent to the adoption).

96. The tender years doctrine, which routinely awarded custody of a child of tender (young) years to the mother, replaced a paternal preference rule in the nineteenth century. *See* CLARK, *supra* note 94, § 20.4, at 496-97. The doctrine, in turn, gave way to the best interest of the child standard, which makes the law neutral as to mothers and fathers. *See id.* § 20.4, at 498; FINEMAN, *supra* note 15, at 77.

97. A presumption in favor of joint custody exists in 26 states plus the District of Columbia. *See Joint Custody Legislation in the U.S.* (visited Jan. 27, 2000) <http://www.vix.com/crc/research/legislation.html>. *But see, e.g.*, CAL. FAM. CODE § 3040(b) (West 1999).

98. Most states use the best interest of the child standard in determining who should receive custody. For a summary of the major critiques of the standard, see Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2219-97 (1991).

work that the other parent is doing.[99]

Again, to the biologists, this legal construction of parenthood must seem somewhat odd. Biologists view motherhood and fatherhood as wholly different experiences. Critically, biologists view motherhood as a vastly more resource-intensive endeavor with regard to both absolute labor and opportunity costs. The initial female investment in a child is much greater than the male's. Her gamete is much bigger and more costly than his; she contributes all of the gestational resources, while he contributes none; and it is she who is usually responsible for meeting the child's needs during the (particularly) long period of dependency that defines human childhood. All of this mothering labor is critical to our collective survival, but the law seems to ignore it when it equates motherhood and fatherhood.[100]

In addition, the law seems to ignore the evolutionary pressure (not to mention the abundant contemporary evidence)[101] suggesting that men are less inclined than women to invest in children.[102] Some men may be willing to so invest, but given the tendency men have to focus less on each child,[103] it seems odd that the law would presume that both parents are equally fit to caretake.

Finally, the law ignores differentials in the cost of losing a child. A male can, at relatively low cost, create another child. He can continue to do this, with only mildly decreased fertility rates, well into his seventies. For a female, because her eggs are so much more costly than sperm in terms of body resources, and so much more precious than sperm in terms of years of availability, the loss of a child is a very serious loss. Once she spends any time rearing a child, she has incurred huge, often prohibitive opportunity costs that can prevent

99. *See* Baker, *supra* note 72, at 1545-48.

100. It is worth noting that we must rely on normative systems, like the law, instead of our genes if we are to care about our collective survival. Genes are concerned only with their own survival. *See* DAWKINS, *supra* note 12, at 2. The early evolutionists "got it totally and utterly wrong.... They made the erroneous assumption that the important thing in evolution is the good of the *species* (or the group) rather than the good of the individual (or the gene)." *Id.*

101. There are many studies documenting how parents allocate domestic chores, including caretaking. Every study indicates that women spend significantly more time caretaking than do men. For a discussion of these reports, see ARLIE HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 271-78 (1989). Tamar Lewin reports that the average American woman spends 11.5 years of her working life caretaking, while the average man spends six months. Tamar Lewin, *Aging Parents: Women's Burden Grows*, N.Y. TIMES, Nov. 14, 1989, at A1 (quoting Joan Kuriansky, Executive Director of the Older Women's League, a nonprofit advocacy group).

102. *See supra* notes 22, 101 and accompanying text.

103. *See* DAWKINS, *supra* note 12, at 147.

her from parenting again. Thus, the cost of losing a child in a custody battle is likely to be much greater for her than for him.[104]

This disparity in biological opportunity costs not only gives mothers a more compelling equitable claim to custody, it throws into question the law's protection of genetic paternity. If another adult came forward and willingly provided resources for a dependent child, it is hard to see why the biological father should be entitled to interfere with the parenting rights of the biological mother and her chosen parenting partner. Effective parenting has as much to do with providing resources, both emotional and physical, as it has to do with providing genetic material. By not providing for the woman with whom he mated, the biological father has breached the implicit mating bargain. Moreover, because he can so readily make more offspring, the cost to him of not receiving parental rights is comparatively small.

In sum then, biologists must look quizzically at the laws of rape, marriage, and parenthood. The law insists that rape is different than sex, when biologically, at least to men, they are the same act. The law draws bright lines between rape and other forms of assault and coercion even when all these acts, at least to women, render the sexual act involuntary. In marriage, the law creates a fictional unity between two people whose biological interests are best served by exploiting each other. In honoring that unity, the law privileges the party who is best able to exploit the other. With regard to parenthood, the law dismisses the importance of maternal labor, disregards men's disinclination to invest in children, and ignores the greater cost that women bear in losing a child. Thus, if anything, the law exacerbates rather than alleviates the power imbalance that nature created between men and women.

III. LESSONS

At least two important lessons can be drawn from the biological perspective on law offered above. The first is that feminists have

104. Biologists would probably argue that as long as the other parent can be ensured that the child will be cared for, neither of them will be really hurt by losing the child in a custody battle. *See* DAWKINS, *supra* note 12, at 148. But, biologists would also acknowledge that women are more likely than men to develop deep emotional attachments to children because it was more reproductively beneficial for them to do so. Thus, even if losing a custody battle will not impair a female's reproductive success, it is likely that she will be more emotionally hurt by the loss of a child. *See* Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 142-58 (1992).

been fighting for all the right reforms. The second is that feminists must not stop at these reforms. In this Part, I explore what these lessons mean for rape, marriage, and parenthood.

My argument is that biology's findings can support feminist visions, not that biology necessarily proves that feminist solutions are the correct ones normatively. Biology's claims are descriptive, not normative. If biology proves anything, it is with regard to facts.[105] However, those facts (if proven) are deeply disturbing. Indeed, they are facts that most people, feminist or not, biologist or not, normatively evaluate as inequitable and harsh.[106] It is the law's job to channel that normative evaluation into cultural norms and rules that curb the inequity and harshness. Thus, biology's facts support feminist visions because biology's facts make us keenly aware of how imperative normative visions are.

A. Legal Reforms

With regard to rape, the biological model suggests that the presence of physical violence is incidental—not central—to the crime of rape. Consent is the critical issue, as feminist law reformers have long recognized.[107] For years, the law required physical signs of resistance as a way of proving nonconsent, but biology makes clear that consent and acquiescence are very different things. Many females acquiesce to sex only after being kidnapped, assaulted, or physically and emotionally harassed. Sex for a woman under these circumstances should be considered every bit as injurious as it is for the woman who is raped by the man who jumps out of the bushes with a knife. It is the victim's lack of consent that demarcates rape, and the biological account suggests that there are a myriad of situations in which women say yes to sex only because they have no meaningful choice.

105. I am grateful to Owen Jones for highlighting this qualification for me and pointing out how important the normative/descriptive distinction is at this juncture.

106. For biologists who recognize just how disturbing biology's facts are, see DAWKINS, *supra* note 12; Smuts, *supra* note 10, at 1-32. For nonfeminists who recognize just how necessary it is to superimpose social norms on biology's facts, see WRIGHT, *supra* note 2, at 375-78.

107. *See* SCHULHOFER, *supra* note 61, at 31-33. As a strategic matter, the reformers disagreed over whether it was better to define rape simply as sex without consent or to focus on the behavior of the assailant. *See id.* at 31. Those who did not want to make consent the central issue at trial worried that a focus on the woman's state of mind would end up being a trial about the woman's dress, demeanor, and past history, not about her actual state of mind. *See id.* at 25. Rape shield laws were attempts to prevent the consent issue from being swallowed up in an indictment of the rape victim's past history. *See id.*

This abundant absence of meaningful choice for women explains why Catharine MacKinnon is at least sometimes right when she says that "for women it is difficult to distinguish [between rape and intercourse] under conditions of male dominance."[108] It is also why Stephen Schulhofer's new proposal to criminalize any act of sexual penetration to which a woman has consented only after being threatened with losing something to which she is otherwise entitled (a job, reputation, right to receive services for which she has paid, an education, etc.) is a significant step forward.[109] Figuring out whether she said "yes" or "no" is less important than analyzing the (often coercive) circumstances under which the intercourse took place. Like female chimps, gorillas, and baboons, female humans often only consent because they have to.

In addition, the biological account suggests that, to the extent that the law and popular ideology have demonized rapists as psychopaths, they have badly misinterpreted the realities of rape.[110] One of the few cross-cultural surveys on attitudes about rape found that respondents (residents of a large metropolitan city) think that a perpetrator's mental illness is the primary cause of rape.[111] In passing federal evidentiary rule amendments that allow prior convictions of rapists (but not other criminals) to be admitted into evidence, proponents argued that rapists constitute a "small class of depraved criminals."[112] Studies of convicted and potential rapists suggest, as biologists would predict, to the contrary. Researchers consistently fail to find evidence of mental abnormality or illness in rapist populations.[113] Various different studies have found that approximately twenty-five percent of college age men admit to having participated in coercive sex,[114] and other studies suggest that more

108. MACKINNON, *supra* note 13, at 174.

109. SCHULHOFER, *supra* note 61, at 283-84.

110. *See generally* Katharine K. Baker, *Once A Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 576-78 (1997).

111. *See* JOYCE E. WILLIAMS & KAREN A. HOLMES, THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES 118 (1981).

112. David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 24 (1994). Karp's remarks in this article were incorporated into the legislative history of what was later codified as Federal Rule of Evidence 412. *See* 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari); *see also* FED. R. EVID. 412.

113. *See* Lucy W. M. Taylor, *The Role of Offender Profiling in Classifying Rapists: Implications for Counseling*, 6 COUNSELING PSYCHOL. Q. 325, 334 (1993).

114. *See* John Briere & Neil M. Malamuth, *Self-Reported Likelihood of Sexually Aggressive Behavior: Attitudinal Versus Sexual Explanations*, 17 J. RES. PERSONALITY 315, 318 (1983) (finding that 28% of subjects indicated likelihood of raping); Mary P. Koss et al., *The Scope of*

men would rape if they knew they would not get caught.[115] If, as the biologists maintain, rape is not that different from sex, then it would make sense that a sizable number of men would view the two acts interchangeably. Men continue to see rape and sex as substitutes. This finding suggests, as I have argued elsewhere, that real rape reform requires more than just penalizing all rapists. It requires creative and expansive policies aimed at decreasing the motivation for rape, eradicating the rapist-as-psychopath myth, and helping men internalize the wrong of all forms of rape.[116]

With regard to marriage and legal deference to the marital entity, the biological model leads one to question, as feminists have, the purpose and legitimacy of the public/private divide. As Elizabeth Schneider summarizes:

> [P]rivacy has been viewed as problematic by feminists theorists. Privacy has seemed to rest on a division of public and private that has been oppressive to women and has supported male dominance in the family. Privacy reinforces the idea that the personal is separate from the political.[117]

By drawing a boundary around the marital entity and refusing to recognize the bargaining and the work that goes on within that entity, the law renders much of what women do legally worthless and invisible.[118] Biology, like feminism, suggests that the dismissal of women's work ignores the central role that bargaining plays within marriages. Thus biology, like feminism, suggests that contracts between spouses should be enforced, that household labor should be taxed, and that at divorce women should be compensated for what they have earned both in terms of household contribution and

Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students, 55 J. CONSULTING & CLINICAL PSYCHOL. 162, 166 (1987) (finding that 25.1% of men engaged in some form of sexual aggression).

115. *See* Todd Tieger, *Self-Rated Likelihood of Raping and the Social Perception of Rape*, 15 J. RES. PERSONALITY 147, 154 (1981) (finding that 64 out of 172 males indicated "some likelihood of raping").

116. For more on this, see *infra* text accompanying notes 127-33.

117. Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 979 (1991); *see also* Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, *in* PUBLIC AND PRIVATE IN SOCIAL LIFE 281, 295-97 (S. I. Benn & G. F. Gaus eds., 1983). "[Feminists] have shown how the family is a major concern of the state and how, through legislation concerning marriage and sexuality and the policies of the welfare state, the subordinate status of women is presupposed by and maintained by the power of the state." Pateman, *supra*, at 297.

118. "The fact that the law in general has so little bearing on women's day-to-day concerns reflects and underscores their insignificance." Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 151, 156 (David Kairys ed., rev. ed. 1990).

investment in human capital.[119]

The biological perspective also suggests that the normative goal of marital deference is ill advised. Men and women cannot become one because they are independent beings motivated by their own selfish genes. The law tries to make men and women become one in marriage, but in doing so it turns a blind eye to the sexual power differential that is obvious to most biologists. To treat husband and wife as one for evidentiary, tort, and domestic violence purposes keeps the true dynamics of male-female relationships hidden. It reinforces men's ability to suppress the inevitable conflict between men and women.[120] As Fran Olsen suggests, the legal "taboo on inquiring into the quality of male-female relationships may be based more on a fear of exposing systematic inequality than on anything else."[121] Observing those relationships as a matter of course in their work, biologists take for granted what feminists have always maintained, that the personal is political.

With regard to parenthood, the biological model brings into question legal rules regarding custody and parental rights. Biologists think of parenting as a costly but necessary investment. The biological differences between women and men make it inevitable that women will invest more than men initially and highly likely that women will invest more than men throughout the child's period of dependence. Biological differences also make it inevitable that mothers suffer more at the loss of a child than do fathers. Cultural gender norms may amplify and exaggerate these biological differences with regard to both physical and emotional investment in children, but, even without that cultural overlay, science suggests that mothers work much harder at parenting than do fathers. Accordingly, as both Mary Becker and Martha Fineman have argued, mothers should be given preferential status as parents.[122] The biological model supports maternal deference standards in custody determinations[123] and definitions of family that focus on the mother-child dyad rather than the sexual union.[124]

119. For a review of all of these arguments, see Silbaugh, *supra* note 80, at 79-86.

120. *See* Becker, *supra* note 14, at 183 ("Men have an obvious incentive to suppress conflict to preserve the status quo—in which they enjoy a disproportionate share of economic and physical security, leisure time, status, power and sexual satisfaction.").

121. Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 857 n.57 (1985).

122. Becker, *supra* note 104, at 142-58; FINEMAN, *supra* note 15, at 88-89.

123. *See* Becker, *supra* note 104, at 142-58.

124. *See* FINEMAN, *supra* note 15.

In addition, the biological model suggests that statutes conferring fatherhood on men who contribute genetic material instead of on men (or women) who contribute resources to a needy pregnant or postpartum mother are misplaced. The gamete is just one kind of investment that an adult can make in a child. Often, the more costly investment comes with meeting the needs of a mother rendered dependent by pregnancy and child rearing.[125] Thus, as Barbara Woodhouse argues, the gestational father (the person who supports the mother during pregnancy and beyond), not the genetic father, should be the one on whom the law confers parental status.[126]

B. Normative Visions

Perhaps the most important lesson that biology teaches us is that even with most of these reforms in place, the world will still not be one in which we truly wish to live. Even if all forms of sexual coercion are made criminal, even if women's bargains and work in marriage are respected as work, and even if women do get greater parental rights, the most we will have accomplished is a more just way of adjudicating nature's inequities. We want more than that.

For instance, in simply declaring rape the opposite of sex, the law ignores the more subtle ways in which sexual coercion operates. We cannot afford to do this, but neither should we stop once we punish all men who exploit women to get sex. There is value in viewing sex as a private, symbolic expression between two individuals. There is value in thinking of sex as an experience of mutual communicative pleasure,[127] one in which each party is motivated as much by a desire to share as by a desire to "win" or "score" or even procreate. There is value in viewing sex as truly different than rape. If we honor these values, our goal must be to change what many men (and some women) want from sex. We need to manipulate, not merely cabin,

125. *See id.* 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."). The adult dependency created by meeting the dependency needs of offspring is one thing that distinguishes humans from other primates. Most primate females are able to feed both themselves and their young without relying on anyone else. *See* Smuts, *supra* note 10, at 15.

126. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1748-865 (1993). Given the importance of gestational labor, the biological model may also suggest that a gestational surrogate should have a greater claim to parenthood than a mother who merely donates an egg. *Cf.* Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993) (holding that the woman who donated the egg, not the woman who carried the fetus, was the mother of the child).

127. *See* Chamallas, *supra* note 61, at 836-39.

men's biological appetites.[128]

Various cultures have done this before. The ancient Greeks encouraged men to have strong sexual desires as long as they satisfied them in the act of penetration.[129] Stigma depended on whether one was active or passive, not on with whom one was active or passive. In order to consummate their close relationships with other men, Greek males thrust between the tightly clenched thighs of their male lovers.[130] These male/male relationships were often the most affectionate and emotionally meaningful relationships in the lives of Greek men.[131] Thus, the most honored and important sexual interactions were those that, from a biological perspective, made no sense at all.

What this historical example shows us is not that we should return to a world in which active penetration is the mark of healthy sexuality, but that it is possible to define healthy sexuality in a manner that completely ignores reproductive success. Mutuality (of pleasure, commitment, and communication), not intercourse, should define sex, and coercion, not violence, should define rape. If we substituted mutuality for penetration as the defining principle of sexual interaction, it would no longer make sense to substitute rape for sex. To affect this change though, we have to alter men's desire for sex as currently understood. This means manipulating men's desire to engage in rape not just by punishing rape but by making men understand and desire a sex defined by mutuality.[132] If we can change the social meaning of sex, some men may continue to rape, but far fewer men will desire coercive sex. A clear distinction between rape and sex can make sense, as it should, only if we change our social world such that rape and sex are completely different things.

With regard to marriage, there is disagreement about what

128. For more on the various ways in which we might manipulate men's sexual appetites, see Katharine K. Baker, *Unwanted Supply, Unwanted Demand*, 3 GREEN BAG 103, 105-13 (1999).

129. *See* Martha C. Nussbaum, *Constructing Love, Desire, and Care*, *in* SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE 17, 28 (David M. Estlund & Martha C. Nussbaum eds., 1997).

130. *See id.*

131. *See id.*

132. *See* Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 664 (1999).

> In order to alter the belief that nonconsensual sex is a substitute for consensual sex, we need to move beyond a sense that nonconsensual sex is wrong and toward a recognition that it is truly "other." It will not become "other" until we understand the social meaning of the act differently.

Id.

feminism's normative goals might be. Some feminists want to redefine who should be able to enjoy the benefits of marriage, including privacy protection;[133] other feminists want to abolish the notion of marriage and privacy altogether.[134] Those who see value in marriage see value in living a life so blended with another that one views the other and gives to the other as a part of oneself. They see value in alternative systems of justice that rely less on abstract principles and more on situational dynamics.[135] Certainly the work of Carol Gilligan,[136] Nel Noddings,[137] and other relational feminists[138] suggests that these traditionally female notions of connection and justice are worthy of emulation.

Nonetheless, to pursue the feminist benefits of marital privilege without being aware of the potential risks that marriage creates is folly. To treat the notion of interdependence as more important than physical safety, as the law traditionally did in its approach to domestic violence, is clearly wrong. To prevent women from suing on contracts in which they promised to provide domestic caretaking services in return for favorable testamentary provisions, when those domestic caretaking services are readily available in external markets, also

133. *See* Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 816 (1998) ("[M]arriage is worth strengthening because its popularity and its associations with familial responsibility and commitment to others make it too beneficial a resource to abandon."); Robin West, *Universalism, Liberal Theory, and the Problem of Gay Marriage*, 25 FLA. ST. U. L. REV. 705, 727 (1998).

> The right of the individual to marry within his sex is covered by the same right of privacy that protects the individual's right to marry outside his race, to take birth control, or to procure an abortion. It goes to the heart of our right to make fundamental decisions regarding our individual lives.

West, *supra*, at 727; *see also* Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, B.U. L. REV. (forthcoming 2000) (manuscript at 89, on file with author) ("Acknowledging scholars' concerns about the atomization of law and society as significant and in some ways negative, the quest for marriage by same-gender couples can be seen as clearly positive.").

134. *See* FINEMAN, *supra* note 15, at 4-5 (proposing that all relationships between adults be nonlegal and therefore nonprivileged.); Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1535-36 (1993) (arguing that marriage will perpetuate gender stereotypes); *cf.* Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1652-66 (1993) (arguing for gay marriage but against the use of privacy doctrine).

135. *See* ROBIN WEST, CARING FOR JUSTICE 22-93 (1997).

136. CAROL GILLIGAN: IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 24-63 (1982); Carol Gilligan, *Reply to Critics*, *in* AN ETHIC OF CARE: FEMINIST AND INTERDISCIPLINARY PERSPECTIVES 207 (Mary Jeanne Larrabee ed., 1993).

137. NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION (1984).

138. *See, e.g.*, Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 39-42 (1985).

seems quite wrong. Indeed, such holdings arguably undermine the institution of marriage by suggesting that a woman is better off divorcing her husband and then bargaining with him than bargaining with him within marriage. Refusing to provide women who work in the home with various forms of social insurance[139] comparably suggests more of an assumption that women are necessarily beholden to men than a desire to encourage interdependence among equals.

Much of the work that women do within families cannot be bought and sold in an external market, however. Spouses (particularly women) have always provided a forum for intimacy by allowing their partners to feel less atomized, more emotional, and more connected to others.[140] This work—which is the work of intimacy—and the feelings it engenders should be recognized as important, possibly even crucial, to our collective well-being. But it is not clear that the law should put a price tag on it or view marriage as a contract for its provision.[141] By viewing marriage as an exchange between two people, we may destroy the fusion of self, which marriage is supposed to represent.[142] In failing to acknowledge the extent to which the interests of men and women conflict, the law blinds itself to the extent to which men exploit women's labor in marriage. But if we legitimate the biological perspective, which presumes that the interests of men and women conflict, we abandon the normative insights of much of cultural feminism.

At present, the profound economic and political disparity between men and women may make the privacy that marriage affords

139. *See* Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264 (1989) (explaining the various ways in which the social security system fails to address adequately the work that women do within the home); *see also* Silbaugh, *supra* note 80, at 72-79 (describing the home and housework exceptions to the NLRA, OSHA and Worker's Compensation regulations).

140. *See* Baker, *supra* note 72, at 1551-56.

141. For general discussions of the problems associated with commodifying what we tend to think of as incommensurable goods, see ELIZABETH ANDERSON, VALUES IN ETHICS AND ECONOMICS 44-64 (1993); Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

142. Viewing relationships between the sexes as matters of exchange hinders the construction of a shared identity because the notion of exchange itself suggests that the self is separate from the goods or commodities being exchanged. *See* Robin L. West, *Legitimating the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1451 (1993). For instance, in a typical exchange, an individual might trade salt for sugar because she wants to enjoy more sugar and is willing to cope with less salt. In contrast, in an ideal relationship (at least the ideal as embodied in much legal doctrine), one party gives salt and the other gives sugar in order to create something new, something the very existence of which will alter the identities of the parties themselves. *See* REGAN, *supra* note 48, at 63.

too dangerous. If women do not have the political or economic power to live and procreate on their own, without becoming dependent on men in marriage, then it is all too easy for the unity that marriage creates to become a unity in which, as Blackstone said, "the very being and [legal] existence of the woman . . . is . . . entirely . . . incorporated in that of the husband."[143] But our goal should not be to destroy the idea of unity. It may be worth retaining certain marital privileges, like nonintentional spousal tort immunity and the communication and testimonial privileges, in order to support the ideal of unity, even if in doing so we potentially hinder a woman's chance for vindication against a wrongful spouse. It may be worth accepting the law's refusal to interfere with economic distributions within marriage while that marriage is ongoing.[144] It may be important to maintain property distribution and maintenance rules that assume a blending of interests and award property and maintenance at divorce based on a model of ongoing reciprocity, not individual self-fulfillment.[145] Most important, the ideal of unity suggests that economic and political parity[146] should be seen as a prerequisite for, not an impediment to, loving and selfless and honorable marriages. When both parties are capable of independence yet opt instead for a life of interdependence, the union formed is far less likely to fall victim to one-sided exploitation. This recognition, in turn, suggests that we should view marriage between same-sex couples as not merely compatible with, but as the ideal for, heterosexual marriage.[147]

Integrating a feminist normative vision for parenthood into the contemporary legal regime is also difficult.[148] By ignoring mothers' greater physical and emotional investment in parenthood, the law

143. 2 WILLIAM BLACKSTONE, COMMENTARIES *433.

144. *See* McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953).

145. This would suggest that income sharing, not foregone opportunities, contribution, or rehabilitation, should be the principle underlying property distribution and maintenance. *Compare* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 114-41 (2000) (arguing in favor of equalizing the incomes of the two post-divorce households), *and* Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 3 (1989) (suggesting that alimony compensates a spouse for her residual loss of earning capacity).

146. For innovative ways in which we might achieve this political parity in the short term, see Mary Becker, *Patriarchy and Equality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21. Becker suggests that political parity might be achieved through campaign finance reform, proportionate and semiproportionate voting, and votes for children. *Id.*

147. *See* West, *supra* note 133, at 726-29.

148. Katharine Bartlett and Carol Stack recognized this some time ago. Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9, 9-11 (1986) (arguing that it was too soon to abandon the idea of joint custody).

does women a disservice, but it is not clear that the feminist goal for parenthood should be one in which motherhood is exalted over fatherhood. At present, women choose to and do mother much more than men father, but women might well prefer to do less mothering. This is true for two reasons. First, as the biologists well recognize, parenting is work. Women should be compensated for this work, but not conscripted into doing it. In a 1985 study of a cross-section of American mothers, "[a]lmost half reported that day-to-day responsibilities of motherhood were more drudgery than pleasure."[149] We need to be careful in what we ask for. Second, given the extent to which women are socialized to parent, it is likely that our social norms greatly exaggerate whatever biological inclinations women have to mother. As one woman wrote to the *New York Times*: "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."[150] Social norms may encourage women to overinvest in their children.[151] Caretakers that invest too heavily in their children are not necessarily doing themselves or their children much good,[152] and they are allowing men who do not invest as heavily in caretaking to continue to monopolize the distribution of resources and political power.[153]

149. LOUIS E. GENEVIE & EVA MARGOLIES, THE MOTHERHOOD REPORT: HOW MOTHERS REALLY FEEL ABOUT BEING MOTHERS 16 (1987).

150. Peggy Tarvin, Letter to the Editor, *Baby Doll Syndrome*, N.Y. TIMES, Aug. 28, 1995, at A14.

151. It was not until the nineteenth century that women even had the opportunity to devote the kind of time to children that "mothering" is thought to require today. *See* NANCY F. COTT, THE BONDS OF WOMANHOOD: "WOMEN'S SPHERE" IN NEW ENGLAND, 1780-1835, at 26-27 (1977). When the household was the critical locus of food and textile production, women were far too busy producing necessary goods to give children the kind of individualized caretaking that we idealize today. Moreover, working class women have always been responsible for both production and reproduction.

152. Mothers who work outside the home often indicate that their work acts as a buffer against the strains and anxieties of parenting. *See* ROSALIND C. BARNETT & CARYL RIVERS, SHE WORKS, HE WORKS: HOW TWO-INCOME FAMILIES ARE HAPPIER, HEALTHIER, AND BETTER-OFF 56-59, 114-26 (1996). Various childhood experts suggest that children suffer when they are isolated in the world of privatized caretaking. Such children are at risk for becoming overinvested in their caretakers and underinvested in the world around them. *See* BEATRICE B. WHITING & JOHN W. M. WHITING, CHILDREN OF SIX CULTURES 106 (1975); Sarane Spence Boocock, *Children in Contemporary Society*, *in* RETHINKING CHILDHOOD: PERSPECTIVES ON DEVELOPMENT AND SOCIETY 414, 432-34 (Arlene Skolnick ed., 1976).

153. *See* PAULA ENGLAND & GEORGE FARKAS, HOUSEHOLDS, EMPLOYMENT, AND GENDER 55 (1986) ("[M]en typically make fewer relationship-specific investments than women, accumulating instead resources which are as useful outside as within their current relationship."); Katharine K. Baker, *Taking Care of Our Daughters*, 18 CARDOZO L. REV. 1495, 1517 (1997) (book review) ("[W]hen one person invests in caretaking . . . she significantly weakens her ability to compete publicly with one who has not so invested."); Smuts, *supra* note 10, at 1-32 (providing an evolutionary analysis of how men came to control resources and

If we adopt strong maternal preference standards and/or redefine our notion of family so that it centers on the mother-child dyad, we reinforce the division of labor that nature laid out for us. Ignoring the reality of that division when it stares us in the face is unjust, but endorsing the legitimacy of that division by codifying it in law may be unwise. If what women want is not just recognition for the work they do but also help with the work they do, we must do more than just compensate mothers. We must motivate fathers. Just as we must change the social meaning of sex such that rape and sex are, as socially understood, incompatible not substitutable, so must we change the social meaning of parenthood such that fatherhood and motherhood *are* substitutable. If fatherhood were understood to be more about self-sacrifice and emotional investment and less about genetic and financial contribution, women might have to do much less caretaking.

These kinds of changes cannot happen overnight, but the law can facilitate them. Mandatory paternity leave, or at least leave that must be split between two parents if it is to be taken, can help integrate men into the crucial initial stages of child rearing.[154] State-subsidized caretaking markets can help equalize the investments of men and women in their children. Laws that preference emotional investment over genetic contribution also place the appropriate emphasis on the actual work that parenting involves. Biology makes motherhood different from fatherhood. If we want to change that biological reality, we must work hard to do so.

CONCLUSION

The biological perspective helps us see what we know. It reveals how our legal rules ignore the current inevitability of rape, the exploitation inherent in gender dynamics and the work of parenthood. In doing so, it not only confirms the existence of patriarchy, but also demonstrates that patriarchy is the norm in many species. Given the normalcy of patriarchy, it should come as no surprise that a legal system designed and, until quite recently, controlled exclusively by men has not served women well.

political power).

154. *See* RHONA MAHONEY, KIDDING OURSELVES 105 (1995) (describing patterns by which couples allow the first caretaker to become the primary caretaker); Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1055 (1994) (stating that, once the mother stays home initially, it becomes more efficient and emotionally easy for her to become the primary caretaker).

Acknowledging both the normality of patriarchy and the failure of the law to control its inequities need not leave feminists pessimistic, however. Indeed, we can use biological insights to bolster the legitimacy of our claims. Biology's facts parallel our description of the world around us, and those facts often suggest that our concrete attempts to change the law make sense. Biology also reinforces our normative call to affect changes far deeper than legal reform.

If the biologists are right, our genes instruct us to be deeply problematic characters. Men, in particular, are biologically inclined to be violent and selfish toward each other, toward women, and toward most children. If all we have asked for thus far is haven from this violent and selfish male behavior, then we have not asked for nearly enough. With all due deference to Simone de Beauvoir, biology makes clear that the work of feminism must not be limited to creating a world in which women are born and not made.[155] The work of feminism must include taking the men that are born and making them better.

155. *See* SIMONE DE BEAUVOIR, THE SECOND SEX 267 (H. M. Parshley ed. & trans., David Campbell Publishers Ltd. 1989) (1952).