

# OF RICHARD EPSTEIN AND OTHER RADICAL FEMINISTS

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My goal in this discussion is to persuade all members of the Federalist Society that they are or should be feminists. I shall pursue this goal in two ways: first by setting forth an expansive definition of feminist jurisprudence; secondly by showing that anyone who combines the two commitments Richard Epstein urges on feminists—commitments to the descriptive message of sociobiology and to the normative message of libertarianism—must inevitably be, not merely a feminist, but a very radical feminist indeed. In short, feminism is for everyone, especially for Richard Epstein.

## I. WHAT IS FEMINIST JURISPRUDENCE?

I have often been asked to define feminist jurisprudence and have tended in looking for definitions to begin with a dictionary. I shall do that here as well. Let me begin with the less controversial of the two words: etymologically, “jurisprudence” comes from two latin words: “juris”, that is “of law”, and “prudentia”. “Prudentia” is not high theory; it is theory concerned with the concrete situation, the practical problem. Thus, I prefer the term “feminist jurisprudence” to “feminist legal theory” because we need both theory and concrete application.<sup>1</sup> Feminist jurisprudence is

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\* Associate Professor of Law, University of Virginia School of Law. This article brings together three specialized fields of inquiry - sociobiology, libertarianism and radical feminism - for each of which I have had invaluable assistance from experts. The sociobiological portions of the article are in large part a gain from trade with evolutionary biologist Todd Preuss, trade between the disciplines more importantly than between the sexes. I am also grateful to Bill Rodgers, Margaret Gruter and the Gruter Institute for Law and Behavioral Research for first giving me the occasion to think seriously about the connections between sociobiology and feminism, to Bob Dewar for anthropological expertise and to John Monahan for help with literature on violence. Lillian BeVier and John Harrison provided an insider's perspective on the Federalists and libertarianism; Mary Becker, Martha Fineman and Linda McClain help with feminist theory; Eileen Boris historical references; Barbara Armacost, Clay Gillette, Jack Goldsmith, Pam Karlan, Jody Kraus, Cliff Landesman, Saul Levmore, Julia and Paul Mahoney, Richard McAdams, Dan Ortiz, Julie Roin, Paul Stephan, Bill Stuntz, Peter Swire, Jim Whitman, and Jonathan Vogel brainstorming aid and comments on drafts; Kent Olson reference help; Susan Simches secretarial support; and Julia Mc Donough, Emmy Paulette and Stacey Shawn research assistance. I am indebted to them all.

1. This emphasis on the particular over the abstract is important to feminism, which has emphasized its origins in the concrete experiences of women. See, e.g., MARTHA A. FINEMAN & NANCY S. THOMASDEN, *AT THE BOUNDARIES OF THE LAW: FEMINISM AND LEGAL*

a heavily normative area of the law. It asks what, from a feminist perspective, is wrong with the world; how much does the law have to do with creating, reinforcing and maintaining what is wrong; what would the ideal world look like; and how can law help us to get to that ideal. But, what is feminism? Feminism is an extremely controverted term. On the one hand, there are those who say "I am not a feminist but. . .," and then proceed to describe most of the commitments central to any feminist agenda. On the other hand, there are those who say, "I am a feminist but you are not." If, however, you look in the dictionary for a definition of feminism, you generally come to a fairly inclusive one and it is this inclusive definition of feminism that I hope all will come to accept. Dictionary definitions generally talk about a commitment to the equality of the sexes, a commitment to women's rights and the removal of restrictions that discriminate against them.<sup>2</sup> I hope that there are few who, using this terminology, would not be feminists.<sup>3</sup> That, of course, does not answer the question what it means to have equality of the sexes,<sup>4</sup> what it means to have women's rights. This is why feminist jurisprudence remains a topic worth talking about and one about which a lot of people have a lot of contradictory things to say.

I myself think it is important to remember that feminism is not simply about women.<sup>5</sup> Feminism is about the sexes—there are

THEORY xii-xiii (1991) (stressing need for "middle-range theory" that "mediates between the material circumstances of women's lives and the grand realizations that law is gendered, . . . is a manifestation of power . . . and works to the detriment of women," a theory that "connects the empirical with the abstract so that both are enriched.")

2. See, e.g., WEBSTER'S NEW THIRD INTERNATIONAL DICTIONARY (16th ed. 1971) (defining "feminism" as "a: the theory of the political, economic and social equality of the sexes b: organized activity on behalf of women's rights and interests; specif: the 19th and 20th century movement seeking to remove restrictions that discriminate against women.")

3. Or at least, to the extent that they are not active advocates, be sympathetic to feminism.

4. I should note that Martha Fineman insisted in response to my comments at the Symposium that she "oppose[d] equality and do[es] not think it should be a goal of feminism." See, e.g., MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 20-22 (1991) (arguing that equality has limitations because it is a concept with a legal history that cannot be entirely reshaped for feminist ends, and to the extent it is limited to rule-equality or sameness of treatment, rather than equality of results, it poorly serves the needs of women).

5. Thus I disagree with moderator Gary Lawson, whose definitions focus exclusively on women. See Gary Lawson, *Feminist Legal Theories*, HARV. J.L. & PUB. POL'Y 325 (1995) (according to Lawson, feminism may be the "study of the relationship between women and the law," "concern' . . . for improvement in the status of women," etc.). Not all feminist legal theorists would agree with me. See, e.g., Christine Littleton, *Does it Still Make Sense to Talk About "Women"?*, 1 UCLA WOMEN'S L.J. 15, 33 n.84 (1991) ("In this Article I make a claim that I have only recently begun to understand as controversial: feminism is about women. . . . A feminist taking this perspective . . . would not . . . be required or even

two of them.<sup>6</sup> I think we have to focus on how men as well as women fit into the world, because up to now the focus on women has left men in a sense far less free than women.<sup>7</sup> It has also, as critics of liberal feminism have observed, placed too much emphasis on fitting women into the slots left in a world shaped around a male standard. Women themselves will not be completely free unless the feminist focus shifts from women's rights alone to the relations between men and women, to the equality of each in relation to the other and the realization of the freedom of each under law and in the world. But this inclusive definition covers no particular ideology—no particular ideology, that is, about things other than a general commitment to the equality of the sexes. I do, therefore, believe that it is possible to be a conservative and a feminist<sup>8</sup> and I am sorry that the current state of affairs has made a Federalist Society Conference on Feminism seem like a confrontation—it is the feminists versus the federalists. There are probably very few people who arrived saying, "I am both a feminist and a federalist." I hope that more will leave saying this. I particularly hope that one of them will be Richard Epstein.

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encouraged to think about what men might need. . . . I am not making the claim that it is 'wrong' to try to help anyone. . . . The claim is merely that, even though many feminists do sincerely care about men, caring about men is not what feminism is about.")

6. Saying that feminism concerns both men and women is not quite the same as saying that both men and women should be feminists, something I also believe. For, even if feminism concerned and benefitted only women, surely at least some men—those committed to the well-being of the women in their lives or more abstractly to justice—would ally themselves with the feminist cause even if there was nothing directly in it for them. Thus did some whites ally themselves with the abolition and civil rights movements.

7. See Mary Anne Case, *Disaggregating Gender from Sex and Orientation or the Effeminate Man in the Law and Feminist Jurisprudence* (Forthcoming Yale L.J. 1995) (arguing that substitution of gender discrimination against the stereotypically feminine for prohibited discrimination on the basis of sex now leaves men less free to engage in behavior coded feminine than women are to engage in traditionally masculine behavior and that this fact has undesirable consequences for both men and women).

8. My conviction that feminism is quite compatible with conservatism is fueled largely by my long study of the history of feminist theory in western Europe from the mid-fourteenth century to the French Revolution. Some of the most cogent and radical writings on the equality of the sexes from that era are the product of female intellectuals notable among their contemporaries for their conservatism on matters other than sex equality. For a discussion of how these women, notably Christine de Pizan, Marie de Gournay, Mary Astell and Olympe de Gouges, came to feminism, see Mary Anne Case, *From the Mirror of Reason to the Measure of Justice*, 5 YALE J.L. & HUMAN. 115 (1993).

## II. SOCIOBIOLOGY + LIBERTARIANISM = RADICAL FEMINISM

In his Symposium contribution and elsewhere,<sup>9</sup> Epstein urges both libertarianism and sociobiology on feminists.<sup>10</sup> I personally see substantial tension between those two goals, as I shall discuss. But to the extent that they can be combined successfully, the result may surprise Epstein. The combination of his normative libertarian opposition to the elimination of force and fraud and his descriptive emphasis on sociobiology would logically make Epstein a radical feminist.<sup>11</sup> The worldview of a libertarian sociobi-

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9. See, e.g., Richard A. Epstein, *Gender is For Nouns*, 41 DEPAUL L. REV. 981 (1992); *The Authoritarian Impulse in Sex Discrimination Law: A Reply to Professors Abrams and Strauss*, 41 DEPAUL L. REV. 1041 (1992). Besides Kathryn Abrams's and David Strauss's replies to Epstein, the recent legal academic literature on the intersections of feminism, sociobiology and libertarianism includes RICHARD POSNER, *SEX AND REASON* (1992), and the flood of critical reviews it provoked. See, e.g., Robin West, *Review Essay, Sex, Reason and a Taste for the Absurd*, 81 GEO. L.J. 2413 (1993). Sociobiology may appeal to Epstein and Posner because for them it seems to be little more than law and economics plus sex. In their relentless telling of sociobiological "just-so" stories, both Epstein and Posner may have fallen victim to what Todd Preuss has called Occam's dildo. While Occam's razor requires that of two competing explanations the simplest be selected, Occam's dildo predicts that the most titillating of the two explanations will be preferred.

10. Epstein's suggestion that sociobiology is of use to the feminist enterprise is not an original one. See, e.g., *The primal dramatist: He sees the script of human evolution vividly played out by the great apes*, OMNI, June 1993 (interview with Harvard anthropologist and sociobiologist Irvan De Vore by Robert L. Trivers). Matt Cartmill's review of DONNA HARAWAY, *PRIMATE VISIONS: GENDER, RACE AND NATURE IN THE WORLD OF MODERN SCIENCE* (1989) in 12 INT. J. OF PRIMATOLOGY 67, 70 (1991) ("White Capitalist Patriarchy dictated the terms of primatological discourse until the mid-1970's, when sociobiology came along and freed primatology from its male centered paradigms. Nowadays, 'primatology is a genre of feminist theory.' (p.277)") (quoting Haraway)). Although, unlike Haraway, Epstein seems to see sociobiology as a necessary constraint rather than a useful tool for feminists, I shall try to show that he speaks more truly than he knows when he recommends it to them. Contrary to his implicit assumptions, sociobiology would support more cultural and radical feminist views than it would undermine. I am not the first to point out the radical feminist uses of biology to Epstein. See David A. Strauss, *Biology, Difference and Gender Discrimination*, 41 DEPAUL L. REV. 1007, 1012 (1992). The radical feminist implications of libertarianism are explored in SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 74-88 (1989) (demonstrating that under Nozick's entitlement theory, strictly applied, each individual is the property of his mother, who produced him with nothing but her labor, her body and material (i.e. sperm) she obtained by legitimate transfer).

11. I use the term radical both in its common English meaning and in the more technical one used to describe a particular school of feminist jurisprudence. Thus, while some of the "radical" feminist positions I here attribute to Epstein are propounded by what in technical parlance are cultural feminists (e.g. Robin West) and others are quite mainstream, they are also in accord with the views propounded by radical feminist Catharine MacKinnon, whose dominance approach focuses on male violence and seeks to treat women differently when to do so would prevent their subordination. I do not here endorse the use of sociobiology by feminist jurisprudes or any other legal academics. Nor do I endorse all the radical feminist positions I here describe. Rather, I wish only to demonstrate that because Epstein does endorse sociobiology as well as libertarianism, he must needs also endorse something akin to these radical feminist positions. I should note that I have no idea where Epstein stands on most of these issues. He may entirely agree, he may be shocked.

ologist should closely resemble that set forth by Robin West<sup>12</sup> or Catharine MacKinnon; if he were unusually optimistic it might resemble that of Martha Fineman.<sup>13</sup> And such a person should be inclined to favor law reforms ranging from the abolition of marriage to adoption of a reasonable woman standard to a strengthening of tort and criminal laws on sexual coercion.

Of course, this is not what Epstein thinks he gets by urging sociobiology on feminists. Epstein fails to see the radical feminist implications of his positions in part because, as I shall demonstrate, he has got most of his sociobiological facts simply wrong and in part because he has failed to remove the beam from his own eye and that of other males before seeking to remove the mote from the eye of females. In discussing what he posits to be the relevant differences between the sexes, he systematically focuses on differences that disadvantage women but are insignificant in all senses of the word and ignores others that are not only quite large and better documented but normatively far more important. Thus we hear from him much about males' slightly greater average spatial and mathematical abilities and very little about the substantially greater male propensity to violence. This despite the fact that male violence is far more of a problem in society than female math fear.<sup>14</sup> These two kinds of errors loosely

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12. See, e.g., Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987); *Equality Theory, Marital Rape and the Fourteenth Amendment*, 42 FLA. L. REV. 45,62-63 (1990); *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COL. L. REV. 1442 (1993).

13. See, e.g., MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1994).

14. Epstein's blindness is a common one. See, e.g., Susan J. Berkson, *Violence and the Invisible Male*, CHICAGO TRIB., July 29, 1992 at C15. ("See no gender. Hear no gender. Speak no gender. If the gender is male. . . . Oh why is this country so violent, we moan. What's wrong with Americans, we lament. Wrong questions. We should be asking, why are men in this country so violent? What's wrong with American men? Now, before you jump out of your seat and scream that not all men are violent, that there's nothing wrong with American men, stop the 'man-bashing,' look at these statistics from the very manly FBI. According to their 1990 Uniform Crime Reports, 81.6 percent of all crimes are committed by men, almost 89 percent of all violent crimes are committed by men, and 90 percent of all homicides are committed by men. This is not just the majority, but the vast majority, the overwhelming majority. When women are such a vast majority - in any situation - we hear about it. But if that lopsided majority is male, we don't even see it. . . . We see black. We see white. We do not see gender. If the police officers who beat Rodney King had been women, the subject of the analyses would have been 'Women: Fit To Be Cops?'. . . . If women had been out on the streets shooting guns and killing motorists, Time and Newsweek would run cover stories on 'Killer Women: The Phenomenon of Female Violence.' But the perpetrators were male so their gender went unmentioned. Their gender went unnoticed. . . . After their post-Rodney King verdict meeting with President Bush, civil rights leaders told the press that in order for the crisis to be solved, unemployment and poverty had to be eliminated. Men with jobs don't rape? Men with money

track the two broad kinds of biological evidence Epstein seeks to deploy against feminists. The first, more properly called sociobiological, is speculative extrapolation from evidence about non-human primates and other animals and from imaginative recreations of the lives of our distant ancestors.<sup>15</sup> The second, more simply biological, focuses on measurable, testable, quantifiable (although often not yet well measured) differences in present day human beings.<sup>16</sup>

### A. *No Norms From Nature*

Before discussing the sociobiological evidence, however, let me first consider the normative use to which it should be put. Sociobiology strikes me initially as of little relevance to the law and especially to the law as it should be. To rush directly from sociobiological evidence to normative conclusion is to cry, like

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don't batter? . . . The only thing rapists have in common is their gender. . . . A study by the National Institutes of Mental Health found that battering, as well, cuts across all lines of color and economic status. Women are angry. Women are unemployed, are mired in poverty, have despair. Women have lots of rage at men and at a system that oppresses them. By and large, however, women do not batter, rape, or go into the street and shoot men. More attention might be paid if they did. Look at the uproar caused by two fictional characters (Thelma and Louise) who acted on their anger and shot a sexist, abusive man. 'Man-bashing,' the male critics cried.'") Cf. MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 145 (1990) ("For crimes involving force and fraud, male arrests account for 60-99 percent of those arrested. This disproportionality characterizes all official data since the FBI began collecting statistics . . . Unofficial statistics . . . confirm the official portrait. . . . Men are always and everywhere more likely than women to commit criminal acts.")

15. Epstein repeatedly refers to "the sociobiology," as though there were a unified and coherent body of knowledge and theory regarding the behavior of non-human species and its relevance to humans. This is not the case—different scholars often have different interpretations of the causes of behavior in a given species. Moreover, the portraits of human nature drawn by students of animal behavior vary dramatically, depending on what aspects of animal behavior a scientist chooses to emphasize. It should also be noted that the term "sociobiology" has a broad sense and a narrow sense. In the broad sense, "sociobiology" is just the comparative study of the social behavior of animals (including humans). Construed narrowly, "sociobiology" implies a commitment to a particular theoretical agenda, in which behaviors are to be explained as evolutionary adaptations; that is, their causes are to be sought in a history of natural selection. This latter, more narrow view is identified with scholars such as E.O. Wilson, Robert Trivers, Irvan DeVore, and W.D. Hamilton. Students of animal behavior (sociobiologists, *sensu lato*) vary in their degree of commitment to the adaptationist agenda and their degree of willingness to speculate about past events in lieu of evidence, and thus not all would identify themselves as sociobiologists (*sensu stricto*).

16. Although Epstein protests that "the actions of some hormones and neurotransmitters differ sharply between the sexes" and that "we cannot act and speak as though [these silent chemicals] have no influence over social behavior," he barely mentions what he thinks they or their influence may be, let alone what importance it may have to feminist legal theory or to the law more generally. Richard A. Epstein, *Two Challenges for Feminist Thought*, 18 HARV. J.L. & PUB. POL'Y 338 (1995) (hereinafter *Two Challenges*). I shall therefore devote comparatively little attention here to neurobiology.

Shakespeare's bastard villain, "Thou nature art my goddess."<sup>17</sup> This, to me, is a dubious invocation in light of the view, prevalent since the ancient Greeks, that *nomos* and *physis*, law and nature, are antithetical.<sup>18</sup> Law is precisely that which fights nature. If something were all that natural, a law would not be needed to bring it about. This is clear in almost every area of legal scholarship other than those pertaining to sex and gender. It has long puzzled and troubled me that it is only with respect to sex and gender that nature is thought to drive law; only there does the cry go up, not only that whatever is is right, but that it ought to be the law. The evidence for natural human aggression is far stronger than any of the evidence Epstein puts forth in favor of differences between the sexes. No one (least of all Epstein) would, however, suggest that just because human beings are naturally aggressive there should be no laws of murder and assault. Similarly, despite recent interesting studies of the natural deceptiveness of human beings,<sup>19</sup> I don't hear anyone (least of all Epstein) saying that just because human beings are naturally deceptive we should abolish the law of fraud. I, therefore, remain puzzled as to why any state of affairs in nature with respect to the sexes, let alone the weak evidence we have of it, should determine the law with respect to sex and gender.

It now appears that Epstein agrees with much of this analysis, thus revealing himself at least a heretic, if not an apostate from nature worship. The edited version of Epstein's remarks contains the following addition:

Normative Implications. The accumulation of biological information about males and females has important normative implications for the study of human behavior and human institutions. But in order to see these connections we must proceed with some care. One fallacy that must be avoided is the assertion that there must be some necessary connection between the natural and the good. There is no such necessary

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17. WILLIAM SHAKESPEARE, *KING LEAR*, act I, sc. ii. In the context of *Lear*, it is far from accidental that nature is invoked by a bastard villain. After all, *Lear* himself insists, "Allow not nature more than nature needs, man's life is cheap as beast's." *Id.* at act II, sc. IV. And among the lessons of the play is that "unaccommodated man" is not "a poor bare forked creature" but a clever actor, capable of taking on what roles he needs to survive. *Id.* at act III, sc. IV.

18. See, e.g., James Q. Whitman, *Law and the Pre-Modern Mind*, 44 *STAN. L. REV.* 205 (1991) (reviewing DONALD R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION*).

19. See generally ANDREW WHITNEN & RICHARD BYRNE, *MACHIAVELLIAN INTELLIGENCE* (1988); ROBERT TRIVERS, *SOCIAL EVOLUTION* Ch. 16 (1985).

connection. There are all sorts of instincts for which people have strong biological instincts: there are people who like to beat up their rivals, to lie, and to cheat. Indeed, it is precisely because these instincts are so natural and inbred that they are hard to eradicate. Our evolutionary inheritance is what we have for better or for ill, but no one could say that it ideally equips us for life within the social setting.<sup>20</sup>

I find this acknowledgement of the danger of leaping from an is to an ought helpful.<sup>21</sup> Before going on to examine what normative implications from biological information are left, I think a close reading of this passage is in order, for it points up, not only the tension between Epstein's libertarianism and his sociobiology, but also the inconsistencies between his discussion of human nature on the one hand and the nature of males and females on the other. Note the subtle but important nuance in Epstein's formulation—"there are people who like to beat up their rivals. . ."—suggesting that there are also those who do not.<sup>22</sup> In fact, aggression and deception are at least as much human universals as nurturing is a female universal. But when it comes to the sexes, rather than to humans more generally, Epstein doesn't shy away from universals—he insists, for example, that "any male can generate sperm by the billions"<sup>23</sup> although, of course, many males are infertile. He states categorically that "[m]ales will take the initiative [in courtship] . . . [f]emales will

20. *Two Challenges*, *supra* note 16, at 339.

21. While Epstein has in the past said that he "do[es] not wish to be understood as saying that whatever patterns of behavior that one finds in life should be regarded as immune from social criticism and reformation solely because they are at root 'natural' or biological", he has also insisted that "often it seems best to make peace with natural differences instead of railing against them." RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 275 (1992). He has generally supported this eagerness to capitulate to nature with the assertion that "[i]f features of human behavior are regarded as biological, then the cost of change becomes higher, so that the quantity of change that should ideally be demanded through either the political or social process will be correspondingly reduced." Epstein, *supra* note 9, at 1012. This assumption that the natural is per se more costly or difficult to change than the "socially constructed" has already been convincingly refuted by, among others, David Strauss, in his reply to *Gender is for Nouns*. See Strauss, *supra* note 10, at 994 (using the example of eyeglasses correcting "natural" nearsightedness to demonstrate that there is no necessary connection between what is natural and what is difficult to change). See also CATHARINE A. MACKINNON, *Difference and Dominance*, in *FEMINISM UNMODIFIED* at 41. ("Does this differential describe the sex difference? Maybe so. It does describe the systematic relegation of an entire group of people to a condition of inferiority and attribute it to their nature. If this difference were biological, maybe biological intervention would have to be considered. If it were evolutionary, perhaps men would have to evolve differently.").

22. *Two Challenges*, *supra* note 16, at 339.

23. *Id.* at 335.

play hard-to-get."<sup>24</sup> Not "there are males who" or "many males" but simply "males."<sup>25</sup> That this is not just sloppy phrasing can be seen from his formulation of a similar point in other writings. In *Gender is for Nouns*, for example, he conceded that, "All forms of aggression and cheating come quite naturally to *many people* who are actuated by narrow self-interest."<sup>26</sup> To be accurate, Epstein would have to say, as would any sociobiologist, that aggression and cheating come quite naturally to us all (unless of course by

24. *Id.* at 336.

25. *Id.* at 336. Never mind that even sociobiologists do not assert this courtship pattern as universally as Epstein. Never mind also the social reinforcement that condemns sexual aggressiveness or "forwardness" in girls and shyness in boys. Parenthetically, I am at a complete loss as to what conclusions about law Epstein wants us to draw from his sociobiological speculations about courtship patterns and early puberty. Surely as a libertarian he does not want to regulate who asks whom on a date. Is he justifying differential ages for marriage? Surely as a libertarian he sees marriage as a contract. Is he saying men should be withheld from contracting until a later age? Will their raging hormones at puberty render them unfit to enter a binding marital agreement? Is he, like Diderot, reserving young women for mature men and denying older women the right to marry? Is he endorsing teen pregnancy? Could he be saying no means yes?

26. Epstein, *supra* note 9, at 994. The fullest statement of Epstein's view that force and fraud are not human universals may come in the chapter of FORBIDDEN GROUNDS titled "Human Nature." There, he notes that, "It may be objected that, however essential the control of force is to the legal and social order, [the social contract tradition's] description of chaos in a world without law rests on too pessimistic a view of humanity. Its Hobbesian emphasis on the brutish side of human nature is grim, relentless and monochromatic. It does a disservice to the large number of decent people who find the use of force abhorrent, and who are unable and unwilling to practice the fine art of deceit. As a descriptive matter this counterargument contains much truth. Surely we should not want to judge the mainstream of human conduct by looking at the worst actions of the worst individuals. The forces of self-interest may lurk in us all, but they express themselves in different ways. For some people self-interest leads to creativity and cooperation, or it encourages them to excel at helping and not hurting. Only in a small, hardened minority does self-interest translate into the gleeful tendency to perform actions destructive of the welfare of others. . . . [W]e can simplify the rich mosaic of human types by positing a single characteristic—virtue—which is the sum of all desirable human qualities. It is distributed across three groups: first, those that have the welfare of others close to heart; second that great mass of persons . . . at the mean . . . who have . . . individual self-interest tempered by a sense of 'confined generosity' toward others; and third, individuals for whom self-interest is everything, and who will stop short of theft and murder only if confronted with a force stronger than their own. Even this formula understates the level of variation. . . . Ordinary people would not steal or kill even if the severity of the punishment were raised or lowered by 10 percent." Epstein, *supra* note 21, at 16-19. Cf. *Two Challenges*, *supra* note 16, at 334 (describing the dominant drive as individual self-interest, which excludes acting for the benefit of a biological stranger).

Where are the supposedly so all-important sex differences in Epstein's general discussion of human nature? Given what Epstein says about female nature in *Two Challenges*, he should expect to see women disproportionately represented on the altruistic end of the human spectrum; yet here Epstein has nothing to say about sex differences. Cf. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) ("[A]ccording to Hobbes, 'men' are naturally inclined to aggress against those they perceive as the vulnerable other. Again, women are not: infants are dependent upon mothers and vulnerable to them, yet the natural mother does not aggress against her child, she breast-feeds her."). In emphasizing virtuous behavior, Epstein may be seen as aligning himself with the feminine as well as the feminist.

"many people" he means all males, a statement which, given the evidence of the differential male propensity to violent aggression might be plausible, but, given Epstein's emphasis on distinguishing by sex in other areas quite disingenuous—why highlight sex differences everywhere else and obscure them when they put males in a bad light?) Epstein does admit that "[i]t would be foolish to say that all men are categorically different from all women,"<sup>27</sup> but his language seems to succumb to this foolishness altogether too often.<sup>28</sup>

### B. *Better an Autonomous Individual Than Just an Egg*

In insisting on the group characteristics of males and females while downplaying those of humans more generally, such as their propensity to force and fraud, Epstein is simultaneously insufficiently libertarian and insufficiently true to sociobiology. Correcting the latter failing would have important consequences for his suggestion that feminists use sociobiology, as I shall demonstrate below. First I shall consider the former failing in light of his suggestion that feminists also be libertarians.

Epstein correctly describes Justice Joseph Bradley's concurring opinion in *Bradwell v. Illinois* as "the antithesis of a libertarian position, and [one which] should be rejected even by those who think that the biological differences between the sexes do make a difference in their occupational preferences."<sup>29</sup> He fails to realize that while indeed the antithesis of a libertarian position, Bradley's is the embodiment of the very sort of vulgar sociobiological view he champions. Like Epstein, the portion of the opinion Epstein specifically repudiates asserts that

nature herself has always recognized a wide difference in the respective sphere and destinies of man and woman.<sup>30</sup> Man is,

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27. *Two Challenges*, *supra* note 16, at 338.

28. While Epstein incorrectly assumes that violence is only at the margins, he focuses only on the margins when it comes to measurable differences between men and women. Male and female spatial and math abilities differ, if at all, only on the margin, where the demands of modern daily life rarely push us. My own mathematical abilities are not even remotely tested by my job; indeed, my feeble female brain could probably even handle all the math in Epstein's work. Moreover, as a father, Epstein, I hope, has more experience nurturing children than I do, and ain't I a woman, ain't Epstein a man? The day should long have passed when the professional female intellectual was viewed as a freak of nature. See Mary Anne Case, *From the Mirror of Reason to the Measure of Justice*, 5 YALE J.L. & HUMAN. 115, 134 (1993). I hope the day is soon at hand when the nurturing male will be equally unremarkable.

29. *Two Challenges*, *supra* note 16, at 346.

30. *Cf. id.* at 342.

or should be, woman's protector and defender.<sup>31</sup> The natural and proper timidity and delicacy which belong to the female sex evidently unfits it for many of the occupations of civil life.<sup>32</sup> The constitution of the family organization, which is founded in . . . the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.<sup>33</sup> The harmony, not to say the identity of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.<sup>34</sup> . . . It is true that many women are unmarried and not affected by any of the duties, complications and incapacities arising out of the married state, but these are exceptions to the general rule.<sup>35</sup> The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.<sup>36</sup> This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based on exceptional cases.<sup>37</sup>

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31. Cf. *id.* at 341.

32. Cf. *id.* at 337.

33. Cf. *id.* at 337-38.

34. Cf. *id.*

35. Epstein, of course, pays lip service to male/female variety, more so, in fact, than he does to the notion that aggression and deception are human universals. But his occasional acknowledgements cannot paper over his general tendency to reduce the members of each sex to dichotomously gendered traits.

36. Cf. *Two Challenges*, *supra* note 16, at 337-38.

37. *Bradwell v. The State*, 83 U.S. 130, 141-42 (1872). Cf. *Two Challenges*, *supra* note 16, at 347; Richard A. Epstein, *Rule of Sex-Blind Jurisprudence Isn't Always Fair*, WALL ST. J., July 21, 1993, at A15 ("Outmoded stereotypes are one thing, but accurate statistical generalizations are quite another."). The extent of the truth of the proposition that "the rules of civil society must be adapted to the general constitution of things, and cannot be based on exceptional cases" is an extremely interesting and difficult question and one well beyond the scope of this paper. Suffice it to say that sometimes we precisely do legislate for the exception, not the rule: consider for instance, Epstein's own assertion that the criminal law is made for the exceptional bad man, not the overwhelming majority of law abiding citizens; that because "law must control the most lawless" one should not look at its effects "on the average members of the population" but on "those people close to the line". See Epstein, *supra* note 21, at 19. At other times, we "adapt our rules" precisely so as to leave room for the exception; we often have, and in my view should have, especial solicitude for the exceptional case; the areas of law in which we tend to do this include much of constitutional jurisprudence, from the protections of criminal procedure (better that 10 guilty men go free. . .) to the First Amendment and, of course, our current sex discrimination law. See *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 708 (1977) ("The question, therefore, is whether the existence of 'discrimination' is to be determined by comparison of class characteristics or individual characteristics. A 'stereotyped' answer to that question may not be the same as the answer that the language and purpose of the statute command. The statute makes it unlawful 'to discriminate against any individual because of such individual's race, color, religion, sex or national origin.' The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."). In

In short, we see reproduced in Epstein's essay a microcosm of the uneasy alliance of libertarians and traditionalists in the conservative movement. I would be prepared myself, although I cannot speak for all feminists,<sup>38</sup> to take quite seriously and be sympathetic toward the libertarian half of his agenda. In part it relies on exactly what the sociobiological half of the agenda denies, that is my individuality, the fact that I am not simply an egg<sup>39</sup> as Epstein the sociobiologist would have it, but I am a full person, free, rational and autonomous.<sup>40</sup> I would much rather

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other words, we legislate for the exception whenever we perceive the cost of error as high, practically (e.g. theft) or in terms of our commitments and values.

38. See generally Martha A. Fineman's comments at Symposium (arguing that women lead gendered lives and are affected far more than men by inevitable and derivative dependency because of their roles as mothers and as caregivers for those, like children and the elderly, who are not and cannot be as autonomous as libertarian theory demands). The libertarian/traditionalist split may also, interestingly, in some ways parallel that between liberal and cultural feminists.

39. According to Epstein, "the differences in behavior between males and females are as fundamental and enduring as the differences between sperm and eggs." *Two Challenges*, *supra* note 16, at 335. His view seems to be that, just as eggs sit still and sperm swim around, so females are destined to be passive and males active in all things from courtship, to the division of labor in the family (women should sit at home and let men go exploring), to performance in the workforce (women will be overly cautious, men compete). See Epstein, *supra* note 9. Here once again, he is wrong both about the evidence with respect to reproduction and about the implications of that evidence with respect narrowly to reproduction for the rest of the behaviors of men and women. His view of passive eggs and active sperm is old-fashioned and outdated: just as behavioral biology has recently focused on female choice in mating, so reproductive biology has progressed far from the quasi-Aristotelian days when conception was seen as the male generative principle acting on inert female matter. See, e.g., Ann Gibbons & Marcia Barinaga, *Feminists find gender everywhere in science*, 260 *Sci.* 392 (1993) (noting that "the egg's active role in fertilization went unexplored for decades" because "the view of the egg as passive and the sperm as active nicely fit social stereotypes of men and women"); William Booth, *Human Egg Found Able to Signal Sperm; Attractant May be Crucial for Fertility*, *WASH. POST*, April 1, 1991, at A1.

Even were Epstein to have been right about the relative activity of eggs and sperm, it is still quite a leap (one Epstein acknowledges he attempts on sheer speculation, citing no scientific evidence) from the microcosm to the macrocosm, from eggs and sperm to men and women and from reproductive strategies to workplace performance. See Epstein, *supra* note 9, at 992. Cf. Helena Cronin, *Oh Those Bonobos!* *N.Y. TIMES*, April 29, 1993, § 7, at 19 (reviewing MEREDITH SMALL, *FEMALE CHOICES: SEXUAL BEHAVIOR OF FEMALE PRIMATES*) ("Eggs are not diminutive women, nor sperm macho homunculi"); Kathryn Abrams, *Social Construction, Roving Biologism, and Reasonable Women: A Response to Professor Epstein*, 41 *DEPAUL L. REV.* 1021, 1028-29 (1992) (demanding "to know the reasons why race-car drivers should—through conscious effort or instinct—apply strategies for reproductive success when entering the Indy 500"). For a correction of the false assumption that even male and female reproductive strategy dichotomize as Epstein assumes they do, see *infra* note 73.

40. Cf. Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 *HARV. J.L. & PUB. POL'Y* 713, 727 (1989) (asserting that, while the "assumption of individual autonomy - that all individuals are free, equal and independent in the state of nature" - is common to both utilitarian and natural law theories, "[w]ithin the family context, individual autonomy is not a dominant theme"); *Two Challenges*, *supra* note 16, at 337 (assuming women are and ought to be confined largely within the family - "And if the female devotes more

have my libertarian individualist self taken into account, than have Epstein reduce me to my reproductive organs and raging hormones or to a member of a less than fully human class of women.<sup>41</sup>

One way that this can be done is for Epstein to apply his own caveats about a too universalist view of human nature to his discussion of the natures of males and females. About humans more generally, Epstein has said:

A balanced view of society, and of the role of law, requires us to recognize differences in character and temperament just as we recognize differences in height and weight. . . . The uncompromising Hobbesian view of human nature is surely overdrawn as a universal portrait. Whatever the biological origins of humankind, manifold social pressures lead to cooperation as well as conflict, to excellence as well as depravity. To portray people only in harsh tones is to develop a skewed picture of human nature that ignores the enormous variation among individuals. The model can only lead to mistaken judgments about the proper normative political order.<sup>42</sup>

One might, however, respond that the uncompromising Epsteinian view of male and female nature is surely overdrawn as a universal portrait. Whatever the biological origins of humankind, manifold social pressures lead to female assertiveness as well as nurturing, to male fidelity as well as promiscuity. To portray males and females only in dichotomous tones is to develop a skewed picture of human nature that ignores the enormous variation among individuals. The model can only lead to mistaken judgments about the proper normative political order.<sup>43</sup> And, though the criminal law must needs legislate against the exception—detering the bad man and not just the majority of law-abiding citizens<sup>44</sup>—the civil law, as Epstein points out in his defense of libertarianism as a feminist strategy, can leave room for the exception—even if Bradley (or, for that matter Epstein the sociobiologist) is right that most women are unsuited by nature

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time in dealing with offspring, then she will spend less time in dealing with strangers, that is, in dealing in transactions at arm's length, for which the vocabulary of rights is designed.")

41. Cf. West, *supra* note 26.

42. Epstein, *supra* note 21, at 16-18.

43. If Epstein protests that recognizing variety is exactly what he has done, I must insist that the overall tone of his remarks is quite otherwise - however many asides he may make about variety, he has come to praise a universalizing and dichotomous view of the sexes, not to bury it.

44. See Epstein, *supra* note 21.

to the practice of law, there is no need to interfere with the liberty of the exceptional ones by categorically restricting the opportunities of their sex.

Given this it is disturbing to read in Epstein's criticism of Ruth Bader Ginsburg's 1970's sex discrimination jurisprudence a blithe willingness to legislate categorically to the detriment of exceptional women and men with no more justification than speculation about administrative convenience or about popular preferences for traditional sex roles. According to Epstein, in *Reed v. Reed*<sup>45</sup>, "the state made no effort to show that decedents generally preferred men to women as executors. But if that showing could have been made, then the statute should have been upheld. The state would have set up a default rule that best mirrors the preferences of ordinary citizens who have the right to choose executors of their choice."<sup>46</sup> But this is Epstein the utilitarian speaking, not Epstein the libertarian let alone Epstein the sociobiologist. A thoroughgoing libertarian might instead choose the default rule that maximized liberty, while the sociobiologist might suggest that the tiebreaker should be certainty of genetic relationship to the deceased.<sup>47</sup>

That Epstein is at heart neither a libertarian nor a sociobiologist but a rule utilitarian who makes use of both approaches only when convenient becomes clearer in his discussion of subsequent sex discrimination cases. According to Epstein, the

statutory schemes [in *Frontiero v. Richardson*<sup>48</sup> and *Califano v. Goldfarb*<sup>49</sup>] made a great deal more sense than the one in *Reed*. In justifying sex-based classifications, why must the law treat unlike cases alike? If 90% of women were in fact dependent on husbands and only 3% of men on wives—roughly the numbers in *Goldfarb*—then it is good economics, not insidious stereotypes, to treat the two situations differently. To require proof of dependency for wives creates an unnecessary administrative headache since an automatic rule already reaches the right result 90% of the time. Better to spare the

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45. 404 U.S. 71 (1971)

46. Epstein, *supra* note 37, at A15.

47. This would, of course, favor mothers over fathers, grandmothers over grandfathers, and maternal kin over paternal kin. Cf. JOHN H. BECKSTROM, *EVOLUTIONARY JURISPRUDENCE* (1989) (sociobiological analysis of inheritance patterns).

48. 411 U.S. 677 (1972) (striking down requirement that husbands but not wives of armed services personnel prove dependency on their spouse as a condition for the couple's eligibility for various benefits).

49. 430 U.S. 199 (1976) (striking down requirement that widowers, but not widows, prove dependency on their deceased spouse as a condition for receiving survivors' benefits).

paperwork and use the savings to increase the overall benefit levels. To pay benefits to male spouses without scrutiny leads to massive overpayments requiring either additional budget appropriations or benefit reductions. The sex classifications in *Frontiero* and *Goldfarb* are perfectly sensible and should have been sustained unless and until the underlying behavioral patterns shift.<sup>50</sup>

Epstein refers to the result in *Frontiero* and *Goldfarb* as requiring the law to "treat unlike cases alike." In fact, of course, the cases of *Goldfarb* and a widow, as well as of *Frontiero* and a male officer are exactly alike—that was Ruth Bader Ginsburg's point as their counsel. The only difference is that the the plaintiffs are exceptional, their opposite sex counterparts are the norm—they come from classes that are different.<sup>51</sup> But if Epstein is right to treat even that portion of the *Bradley* concurrence describing the legal treatment of exceptions as "the antithesis of a libertarian position",<sup>52</sup> he should want similarly situated individuals to be treated similarly regardless of the general tendencies of the class from which they come.<sup>53</sup> Even under a utilitarian calculus,<sup>54</sup>

50. Epstein, *supra* note 37, at A15.

51. I do not mean to create the false impression that Messrs. *Frontiero* and *Goldfarb* were the masculine equivalents of the exceptional woman. On the contrary, neither diverged far from conventional male biography. *Frontiero* was a student with veterans' benefits while *Goldfarb* only had a claim to greater Social Security payments through his wife because, as a retired federal employee, he was not part of the Social Security system.

52. See *Two challenges*, *supra* note 16, at 346. Indeed, a true libertarian might see what happened to Mrs. *Goldfarb* as a taking - her tax money went to non-dependent widows rather than to her or her spouse. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) ("[S]he not only failed to receive for her family the same protection which a similarly situated male would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others.").

53. See, e.g., *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 708 (1977); *McCabe v. Atchison, T. & S.F. Ry. Co.*, 235 U.S. 151, 161, 162 (1914) (rejecting argument that limited demand by blacks justified providing sleeping cars only for whites on grounds that it made the right "depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned on there being a reasonable demand therefor, but if facilities are provided, substantial equality of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied . . . a facility or convenience . . . which under substantially the same circumstances is furnished to another . . ., he may properly complain that his constitutional privilege has been invaded."); *Missouri ex rel. Gaines*, 305 U.S. 337, 350 (1938) ("Here petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him . . . facilities . . . substantially equal to those which the State afforded for persons of the white race whether or not other negroes sought the same opportunity.").

54. And, again, there is little reason to believe this is the correct calculus, either from a libertarian or a conventional constitutional law perspective. See Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge*:

Epstein seems to have gotten it wrong. Consider the Goldberg statistics as Epstein himself presents them. If, indeed, a full 10% of the widows are unqualified, "sparing the paperwork" and paying them all is much more likely to result in "massive overpayments" than in "savings": the cost-benefit analysis works out Epstein's way only if the additional administrative cost of determining widows' dependency at the time of death exceeds the lifetime payout to the unqualified 10%; even accounting for extreme bureaucratic inefficiency this is hard to imagine.<sup>55</sup> Similarly, in *Frontiero*, the Court specifically found that, on the facts, there simply was no saving of administrative costs.<sup>56</sup> Thus, even before the dignitary harms to women and the benefits of giving a

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*Three Factors in Search of a Value*, 44 U. CHI. L. REV. 28, 49 (1976) ("Finally, it is not clear that the utilitarian balancing analysis asks the constitutionally relevant questions. The due process clause is one of those Bill of Rights protections meant to insure individual liberty in the face of contrary collective action. Therefore, a collective legislative or administrative decision about procedure, one arguably . . . representing an optimum position from the contemporary social perspective, cannot answer the constitutional question of whether due process has been accorded. A balancing analysis that would have the Court merely redetermine the question of social utility is similarly inadequate. There is no reason to believe that the Court has superior competence or legitimacy as a utilitarian balancer except as it performs its peculiar institutional role of insuring that libertarian values are considered in the calculus of decision.").

55. The calculus would seem to tip even further against Epstein when one considers that, under the specific terms of the law, dependency for either sex only becomes an issue after an obligatory determination, whose bureaucratic cost cannot be avoided, that other criteria have been met, notably that the survivor's benefits in his or her own right are less than those available through a spouse. Among the subset of surviving spouses who meet all the other eligibility criteria, widows, I suspect, are more likely than widowers to fail the dependency criteria for at least the following reasons: a) wives tend to be younger than husbands and therefore still in the workforce at the time of their spouses' death; b) women often take time out from the workforce for childbearing and rearing, depressing their overall benefit levels more than their income at the time of their spouses' death; c) in couples where one person's income is earned and the other unearned (and therefore not eligible for insurance benefits), the wage earner is more likely to be the husband. Moreover, the small number of males and large number of females who meet all other criteria, the economies of scale in processing, and the comparatively larger benefits due wage-earning males, whose incomes, on average are higher, might even possibly make it no less efficient in terms of absolute dollars to require proof of dependency from widows only - Epstein would then have it exactly backwards. For some figures, see Mary Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein and Tushnet's Constitutional Law*, 89 COL. L. REV. 264, 273 (1989).

56. See *Frontiero v. Richardson*, 411 U.S. 677, 689-90 (1972) ("[T]he government offers no concrete evidence . . . tending to support its view that such differential treatment in fact saves the government money . . ., that it is actually cheaper to grant increased benefits to all male members, than it is to determine which male members are in fact entitled to such benefits and grant increased benefits only to [them]. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits. [Citing labor statistics.] And in light of the fact that the dependency determination with respect to the husbands of female members is presently made solely on the basis of affidavits, rather than through the more costly hearing process, the Government's explanation of the statutory scheme is, to say the least, questionable."); Cf. Epstein, *supra* note 37, at A15.

couple the liberty to structure their lives without disproportionate disincentives<sup>57</sup> are factored in, the statutes' costs outweigh their benefits.<sup>58</sup>

If only Epstein were as committed to "universal liberty" and "a willingness to expand opportunities for all individuals"<sup>59</sup> as he urges feminists to be, he might realize the limits for women's liberty in his utilitarian calculus. As Amartya Sen has pointed out, "freedom as such is not valued in the utilitarian calculus."<sup>60</sup> It also fails to take account the extent to which those, such as "the thoroughly subjugated housewife. . . in circumstances of long-standing disparity and inequity. . . learn to adjust their desires and pleasures accordingly, since it makes little sense to pine for what does not seem feasible",<sup>61</sup> for such "chronically deprived" people, who "have all learned to keep their desires in check and to make the most of whatever tiny experiences of relief come their way. . . the utilitarian calculus is deeply biased."<sup>62</sup> If Epstein were a more thoroughgoing libertarian, he might join with Sen in acknowledging that:

In an objective sense, women . . . are indeed less free to do various things than men are, and there is nothing in the world to indicate that women will not value more freedom when they actually come to experience it (rather than taking it to be 'unfeasible' or 'unnatural'). The absence of present discontent or felt radical desires cannot wipe out the moral significance of this inequality if individual freedom—including the freedom

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57. See, e.g., Strauss, *supra* note 10, at 1016; Edward J. McCaffery, *Slouching Toward Equality: Gender Discrimination, Market Efficiency and Social Change*, 103 YALE L.J. 595, 649 (1993) ("Epstein ironically commits a version of the sin for which he so often condemns others: he forgets to respect individual autonomy. By focusing only on firms, on the institutional or demand side of the market, where he finds no monopoly power or irrational behavior, Epstein fails to see that individuals, on the supply side, are not being allowed to optimize, to pursue their vision of the good life as best their endowments might allow. Where individuals are blocked by market failures from pursuing their life plans, efficiency talk loses much of its normative appeal.")

58. Thus the statutes might fail even a rational basis test (see *Frontiero*, 341 F. Supp. at 208). Additionally, quite apart from equal protection concerns, they might violate procedural due process under the test formulated by the Court in *Mathews v. Eldridge*. That test arguably would find sex-neutral evidentiary procedures to be constitutionally required because the increased administrative costs would be less than the increased social benefit (even if the latter is measured only in dollars saved the fisc from payments withheld from non-dependent wives, let alone when broader tangible and intangible benefits to women and their families are factored in). See JERRY L. MASHAW, *DUE PROCESS AND THE ADMINISTRATIVE STATE* 102 (1985).

59. *Two Challenges*, *supra* note 16, at 346.

60. Amartya Sen, *Individual Freedom as a Social Commitment*, N.Y. REV. OF BOOKS, June 14, 1990, at 49.

61. *Id.*

62. *Id.*

to assess one's situation and the possibilities of changing it—is accepted as a major value. While the defenders of the status quo can get comfort and support from at least some versions of the utilitarian calculus, that defense cannot survive if individual freedom is indeed a social commitment.<sup>63</sup>

### C. *The Facts of Life*

With these considerations in mind, let us now turn to the normative use to which Epstein wishes to put the descriptive information furnished by sociobiology. Recall that Epstein has renounced the notion that nature, and therefore that sociobiology, is an appropriate source of norms. He continues:

The question still remains, however, as to what framework will tell us which types of natural instincts should be honored, and which should be suppressed. My own view is that the question should be answered by looking to see what forms of human behavior advance overall social welfare. In that inquiry, the distinction between force and fraud on the one hand, and voluntary contract on the other must play a central role.<sup>64</sup>

It might seem at first glance that sociobiology has no useful role to play in this endeavor. Surely, unless we look to nature for our norms, the inquiry into what forms of human behavior will advance social welfare can most readily be made without reference to the genetic origins of the behavior, to whether it may have advanced the welfare of our ancestors on the primitive savannah or to whether it is a behavior also engaged in by "the various primates that are not capable of reflective and conscious reorganization of their social life."<sup>65</sup> Such inquiries seem at best irrelevant and at worst may confuse the issue. Nevertheless, Epstein insists that "[t]he accumulation of biological information about males and females has important normative implications for the study of human behavior and human institutions."<sup>66</sup> It turns out that what he has in mind is something akin to an evidentiary presumption: Seeing a behavior in nature is, for Epstein, a sign that it is the product neither of arbitrary convention

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63. Amartya Sen, *Individual Freedom as a Social Commitment*, N.Y. REV. OF BOOKS, JUNE 14, 1990, at 49, 51. For more on how women have "learned to adjust their desires and pleasures" as a result of systemic male violence, see Irv DeVore, Robin West and discussion thereof, *infra* text accompanying notes 109-14.

64. *Two Challenges*, *supra* note 16, at 339.

65. *Id.* at 333-34.

66. *Id.* at 339.

nor of "domination, exploitation and subordination".<sup>67</sup> It therefore, he assumes, should be immune from feminist criticism on either of these grounds.

There are several difficulties with this assumption. The most significant, about which I will say much more later, is that it establishes a false dichotomy between "domination, exploitation and subordination" on the one hand and the natural on the other: by reading force and fraud out of nature, it reintroduces the previously rejected premise that "there must be some necessary connection between the natural and the good."<sup>68</sup> This suggests that Epstein may only have been paying lip service to a renunciation of faith in nature, like a believer in time of persecution sacrificing to what he sees as false idols. Nature really is his goddess after all; what's more he sees her as a benevolent deity. Even were Epstein's premises in order, however, the conclusions he wishes to draw from them would not follow because, as I shall show, the evidence does not support them.

In taking up Epstein's challenge,<sup>69</sup> I propose to treat the sociobiological evidence as seriously as Epstein urges feminists to do, and follow through its implications. Another, to my mind quite sensible, approach would be to inquire even more seriously into its relevance and significance in our world. Such an approach might begin by invoking John Stuart Mill, one of Epstein's culture heroes, for the proposition that, "[o]f all the vulgar modes of escaping from the consideration of the effect of social and moral influences upon the human mind, the most vulgar is that of attributing the diversities of conduct and character to inherent natural differences."<sup>70</sup> It might go on to wonder why Epstein thinks "[i]t is therefore of especial irony to note that it is only with modern technology that we find it possible to relax the traditional sex roles within the family."<sup>71</sup> After observing that the word traditional is apt, for it is indeed tradition—custom not nature—that creates the roles Epstein describes, it might go on to discuss both the role social construction has played in establishing the sex roles Epstein values so highly and the way our own

67. *Id.* at 341.

68. *Id.* at 339.

69. "Feminism should confront much more explicitly the biological constraints on human behavior. Many distinguished biologists consider these constraints to be quite strong." *Two Challenges*, *supra* note 16, at 333.

70. John Stuart Mill as quoted in ANNE FAUSTO-STERLING'S *MYTHS OF GENDER* 123 (1985).

71. *Two Challenges*, *supra* note 16, at 342.

society, with its modern technology and egalitarian commitments, does indeed make it both possible and desirable to relax them. Notwithstanding my sympathy with such an approach, I shall not follow it here.<sup>72</sup>

Instead, I propose to meet Epstein's challenge on the ground he has chosen, that of the primitive savannah, and with his choice of weapons, libertarian norms and biological evidence.<sup>73</sup> My goal, naturally, is not the aggressive masculine one of winning a battle with him, but the cooperative, feminine one of bringing him into the feminist fold.

One can tell at least two very differently colored stories about the relations between the sexes from a sociobiological perspective: The rosy one some natural scientists are trying to tell about female choice and male cooperation should lead Epstein to feminism because he is predisposed toward the natural.<sup>74</sup> The darker

72. For such an approach, see, e.g., Abrams, *supra* note 39.

73. I do not propose to fight for every inch of the territory, however: To catalogue all the errors Epstein makes in his discussion of sociobiology, I would need to be far better trained in the natural sciences and to write a book. Although I shall generally confine myself to a brief discussion of some problems with those of his premises most central to his argument and mine, let me by way of illustration of what might be said did time, space, information and energy permit, examine just one of Epstein's myriad minor premises in light of actual biological evidence. Consider Epstein's assertion that females are monogamous by nature. It is simply false that "[m]ating with many males produces little additional gain, especially after fertilization takes place, and may well produce some substantial loss, such as the substitution of an inferior male as the father." *Two Challenges*, *supra* note 16, at 336. In fact, the reasons why a female might, and (in many species including ours does) profitably mate with more than one male are many. For example, 1) confusing paternity by mating with several males can give each of these males the incentive to behave as if he were the father; this may prevent a male from attacking her while pregnant or killing her offspring once they are born, as a male interested in hastening the day she mates with him and bears his child may do; on the positive side, it may induce each of the potential fathers to be solicitous of her children; 2) it may allow her to substitute a higher status male as the father while remaining in a pair bond with an "inferior" male who will help raise the child (i.e. it enables division of male reproductive labor between a sperm donor and a father figure); 3) it may promote sperm competition. Scientists have documented each of these effects in both humans and other animals. See, e.g., M.A. BAKER & R.R. BELLIS, *HUMAN SPERM COMPETITION: COPULATION, MASTURBATION AND INFIDELITY* (forthcoming 1995); Robert Wright, *Infidelity: It May Be in our Genes*, TIME, August 15, 1994; Rosie Woodroffe & Amanda Vincent, *Mother's Little Helpers: Patterns of Male Care in Mammals*, 9 TRENDS IN ECOLOGY & EVOLUTION 294, 295, 296 (August 1994). None of this means that monogamy should not be valued in human society, only that it comes no more "naturally" to females than to males.

74. Cf. Jane Lancaster, *Introduction to MEREDITH SMALL, FEMALE PRIMATES: STUDIES BY WOMEN PRIMATOLOGISTS 1-12* (1984) (Examining four areas of sexual dimorphism). See also HARAWAY, *supra* note 10. ([I]n each case, the point is that 'females too do x.' It turns out that 1) females are competitive and take dominance seriously; 2) females too wander and are not embodiments of social attachment and conservatism; 3) females too are sexually assertive; and 4) females have energy demands in their lives as great as those of males. . . . Lancaster's is an origin story about property in the individual body; it is a classic entry in the large text of liberal political theory, rewritten in the language of repro-

one, rife with male violence, will commit him even more dramatically to radical feminism, because he is even more predisposed against force and fraud, however natural. Although Epstein stresses what he calls an "upbeat" view, I will focus instead on nature's Hobbesian rather than its Lockean<sup>75</sup> aspects, because it seems to me that the evidence on the points that most clearly intersect Epstein's discussion more fully supports what he calls "a very grim view."<sup>76</sup> I will also focus largely on the implications of the combination of sociobiological and libertarian commitments for criminal and tort law, because libertarians concede there should be a criminal and tort law, in the way they do not concede there should be, for example, an employment discrimination law, and because these are also the areas of law where violence and its control are most salient.

No matter which of the two visions, or what combination of them, one chooses, however, the implications seem quite different from those imagined by Epstein, but quite familiar to radical feminists. These alternative implications, whose ramifications for the law I shall consider, can be summed up somewhat tendentially under the headings "Men are Well Nigh Useless" and "Men are Slime."<sup>77</sup> The sociobiological evidence unfortunately

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ductive strategy. . . . In the reconstruction of the female primate as an active generator of primate society through active sexuality, physical mobility, energetic demands on self and environment, and social competition . . . female (human) nature is reconstructed to have the capacity to be a citizen, a member of a public 'we,' one who constructs public knowledge, a scientist.)"

75. Compare THOMAS HOBBS, *LEVIATHAN* (describing human life in the state of nature as "solitary, poor, nasty, brutish and short" due to the war of each against all) to JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT* (describing a natural state of relative abundance in which potential peaceful coexistence and co-operation is sabotaged by a few aggressive individuals). Cf. DISCOVER, March 1993 (Nicknaming aggressive young male baboon who harasses females pregnant by other males to induce abortion "Hobbes").

76. *Two Challenges*, *supra* note 16, at 343.

77. The proposition that "Men Are Slime" is not mine, but one that evolutionary psychologist David Buss endorses in his contribution to this volume. See David M. Buss, *Evolution and Human Mating*, 18 HARV. J.L. & PUB. POL'Y 537 (1995). The proposition that "Men Are Well Nigh Useless" is suggested by the comments of Martha Fineman at the Symposium. See Martha L.A. Fineman, *Feminist Theory and Law*, 18 HARV. J.L. & PUB. POL'Y 349 (1995). Fineman sought to "rais[e] the question in biological terms of what role besides donating sperm there is for men in our contemporary society, where women are not only working as market actors, but in fact assuming the major responsibility for children." *Id.* at transcript 36. As I will show, her question might well be asked in a broader sociobiological context, not merely about contemporary society. Cf. Richard A. Epstein, *The Varieties of Self Interest*, 8 SOC. PHIL. & POL'Y 102 (1990) (speculating on why two sexes are preferable to one or three for reproductive purposes) to the findings of the University of British Columbia at Vancouver's Rosemary J. Redfield, as reported in *Birds Do It, Bees Do It . . . But It's Such a Bother*, WASH. POST, May 23, 1994, at B1 (computer simulation of relative costs and benefits shows that "the biological costs of sex for females outweigh any

suggests that interaction with males does not typically provide the sort of benefits to females Epstein posits and often can do them much harm.

### 1. *Men are Well Nigh Useless*

The behavior Epstein posits as offering the greatest gains from trade between the sexes—the division of labor between a female who specializes in reproduction and the nurturing of the young and a male who protects and provisions her and her offspring—is simply not found among any non-human primates or other animals. Epstein's hypothetical sexual division of labor notwithstanding, no female in nature, having given birth, can lie back and expect her mate to bring her dinner. On the contrary, the first thing females in many species must do postpartem is go hunting—childbirth may leave them weak, but it also leaves them hungry. Thus, "a situation in which a mother, the moment after childbirth, took up her hunting implements and sallied forth into the woods", a situation Epstein asks us to imagine only for the purpose of mocking it, is quite true to nature.<sup>78</sup> The only part of this "imagin[ary]" account that is counterfactual is the supposition that the mother can "leav[e] the newborn infant in the care of its father":<sup>79</sup> "Males that remain with their mates are expected to be predisposed to paternal care; the surprise is that many males do not care for their offspring, despite remaining in close proximity to the female and young."<sup>80</sup> The vast majority of vertebrates do not share food at all. Even the exceptions do not exhibit the pattern preferred by Epstein.<sup>81</sup>

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proposed advantage": females are better off with parthenogenesis than with sexual reproduction—they are more likely to have genetically healthy offspring and can pass on more of their genes at less cost.). I want it to be clear that I do not personally endorse either proposition—some of my best friends are men. I simply hope to illustrate the true implications of the sociobiological evidence Epstein, not I, insists we look at. And, if Epstein can, as he admits, "[P]erhaps . . . overstat[e some bits of this information] for dramatic effect", I should be forgiven for doing the same. *Two Challenges*, *supra* note 16, at 339.

78. *Two Challenges*, *supra* note 16, at 341.

79. *Id.* at 341.

80. Woodroffe & Vincent, *supra* note 73, at 295 (citing the examples of gibbons and European badgers).

81. The exceptions include certain birds, marmosets and certain other New World monkeys and social canids. In the latter, food is shared, not simply between mating couples, but generally among the group, which includes mothers who are provisioned by subordinate females who themselves forgo breeding. But not even in any of these exceptional cases can females or infants rely on males for food. Only among eusocial mammals such as naked mole rats is there anything even remotely close to a division of labor in which reproducing females dedicate themselves fully to reproduction because they are provisioned by others in the group. But if eusocial animals or social canids are Epstein's

Ozzie and Harriet cannot be found on the primitive savannah. Rather, the overwhelmingly predominant pattern among non-human primates and other animals, as well as among human societies including our own, is what feminists have dubbed the "double shift" or "second shift", in which the female, in addition to doing the work of childrearing without significant assistance from the male, must labor to provide for herself and her children.<sup>82</sup> Anthropologists have shown that this is the pattern among hunter-gatherer societies, in which women typically provide 60 to 80 percent of the group's diet.<sup>83</sup> Historians have shown that the double shift was the pattern among virtually all classes at virtually all times in Western history.<sup>84</sup> And sociologists have shown that this remains the pattern in other industrialized countries<sup>85</sup> and in America today, not only among so-called single-parent families, but even among so-called nuclear families.<sup>86</sup> Far from being a human, let alone a biological, universal, the separate spheres idealized by Epstein are a rare exception found

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model, he should favor some form of communitarianism, socialism or the extended family, not the nuclear family. For a comprehensive survey of the very limited assistance mammal mothers get, see Woodroffe & Vincent, *supra* note 73; see also ANNE W. GOLDIZEN, TAMARINS AND MARMOSETS: COMMUNAL CARE OF OFFSPRING IN PRIMATE SOCIETIES 33-43 (Barbara B. Smuts et al., ed. 1986) (describing cooperative breeding behavior in which individuals other than the mother are involved as extremely rare among mammals).

82. See generally ARLIE HOCHSHIELD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989).

83. See, e.g., Hill Williams, *Finding Global Ties that Bind—Writer Discovers Unity in Diverse World Cultures*, SEATTLE TIMES, Jan. 29, 1990, at E1. ("[Author John] Reader was deeply impressed with the role of women wherever he went. In a hunter-gatherer society in Africa's Kalahari desert, he learned that 80 percent of the people's diet is vegetable. 'The men, the hunters, go out after preparing themselves with dances, and there is only a one in four chance they'll bring something back,' Reader said. 'When women go out, they bring back food 100 percent of the time.' Pygmy women, speaking through an interpreter, told him: 'We only need men for one thing, and that once a year. So we tell them, sure, go off and kill an elephant.' Reader couldn't help drawing a comparison to the families he talked to in housing projects in Cleveland where, 'there were no fathers, but this network of mothers kept things going, taking care of the children.' "); accord Richard B. Lee, *What Hunters Do For a Living*, in *MAN THE HUNTER* 31, 33 (Richard B. Lee & Irven DeVore ed. 1968); James Woodburn, *An Introduction to Hazda Ecology*, in *id.* 49, 51.

84. See generally STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (1992). An extensive feminist historical literature has documented that separate spheres were a 19th century middle-class invention more prevalent even then in theory than practice—lower class women could not afford to specialize in caring for their children and upper class women did not choose to. In many societies, for example, the latter hired the former as wet nurses.

85. See, e.g., Janice Drakich, *In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood*, 3 *CAN. J. OF WOMEN & L.* (1989) 69, 83-85 (citing studies showing that wives with full time paid employment still spend two to three times as much time on childcare and housework than their husbands do).

86. See, e.g., D. BURDEN & B. GOOGINS, *BOSTON UNIVERSITY BALANCING JOB AND HOME-LIFE STUDY 15* (1987). (Married women in the workforce do twice as much housework as their husbands.).

only among a small segment of the population in a narrow geographic area for a brief moment of human history.<sup>87</sup>

Thus, if Epstein wants to ratify nature, as well as pursue the libertarian project, then he should endorse Martha Fineman's view that the appropriate unit for family law and policy is not the "intact" nuclear family, but mothers and their offspring—he should seek the abolition of marriage and oppose rights for fathers except as they flow from contractual arrangements made with mothers. Fineman proposes that the mother-child dyad be substituted for the married couple as "the core, primal, basic family affiliation" on which law and policy are based.<sup>88</sup> As to marriage, Fineman says:

[W]e should abolish marriage as a legal category and with it any privilege based on sexual affiliation. . . . There would be no special legal rules governing the relationships between husband and wife . . . as now exist in family law. Instead, the interactions of male and female sexual affiliates would be governed by the same rules that regulate other interactions in our society—specifically those of contract and property, as well as tort and criminal law. The illusive equality between adults in sexual and all other areas would thus be asserted and assumed, a result which to many will be symbolically appealing. Women and men would operate outside the confines of marriage, transacting and interacting without the fetters of legalities they did not voluntarily choose. Of course, people would be free to engage in "ceremonious" marriage; such an event would have no legal (enforceable in court) consequences . . . [and] no imposed terms such as now operate in the context of marriage. . . . One benefit of abolishing marriage as a legal category (on which a whole system of public and private subsidies and pro-

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87. Cf. June Carbone & Margaret Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change and Divorce Reform*, 65 *TULANE L. REV.* 953 (1991) (noting that Gary Becker is "using the language of economics to re-invent the separate spheres that were the hallmark of the nineteenth century ideal of complementarity").

88. FINEMAN, *supra* note 13, at 228-30. Cf. Sherwood L. Washburn, *Human Behavior and the Behavior of Other Animals*, in *SOCIOBIOLOGY EXAMINED* 254, 259-60 (Ashley Montagu, ed., 1980) ("The idea that sexual attraction is responsible for the existence of the social group in nonhuman primates and for the family in man is appealing. It is simple and easily stated, and in our culture, biological explanations are regarded as more scientific than social ones; but the sexual attraction theory of society does not fit the data - even in the case of our closest relatives. . . . The importance of sex as *the* binding mechanism is an idea that comes from 19th century European culture, just as the lack-of-estrus-monogamy theory comes from a simplistic view of our culture. Social organization is the most important adaptive mechanism, and sex adds a wide variety of attractive or disruptive behaviors."); Rhonda Hillbery, *The household issue: Scholars say genetic predisposition doesn't dictate the form of the family*, *MINNEAPOLIS STAR TRIB.*, May 1, 1994, at 1A. Gibbons are monogamous, baboons polygynous, chimpanzees promiscuous, but this describes their sexual activity, not the rest of their family life.

tections are based) is that the state interest in bolstering the institution would dissolve. Adult, voluntary sexual interactions would be of no concern to the state since there would no longer be a state-preferred model of family intimacy to protect and support. Therefore, all such sexual relationships would be permitted—nothing prohibited—nothing privileged. . . . Ending legal marriage would have other diverse beneficial implications. For example, it would remove the justification for the defense of marriage to a charge of rape; it would render indefensible the differential treatment of children based on their parents' marital status; it would obliterate the whole idea of "marital property" . . . This proposal . . . which I realize may be viewed as quite radical, is necessary given the ideological position of the sexual family and its role in maintaining inequality.<sup>89</sup>

Fineman's proposal would allow Epstein to be true to his insistence that "[t]he basic biological theory is important . . . because it gives some broad and useful clues as to the direction that these [voluntary] interactions [within the family] will take."<sup>90</sup> Epstein made this assertion under the mistaken impression that the "natural" direction these interactions would take is that of the "traditional" couple occupying separate spheres. As we see, there is instead much evidence to suggest that, instead, what some may think of as a deviant or broken family—that of a single mother and her children—is even more likely to emerge "naturally." This basic family unit is defined by, as Fineman puts it, "a vertical rather than a horizontal tie; a biological rather than a sexual affiliation, an inter-generational organization of intimacy."<sup>91</sup> For the very reason set out at length in Epstein's paper, i.e. that inclusive fitness negates pure altruism but encourages concern for kin, a mother and children are far more likely to work cooperatively and productively for mutual interest than would those biological strangers a husband and wife.<sup>92</sup> Epstein must acknowledge, on the strength of the very biological evidence he himself cites, that the mother-child dyad is far more likely to guarantee mutual gains from trade than is the sexual couple. If Epstein was not merely using biological evidence instrumentally in support of his unshakeable prior commitment to "traditional" marriage, but is prepared to follow the evidence wherever it may lead short of

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89. Fineman, *supra* note 2 at 228-30.

90. *Two Challenges*, *supra* note 16, at 340.

91. Fineman, *supra* note 2, at 6.

92. See *Two Challenges*, *supra* note 16, at 333-35.

force or fraud, he should therefore give the same blessing to single mothers he urged us, on the basis of insufficient data, to give the traditional family. As I understand the scope of that blessing, now circumscribed by Epstein's renunciation of nature as a source of norms, it is limited but significant: We are to look to nature for patterns and trends which, to the extent a biological cause can plausibly be identified for them, should then be absolved of the accusation that they result from questionable and distorting societal pressures. Thus, as Epstein asserted that it is nature, not the patriarchy, that gave us so many traditional families, he should similarly now take the view that it is nature, not our degenerate, promiscuous society, that led to so many households headed by single mothers.<sup>93</sup>

Quite apart from the sociobiological support it may have, Fineman's proposal should also appeal to Epstein because it is more true to libertarian norms than is state-sponsored marriage. That Epstein is far from Fineman's position because, in fact, he values traditional marriage far more than he does either libertarianism or sociobiology is clear from his denial that under his Takings theory, "the criminal laws against prostitution violate the eminent domain clause."<sup>94</sup> According to Epstein, prostitution's harmful externalities permitted its prohibition:

In addition I may be sufficiently old-fashioned, but prostitution seems problematic because many of these men are married. They took vows which said 'exclusive unto thee' and now they're in breach of the marriage contract. The law of inducement of breach of contract is generally a recognition of the inadequacy of direct remedy against the other contracting party. Sometimes you have to go after third parties. . . . [W]hen you can't get the right wrongdoer it may well be necessary to accept broad restrictive practices.<sup>95</sup>

The flaws in this chain of reasoning are almost too obvious and numerous to catalogue. To begin with, not all men are married; surely if adultery is the harm it would be possible to prohibit only adulterous prostitution. Moreover, we do not treat marriage, let

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93. Cf. William D. Murray, *Quayle blames L.A. riots on disintegrating family unit*, UPI, May 19, 1992 (stating that the Vice-President criticizes Murphy Brown for "bearing a child alone and calling it just another 'lifestyle' choice"). Of course, Epstein is free to continue to argue in favor of the traditional family if he wishes. But he should realize that the best arguments in its favor will not be biological and, indeed, that biological arguments may cut against him.

94. Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 32 (1986).

95. Richard A. Epstein, *Proceedings of the Conference on Takings of Property and the Constitution*, 41 U. MIAMI L. REV. 49, 83 (1986).

alone the vows recited during the marriage ceremony, as an enforceable contract; even if we did, we do not specifically enforce, we do not permit speculative damages; we certainly do not criminalize inducement to breach, indeed, we often permit breach. Moreover, we do not allow free contracting over the terms of the marriage contract; if we did, there are many reasons to suppose that not all couples would bargain for fidelity. What the anti-prostitution argument tells us, however, is the strength of Epstein's commitment to traditional marriage even when it contradicts libertarian principles<sup>96</sup> as well as sociobiological evidence.

## 2. *Men are Slime*

As his attempt to derive separate spheres from nature shows, for someone who cites Hobbes so often, Epstein has a remarkably benign view of nature: it's warm and cuddly, not red in tooth and claw;<sup>97</sup> This "upbeat"<sup>98</sup> view leads him astray when he tries to draw normative implications from sociobiological evidence. For, in his argument for the traditional family (an argument which, as I have suggested, the sociobiological evidence does not support) Epstein draws a bright-line distinction between contractual arrangements "procured by force or fraud" and those induced by "genuine human needs, born of scarcity."<sup>99</sup> As the sociobiological evidence makes abundantly clear, this is a false dichotomy. Epstein grossly underestimates the extent of force and fraud in

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96. Cf. Frances Olsen, *The Myth of State Intervention in the Family*, 18 MICH. J.L. REF. 835, 857 & n.57 (1985) ("[C]onsider the laws that forbid prostitution and nullify contracts when sexual services constitute all or part of the consideration on one side of the agreement. In our present society, the effect of nullifying such contracts usually enriches the male at the expense of the female. . . . The anti-prostitution rule also limits the right to contract, and limits it in a way more likely to hurt women than men. It is one thing to say that we will not assume that men necessarily get more out of sexual intercourse than women do, but it is quite another to say that courts may not consider and couples may not contract about any differential benefit that may accrue. Given the statistics on present satisfaction with sexual intercourse, I would suggest that this clearly harms women."). Epstein's analysis is typical of one that prevents women from being free market actors because it insists, as does the law, that most of the services over which women have market power (e.g. their sexual and gestational services) must be given away, not sold.

97. Surely we all would like it if "love [were] creation's final law / Tho Nature red in tooth and claw / with ravine shrieked against his creed," but there should be no confusing the law of love and the law of nature; indeed, as Tennyson reminds us, they are at odds. Alfred Lord Tennyson, *In Memoriam A.H.H.*

98. *Two Challenges*, *supra* note 16, at 343.

99. *Id.* at 340.

nature.<sup>100</sup> More particularly, he overlooks the extent to which the "genuine human needs" that drive male-female interaction include male needs satisfied by force and the female need to protect herself against the exercise of male violence.<sup>101</sup>

In contrast to Epstein, evolutionary psychologist David Buss, who also spoke at the Conference about human mating strategies from a biological perspective, put male violence front and center. Buss's matrix of "strategic interference", or the costs imposed by conflict in sexual strategies, highlighted the 70% of homicides perpetrated by one male on another and the substantial minority of homicides men perpetrate on women because they are enraged by real, imagined or threatened sexual infidelity or defection from the relationship on the part of the woman.<sup>102</sup> By contrast, according to Buss, female on female

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100. He may also go on to overestimate the extent to which the mere existence of civil society eliminates the threat of force and fraud. If he does do the latter (it's hard to tell, given how absent force and fraud are from his picture of the natural world) he is, at least with respect to women, making another serious error. Once again, he would do well to listen to John Stuart Mill, who said: "[P]eople flatter themselves that the rule of mere force is ended; that the law of the stronger cannot be the reason of existence of anything which has remained in full operation down to the present time. However any of our present institutions may have begun, it can only, they think, have been preserved to this period of advanced civilization by a well-grounded feeling of its adaptation to human nature, and conduciveness to the general good. They do not understand the great vitality and durability of institutions which place right on the side of might . . . how slowly these bad institutions give way, . . . beginning with those which are least interwoven with the daily habits of life; and how rarely those who have obtained legal power because they first had physical, have ever lost their hold of it until the physical power had passed over to the other side. Such a shifting of physical force not having taken place in the case of women; this fact, . . . made it certain that this branch of the system of right based on might, would be the very last to disappear. . . . [S]o long as it does not proclaim its own origin and discussion has not brought out its true character, [it] is not felt to jar with modern civilization, any more than domestic slavery among the Greeks jarred with their notion of themselves as a free people. The truth is, that people of the present and the last two or three generations have lost all practical sense of the primitive condition of humanity. . . . People are not aware how entirely, in former ages, the law of superior strength was the rule of life; how publically and openly it was avowed. History gives a cruel experience of human nature, in shewing how exactly the regard due the life, possessions, and entire earthly happiness of any class of persons, was measured by what they had the power of enforcing; how all who made any resistance to authorities that had arms in their hands had not only the law of force but all other laws, and all notions of social obligation against them. . . ." JOHN STUART MILL, *THE SUBJECTION OF WOMEN* in JOHN STUART MILL & HARRIET TAYLOR MILL, *ESSAYS ON SEX EQUALITY*, 131-32 (Alice Rossi, ed., 1970).

101. Let me once again insist that I personally am not here saying that all relations between men and women are irreparably tainted by force and fraud, but merely that the sociobiological evidence Epstein, not I, insists we look at may suggest this.

102. See generally, MARTIN DALY & MARGO WILSON, *HOMICIDE* (1988); Daly, Wilson and Weghorst, S.J., *Male Sexual Jealousy*, 3 *ETHOLOGY & SOCIOBIOLOGY* 11 (1982) (analyzing murders of women by their husbands and finding the results match Darwinian predictions about males ensuring their female mates' fidelity).

homicide is quite rare<sup>103</sup> and female on male homicide “typically occurs in defense against a man who is enraged about infidelity or defection, or after a prolonged history of abuse. . . .<sup>104</sup> Men also inflict costs on women of a very different sort than homicide, sexual aggression, sexual harassment, sexual coercion— . . . these situations typically involve male perpetrators and female victims.”<sup>105</sup> Additionally, Buss notes, male sexual jealousy is responsible for devices to control female sexuality ranging from cloistering to genital mutilation.<sup>106</sup> The only costs Buss claims women inflict on men are “sexual exclusion and sexual withholding”, about which he sensibly notes that while “psychologically, men experience these forms of exclusion as costs. . . women obviously have and should have control over whom they want to date, marry and have sex with.”<sup>107</sup>

The hypothesis that “men are slime”, which Buss concedes may account for all his data,<sup>108</sup> is, like the data on male violence themselves, noticeably missing from Epstein’s account of relations between the sexes. Male violence and its costs are not, however, missing from the accounts of sociobiologists. Consider the following exchange between two of the most eminent proponents of sociobiology, Harvard anthropologist Irvan DeVore, the patriarch of primate sociobiology, and Berkeley biologist Robert Trivers, whom Epstein cites frequently:

[Trivers for] Omni [Magazine]: Are you still being attacked by feminists?

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103. Buss, *supra* note 77, at 539. While men kill each other, according to Buss, women just verbally “derogate” each other, laughing at flaws in another woman’s appearance. Even here, however, his example of such a colorful stream of insults comes, not from the actual experience of women, but from a fictional account of two women written by a male author: it’s a bit of male fantasy. See *id.* at 539 n.12 (quoting JOHN BARTH, *THE SOT-WEED FACTOR* (1987) to “illustrat[e] the enormous range of insults hurled by women”).

104. Cf. Catharine A. MacKinnon, *Toward Feminist Jurisprudence* 34 *STAN. L. REV.* 703, 716-17 & n.72 (1982) (Reviewing ANN JONES, *WOMEN WHO KILL*) (“[T]he norm of romantic love situates the sexes differently with respect to passionate violence. Perhaps that norm tends to legitimize women’s victimization at the hands of men, at the same time requiring some sex specific explanation for women who respond in kind. Indeed, it is this kind of process that creates the social category and problematic of ‘women who kill’ in the first place. The process only becomes visible upon inquiring whether men who kill for similar putative reasons are regarded as acting sex-specifically, *as men*. The point is not to develop a gender-neutral explanation for female violence, but to expose the sex-specificity of male violence.”).

105. Buss, *supra* note 77, at 538. The atypical cases, he notes, involve male perpetrators and male victims, as in prison rapes.

106. *Id.* at 539.

107. *Id.* at 540.

108. *Id.*

DeVore: Oh yes, but not so much anymore. At first, our investigations were largely devoted to analyzing strategies of male reproduction — male behavior tends to be far more flamboyant and male reproductive success tends to vary more than females'. Yet my female graduate students knew in their guts that this could not be the whole story; they began to educate themselves and me. Together, we worked through the reality of male-female relations in animal and human societies. Perhaps I'm proudest of the fact that these bright young women, confronted with fundamental theory in biology, are able to reconcile social and feminist concerns with it.

[Trivers for] Omni: Can you give me an example?

DeVore: Male domination of women — as measured by the grievous statistics on murder, rape, spousal assault, and infant killing, and myriad lesser costs — is unquestionably a problem in human society. What has been in doubt is how recent a phenomenon this might be. Barbara Smuts' review suggests it is not recent at all. A general pattern of male coercion of female sexuality exists in many *primates*. Male aggression toward females commonly rises as the females become more sexually attractive, because dominant males seek to prevent female sexual congress with other males, some of whom may be preferred by the female. Forced copulations, infanticide, aggression toward and murder of females occur throughout *primates* but with very different frequencies in different species. Female vulnerability may depend strongly on the existence or nonexistence of female kin and/or friends who can provide support. Gorilla females, for example, live in one-male units without adult female relatives to help them. The male is twice their size. They are very vulnerable. If there's no support available, the female may need to seek protection from a single male in exchange for more or less exclusive sexual rights. This logic, Smuts suggests, is at work in our species. In many societies, marriage protects a woman from rape by outside males while legalizing it by the husband. This new work may force even you biologists to enlarge your understanding of sexual selection.

[Trivers for] Omni: How is that, Irv?

DeVore: You see sexual selection as consisting usually only of male-male competition and female choice. But Smuts' work calls attention to male coercion of female sexuality as an evolutionary force. Male coercion limits female choice, but it may also force costs on females, causing them to pursue a less profitable life than without the coercion. Male sexual coercion uses the cost, or threat of cost to manipulate the female. If 10 to 30 percent of the offspring in each generation are lost to male reproductive coercion, we're dealing with a major evolutionary force.

A common theme turning up all over the animal world: Females may be forced to buy into a degree of domination and abuse from one male to protect herself [sic] from worse abuse by others. This may be the fly-in-the-ointment of sexual selection. In the Eighties, many of us came to imagine a world where female choice often ruled for female benefit. Male-male competition would evolve under female control, as I used to say like a giant tournament designed to reveal to choosing females the fittest genes for future progeny. Male coercion takes the system downhill, subverts female choice to choosing the lesser of two evils, limiting female choice to become an offshoot of male coercion. The only challenge to female choice as an overriding force for female gain is that male coercion may force the female into a relatively narrow choice — which male can best help prevent molestation by others.<sup>109</sup>

Of course, this awareness of the pervasiveness of male violence and its interference with female liberty is central to much feminist jurisprudence.<sup>110</sup>

Compare, for example, Irv DeVore's discussion of female monkeys who "give sex exclusively to one male in exchange for

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109. *The primal dramatist: He sees the script of human evolution vividly played out by the great apes*, OMNI, June 1993 (interview with Harvard anthropologist and sociobiologist Irv DeVore by Robert L. Trivers, biologist at U.C. Santa Cruz). See also Joseph H. Manson, *Primate Puzzles*, 2 EVOLUTIONARY ANTHROPOLOGY 109, 111 (reviewing MEREDITH J. SMALL, FEMALE CHOICES, SEXUAL BEHAVIOR OF FEMALE PRIMATES and KAREN B. STEIN, FACES IN THE FOREST: THE ENDANGERED MURIKUL MONKEYS OF BRAZIL (1993)) ("Small rightly points out that the threat of male aggression constrains female sexual behavior and, even in our own society, limits our ability to collect accurate information about female preferences. A long history of hominid male sexual coercion is suggested by its high cross-cultural frequency, its taxonomically widespread occurrence in nonhuman primates and, most convincingly, the theoretically derived prediction that paternally investing males . . . will take drastic measures to increase paternity confidence."); BARBARA B. SMUTS, SEX AND FRIENDSHIP IN BABOONS, 259, 260 (speculating from observation of baboon mating strategies that what early human males had to offer females was protection from aggression by other males, not hunting ability or other economic benefit).

110. See, e.g., Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441, 455 (1992) (citing, *inter alia*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED. ("[W]omen live within the constraints of a high risk of sexual violence and a pervasive fear of sexual violence inhibiting our actions in the public world and coloring our inner lives in private. This greater vulnerability obviously compromises women's physical security and psychological well-being in many ways of which I will mention only a few. . . . Sexual violence and the fear of sexual violence . . . drastically limit our choices and even our perception of our choices of ways to live. It makes marriage appear much safer and, hence, more desirable than it is. . . . More generally, the fear of the potential for sexual violence from husbands, partners, potential partners, acquaintances, or strangers leaves all women, not just abused wives and rape victims, considerably more vulnerable, more dependent, and more constrained than our brothers, fathers, sons and husbands.")). As has been pointed out often before, a fear of bad, dangerous male sexuality, needing to be controlled, is also something Catharine MacKinnon and other radical feminists share with certain kinds of conservatives.

protection from other males"<sup>111</sup> to Robin West's account of the effect of the fear of male force on human women:

One way that (some) women respond to the pervasive, silent, unspoken and invisible fear of rape in their lives is by giving their (sexual) selves to a consensual, protective and monogamous relationship. This is widely denied—but it may be widely denied because it is so widely presumed. It is, after all, precisely what we are supposed to do. One woman describes her embrace of this option thusly: . . . 'The threat of men's violence drove me into couple relationships. I feel ambivalent about these men. They were not unmitigated bastards and they did afford me protection. . . . Being alone I felt, at times, besieged and up for grabs. Being with one man sheltered unwelcome attention from men in the streets, at parties, etc.' Women who give themselves up to a monogamous relationship in order to avoid the danger of rape from others, often end up giving themselves *within* the monogamous relationship so as to avoid the danger of rape by their partner.<sup>112</sup>

Or compare Birute Galdikas's account of the harassing behavior of subadult male orangutans<sup>113</sup> with Robin West's account of adolescent human male sexuality.<sup>114</sup> The locker-room boys de-

111. De Vore, *supra* note 109.

112. Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, *supra* note 12. It may be easier to see the problematic nature of the bargain made with a sexual protector in the all-male prison context, where pairing off with a powerful inmate protects the weak from rape by others. See WILBERT RIDEAU, *THE SEXUAL JUNGLE* in WILBERT RIDEAU & RON WIKBERG, *LIFE SENTENCES: RACE AND SURVIVAL BEHIND BARS*, 73, 101 (1992) (quoting prison psychologist as saying, "It does happen sometimes that although the relationship is established against the will of another, it may become a relationship which becomes positive, desirable, and the person who is forced will continue it voluntarily. . . . But to say that if that happens, the role is accepted as a natural role in life, has to be taken in the context of the prison, where I would see it as a healthy kind of compensatory or coping behavior.").

113. Birute M. F. Galdikas, *Orangutan Adaptation at Tanjung Puting Reserve: Mating and Ecology*, in *THE GREAT APES*, 195-233 (D.A. Hamburg & E.R. McCown, ed., 1979) as cited in ALISON F. RICHARD, *PRIMATES IN NATURE* (1985). ("Subadult males . . . follow subadult females and adult females zealously. Females are less than encouraging of these attentions, and when mating does occur, it is invariably without their full cooperation. Unwillingness is expressed in varying degrees, 'from seemingly token resistance with women squalling to fierce battles.'").

114. Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, *supra* note 12. ("Promiscuous Heterosexuality: Fear and Consent . . ." "I wonder if it is possible to explain - at all - to men who remember their *own* sexual adolescence and initiation as one of continuous rejection from women, that other men - the ones who scored - *got it* more often than not by overt intimidation. That they accomplished this great triumph by refusing to even see the girl's subjectivity, much less give a damn for her welfare, by making their profound lack of concern manifest, and then by exploiting her resulting (fully justified) perception of his dangerousness. That non-criminal locker-room teenage boys are exploitative and frightening; that promiscuous heterosexuality, both adolescent and post-adolescent - our oft-times cultural prototype of innocent and mutual pleasure - is often fraught with fear and the threat of violence. Is it

scribed by West would be far more at home in the jungle than would the good and faithful provider described by Epstein.<sup>115</sup> They sound, literally as well as figuratively, like apes.

What implications should an acknowledgement of the full extent to which "natural" interaction between the sexes is tainted by force and fraud<sup>116</sup> have for a libertarian sociobiologist's commitments with respect to the laws governing such interaction in society? On the broad theoretical level, it may incline him to Robin West's "pure protection theory" of equal protection. For, as West, MacKinnon and others have pointed out, women are not yet the beneficiaries of the social contract: unlike Hobbes's "man", women do not yet, "kno[w] there be laws, and public Officers, armed, to revenge all injuries shall be done to" them.<sup>117</sup> On the contrary, the laws are often worse than neutral, protecting their aggressors, while subjecting women to increased vulnerability.<sup>118</sup>

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possible to make non-dangerous men even entertain the possibility that they were/are the beneficiaries of the violence threatened and acted upon by their more sexually 'successful' teenage peers?"); see also Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309, 1328 (1992). ("This leads to a simple law and economics hypothesis that increasing protection from sexual abuse should increase the bargaining power of women vis a vis men, whether or not those men are seen as potentially abusive, both in domestic situations and in the workplace. Reducing protection, on the other hand, should make women more dependent on men who don't abuse, by making leaving riskier, and thereby make them more willing to make concessions.").

115. According to evolutionary psychologist Steve Gangestad, "To think that [the traditional American family] is a natural state or [the] only natural state is a mistake. . . . There are plenty of arrangements available, [including polygyny, polyandry, matrilinealism and varying degrees of male involvement in the family] "ranging from being closely involved in caring for children to having almost no role. . . . One of the only areas where cross-cultural generalization seems to hold up involves killing and carnage, Gangestad said. 'Men do more killing, and men are usually the target of killing, too.'" Hillbery, *supra* note 88, at A1.

116. My focus in this paper will be on force, not fraud, among other reasons because I've never been convinced the prohibition of fraud can coherently form part of a libertarian agenda. See James M. Child, *Can Libertarianism Sustain a Fraud Standard?* 104 ETHICS 723 (July 1994). Evidence indicates, however, that, like force, fraud is disproportionately exercised by men. See, e.g., MICHAEL R. GOTTFREDSON AND TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 146 (1990) (observing that, although many women are arrested for fraud, "women are greatly overrepresented in occupations where such offenses are possible. . . .When opportunity is controlled, the traditionally higher rate of fraud among males is again revealed.").

117. THOMAS HOBBS, *LEVIATHAN* ch. 13 as quoted in EPSTEIN *supra* note 21.

118. See, e.g., Olsen, *supra* note 96, at 855-56 (A system in which the state created a "state of nature" within the family "by steadfastly refusing to enforce any tort, contract or criminal law between members of a family. . . would seem to benefit the stronger and prejudice the weaker members of a family. In fact, though, it might disempower the physically weak less than the system that seems to operate in some communities - a system that treats intrafamily battery as private, but leaves homicide fully outlawed. Such a system is especially disempowering to wives if spouse abuse is not recognized as a defense to homicide. . . . The particular tort, contract, and criminal laws the state chose to create and

The pure protection model views the target of the equal protection clause as the denial of the state's protection to some of its citizens from private violence, aggression, and wrongdoing. The goal is a community in which all are equally protected by the state against a private encroachment of rights. One way to describe the vision behind this pure protection model of equal protection, and to a lesser extent behind [Catharine MacKinnon's] anti-subordination model, is in terms of state sovereignty. The pure protection model envisions a world in which the state is the sole, legitimate reposit of organized force exercised by some individuals against others. . . . [Men cannot] constitute a separate sovereignty over women. Only the state has the power to exercise dominion, through the use of organized violence, over its citizens. Any other exercise of violence and power by one group of citizens over another is criminal, and the state is constitutionally obligated to guard its citizens against such domination.<sup>119</sup>

At minimum, such an approach would, as West notes, require the abolition of the marital rape exemption.<sup>120</sup> This, it seems, is the very least a libertarian sociobiologist would endorse. More generally he should favor reform in the law of rape, which up to now "has reflected a view of sex and women which celebrates male aggressiveness and punishes female passivity."<sup>121</sup> Moreover,

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enforce would affect the relative power of individuals and thus the bargains they could negotiate with their spouses. . . . For example, strong battery laws are likely to help wives. . . . Weakened self-defense doctrines limit their ability to protect themselves, and would seem to protect husbands."); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 193 (1989) ("[M]ale power by men in the family is coextensive with state power. . . . [T]he legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited domestic labor. It has preserved the central institutions whereby women are deprived of identity, autonomy, control and self-definition. It has protected a primary activity through which male supremacy is expressed and enforced."). It is this sort of analysis that has led many feminists to speak of the state as participating in a "male protection racket." See, e.g., Susan Rae Peterson, *Coercion and Rape: The State As a Male Protection Racket*, in *FEMINISM AND PHILOSOPHY* 360 (Mary Vetterling-Bragin et al., ed., 1977).

119. Robin West, *Equality Theory, Marital Rape and the Fourteenth Amendment*, *supra* note 10.

120. See *id.* at 46-48 for a state by state overview of the continuing extent of the exemption. It is unclear whether Epstein, who notoriously has to think long and hard before deciding people should not be allowed to sell themselves into slavery and who seems untroubled by the non-negotiability of the terms of marriage, would view sexual use on demand as part of the contract between husbands and wives which, in his view, should be enforced "even in the face of ex post reluctance or regret" (*Two Challenges*, *supra* note 16, at 340.) and if so whether he would view marital rape as appropriate self-help or specific performance.

121. Susan Estrich, *Rape*, 95 *YALE L.J.* 1087 (1986). Estrich proposes, *inter alia*, the elimination of the requirement that in addition to non-consent, the prosecution also show force by the defendant and resistance by the victim. In light of current urban life, as exemplified by the Bernie Goetz incident and commentary thereon, the analogy between rape and consensual sex on the one hand and robbery and charitable contribution on the

he should favor new, strengthened seduction laws, to minimize the extent to which fraud, as well as force, is allowed to contaminate bargains between the sexes.<sup>122</sup> Beyond this, he may be led to endorse proposals such as that of Beverly Balos and Mary Louise Fellows, that "the existence of a prior relationship between the defendant [in a rape case] and the victim should impose a heightened duty of care on the defendant to obtain consent by positive words or actions"<sup>123</sup> and that even this would not suffice when the prior relationship demonstrated a certain pattern of dominance by the defendant. According to Balos and Fellows:

Although acknowledging male dominance in heterosexual relationships does not lead to the conclusion that all heterosexual sex should be criminalized, it demands that the criminal law recognize the impossibility of consent in egregious circumstances where a man exercises control over a woman through physical and mental intimidation. . . . If the state shows that the defendant had a history of physically abusing the victim within the definitions used for domestic abuse prosecutions, the defense that the victim consented to the sexual contact with positive words or positive conduct would be unavailable.<sup>124</sup>

More generally, to the extent women's disproportionate vulnerability is the result of differences in "size and strength" in addition to "psychology and behavior", Epstein should favor a "reasonable woman" standard for a wide variety of criminal and

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other should no longer seem so farfetched. If someone you reasonably perceive to be threatening because of his physical strength and the circumstances asks you for money, say, on a subway train in a bad neighborhood late at night, and you give it to him, have you donated to a beggar or capitulated to a thief? Whose state of mind counts and how must it manifest itself? How different is this situation from one in which a woman submits without resistance to a demand for sex?

122. "Lying to secure money is unlawful theft by deception or false pretenses, a lesser crime than robbery, but a crime nonetheless. Yet lying to secure sex is old-fashioned seduction - not first degree rape, not even third degree rape. A threat to expose sexual information has long been considered a classic case of extortion, if not robbery itself. But securing sex itself by means short of a threat of force has, in many jurisdictions been considered no crime at all. To the argument that it is either impossible or unwise for the law to regulate sexual 'bargains' short of physical force, the law of extortion stands as a sharp rebuke. It has long listed prohibited threats in fairly inclusive terms." *Id.*; see also Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 *LAW & PHIL.* 35 (1992).

123. Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 *MINN. L. REV.* 599, 602 (1991). "A prior relationship will no longer be used, as is the current practice to infer present consent from the fact of previous consent." *Id.* at 608.

124. *Id.* at 609 (citing Catharine MacKinnon); see also BARGAINING WITH THE STATE 46. ("[C]oercion as the threat of force . . . should be regarded as wrongful even when it leads to an agreement between the parties because of the tight correspondence between the victim's losses and the overall social losses of aggressive practices.").

tort law questions.<sup>125</sup> But, though Epstein insists "we act at our collective peril if we ignore [biological] teaching [about differences in male and female behavior] in working to fashion . . . social institutions",<sup>126</sup> Epstein himself seems to remember these supposedly important differences only when challenging feminists. Nowhere in Epstein's Torts Casebook nor in his musings on human nature and the nature of coercion in his other books nor in the sources he cites as authority is there any awareness of the sex differences he insists feminists should remember.<sup>127</sup>

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125. See, e.g., Estrich, *supra* note 121 ("[R]ape does not involve 'one person' and 'another person.' It involves, in practice if not everywhere by definition, a male person using 'force' against a female person. The question of whose definition of 'force' should apply . . . is therefore critical. . . . The reality of our existence, and our size, is that less force is required to overcome most women than most men. . . . To expect women to resist an attacker who is likely to be both larger and stronger is to expect them to do what many or most women have been brought up and conditioned (and if they read some manuals, instructed) not to do. . . . [But, according to many judges in rape cases] the 'reasonable' woman . . . is not a woman at all. Their version of a reasonable person is one who does not scare easily, one who does not feel vulnerability, one who is not passive, one who fights back, not cries. The reasonable woman, it seems, is not a schoolboy 'sissy.' She is a real man. . . ."); MacKinnon, *supra* note 104, at 717 n.73 ("Feminism tends to . . . telescop[e] the universal and the individual into the mediate, group-defined, social dimension of gender. In such a view, a man never attacks a woman as an individual, nor does she ever respond as such. Nor are the same responses justified for a man as for a woman, at least, not for the same reasons. The social construction of male and female is inescapable in individual interactions. The man's acts embody, enforce and rely upon the social power given men as a group, including the legitimacy given male physical assertiveness and the availability of men's alternatives. A woman's response is also defined by women's conditioning to containment and is circumscribed by women's social options. To argue self-defense for women on a feminist basis is simultaneously to attribute necessity and rightness, constraint and justice, by construing her response, under the circumstances, as a sexed act. Feminism mediates the universal - no gender-neutral universal is available because no gender-neutral universe exists - and the particular - because no individual is asexual, lacking gender. . . . To argue that a woman kills 'as a woman' thus has more specificity than justification theory permits and more generic, group definition than excuse theory accommodates."). See also Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993). As my colleague Clay Gillette has suggested, even the law of self-help repossession might profit from a reasonable woman standard. See *Williams v. Ford Motor Credit Co.*, 674 F.2d 717 (8th Cir. 1982). Indeed, if Epstein is serious about enabling women to protect themselves and their property from male violence, he might consider allowing them to respond with deadly force, not only against non-deadly male batterers and rapists, but against thieves.

126. *Two Challenges*, *supra* note 16, at 347.

127. See, e.g., Epstein *supra* note 21, Ch. 1; BARGAINING WITH THE STATE, Chapter 4 (1993). That Epstein has not previously adopted a reasonable woman standard is suggested by the fact that, in the latter discussion, while Epstein uses a female victim in his hypotheticals he makes no mention of sex-specific considerations and indeed, cites only authorities that speak, without qualification, only of the "reasonable man's" response. See, e.g., BARGAINING WITH THE STATE at 46, n.7. See also the failure in FORBIDDEN GROUNDS to suggest that propensity to cooperative and destructive pursuit of self-interest can, in light of sociobiological evidence, be gendered female and male respectively, discussed *supra*, note 26.

If, however, Epstein were to take the advice he offers feminists, he might endorse even more radical solutions, such as that of Golda Meir: "When a cabinet meeting suggested that the women stay home after dark, Meir replied, 'But it's the men who are attacking the women. If there's to be a curfew, let the men stay home, not the women.'" <sup>128</sup> If Meir's proposal seems an over-reaction, compare it to Epstein's view, *supra*, that prostitution should be banned to enforce marital fidelity. When the magnitude of the harm and the effectiveness of the remedy in the two cases are compared, Meir's looks the more plausible of the two proposals. And if the objection is raised that a curfew for men only would violate the equal protection clause, consider Epstein's expansive willingness to endorse differential treatment of men and women when the risks posed by each sex are different. <sup>129</sup> What the combination of Epstein's commitments may thus be pushing him toward is the MacKinnon domination or anti-subordination principle—the law should oppose the subordination of women whether to do so requires treating men and women the same or differently. The specifics of the law reform proposals a libertarian sociobiologist might be led to endorse remain to be worked out, but the general outlines thus seem clear and they are those of a radical feminist.

### III. CONCLUSION

In my own view, if there is any true descriptive lesson from the behavior of non-human primates and other animals, it is one of variety. <sup>130</sup> This should also be the lesson of libertarianism—al-

128. Letty Pogrebin, *Do Women Make Men Violent?* Ms., March 1975, at 55, quoted in Dianne Herman, *The Rape Culture*, in *WOMEN: A FEMINIST PERSPECTIVE* 41, 43 (Jo Freeman, ed., 1979) (2d ed.). Herman continued, "Golda Meir's suggestion wouldn't strike us as odd if we did not assume that women must bear the responsibility for men's sexual aggression." *Id.*

129. See, e.g., Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699, 725 (1992) ("[T]he failure to draw a distinction in some cases amounts to an unacceptable burden on one class or the other. . . . If the risks for men and women are different, and in [*Craig v. Boren*] teenage men were ten times more likely to drive drunk than women, then it is appropriate for a statute to reflect those differences. If the risk for eighteen-year old men is greater than that for sixteen-year old women, then the need to control for external harms suggests, if anything, that younger women should be able to drive when older men cannot. The conclusion holds, moreover, no matter what the reason for the sex-linked differences, be they biological or sociological, or, as seems more likely, some combination of the two. The statute is surely permissible insofar as it cuts off, or at least reduces, an implicit subsidy for men that might otherwise exist given the differential accident rates.").

130. See, e.g., Vicki Croke, *Dr. Dolittle, Meet Dr. Ruth: Animal Beat*, BOSTON GLOBE, March 20, 1993, at 21 ("Certainly there is an animal out there making it possible for each and

low, indeed encourage experimentation, so that men and women can reach their own freely arrived at mutually beneficial deals and structure their lives as best suits them.

To say that we do not know how women would choose to organize their lives in a world free of the fear of force and fraud because we have not yet known such a world is to speak like a feminist. As Catharine MacKinnon notoriously said, "Take your foot off our necks, then you will hear in what tongue women speak."<sup>131</sup> Often forgotten is that MacKinnon is here quoting Sarah Grimke, one of the early generation of feminists of whom Epstein speaks so approvingly. Grimke, as also quoted by Ruth Bader Ginsburg in her *Kahn v. Shevin*<sup>132</sup> brief, said, "We ask no favors for our sex. All we ask of our brethren is that they take their feet off our necks."<sup>133</sup> What Epstein seems to miss is that the difference between feminists of an earlier generation and the more radical ones of the present is not, as the coded language of the gay rights debate would have it, one of equal rights versus special rights, of "no favors" versus favors for our sex. Rather, this generation sees itself as continuing work of which he should approve—that of freeing women from force and fraud, more fully removing the foot from the neck.<sup>134</sup> The only questions may be exactly how heavily the foot is seen to weigh and how best to effect its removal. If Epstein really is committed to the libertarian

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every one of us to point and say, 'See, my behavior is perfectly natural.' There are group sex (frogs and snails), sex changers (snails and oysters), voyeurism (elephants and 'mating pandemonium'), sensitive guys (baboons) and same-sex pairings (gulls). And monogamists can take heart, too. We still have the California mouse. . . . Experts tell us this species is 100 percent monogamous - they mate for life and split child care right down the middle."); Sherwood L. Washburn, *Human Behavior and the Behavior of Other Animals*, in *SOCIOBIOLOGY EXAMINED*, 254, 260 (Ashley Monatagu, ed., 1980); BARBARA B. SMUTS, *GENDER, AGGRESSION AND INFLUENCE IN PRIMATE SOCIETIES* 400 (Barbara B. Smuts et al., ed., 1986).

131. MacKinnon, *supra* note 21, at 45.

132. 416 U.S. 351 (1974) (holding that it did not violate the equal protection clause for Florida to grant a property tax exemption to widows although no corresponding benefit was offered to Ginsburg's client, a widower)

133. Brief for Appellants Mel Kahn et al. at 16 n.11 (1973), quoting SARAH GRIMKE, *LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMEN*; ADDRESSED TO MARY PARKER, PRESIDENT OF THE BOSTON FEMALE ANTI-SLAVERY SOCIETY 10 (1838). The "favors" that Ginsburg rejects are gender classifications that "accor[d] a privileged status to women" because they are "still regarded as the center of home and family life." These "favors", such as the exemption of women from jury service, came, Ginsburg said, "at an exorbitant price." Appellants' Brief at 16.

134. "Indeed, as suggested by the sixties term 'Women's Liberation,' the fact that women find political participation and economic self-sufficiency a much more illusive goal than men might be described as the most important finding of the second wave of twentieth century feminism. . . ." Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441, 455 (1992).

project, he should be devoting all his efforts to making it possible rather than insisting that it has already arrived. In other words, Epstein, as a libertarian and a fan of sociobiology, ought to be a feminist—he should (at the risk of going counter to his biologically determined drive to lead rather than follow women) join us rather than just urge us to join him. We welcome him as we would welcome all of you.

