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## Review Essay

### THE NEW HOME ECONOMICS

Jane E. Larson<sup>1</sup>

*Sex and Reason*, By Richard A. Posner.<sup>2</sup> Cambridge, MA: Harvard University Press. 1992. Pp. vii, 458. \$29.95.

Surely Judge Richard Posner has titled his new book *Sex and Reason* with pointed irony, playing with the prevailing convention by which we speak of sex *versus* reason. For what could be less reasonable than sex, that realm of human experience both feared and celebrated for its irrationality?<sup>3</sup> Yet the central premise of *Sex and Reason* is that a deep structure of rationality governs human sexual desire and behavior. With this book, Posner sets out to challenge the received notion that sex is essentially irrational, and thus joins forces with Nobel laureate Gary Becker<sup>4</sup> to conquer for economics the last great frontier of human activity as yet uncolonized for the kingdom of rational choice.

Posner's new book has two other ambitious goals: to provide a sweeping historical and cross-cultural introduction to human sexual mores and conduct; and to argue for sexual deregulation in the United States, extending his strong economic libertarianism into the realm of sexual policy. Consistent with the classical liberal commitment to limited government, Posner believes that individuals should be free to govern their own sexual conduct except where it causes harm or intrudes on the rights of others.

Although Posner's "liberatory" history and "libertarian" pol-

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1. Associate Professor of Law, Northwestern University School of Law. I am grateful to Lisa Brush, Martha Ertman, Linda Hirshman, Keith Hylton, Jonathan Knee and Joseph Miller for comments, and to the Bruce M. Gordon Fund of the Northwestern University School of Law for research support.

2. Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School.

3. See, e.g., Martha Nussbaum, "Only Grey Matter"? *Richard Posner's Cost-Benefit Analysis of Sex*, 59 U. Chi. L. Rev. 1689, 1725 (1992) (criticizing Posner for failing to confront the "Dionysian" qualities of sex, that "mysterious and awesome side to sexual experience" in which "only a risk so terrible that it can annihilate makes true joy possible").

4. See Gary S. Becker, *A Treatise on the Family* (Harv. U. Press, enlarged ed. 1991).

icy position have attracted the most attention to *Sex and Reason*, his explanatory theory of human sexual rationality should be the most discussed aspect of the book. Elsewhere, *Sex and Reason* has been criticized as bad economics.<sup>5</sup> Yet political critics, particularly feminists, were slower to respond, perhaps because Posner's analysis upends conventional categories of gender criticism.<sup>6</sup> Whereas feminists are primed to resist the familiar "woman is to nature as man is to culture" formulation of gender hierarchy,<sup>7</sup> Posner has crafted a sexual politics in which the preferred position (i.e., the male position) is the biologically determined one. *Sex and Reason* is the story of biologically determined Man and culturally malleable Woman. But if the justifications for gender hierarchy have changed with this book, the bottom line has not; Posner's upending of conventional categories does not alter the hierarchy of men over women. A feminist reading of *Sex and Reason* thus reveals a familiar picture: Another supposedly neutral norm—this time, economic and scientific rationality—turns out once again to justify a male-superior social order.<sup>8</sup>

## I. THE EMPIRE OF RATIONAL CHOICE

In the last decade, economists have aggressively expanded the scope of their inquiry and influence. Where once the discipline of economics seemed by definition confined to the world of commerce, it is now common to hear scholars refer to virtually all realms of life, including sexual and family life,<sup>9</sup> as "markets." What unifies economic accounts of matters as seemingly disparate as the adoption of children and the sale of automobiles is an underlying vision

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5. See Gillian K. Hadfield, *Flirting With Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 Harv. L. Rev. 479, 481 (1992) (book review); Martin Zelder, *Incompletely Reasoned Sex: A Review of Posner's Somewhat Misleading Guide to the Economic Analysis of Sex and Family Law*, 91 Mich. L. Rev. 1584, 1584 (1993).

6. But see Symposium on *Sex and Reason*, 25 Conn. L. Rev. 473 (1993) (feminist or lesbian feminist critical reviews of *Sex and Reason*). See also Richard A. Posner, *The Radical Feminist Critique of Sex and Reason*, 25 Conn. L. Rev. 515 (1993) (response).

7. See Sherry B. Ortner, *Is Female to Male as Nature Is to Culture?* in Michelle Z. Rosaldo and Louise Lamphere, eds., *Woman, Culture, and Society* 67 (Stanford U. Press, 1974).

8. "[W]hat has passed as a humanistically impartial vocabulary of power, reason, morality, interests, autonomy, justice, history, theory, progress, and enlightenment is actually imbued with the gendered masculine meanings and values." Christine DiStefano, *Configurations of Masculinity: A Feminist Perspective on Modern Political Theory* 4 (Cornell U. Press, 1991).

9. See, e.g., Becker, *A Treatise on the Family* (cited in note 4) (family); Margaret F. Brinig, *Rings and Promises*, 6 J. Law, Econ. & Org. 203 (1990) (engagement and courtship); Richard A. Posner, *Economic Analysis of Law*, ch. 5 (3d ed. 1986) (family); Elisabeth M. Landes and Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. Legal Stud. 323 (1978) (adoption).

of human nature and purpose. In the economic model, rational individuals shape the world by single-minded pursuit of self-interest. Where economists once conceived of "rationality" (as lay people probably still do) as conscious decisions made using the faculty of human reason, Posner is among an influential group of economic thinkers who now expansively claim that any choice suited to an actor's ends—whether those ends are acknowledged or unconscious—maximizes self-interest, and hence may be called "rational." In *Sex and Reason*, Posner argues that rational choices need not necessarily be conscious choices, but merely choices suited to an actor's ends.<sup>10</sup> Thus if a Wall Street investment banker sacrifices her affluent lifestyle in order to work for the homeless, an economist would insist that she is as bent on advancing self-interest as her former officemates. That the homeless activist maximizes her utility through altruism and the investment banker through material gain is a distinction of no consequence to the economist.

In this expansionist move, economists posit their discipline as more than just another social science or political theory, but rather as a meta-theory of human nature, uniquely fundamental in its capacity to explain behavior and institutions and to predict future outcomes. An assertion that threads through Posner's work in general, and his new book in particular, is the claim that economics has more positive explanatory force than other social sciences, and greater normative insight and moral legitimacy than its rivals such as philosophy, religion, or ethics.<sup>11</sup> This new economics may rightly be called "imperialistic."

Yet even as economic theory argues that the tendency to engage in cost-benefit calculation is inherently human, the discipline has lacked grounding for this controversial assertion about human nature, making rational choice theory an unsatisfying account of human nature to many. Anthropologists, sociologists, psychologists, theologians, artists and travelers have long reminded us that other cultures and subcultures begin from more communitarian or

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10. Posner began to develop this idea in earlier works, e.g., Richard A. Posner, *Problems of Jurisprudence* 169-70 (Harv. U. Press, 1990) (idea of "optimal" choice carries no necessary implication that strategizing involved is conscious).

11. As applied to sexuality, for example, Posner indicates that the economic theory is the "most promising theory" of sexuality we are likely to have for some time. In distinguishing his theory from competitors, including sociology, psychology, jurisprudence, philosophy, feminism, history and anthropology, he claims his approach is more than just another in an "endless procession of theories of sexuality," but "incorporates, integrates, and transcends the perspectives, insights, and findings of the other theories of sexuality that can fairly be described as either scientific or social scientific." Frankly moral theories of sexuality, such as religions or some philosophical views, Posner does not discuss at any length in *Sex and Reason*, because they make no claim to a scientific basis.

spiritual assumptions, principles that they consider to be as unquestionably fundamental an aspect of human nature as the self-interestedness characteristic of mainstream Western culture.

The most ambitious goal of *Sex and Reason*, then, is metaphysical—to justify the rational choice model as a universal description of human nature, and a comprehensive explanation for human behavior. Joining forces with sociobiologists, Posner claims that the utility maximization to which economists refer is really an expression of the fundamental genetic struggle for reproductive fitness, a behavior inscribed through natural selection in the genes of all members of the human species. Renaming his synthetic theory “bioeconomics,” Posner describes evolutionary biology as “a parallel mode of inquiry to economic analysis,” “if not a foundation of my analysis, continuous with it.” Both theories analyze rational behavior in the sense of fitting of means to ends, he points out, with the difference being that the rational maximizer in evolutionary theory is the gene, and in economics it is the individual.<sup>12</sup>

As applied to sexuality, Posner’s bioeconomic theory explains as biologically determined the persistent and repeating patterns of human sexual behavior throughout history and across cultures. The tendency for these sexual behaviors is coded into human genes, he argues, and these behaviors persist because they have been tried and tested as optimal evolutionary strategies for the human species. Posner is careful to point out (as most evolutionary biologists do) that our genes incline us to certain sexual behaviors, but do not immutably determine our behavior. Within the broad boundaries of biologically driven sexual preferences, human beings are rational creatures who strive to maximize their sexual satisfaction by choosing certain partners and sex acts over others, and disdaining other sexual options. Whether the disfavored partners, acts, or values are decried as “unnatural,” “immoral” or merely erotically uninspiring, Posner argues that the real causal factor in human sexual choices is not culture or morality, but instead genetic efficiency.

An example that conveys the flavor of Posner’s bioeconomic

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12. The fusion of economics and evolutionary biology has been noted by other law and economics theorists. Richard Epstein, for example, has argued that the Darwinian model of natural selection provides the conceptual grounding for the extension of rational choice theory into analysis of unconscious choices. See Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 Harv. J.L. & Pub. Pol’y 713 (1989); Richard A. Epstein, *The Varieties of Self-Interest*, 8 Soc. Phil. & Pol’y 102 (1990). See also Jack Hirshleifer, *Economics from a Biological Viewpoint*, 20 J. Law & Econ. 1, 5 (1977) (listing borrowings by biologists of economic concepts and arguing for theoretical consistency of economic and evolutionary biological approaches); Gary S. Becker, *Altruism, Egoism, and Genetic Fitness: Economics and Sociobiology*, 14 J. Econ. Lit. 817 (1976) (noting consistency between premises of sociobiological theory and economics).

analysis is his discussion in *Sex and Reason* of "opportunistic homosexuality." Posner is intrigued by the fact that in many "macho" (his term) cultures (e.g., ancient Athens or the modern Middle East), male homosexual encounters are quite common and more easily accepted than in more sexually egalitarian cultures such as our own. These patriarchal cultures fiercely condemn nonmarital sexual activity among wives and daughters, and highly value female virginity and chastity, often to the point of sequestering female family members in order to guard these "assets." In these societies, says Posner, the sexual inaccessibility of women is a problem of "high search costs" for heterosexual men, which increases the benefit to such men of finding other (although less preferred) outlets, primarily sex with other men. Such "opportunistic" homosexual encounters do not mark the men involved as "real" homosexuals—that is, men whose preference for same-sex partners would remain stable no matter how sexually available women are. Opportunistic homosexuals are men who will "substitute" a man for a woman as a sexual partner when the "cost" of a woman is too high.

In similar fashion throughout *Sex and Reason*, Posner uses economic concepts to explain sexual choices, such as "complementarity" (a reduction in the cost of one good effectively increases the demand for another good, e.g., better access to birth control triggers more heterosexual intercourse), "substitution" (e.g., if heterosexual intercourse is costly or unavailable, rates of masturbation or same-sex contacts are higher), "search costs" (e.g., difficulty in finding a pool of partners drives gays and lesbians from rural areas and small towns to large cities), "inferior goods" (e.g., the higher incidence of male homosexual behavior in prisons, in the priesthood, and on naval vessels where access to women is limited) and "externality" (consequences of individual sexual conduct may be borne by third parties, e.g., the effects of HIV infection on unwitting sexual partners or children in utero). Even love, according to Posner, can be given a precise economic meaning: "[I]t is a preoccupation with the unique particulars of another person, particulars for which there is, by definition, no substitute to be found in any other person."

## II. THE SEXUAL PAROCHIALISM OF THE ELITE

Fortunately, Posner grants the reader of *Sex and Reason* frequent and diverting respites from this economic grind. Long remarked for his interest in unexpected subjects such as literature<sup>13</sup>

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13. See generally Richard A. Posner, *Law and Literature: A Misunderstood Relation* (Harv. U. Press, 1988).

and feminism,<sup>14</sup> Part One of the book—an essay on the history of sexuality—is to my reading the most satisfying section. Part One reflects Posner's openminded appreciation for the great variety and diversity in human sexual conduct and culture. The nuance and scope of the essay reflects Posner's skillful synthesis of the burgeoning scholarship on sexuality from a range of disciplines outside the law, including anthropology, sociology, psychology, history, critical theory and gay and women's studies. Posner pointedly comments that lawmakers (and judges in particular) are dangerously ignorant about sex. Part One sets about remedying that ignorance, immersing the reader in what may be the surprisingly unconventional realities of sexual experience.

To appreciate the spirit of openness and curiosity that marks this fascinating and competent summary of an impressive array of empirical research on sexuality, it is worth repeating Posner's explanation for why he wrote *Sex and Reason*. For, as he acknowledges, sex is "not a fully respectable subject for public discussion in the United States" and "anyone who writes about it is apt to be thought a little off." Posner describes reading Plato's *Symposium* and finding to his surprise that it contained an engaging account of male homoeroticism. Given the philosopher's unquestioned respectability and canon authority, Plato's homoeroticism could not, to Posner's mind, be reconciled with the "ancient roots" attributed to the cultural loathing and persecution of homosexual conduct invoked by the Supreme Court in its 1986 *Bowers v. Hardwick* decision<sup>15</sup> upholding the constitutionality of state laws criminalizing sodomy as applied to same-sex encounters. And plainly, one of the achievements of *Sex and Reason* is its far more accurate depiction of the tangled threads of celebration, tolerance and condemnation that form the Western world's complex historical response to male homosexuality—a rich and thought-provoking account that may serve in some measure to remedy the misleading, uninformed and, in Posner's words, "mean-spirited" history of *Bowers*.

Posner has long been critical of the effects on decisionmaking of the judiciary's lack of social diversity. In an earlier book, *Problems of Jurisprudence*, Posner describes "[a] legal profession whose members have the same social and educational background, politics, religion, professional experience, and the like," and who

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14. See generally Richard A. Posner, *Ms. Aristotle*, 70 *Tex. L. Rev.* 1013 (1992); Richard A. Posner, *Conservative Feminism*, 1989 *U. Chi. Legal F.* 191; Richard A. Posner, *Problems of Jurisprudence* (Harv. U. Press, 1990); Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 *Harv. L. Rev.* 1431 (1986).

15. 478 U.S. 186 (1986).

"tend to agree on the premises for decision."<sup>16</sup> When it comes to breadth of sexual experience, Posner observes in *Sex and Reason* that the judiciary is perhaps even more homogenous, dominated by older, white, heterosexual men. Relatively few women, even fewer racial minorities, and virtually no openly gay or lesbian lawyers are judges. Posner notes that preappointment investigations are designed, in fact, to exclude anyone with anything but a highly conventional sexual past from the bench. Such a narrow frame of experience, Posner argues, leads judges to rely on what they believe to be "self-evident truths" in making crucial decisions about sexual rights and wrongs, overlooking or misunderstanding the real social differences and conflicts about sexual experience and morality in society.<sup>17</sup> Posner remarks:

It will be apparent to anyone who takes the trouble to read these opinions [on the constitutionality of laws banning nude dancing<sup>18</sup>] that nudity and the erotic are emotional topics even to middle-aged and elderly judges and also that the dominant judicial, and I would say legal, attitude toward the study of sex is that 'I know what I like' and therefore research is superfluous.

Unlike the other conservative judges with whom he tends to be lumped,<sup>19</sup> Posner largely approves of the Warren Court's liberal sexual jurisprudence beginning with *Griswold* and culminating in *Roe*, and criticizes the retreat signalled by more recent Supreme Court decisions such as *Bowers* and the decisions cutting back on the right to abortion.<sup>20</sup> In *Sex and Reason*, Posner convincingly

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16. Posner, *Problems of Jurisprudence* at 202 (cited in note 14).

17. Where the political elite is drawn from a narrow strata of society and is closed to outsiders, Posner has observed that "law will appear—will in some sense, *be*—objective, impersonal. In just the same way, objective interpretation presupposes an interpretive community that is homogenous." Posner, *Problems of Jurisprudence* at 202-03, 448 (cited in note 14). Posner has also criticized as parochial the information sources to which judges ordinarily turn in seeking information relevant to making their decisions, noting the "systematically unreliable" nature of the factual accounts provided in judicial precedents, *id.* at 211, 87-100, 117-18, and "the lack of scientific curiosity that is so marked a characteristic of legal thought." *Id.* at 213.

18. See *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990) (en banc), rev'd sub nom *Barnes v. Glen Theater Inc.*, 111 S. Ct. 2456 (1991).

19. See, e.g., Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 110-26, 169-70, 290-91 (The Free Press, 1990) (stating that *Bowers* was rightly decided and criticizing *Griswold*, *Roe* and general expansion of the constitutional right to privacy).

20. Although Posner praises the outcome of these libertarian decisions on sexual freedom, he is not so impressed by their reasoning. *Griswold* and its successors probably have no legal-doctrinal ground in the Constitution, Posner comments, but he nonetheless observes that "[a] constitution that did not invalidate so offensive, oppressive, probably undemocratic, and sectarian a law [Connecticut's law prohibiting distribution of contraceptives to married couples] would stand revealed as containing major gaps . . . . [P]erhaps the courts are authorized to plug at least the more glaring gaps."



demonstrates that he not only possesses an independent and curious mind, but is libertarian in the most principled sense of the word. This places him at clear odds with contemporary social conservatives, who believe in the unrestrained power of human freedom and creativity in the commercial marketplace, but seek to limit individual sexual, political and social freedoms. “[I]n sex as in other areas of life,” Posner writes, “beware governmental regulation.”

### III. THE IDEAL OF MORALLY INDIFFERENT SEX

In place of the sexual conventions that dominate conservative thinking, Posner proposes a model of “morally indifferent sex” under which the laws and social attitudes that regulate sex are to be shaped by “practical, concrete, nonmoralistic concerns with the external effects of sex and with the use of force or fraud to gratify sexual desires.” Posner describes the morally indifferent approach to sex as a “functional” theory, a theory that treats sexual activity as nothing more than a means to personal or social ends (whether procreation, pleasure or sociability), as morally neutral as the act of eating, and simply another “good” to be bargained for in the market and on the road to utility-maximization. “The functional approach,” Posner argues, “is resolutely secular, scientific in either a broad or narrow sense, and disinclined to view sexual activity in moral terms.” Among such functional theories of sex, Posner includes his own, as well as sociobiological, Freudian, feminist, sociological and anthropological theories of sex. Against these, he contrasts moral theories of sex, which begin either from a religious or philosophical perspective that sees human beings as “beings of a special worth and dignity, endowed with a moral sense and entitled to respectful treatment by our fellow man.” Moral theories of sex see some sexual behaviors and drives as consistent with the unique human existence, and others not. Posner predicts that a morally *indifferent* regime of sexual regulation would be less restrictive than that which prevails today in the United States, which he ascribes to the Puritan heritage of our nation. It would resemble, instead, the modern Swedish society, which serves throughout *Sex and Reason* as Posner’s socio-sexual ideal.

It is certain that Posner’s policy recommendations for a morally indifferent regime of sexual regulation will surprise those who associate social conservatism with the Law and Economics movement to which Posner is linked:

*Marriage.* Gradually substitute contractual cohabitation for the state-defined status relationship of marriage. Permit same-sex as well as heterosexual couples to enter such contractual arrange-

ments. Protect women who bear children outside of marriage or a contracted-for relationship. Keep polygamy illegal because it is associated with low political and social status for women.

*Divorce.* Provide compensatory benefits in the case of divorce for women who have sacrificed career opportunities to assist a spouse or partner.

*Single Parenthood.* Deter sexual conduct that has significant adverse consequences for society, such as teenage pregnancy and single parenthood. Make aggressive and explicit sex education a part of school curricula from an early age, and provide contraceptives to teenagers. Fund government programs for prenatal and neonatal health care, and offer generous maternity and child-welfare benefits, but condition benefits on the mother establishing herself in the job market.

*Pornography.* Restrict only sexually explicit materials that involve children or that harm adult models. Remain skeptical of empirical evidence linking violent pornography to rape.

*Homosexuality.* Recognize same-sex domestic partnerships. Repeal sodomy laws and lift formal and informal professional exclusions. Gradually integrate gays into the military. Include gays and lesbians as a protected class under federal, state and local antidiscrimination statutes.

*Sexual Coercion.* Prohibit rape, incest and sexual harassment as they are today.

*Sex and the Constitution.* Recognize a federal constitutional right of individual sexual autonomy under either a privacy or liberty rationale, protecting all consensual relations between same-sex and nonmarital partners, as well as access to abortion and contraception.

In every currently controversial area of sexual policy, Posner dismisses those who preach a return to a more regulated sexual regime and characterizes the prevailing American sexual moralism as "shallow," "obstructed by layers of ignorance, ideology, superstition, and prejudice," and generally lacking in respect either for empirical fact or clear thinking.

Posner's moral neutrality and hostility to religiously based morality links him to the broader economics tradition, as well as to a morally skeptical version of classical liberalism. Beyond their baseline assumption that it is human nature to pursue self-interest, economists claim to be agnostic about the virtue or evil of *what* people define their "tastes" to be.<sup>21</sup> By contrast, "[t]he main business of religion is," as De Toqueville reminded us, "to purify, control, and

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21. See George J. Stigler and Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 *Am. Econ. Rev.* 76, 76 (1977).

restrain that excessive and exclusive taste for well-being.”<sup>22</sup> The roots of this skepticism regarding religious and moral values can be found deep in the roots of the classical liberal tradition. As William Galston points out, the moral neutrality of the liberal state expresses a fear of moral coercion that derives from the historical experience of the bloody English religious wars. In the mind of the political thinkers to whom Posner is indebted, nonsectarianism and tolerance for moral differences are vital to the maintenance of public order.<sup>23</sup> Posner’s project in *Sex and Reason* is thus impeccably economic and classically liberal—nonsectarian, deregulatory, and tolerant of great diversity of taste. Hence, his agreeably libertarian conclusions.

Despite the appeal of Posner’s sexual libertarianism to social progressives, other aspects of Posner’s economic analysis of sexual customs and practices are more troublesome.<sup>24</sup> Posner explains, for example, that practices of female genital mutilation and female infanticide (both widely practiced in present-day African and Asian societies) are arguably evolutionarily efficient: clitoridectomy and infibulation increase the value of the mutilated woman by reducing the cost (to men) of sexually sequestering her for purposes of ensuring security about paternity; female infanticide increases the value of surviving women by reducing the supply. Posner is careful to say that his arguments for the efficiency of these practices “is not intended to deny the case for reform.” But then he goes on to generally justify these and other forms of subordination of women endemic both to historical and modern periods of human history as uncoerced, reflecting instead women’s “choices” to assume subordinate roles in light of their biological and social conditions. In Posner’s theory, women choose to comply with what he terms “superficially misogynistic” practices—including genital mutilation and female infanticide—because of the constraints of biological logic, not as a result of the social domination of men.

Other progressives will love Posner’s conclusions, just as conservatives are certain to hate them. Philosopher Martha Nussbaum, for example, a strong advocate of civil rights for gays and

22. Alexis De Toqueville, *Democracy in America* 448 (Anchor, 1969).

23. William A. Galston, *Liberal Purposes: Goods, Virtues and Diversity and the Liberal State* 12 (Cambridge U. Press, 1991).

24. Particularly to feminists; see Martha Albertson Fineman, *The Hermeneutics of Reason: A Commentary on Sex and Reason*, 25 Conn. L. Rev. 503, 507-08 (1993) (expressing shock at tone of misogyny pervading Posner’s discussion of female infanticide); Katharine T. Bartlett, *Rumpelstiltskin*, 25 Conn. L. Rev. 473, 484-85 (1993) (criticizing Posner’s argument regarding female infanticide for ignoring the psychic diminishment suffered by surviving women who live with knowledge that society kills women for their femaleness).

lesbians,<sup>25</sup> lauded *Sex and Reason* for its attacks on sexual bigotry. The conservative *Washington Times*, by contrast, opened its review of Posner's book with an ominous comment: "With a book like *Sex and Reason*, Richard A. Posner can forget about ever having a successful Supreme Court nomination."<sup>26</sup> The enthusiasm of progressives for *Sex and Reason* is not surprising, but perhaps premature. Because Posner is so identified with conservatives (rightly or wrongly), the sexual libertarianism of his book will surely have a greater persuasive impact than any similar effort by a progressive, feminist, or gay or lesbian thinker. Even though there is no necessary (or even predictable) connection between one's theories and one's politics,<sup>27</sup> readers inevitably take account of the author's identity—including his or her political image—in evaluating the significance of certain arguments. Nothing is so persuasive as an apparent convert.<sup>28</sup>

#### IV. BIOPOLITICS: NATURAL MAN AND CULTURAL WOMAN

It would be a mistake, however, to embrace Posner's broad-minded policy preferences and ignore the theory that drives them. Posner's bioeconomic theory of sex could have long-term public policy implications somewhat less pleasing to feminists and progressives than those that have drawn early popular attention to *Sex and Reason*. In fact, after such a rich and nuanced introduction to the range of human sexual practices and values, the simple and even reductive explanatory theory of Part Two of *Sex and Reason* comes almost as a shock.

One might assume that a book whose purpose is to explain the rationality of sexual choices would accept as possible some meaningful range of sexual free will and action. For if sexuality is fixed or determined by forces outside of human agency, notions like "ra-

25. Martha C. Nussbaum, *Venus in Robes*, *The New Republic*, Apr. 20, 1992, p.36.

26. Mark Miller, *Tabulating Reason Why Sex Has Social Price*, *Wash. Times*, Mar. 29, 1992, B8. This prediction was made during the Bush presidency, when Republicans apparently assumed that conservatives would be picking Supreme Court Justices for the foreseeable future.

27. See Jack Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 *Cardozo L. Rev.* 1613, 1625-30 (1990). Balkin has coined the term "ideological drift," by which positions identified at a particular moment in history with a given political stance come at a later point to be identified with quite different stances. See also J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 *Duke L.J.* 375, 383 (growing left-liberal support for state regulation of hate speech at odds with traditional leftist opposition to censorship).

28. Speculation that Posner belongs amongst social critics began long before *Sex and Reason* was published. E.g., Scott Altman, *Beyond Candor*, 89 *Mich. L. Rev.* 296, 341 (1990) ("Judge Posner should be every CLS scholar's hero").

tionality” and “choice” are left with very little to explain. Thus the reader of *Sex and Reason* might expect Posner to begin from the premise that human sexual behavior is primarily shaped by individual or social factors as opposed to biological inheritance.<sup>29</sup> The social constructionist view emphasizes the plasticity of human sexual desire, and the historical and cultural contingency of sexual values and practices; it stands opposed to claims that sexual orientations, passions, or moralities derive from immutable sources, whether divine or natural. For example, under the social constructionist view, it makes no more sense for a gay rights advocate to insist “I was born this way” than for Pat Buchanan to refer to homosexuals as a “perversion of nature.”

Yet curiously, Posner’s theory of sex rests firmly on a foundation of biological imperative, locating the answer to all of the big questions about human sexuality—the origins of the differences between male and female sexuality, the nature of heterosexuality and homosexuality, and the reasons for the virtually universal cultural practice of male dominance and female subordination—in genetics. Posner argues that sex drive, sexual orientation and gender hierarchy are genetically determined; social influences and individual agency come into play only in the type and frequency of sexual contacts that a person may undertake in order to satisfy those biologically defined drives, identities or positions. In economic terms, then, sexual “choice” exists only in the substitutions that people make among options of varying costs so as to satisfy their fixed sexual preferences. “The preference is treated as a given,” Posner writes, “and the focus of the economic analysis is on the costs and benefits of alternative methods of satisfying the preference.”

Economists have argued that the deterministic quality of the analysis in *Sex and Reason* deprives Posner’s analysis of any real economic quality.<sup>30</sup> But if the determinism underlying *Sex and Reason* makes the book less interesting as economics, it is the core of the book’s interest as an expression of sexual politics.

Sociobiology rests on the highly contested premise that observations of nonhuman animal behavior provide direct insight into human nature, and that human social institutions can be traced

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29. At several points in *Sex and Reason*, Posner does appear to align himself with what he terms the “social constructionist” hypothesis. He asserts, for example, that much cultural variation in sexual behavior and beliefs can be explained by a handful of cultural variables (economic status of women, urbanization, income, sex ratio, contraceptive knowledge and provision for government support of women and children).

30. See Hadfield, 106 Harv. L. Rev. at 481 (cited in note 5); Zelder, 91 Mich. L. Rev. at 1584 (cited in note 5).

back to biological bases.<sup>31</sup> Although Posner acknowledges the scientific controversy surrounding sociobiology, he nonetheless stands prepared, he writes, "to defend the sociobiology of sex against its detractors."<sup>32</sup>

Among the most challenged claims by sociobiologists are those that concern the sexual differences between men and women. Only the beginning point is uncontroverted and uncontroversial: Humans reproduce sexually, requiring both male and female genetic material. From this one example of the genetic necessity for paired sexual opposites, however, sociobiologists have gone on to justify as biologically innate a persistent pattern of gender hierarchy and a broad range of arguably purely social behaviors (male aggression/female passivity; male promiscuity/female monogamy; male parental indifference/female parental nurturing). "Biology—the stable, ahistorical, sexed body—is understood to be the epistemic foundation for prescriptive claims about the social order."<sup>33</sup> Given the feminist analysis linking practices and values of sexuality to women's subordination,<sup>34</sup> any theory that identifies both male sexual aggression and gender hierarchy as inevitable or immutable is certain to be both politically controversial and scientifically contested.

According to the standard sociobiological script, women are genetically endowed with a weaker sex drive, can reproduce only a limited number of times in a lifetime, but know that the offspring they bear are their genetic issue. Men, by contrast, have an innately powerful sex drive, relatively unlimited power to inseminate many females during a lifetime, but little assurance that the offspring born to the women around them genetically belong to them. These promiscuous males and passive females must pursue different sexual and reproductive strategies if each wishes to maximize his or her genetic gift to the species. Males must inseminate as many females

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31. "Sociobiology is defined as the systematic study of the biological basis of all social behavior." Edward O. Wilson, *Sociobiology: The New Synthesis* 2 (Belknap Press, 1975). Sociobiologists observe non-human animals, particularly primates, and seek to analogize their behavior to the human environment. Or worse, sociobiologists eschew empirical evidence of animal behavior altogether and speculate about what humans *would do* apart from social or environmental influences. The most detailed and influential critique of sociobiology as bad science is Philip Kitcher, *Vaulting Ambition: Sociobiology and the Quest for Human Nature* (MIT Press, 1985) ("Vaulting Ambition").

32. At one point in *Sex and Reason*, however, Posner hedges his bets, stating that even if sociobiology has no validity, his analysis "would be unaffected." Even if the origins of different sexual behaviors are cultural rather than biological, Posner claims, an economic analysis of how different biological and reproductive realities affect human choice would still be useful.

33. Thomas Laqueur, *Making Sex: Body and Gender from the Greeks to Freud* 6 (Harv. U. Press, 1990).

34. See Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 127 (Harv. U. Press, 1989).

as possible, but cooperate in the support and rearing only of their own offspring; females must be sexually choosy, trading sexual access for support and cooperation from males in childrearing. The "invisible hand" of natural selection supports these gendered agendas by preferring dominant men with powerful sex drives who will be suitably promiscuous, and jealous, coy and sexually manipulative females who will withhold sex as a bargaining strategy. According to this standard sociobiological script, it is from the negotiations between these sexual pairs that the persistent cultural pattern of male domination and female subordination arises in all its human iterations—including the double standard, rape, sexual competition among males and male control of female sexuality through institutions such as monogamy, marriage, male jealousy, sequestration (harems in the East, "the private sphere" in the West) and repression or denial of female sexuality.

In the past decade, scientists have disproved this prediction of passive females and promiscuous males as having been based on evidence gathered using distorted observation methods.<sup>35</sup> The revelation of bias and bad science in early primate studies heavily relied on by sociobiological theorists has "revolutionized the entire field of evolutionary biology and the study of the evolution of behavior."<sup>36</sup> Primatologists, anthropologists and even many sociobiologists now reject the promiscuous male/passive female sociobiological script as male-centered in its theoretical premises and contradicted by the best scientific evidence. More recent primate field observations reveal a range of behaviors that violate the gender roles set out in the standard sociobiological script, including reproductive competition among females, female dominance patterns as an origin of social hierarchies, female promiscuity, female mate choice based on paternal care tendencies and long term relationships between males and

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35. Early primate studies focused on the behavior of males and systematically failed to observe or analyze the strategy and choice underlying female sexual and social behavior. See Jane Lancaster, *Introduction* in Meredith F. Small, ed., *Female Primates: Studies by Women Primatologists* 1, 1 (A.R. Liss, 1984) ("*Female Primates*"). In observation sciences, one primateologist cautions: "we discount the unimaginable and fail to see what we do not expect." Sarah Blaffer Hrdy, *The Woman That Never Evolved* 89 (Harv. U. Press, 1981). As anthropologist Marshall Sahlins puts it, "Before there is natural selection, there is cultural selection: of the relevant natural facts." Marshall Sahlins, *Culture and Practical Reason* 208 (U. of Chi. Press, 1976).

36. Lancaster, *Introduction* in Small, ed., *Female Primates* at 1 (cited in note 35). The criticism is not simply that early studies failed to fairly include observations of the behavior of female primates, but that the exclusion of systematic study of female behavior and strategies led to flawed and incomplete theories and conclusions about the determinants of primate sexual and social behavior. For a similar criticism of Posner's theory as excluding data concerning human females to its detriment as an adequate economic theory of sexuality, see Hadfield, 106 *Harv. L. Rev.* 485 (cited in note 5), and Gillian K. Hadfield, *Not the "Radical" Feminist Critique of Sex and Reason*, 25 *Conn. L. Rev.* 533, 535-36 (1993).

female involving male care of offspring not necessarily their own issue.<sup>37</sup> Although these changed scientific understandings of male and female sexual and reproductive strategy has weakened sociobiology's empirical claims as well as its explanatory power, the classic sociobiological thinkers on which Posner relies throughout *Sex and Reason* have not yet taken account of these advances in the underlying biological science.<sup>38</sup> Thus for all the interdisciplinary strength of *Sex and Reason*, the book is flawed by its failure to take account of improvements in scientific knowledge.

In the complex modern politics of sexuality, however, arguments for the biological origins of sex can find unexpected adherents. Gay men, for example, have found a strong argument for tolerance in the assertion that sexual orientation is innate rather than learned. Not surprisingly, therefore, throughout *Sex and Reason* Posner refutes traditional arguments for the social persecution of homosexuals, provides matter-of-fact accounts of same-sex eroticism, and often writes with a tone of sympathy for gay men.<sup>39</sup> Pos-

37. See Hrdy, *The Woman That Never Evolved* at 59-130 (cited in note 35). See also Barbara B. Smuts, *Sex and Friendship in Baboons* 81-122, 235-60 (Aldine Pub., 1985); Sarah Blaffer Hrdy, *Female Reproductive Strategies*, in Small, ed., *Female Primates*, at 103, 104 (cited in note 35); Barbara B. Smuts, *Sexual Competition and Mate Choice*, in Barbara B. Smuts, et al., eds., *Primate Societies* 385, 392-99 (U. of Chi. Press, 1986).

38. Instead, throughout *Sex and Reason*, Posner adheres to the traditional sociobiological version of human sexuality recounted by Donald Symons, *The Evolution of Human Sexuality* (Oxford U. Press, 1979), and praises Symons as having written "the best single book on the sociobiology of sex."

39. Posner's handling of male homosexuality is not consistently sympathetic, however. His sturdy support for gay men stands in odd contrast with certain passages of *Sex and Reason* in which, for example, he recites without either citation or comment a detailed list of cruel stereotypes of gay men, ranging from "physical weakness and cowardice" to "promiscuity and intrigue, prominently including seduction of the young," "concentration in a handful of unmanly occupations," and "a bitchy, gossipy, histrionic, finicky, even hysterical manner." For a thoughtfully critical review of Posner's treatment of male homosexuality, see William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 Yale L.J. 333 (1992).

Nor has Posner signed on to the entire gay rights agenda. He disagrees, for example, with the political orthodoxy among gay rights advocates who claim that a stable ten percent of the population in any culture is gay and lesbian. Posner concludes that the number of gays and lesbians is perhaps only one to two percent of the population, and that there are many fewer lesbians than gay men. Posner also remains cautious about gays and lesbians adopting children, and would integrate gays and lesbians into the military only very slowly in order to give time for entrenched attitudes of homophobia to dissipate, and so as not to impair the functioning of the armed forces. Finally, Posner argues against legal recognition of committed same-sex unions as "marriages" on the peculiar rationale that symbolic recognition of same-sex relationships would falsely convey the message that these unions are as satisfying and stable as heterosexual marriages: "[E]ven in a tolerant society the life prospects of a homosexual—not in every case, of course, but on average—are, especially for the male homosexual, grimmer than those of an otherwise identical heterosexual." The government, Posner concludes, should not be placed in "the dishonest position of propagating a false picture of the reality of homosexuals' lives." Posner redeems himself somewhat, however, by questioning why the government needs to warrant the quality of *any* intimate relationship. He



ner believes (despite his acknowledgement that no conclusive scientific evidence exists for the position) that sexual orientation is genetically determined in gay men and therefore immutable.<sup>40</sup> On the basis of this belief, he urges a lifting of most sanctions on homosexuality and the creation of legal protections against anti-gay bigotry.<sup>41</sup>

By contrast, Posner's account of lesbianism in *Sex and Reason* is markedly less sympathetic or engaged.<sup>42</sup> Not only does he devote dramatically fewer pages in *Sex and Reason* to lesbianism than to male homosexuality, but he repeatedly uses the term "homosexual" generically to refer to gay men to the exclusion of lesbian women. Unless, for example, you accept Posner's unspoken presumption that all homosexuals are male, how else to comprehend the following characteristic sentence?—"[F]or what it is worth, it has been estimated that 40 percent of homosexuals have some effeminate mannerisms."

More than semantics are at stake in this elision of lesbian sexuality. In *Sex and Reason*, Posner contends that lesbianism—like female sexuality in general—is more "opportunistic" than male sexuality of all stripes; that is, less often innate and more likely to be learned. The explanation offered is that women's sexual desire is biologically weaker than that of men, and thus their sexual release relatively less important as a force in shaping human sexual values and practices.<sup>43</sup> On the other hand, biology also determines that

predicts that all longlasting intimate relationships, heterosexual and homosexual alike, will evolve into a form of contractual cohabitation that will replace the highly regulated status relationship of marriage.

40. It is a troubling tendency of sociobiologists to make theoretical conclusions based on such speculation rather than on observable empirical evidence. As a theory, sociobiology is only as valid as the science on which it rests. "The dispute over sociobiology," writes critic Philip Kitcher, "is a dispute over the evidence." Kitcher, *Vaulting Ambition* at 8 (cited in note 31).

41. Specifically, Posner argues for repeal of state laws against consensual sodomy, an end to barriers to openly gay and lesbian people entering professions (including the judiciary and the military), inclusion of gays and lesbians as a protected class under Title VII and other antidiscrimination laws, and legal rules permitting gays and lesbians to contract for permanent intimate relationships including many of the financial privileges of marriage such as insurance, pension and inheritance.

42. For a critical review of the neglect of lesbians in *Sex and Reason*, see Martha Ertman, *Denying the Secret of Joy: A Critique of Posner's Theory of Sexuality*, 45 Stan. L. Rev. 1485 (1993) (describing Posner's "excision" of lesbians). See also Ruthann Robson, *Posner's Lesbians: Neither Sexy Nor Reasonable*, 25 Conn. L. Rev. 491 (1993) (scant treatment in *Sex and Reason* of lesbians merely a rehearsal of the most superficial stereotypes).

43. As evidence of this, Posner points to the negligible frequency of women's resort to prostitutes when unpaid sexual partners are not available. Martha Nussbaum has criticized this reasoning on the ground that it ignores the possibility that women may have a strongly held preference for intimate, romantic or "beautiful" sex, which would make prostitution an unsuitable substitute, see Nussbaum, 59 U. Chi. L. Rev. at 1716 (cited in note 3), but, for example, romance novels an acceptable substitute. See Ann Barr Snitow, *Mass Market Ro-*

the social benefits from sexual connection are relatively more important to women because of their reproductive vulnerability (remember our sociobiological female using sex to "bargain" for male support). Because of these biologically fixed preferences, Posner believes that women are more likely than men to respond to changes in social circumstance by altering their fundamental sexual desires. Many lesbians, Posner speculates, have been "persuaded" into their sexuality by circumstance—past sexual abuse by men, or political beliefs hostile to men or to heterosexuality.<sup>44</sup> By contrast, Posner believes that scientists will one day prove male homosexuality to be genetically determined rather than socially constructed. Posner thus takes the most forgiving position regarding male homosexuality—that it is often biologically determined—and the most hostile position regarding female homosexuality—that it is the opportunistic resort of women unattractive to men or of angry feminists exercising a political rejection of sex with men.<sup>45</sup>

Posner finds further evidence that women's sexuality originates in culture rather than in nature in his admiring discussion of the modern Swedish state. He observes that in a country like Sweden, where women are freed from economic dependence on men by a generous social welfare system and no stigma on single motherhood, women become more sexually active and independent. The Swedish experience shows, Posner reports, that if women do not need male support or protection for themselves and their children, they become reluctant to marry, to give up control over their chil-

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*mance: Pornography for Women is Different*, in Ann Barr Snitow et. al., eds., *Powers of Desire: The Politics of Sexuality* 245 (Monthly Review Press, 1983).

44. With startling blitheness, Posner argues that men who hate women can still enjoy sexual intercourse with women, which they can experience as degrading and subordinating to the woman. Women who hate men, on the other hand, are unlikely to be able to play such a "private script" in their head during heterosexual encounters.

45. Posner recognizes that these two stories about the origins of sexual preference implicate quite different policy approaches for male and female same-sex lovers. Because gay men are "born that way," their same-sex desires cannot be unlearned, and social and legal intolerance of male homosexuality thus leads only to gratuitous suffering that advances neither personal nor social utility. On the other hand, lesbianism, as a learned lifestyle, could be "unlearned" with the help of repressive social policies. Furthermore, if lesbianism is learned, a society that wants to limit the number of new lesbians will protect developing minds and bodies from unsavory influences by denying custody of female children to lesbian mothers, firing lesbian teachers, counselors or child care workers, and marginalizing and isolating lesbian lifestyles in the media. Yet in *Sex and Reason*, Posner never explores the policy implications of his distinction regarding the causes of male and female homosexuality. Nor does he adequately explain why society has traditionally followed precisely the opposite social policy—directing fiercer punishments at gay men than at lesbian women. Given Posner's premises, the logical or "efficient" sexual policy would be to persecute lesbians, who he believes are open to incentives and deterrents, and leave in peace "unreformable" gay men. See Robson, 25 Conn. L. Rev. at 500 n. 40 (cited in note 42) (harsher legal treatment of lesbians than of gay men possible policy implication of Posner's analysis).

dren to men, or to forego a freer and more active sex life for the strictures of monogamy.

But if social factors have allowed Swedish women to depart from what Posner believes is the female biological inclination to sexual passivity and dependence, why is male sexuality not similarly responsive to changes in social circumstances? Throughout history and across cultures, Posner sees men substituting one sexual activity for another, but never sees the male sex drive or inclination to promiscuity diminishing in response to social factors. By contrast, his discussion of Sweden concludes that when women are freed from the need to cultivate male protection, women's sex drive intensifies towards pleasure and promiscuity. At one level, this differential explanation for what drives male and female sexuality is confusing. Does not this carry the idea of gender differences to extremes, denying an underlying and shared human experience of embodied life?

The view that male sexuality is mostly natural while female sexuality is mostly cultural is not so mysterious, however, when one considers what sexual politics follow from such an original position. For several decades, there has been growing female resistance to male sexual aggression in all spheres of life. Much of this anger and criticism has been translated into calls for increased legal regulation and social condemnation of promiscuous, violent and coercive male sexual conduct, including reform of the rape laws, abolition of the marital rape exemption, creation of legal remedies for workplace sexual harassment, pressure to enforce existing laws against wife-beating, incest and date rape, proposals to define pornography as a civil rights violation and legal and electoral defense of access to abortion and contraception. What better conversation-stopper than scientific "proof" that such efforts are doomed to fail because they run contrary to nature? The implication of "natural" is that something cannot be changed, or at least that society can change a natural tendency only by doing great violence to human well-being.<sup>46</sup> However just or fair feminist demands for changes in male sexual practice might be, such claims can be painted as vain and ultimately foolish if portrayed as running contrary to the laws of nature.<sup>47</sup> Arguments from nature thus work to shut down women's efforts to

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46. Stephen Jay Gould, a preeminent Darwinian scientist but an opponent of sociobiology, points out that "to see a biological influence in human behavior is to offer a reason why something cannot be done." Stephen Jay Gould, *The Mismeasure of Man* 330-31 (Norton, 1981).

47. Sociobiologists do not deny that humans may resist behaviors that are optimal for evolution, but they caution that social justice reforms that are contrary to the dictates of evolutionary wisdom will come at unmeasurable cost to the species. See Edward O. Wilson, *On Human Nature* (Harv. U. Press, 1978).

change men's sexual aggression and promiscuity, but do so in a way that avoids the political opposition that would be generated by an above-the-board defense of existing patterns of male sexual behavior as good or just. With this neat evasion both of male sexual responsibility and of political conflict, one begins to suspect a rationalization rather than rationality at work in *Sex and Reason*.

If claims for the "naturalness" of male sexuality amount to a covert defense of the status quo, the notion of an "acculturated" female sexuality presents a more complex ideological cipher. On the one hand, it is liberating for women to be released from biological fate and freed to reinvent themselves as beings more multi-dimensional, individually determined and sexually expressive than simply the breeders of the species.<sup>48</sup> On the other hand, this suggestion of malleability opens up female sexuality to the risk of being "managed" as a social resource, directed towards whatever purposes men, as the dominant social group, might deem useful or advantageous at a particular moment in history.<sup>49</sup> Although feminists have rightfully feared the stifling constraints of biological definitions of woman's "nature," history seems to indicate that an equal or greater risk is presented by the open-endedness of purely cultural definitions of the "female." Within Western culture, so-called expert knowledge about women's sexuality has flip-flopped from era to era, ranging from St. Augustine's warnings about the uncontrolled lustfulness of the daughters of Eve, to Acton's conclusions about the passionlessness of the Victorian wife, to the Playboy Advisor's use of modern sexology to affirm female sexual availability.<sup>50</sup> These swings of the ideological pendulum suggest that it is in men's

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48. Not to mention that if female sexuality were primarily biologically determined, the degree of social control that throughout human history has been applied to sexually control women would require some explanation. Unless female sexuality was *not* in fact naturally tame, society would not need to coerce compliance but could simply rely on natural unfolding to ensure prescribed female passivity. See Cynthia Fuchs Epstein, *Deceptive Distinctions: Sex, Gender, and the Social Order* 10 (Yale U. Press, 1988).

49. The figure of the "cultural" Woman also may reflect modern notions of an objectified and exploitable nature. See William E. Connolly, *Political Theory and Modernity* 2 (Blackwell, 1988) (modern "insistence upon taking charge of the world" reduces nature to "a set of laws susceptible to human knowledge, a deposit of resources for potential use or a set of vistas or aesthetic appreciation").

50. Until the post-Enlightenment period, Christian Church Fathers described women as "daughters of Eve" who were sexually uncontained, easily tempted, and dominated by lust. See Margaret R. Miles, *Carnal Knowing: Female Nakedness and Religious Meaning in the Christian West* 166 (Beacon Press, 1989). Victorians upended this lustful image with a new "scientific" truth—that women were sexually passionless by comparison to men. See Nancy F. Cott, *Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790-1850*, 4 *Signs* 219, 221 (Winter 1978). In 1903, pioneering sexologist Havelock Ellis announced that the notion of women's sexual "anaesthesia" had been a nineteenth century error. Havelock Ellis, 3 *Studies in the Psychology of Sex* 193-94 (F.A. Davis, 2d rev. ed. 1913). Modern experts emphasize that women are sexually responsive, and contemporary mores encourage

interest that women's sexuality be defined as whatever men might want it to be.

The great danger of such biological arguments—e.g., that men's sexual nature is unreformable whereas women's nature is freely malleable—is that they tend to drift from descriptive premises (people *are* this way) to normative conclusions (people *should* be this way). Thus even thinkers like Posner, who make an effort to resist the reductionism and determinism that plagues biological theories,<sup>51</sup> often fall into this naturalistic fallacy. For instance, sociobiologists claim that knowledge of biology will lead scientists to favor one type of sexual morality or system of sexual values over another, and Posner uses sociobiology in *Sex and Reason* for precisely this purpose. Perhaps this temptation to transform moral questions into factual questions is especially strong in debates over issues so heatedly contested as human sexuality. The calm pose of authority adopted by so-called "objective" science holds out the seductive promise of unbiased and incontestable knowledge, rescuing us from the intolerance and partiality of sexual moralism and polemic.<sup>52</sup> Sociobiology's aura of scientific certainty and "hard science" must be especially appealing to an economist like Posner; economists, like social scientists generally, are often attacked for the nonempirical, unproven presumptions about human behavior upon which their analyses rest.<sup>53</sup> Someday, biological science may well be able to map the intricately woven connections between genes and environment that leads to the overt and subtle choices that over a lifetime make up a human sexual identity and history. That evolutionary biology has not yet come within spitting distance of this certainty, however, must be admitted, which is why Posner's application in *Sex and Reason* of a highly contested scientific theory like sociobiology to foundational matters of social equality between the sexes strikes me as indefensibly risky. As philosopher of science Philip Kitcher writes, "when scientific claims bear on matters of social policy, the standards of evidence and of self-criticism must be ex-

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women to be sexually available. See John D'Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 334-39 (Harper & Row, 1988).

51. At several points in *Sex and Reason*, Posner stresses the difference between the idea of a genetic *limit* on possibility, and the idea that genes *direct* certain behaviors. Genetic coding creates tendencies for certain behaviors, but does not determine those behaviors; men and women can and do abandon behaviors that do not suit present environmental circumstances. Evolutionary theories exact a harsh penalty for nonconformity, however; individuals may disregard genetically optimal behaviors, but if they do so, they won't reproduce. Thus in the evolutionary perspective, nonconformity is rare or dependent on spontaneous genetic mutations.

52. See Fineman, 25 Conn. L. Rev. at 509-11 (cited in note 24).

53. See Carl N. Degler, *In Search of Human Nature: The Decline and Revival of Darwinism in American Social Thought* 241 (Oxford U. Press, 1991).

tremely high.”<sup>54</sup> But even if this far superior state of scientific knowledge had already been achieved, biology could not replace morality in human culture, as Posner hopes. One may hold that biology has constrained human behavior in certain ways without believing that this tells us much that we need to know about how one person ought to behave towards another in sexual matters.

Just as troubling as the “bad science” problem, however, is the moral effect of sociobiological arguments such as those used in *Sex and Reason*. Resolution of moral questions comes in part from what the society understands about what it means to be a person. Once established—whether by science, religion, culture or philosophy—these prevailing conceptions of human nature create a set of boundaries on the possible, defining how people are imagined to be capable of acting, and thus what we may aspire to as individuals and in our lives together. In our times, science has taken up the mantle of the church and tradition as the source for explanations about the nature of things.<sup>55</sup> Thus sociobiologists purport to be reporting on a human nature that they in part have helped to create. In Posner’s hands, the scientific account of what it means to be a person seems to promise great sexual freedom because it eschews the traditional hierarchies of feudal society and the moralistic restraints of Victorian modernity. The scientific voice claims to say nothing about how people should live their lives, but simply to place objective and neutral facts before individuals who can then make well informed, free will choices. But by grounding most of human choice in the human genes, standard accounts of sociobiology, like Posner’s bioeconomics, are revealed not only as preserving of the status quo, but also as deeply pessimistic about the possibilities for human progress.

*Sex and Reason* may not tell us much about men and women or about human sexuality, but it does tell us a great deal about the construction of a masculine sexual politics. And, as political theorist Wendy Brown has noted, “these are very useful things to know.”<sup>56</sup>

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54. Kitcher, *Vaulting Ambition* at 3 (cited in note 31).

55. See Barry Schwartz, *The Battle for Human Nature: Science, Morality and Modern Life* 32 (W.W. Norton, 1986).

56. Wendy Brown, *Where is the Sex in Political Theory?*, 7 *Women & Pol.* 3, 4 (Spring 1987).