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**NATURE, CULTURE, AND SOCIAL ENGINEERING: REFLECTIONS
ON EVOLUTION AND EQUALITY**

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NATURE, CULTURE, AND SOCIAL
ENGINEERING: REFLECTIONS ON
EVOLUTION AND EQUALITY

LINDA C. McCLAIN

1. INTRODUCING THE PROBLEM

In the United States, evidence of the success of legal feminism's equality project is visible in the constitutional commitment to equal opportunity and prohibitions against legislating based on fixed notions about gender roles,¹ as well as in the move toward greater sex equality in family law and other areas of private law.² However, sex inequality persists, and substantive equality remains elusive.³ Social cooperation between women and men in various domains of society is assumed to be a fundamental and necessary building block of society, but it proves hard to secure on terms of equality.

Why is sex equality so hard to achieve? One answer is that feminist quests for equality in private and public life are a form of misguided social engineering that ignores natural sex difference, hardwired by evolution, as it were, into male and female brains. This chapter examines arguments that nature constrains feminist law reform. Appeals to *nature* argue that brain science and evolutionary psychology find salient differences between women and men, limiting what social engineering can achieve in fostering sex equality or reforming family law. These contemporary claims,

cast in the language of hardwired brain circuitry, may signal a new form of the sameness-difference debate: that is, what are the real differences between the sexes, and what difference does difference make for law and policy? As such, they invite scrutiny by legal feminists.

This chapter points out a curious feature in some appeals to natural difference: even as critiques of feminist social engineering invoke nature, problems posed by nature feature as a reason to embrace social engineering in the form of the social institution of marriage. This view of nature is distinct from the conservative religious argument that, because marriage—"the natural family"—*reflects* the created order, feminist social engineering of the family is dangerous.⁴

The appeal to differences between "male" and "female" brains as "hardwired" and a potent explanation for the persistence of gender differences and sex inequality garners charges of "neurosexism." Critics offer as cautionary tales many historical examples of claims that basic differences between the male and female brain explained the basic inferiority of females and their unsuitability for many male-occupied spheres.⁵ They also criticize the underlying studies and experiments on which claims about sex differences and their implications rest. For legal scholars, these historical examples resonate with classic examples of how jurists appealed to basic differences between women and men to rationalize women's exclusion from full participation in society. As a legal scholar, I shall not attempt to assess the adequacy of the science of sex differences. Instead, I shall draw on careful work by scientists and philosophers that reveals the flaws of this body of work. Dichotomies with profound implications for assessing sex roles and the possibility of social engineering rest on startlingly flimsy evidence. Such flimsy foundations for far-reaching claims about sex difference are of obvious concern when the question is whether hardwired, natural differences between men and women doom any feminist efforts at social engineering to promote greater equality. Neuroscience, the philosopher Cordelia Fine argues, gives a "fresh zing" to "old stereotypes."⁶

I link recent popularizing accounts of male and female brains with accounts of evolutionary science concerning human mate selection and parenting because evolution often features in ac-

neuropsychiatrist
counts of the origin of sex differences. Popularizing works such as Louann Brizendine's companion books, *The Female Brain* and *The Male Brain*, refer repeatedly to how our "Stone Age" brains and their ancient "circuitry" shape our contemporary desires and behaviors.⁷ Deterministic language about brains being on "autopilot" or nature just "taking its course" envisions men and women being driven by processes that operate at an unconscious level. A common element is appeal to difference rooted in evolution to explain persistence of sex inequality and to sound a cautionary note about social engineering. Supposed hardwired brain differences feature in explanations for all manner of social practices and for why equality is hard to attain. My focus is primarily on gender relations with respect to egalitarian marriage and work/life balance (or work/family conflict). I observe the tension between the view that intractable, and likely innate, gender differences doom efforts at social engineering to change gender roles and the view that, in light of changing economic and demographic trends, men, in particular, should adapt and that public policy can employ social engineering to encourage the evolution of new understandings of manhood, fatherhood, and masculinity.

2. APPEALS TO NATURE AS A CONSTRAINT ON EQUALITY

Male and Female Brains and Evolutionary Psychology

The appeal to *nature* as a constraint on equality enlists brain science and evolutionary psychology, which reportedly find salient differences between women and men, linked to different reproductive biology and reproductive strategies. These differences limit what social engineering can achieve.

In the 1990s, a flurry of books, including Robert Wright's *The Moral Animal*⁸ and David Buss's *The Evolution of Desire*,⁹ introduced basic concepts of evolutionary psychology and sociobiology, proposing that science shed light on sex difference, why men and women had different views about the harm of rape and sexual harassment, and why they made different choices about work-family balance.¹⁰ Wright criticized feminist legal theorists for avoiding science. He argued that "many of the differences between men and women are more stubborn than most feminists would like, and

complicate the quest for—even the definition of—social equality between the sexes.”¹¹ In the early twenty-first century, brain science rivets popular attention. Once again, evolution presents limits to social engineering and affirms sex difference. Enthusiasing about the neuropsychiatrist Louann Brizendine’s work in popular science, *The Female Brain*,¹² the journalist David Brooks opined: “Once radicals dreamed of new ways of living, but now happiness seems to consist of living in harmony with the patterns that nature and evolution laid down long, long ago.”¹³

What are these differences, and what patterns do they prescribe? Brizendine declares that “more than 99 percent of male and female genetic coding is exactly the same,” but the 1 percent difference “influences every single cell in our bodies.”¹⁴ The inside flap of the book cover of *The Female Brain* promises neurological explanations for such sex differences as these:

- “A woman uses about 20,000 words per day, while a man uses about 7,000.”
- “A woman knows what people are feeling, while a man can’t spot an emotion unless somebody cries or threatens bodily harm.”
- “Thoughts about sex enter a woman’s brain once every couple of days but enter a man’s brain about once every minute.”

Brizendine turns to evolutionary theory to explain the roots of brain differences. However, she is not quietist about human nature. Biology need not be destiny *if* we understand how evolutionary, biological, and cultural forces shape us. Social engineering *informed* by biology holds promise:

Biology powerfully affects us but does not lock in our reality. We can alter that reality and use our intelligence and determination both to celebrate and, when necessary, to change the effects of sex hormones on brain structure, behavior, reality, creativity—and destiny.¹⁵

What does this interplay of biology and human will suggest about social cooperation on terms of equality? I focus on Brizendine’s use of evolutionary theory to interpret brain difference and its

implications for intimate and family life. (I do not here assess whether Brizendine gets the science of brain difference right, though later in the chapter I will discuss criticisms by scientists that she does not.)¹⁶

The "Stone Age" Female Brain

Contemporary females, Brizendine asserts, inherit the "ancient circuitry" of "our most successful foremothers."¹⁷ Teenage girls' drive for social connection with each other has biological and hormonal reasons. Intimacy "activates the pleasure centers in a girl's brain," triggering a near-orgasmic "major dopamine and oxytocin rush."¹⁸ Girls are motivated "on a molecular and a neurological level" to "ease and even prevent social conflict" and to "maintain . . . the relationship at all costs."¹⁹ These findings sound similar to those made by Carol Gilligan and her colleagues on how girls work to maintain connection.²⁰

Connection among females has evolutionary roots as a strategy of protection against aggressive males, evident in studies of female mammals that develop stress responses to "tend and befriend" and to form social groups "that promote safety and reduce distress for the self and offspring."²¹ "These female networks" also share infant care and "information about where to find food" and model "maternal behavior for younger females."²² Social connectedness, thus, contributes to reproductive success.²³ Today's teen females, as they "reach" optimal fertility, undertake similar strategies.²⁴

Competition is as hardwired as cooperation. Brizendine attributes the "biology of mean girls"—the harsh tactics of teen-girl cliques—to a "survival" strategy of "sexual competition" for the best male mates, a "biological imperative to compete for sexual attractiveness."²⁵ Success, for both sexes, requires "some aggression," and relevant hormone levels rise during puberty.²⁶

Our "Stone Age brains" also shape mate selection, sex, and motherhood.²⁷ Brizendine repeats evolutionary psychology's familiar story of the male who chases and the female who chooses, claiming that it is "not sex stereotyping" but "the brain architecture of love, engineered by the reproductive winners in evolution."²⁸ Contemporary couples proceed "down an ancient pair-bonding path," over which they have "little control."²⁹

Brizendine draws on Buss's influential work on the different qualities women and men seek in mates.⁵⁰ Women are "less concerned with a potential husband's visual appeal and more interested in his material resources and social status" and prefer a slightly older partner.⁵¹ "Scientists conclude" that these "universal" mate preferences are part of the "inherited architecture of the female brain's mate-choice system" and are "presumed to serve a purpose."⁵²

What purpose? Brizendine turns to the evolutionary biology scholar Robert Trivers, who explains female mate selection as a sound investment strategy stemming from women's limited number of eggs and their greater investment than men in bearing and raising children. A man "can impregnate a woman with one act of intercourse and walk away"; a woman is "left with nine months of pregnancy, the perils of childbirth, months of breast feeding," and "trying to ensure that child's survival."⁵³ Ancient necessities led females to seek long-term male partners to ensure reproductive success; those who "faced these challenges alone were less likely to have been successful in propagating their genes."⁵⁴ Brizendine is skeptical about whether contemporary "single motherhood . . . will succeed," noting that, even today, "in some primitive cultures," a father's presence enhances a child's survival rates, making a female's "safest bet" a long-term male partner to offer protection and improved access to "food, shelter and other resources."⁵⁵ In effect, women's need for protection and provision explains the so-called sex contract posited by evolutionary theorists.

Men's ancient brain circuitry, ~~according to Buss~~, leads them to seek wives who are "physically attractive, between ages twenty and forty," and with "clear skin, bright eyes, full lips, shiny hair, and curvy, hourglass figures."⁵⁶ These traits are "strong visual markers of [female] fertility," which offers men "the biggest reproductive payoff for *their* investment."⁵⁷ But "the most reproductively successful males also need to pick women who will mate only with them," ensuring their paternity.⁵⁸

Men's concern with paternity supposedly explains their concern with women's social reputation. Brizendine explains that if a woman had sex with a man on a first date or "showed off" about former bed partners, "his Stone Age brain might have judged that she would be unfaithful or had a bad reputation."⁵⁹ But male

Brizendine reports, drawing on

“seduction and abandonment” is an old problem.⁴⁰ Thus, male and female reproductive strategies put them at odds. Evolution, in effect, explains the sexual double standard. High paternal investment requires men’s certainty of paternity.

However, this model suggests that men have little to lose in random and casual sexual encounters. Why wouldn’t they care about any potential offspring they father, if their strategy is to maximize their reproductive success? The premise implies that if men spread around enough genes, even if they do not personally invest in parental care for all offspring, some may survive because of the mother’s efforts.

Male sexual jealousy, thus, has evolutionary roots and “adaptive functions”—preventing infidelity and ensuring paternity;⁴¹ it also has enormous costs, evident in domestic violence.⁴² Drawing on evolutionary science, Judge Richard Posner argues the “biology of sex” explains men’s mate-guarding behaviors such as “physical sequestration of wives, disparagement of female sexuality,” and female genital mutilation.⁴³ The sexes are in conflict, rather than in cooperation; these male behaviors subvert female choice.⁴⁴

The “Ancient” Male Brain

In *The Male Brain*, a shorter, companion volume to *The Female Brain*, Brizendine carries forward her basic themes of how ancient brain circuitry shapes men and women differently. I shall summarize the discussion most pertinent to this chapter—how “the ancient mating brain” and “daddy brain” work—and then discuss criticisms of Brizendine’s claims. Because imagery can be so evocative, it is worth observing the differences in the cover art: a brain formed by telephone cord graces the cover of *The Female Brain*; a brain made of duct tape, the cover of *The Male Brain*. Book jacket copy makes the message explicit: “Women . . . have a lean, mean communicating machine”; “the male brain . . . is a lean, mean, problem-solving machine.”⁴⁵

There is a polemic and a plea for accepting difference: on the basis of her clinical practice and on the “vast new body of brain science,” Brizendine is convinced that “the unique brain structures and hormones of boys and men create a male reality that is fundamentally different from the female one and all too

frequently oversimplified and misunderstood.⁴⁶ There is an ambivalence over whether biology is destiny and over the degree of human agency. On the one hand, "if we know how a biological brain state is guiding our impulses, we can choose how to act, or to not act, rather than merely following our compulsions." On the other hand, when she speaks of the book as enabling female readers to "help your sons and husbands to be truer to their nature," it sounds as if the best course is not to resist nature.⁴⁷ Similarly, she suggests that brain science confirms the common saying "boys will be boys," suggesting that scientists find that "gender-specific toy preferences have roots in the male brain circuitry of both boys and male monkeys."⁴⁸ Describing herself as "part of the generation of second-wave feminists who had decided that we were going to raise emotionally sensitive boys who weren't aggressive or obsessed with weapons and competition," she seems to throw up her hands in the face of evidence of "innate brain wiring."⁴⁹ She concludes the book with a hope that men will have "a sense of relief at finally being understood" and that there can be a reduction in conflict between men and women that is "fueled by unrealistic expectations that stem from failing to grasp each other's innate differences."⁵⁰

As in *The Female Brain*, Brizendine explains "what makes a man a man"—and male attitudes and behaviors—by reference to various hormones, as well as to specific regions of the brain, assigning such unscientific labels as the male brain's "sexual pursuit area" and "lust center." I shall focus on her account of mate selection and parenting. In a chapter called "The Mating Brain: Love and Lust," she follows one couple (drawn from her clinical practice), explaining how "Ryan" is "following the commands of his ancient mating brain" as his "sexual-pursuit area" lights up and sends him to meet "Nicole." Evolution features in explaining mate selection: men today "have been biologically selected over millions of years to focus on fertile females"; they have "[e]volved to zoom in on certain features that indicate reproductive health," such as an "hourglass figure." Throughout, her language is deterministic: nonverbal flirtations are "preprogrammed deep in the human brain"; Ryan is "prewired" to notice "women with hourglass shapes."⁵¹ Smells and sounds (the voice) "trigger" the male brain to react.⁵² While Ryan and Nicole consciously converse, much happens at the level of the unconscious, including the "secret" sending of information about

noting

health and genes. (As in *The Female Brain*, there is no attention whatsoever to how the brain and evolution shape women's and men's sexual attraction to and romantic love for someone of their own sex.)

Evolution features in Brizendine's account of men's imperative for reproductive success: "to a man, winning the mating game means getting his DNA and genes into the next generation," and, thus, the "instinctual part of his brain knows that the more women he has sex with, the more offspring he's likely to have."⁵³ As in *The Female Brain*, the complementary female mating strategy is to be coy, "cautious," and careful, with "the female brain trying to discern whether a man has what it takes to be a good protector and provider."⁵⁴ Indeed, Brizendine interprets Nicole's positive reaction to Ryan's paying for dinner by reference to (what primatologists have dubbed) the "meat-for-sex principle" observed in primates: "females have more sex with males who bring them meat."⁵⁵

Sexual reticence—not being too sexually available too soon—is part of the female sexual strategy that signals to Ryan that Nicole would be a good long-term mate. But how does a male whose "ancient mating brain" favors a reproductive strategy of more sex/more partners/more success become committed to just one woman? The answer, evidently, is frequent sex with one woman: "the more Ryan and Nicole made love, the more addicted their bodies and brains became."⁵⁶ Brizendine explains "the male brain in love" with deterministic language about the force of chemical cocktails that trigger addiction. The release of dopamine sets the "love train" in motion; the "addicting fuel" of hormones keeps it going.⁵⁷ Then, Ryan enters the realm of "mate-guarding," making sure his friends don't "poach."⁵⁸

Brain differences also explain why, although Ryan is fiercely possessive and easily jealous, Nicole should be understanding when he notices attractive women. In an often-quoted passage, Brizendine explains: "the lust center in the male brain automatically directs men to notice and visually take in the details of attractive females . . . Ryan couldn't have stopped his eyes from looking at [another woman's breasts] even if he'd tried."⁵⁹ Meanwhile, a man's fear of loss or rejection can drive him to "pop the question" of marriage.⁶⁰

Interestingly, it is Ryan's "deeply passionate feelings" that "can

lead to enduring commitments." Societal institutions play very little role in Brizendine's account. By contrast to portrayals of marriage (as I discuss later) as channeling heterosexuality into marriage and disciplining otherwise unruly sexual impulses, Brizendine's model has the brains themselves doing the directing. With the aid of the right hormonal processes, the brain merges love and lust into commitment without any evident outside assistance from the pressures brought to bear by social institutions.

How do men's brains turn them into fathers? Brizendine's chapter "The Daddy Brain" chronicles how men come to bond with infants. Some popularizing accounts of human attachment stress the mother-child bond. By contrast, in explaining how new parents Tim and Michelle fall in love with their baby, Brizendine includes both mother and father when she speaks of Mother Nature forging a "nearly unbreakable biological bond between parent and child."⁶¹ The same brain circuits involved in falling in love are "hijacked" to make sure parents fall in love with their child.⁶²

Once again, in contrast to accounts that stress maternal bonding, Brizendine states: "The tending instinct is prewired into all human brains, not just mothers."⁶³ Tim's brain circuits, including his "reward center," pulse with the "joy of fatherhood." This is self-reinforcing: the more he tends to his infant, the more the brain is stimulated to reinforce his "tending instinct."⁶⁴ However, Brizendine returns to the theme of difference soon enough: infants detect differences between mom and dad, and it's "hard to match the biological force of the love bond between Mommy and baby," in part because of women's role in breastfeeding. Another gender difference Brizendine reports, pertinent to the issue of work/family conflict (to be discussed later), is mothers' tendency to be reluctant to entrust infants to their fathers' care and to believe that fathers will be less competent. Brizendine explains that such mothers are "unknowingly operating on ancient brain circuitry" that tells them "that female kin" were the ones to "look [to] for help."⁶⁵ Fortunately for Tim, Michelle doesn't expect him to fill the "ancient shoes" of "all her female kin" and encourages him to "be a dad," strengthening her marriage in the process.⁶⁶

Thus, in the midst of an otherwise very deterministic account of how our ancient brains shape our mating and parenting, Brizendine shows recognition of the role of environmental factors—such

as a mother's positive reinforcement—in turning men into dads. She attributes certain features of child well-being to father-child interactions. Here, her inattention to the role of social construction of masculinity, and to whether such constructions warrant criticism, is discouraging. For example, while “daddy's little girl steals his heart,” and while he is (supposedly) infinitely and patiently willing to drink tea at her tea parties or to do things to help her, when it comes to sons, fathers “help” by “making the boys stronger and tougher” so they can “survive as a man in the real world.” This may mean that fathers “inhibit displays of affection in favor of rougher handling.”⁶⁷

The same lack of criticism features in Brizendine's chapter, “Manhood: The Emotional Lives of Men,” in which she states that males learn, “from childhood on,” that “[a]cting cool and hiding their fears are the unwritten law of masculinity.”⁶⁸ This echoes her earlier description of how male teens must hone the “[a]ncient male survival skills of facial posturing and bluffing,” “learning to hide their emotions.”⁶⁹ Here is an interesting mixture of nature and nurture. Studies show that when men are viewing emotionally provocative photos, their facial muscles are initially “more emotionally reactive” than women's, but then their facial muscles become “less emotionally responsive,” leading researchers to conclude that men “consciously—or at least semiconsciously—suppressed showing their emotions on their faces.”⁷⁰ Men aren't hard-wired to be less emotionally responsive, but they are socialized to be so, this experiment suggests.

Is there an evolutionary explanation for emotional differences? Brizendine states that, “through hundreds of thousands of years, our female and male brain circuits have been fine-tuned to run on different hormones.”⁷¹ But she doesn't give an explicit evolutionary explanation for why this might be so. One of the basic differences Brizendine reports is between “emotional empathy” and “cognitive empathy.” In the former, someone feels “the same emotional pain” another feels. Women, we learn, excel at this. By contrast, men's brains have a preference for “cognitive empathy,” where the male brain's “analyze-and-fix-it circuits” are activated to find a solution to someone's problem.⁷² When Danielle wants sympathy but her husband Neil offers an analytical response of how to solve the problem, she is “trapped in her female brain circuit

loops," just as he is "trapped in his male brain circuit loops." His brain is not "designed to wallow in anguish"; the male "express train" brain wants to get to its final destination. By contrast, her female friends will remain in their "emotional empathy system" and share Danielle's emotions.⁷³

What about aggression, long claimed to be one genuine area of difference between men and women? Once again, Brizendine turns to specific features in the male and female brain, explaining that Joe blew up at a cab driver because his "brain area for suppressing anger," the septum, is smaller than in the female brain. The male "anger-aggression circuits" are formed before the male is born and are "behaviorally reinforced during childhood and hormonally reinforced during the teen years."⁷⁴ But is there an evolutionary explanation? Yes, Brizendine explains to her patients, Joe and his wife, Maria, that "Joe's male brain biologically saw the cab driver's actions as a challenge to his territory and dominance, and his brain responded with a series of chemical changes, prompting his aggressive behavior."⁷⁵ Distinguishing explanation from justification, Brizendine adds: "This brain biology doesn't give men permission to be uncivilized, but it does provide insight into why they defend their manhood so vigorously." Joe's "hormone cocktail" in his "male brain" underpins his aggression and anger, an explanation Joe readily accepts.⁷⁶

Brizendine never discusses physical violence directed by men against intimate partners and children, just as she never discusses forms of male jealousy and mate-guarding that harm women. Joe looks "stricken" when he learns that his anger scares his wife, Maria, telling her, "But you know I'd never hurt you." Joe's surprise is not unusual, Brizendine says. But she does report that "high-testosterone men, like Joe, more than low-testosterone men, have a need to dominate others, and so they react dramatically to being challenged." Here Brizendine includes reference to primate studies showing that "dominant males whose status is consistently challenged maintain higher levels of testosterone and are more aggressive than subordinate males."⁷⁷ But the battleground here is the home, and the implication is that it is his, rather than her, territory. Brizendine seems to view Maria's reactions to Joe's dominance as a provocation to his further anger: "When Maria glared at Joe or shouted back at him, she was unknowingly challenging

his dominance, thus increasing the testosterone.⁷⁸ Is the implication that she should accept his dominance? She agrees to “stop glaring back” if he will “promise to walk away before he gets so mad that he can’t shut up.”⁷⁹

A “stable marriage” and “a stable social hierarchy,” Brizendine contends, are social conditions that help to “dial down” men’s testosterone and cortisol and, hence, their tendency to anger and aggression. But is a stable marriage one in which women simply accept male dominance? In discussing the importance of stable hierarchy, Brizendine turns explicitly to evolutionary biology to explain that “behaviors like bluffing, posturing, and fighting have evolved to protect males, especially from opponents within their own species.” Male-male “competition and hierarchical fighting is driven by both hormones and brain circuits.”⁸⁰ The “one-upmanship and drive for status seeking . . . found in men worldwide” are “not just a habit or a cultural tradition but more like a design feature of the male brain.”⁸¹ For example, competition at work that leaves men threatened with losing face and “forfeiting [their] place in the hierarchy” triggers men to become obsessed with “defending [their] territory,” and testosterone puts men in “fight mode,” prepared for “War.”⁸²

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Critiques of Brizendine as Exemplifying “Neurosexism”

The philosopher Cordelia Fine argues that Brizendine’s *The Female Brain* and similar “popular and influential books arguing for fundamental and ‘hardwired’ differences in male and female psychology” are illustrative of “the popular new genre of neurosexism.”⁸³ In this genre, where “gender stereotypes [are] dressed up as neuroscience,” “scientific accuracy and commonsense are often casualties in the ugly rush to cloak old-fashioned sexism in the respectable and authoritative language of neuroscience.”⁸⁴ Fine suggests that such explanations may be so appealing because “[t]he answer, ‘Oh, it’s the brain,’ offers a tidy justification for accepting the status quo with clear conscience.”⁸⁵ If current social arrangements reflect fundamental, hardwired differences, perhaps trying to bring about alternative arrangements is futile.

In a book-length treatment of the “seductive allure” of neurosexism, *Delusions of Gender: How Our Minds, Society, and Neurosexism*

Create Difference, Fine situates the current appeals to neuroscience as the explanation of “hardwired” differences in the historical context of earlier diagnoses of differences in male and female brains. Doing so is quite instructive on the topic of evolution, equality, and social engineering because it counsels a healthy skepticism about contemporary claims. Fine offers as cautionary tales many historical examples of claims that basic differences between the male and female brain explained the basic inferiority of females and their unsuitability for many male-occupied spheres.

Neurologists from earlier centuries argued that “fundamental differences” in the brains of the sexes had concrete implications for men’s and women’s places in society. “In 1915, the illustrious neurologist Dr. Charles Dana” wrote an opinion piece in the *New York Times* concluding that these “structural differences . . . in the two sexes” will not “prevent a woman from voting,” but “they will prevent her from ever becoming a man, and they point the way to the fact that women’s efficiency lies in a social field and not that of political initiative or of judicial authority in a community’s organization.”⁸⁶ In the late nineteenth century, the evolutionary biologist and physiologist George Romanes wrote that, because women’s brain weight was “about five ounces less than that of men,” “on merely anatomical grounds we should be prepared to expect a marked inferiority of intellectual power in the former.” He concludes: “In actual fact we find that the inferiority displays itself most conspicuously in a comparative absence of originality, and this more especially in the higher levels of intellectual work.”⁸⁷ Fine further observes that when women did achieve at what were deemed male spheres of accomplishment, they “acted above their sex,” with commentators attributing it to their having, in effect, “male” brains and “abnormal” development.⁸⁸

For legal scholars, such historical examples will resonate with classic examples of how jurists appealed to basic differences between women and men to rationalize women’s exclusion from full participation in society. The most famous example is the concurring opinion of Justice Bradley in *Bradwell v. United States* (1872), in which Myra Bradwell unsuccessfully appealed to the U.S. Supreme Court for admission to the Illinois bar to practice law. Justice Bradley explained how civil law limiting women’s participation in society properly reflected nature and divine order:

Illinois ital

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and women. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy, which belongs to the female sex evidently, unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say, 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. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state.⁸⁹

In the late twentieth century, the U.S. Supreme Court repudiated this vision of naturally rooted and divinely ordained sex inequality. What once seemed to be innate differences between the sexes now seemed to be unconstitutional "archaic" stereotypes, "fixed notions" rather than "real differences" between men and women. Such views had no relationship to women's actual ability to contribute to and participate in the life of the nation. Justice Sandra Day O'Connor, the first woman appointed to the Court, and Justice Ruth Bader Ginsburg, who litigated the cases that led to the transformation of the Court's equal protection jurisprudence, often refer to Bradley's concurrence in noting this transformation of the Court and of the larger society.⁹⁰ Such views of the Constitution and of women's place in the family and society are now "discredited" and at odds with contemporary constitutional understandings of women's liberty and equality.⁹¹

With good reason, then, skepticism is in order concerning contemporary claims about "hardwired" differences between the sexes. Fine aptly poses the question whether "early twenty-first-century neuroscientific explanations of inequality" are "doomed to join the same garbage heap as measures" used in earlier centuries, and her own suspicion is that they will.⁹² Even though historical examples of scientific explanations of sex inequality counsel skepticism about contemporary neuroscience claims, it is still important to take a critical look at the claims themselves—especially

if hardwired differences should make us more humble about the possibilities for social engineering to promote equality. Fine, as noted earlier, labels this kind of scientific argument “neurosexism.” As a legal scholar, I shall not attempt here to assess the underlying merits of the scientific claims Brizendine and others make. Instead, I shall draw on the work of Fine, Melissa Hines, and other scholars who do carefully criticize the underlying studies and experiments on which claims about sex differences and their implications rest.

Brizendine’s hugely popular books are not without some favorable reviews in scholarly journals for providing a helpful “roadmap” for understanding how hormones shape brains.⁹³ However, scholars have offered trenchant critiques of her books. For example, in *Nature* magazine, Rebecca Young and Evan Balaban label *The Female Brain* a work in “psychoneuroindocrinology” and conclude:

despite the author’s extensive academic credentials, *The Female Brain* disappointingly fails to meet even the most basic standards of scientific accuracy and balance. The book is riddled with scientific errors and is misleading about the processes of brain development, the neuroendocrine system, and the nature of sex differences in general.⁹⁴

One serious criticism of Brizendine’s work is that her dramatic claims about gender differences are not supported by the sources she cites. Perhaps the most widely discussed example is about use of language: “A woman uses about 20,000 words per day, while a man uses about 7,000,” a claim driving home her vivid contrast between the “communicating machine” on the one hand and the “problem-solving machine” on the other. Mark Liberman, the author of the online *Language Log*, searched unsuccessfully—among Brizendine’s sources and elsewhere—to find any support for this claim. He warns that books like Brizendine’s “tend to confirm our culture’s current stereotypes and prejudices, and the science they cite is often overinterpreted, and sometimes seems simply to have been made up.”⁹⁵

Other reviews cite her “careless” research, including the error of citing “unrelated research” to support a dramatic claim about brain difference. One reviewer, Nicole Else-Quest, notes such prob-

lems as the use of unscientific language (like the image of female brains “marinating in estrogen”), overgeneralizations about non-human animal research to support her theory, and Brizendine’s practice of ignoring research “that directly and clearly refutes her speculation.” Such books, she notes, feed the endless “public hunger for scientific evidence that confirms men and women to be of different species,” and such hunger—not “large meaningful gender differences in brains or behavior—must be acknowledged as the impetus for *The Female Brain*.”⁹⁶

There is not yet as extensive a critical literature on Brizendine’s more recent book, *The Male Brain*, but some reviews point out similar problems. One review says of Brizendine’s “breezy, incautious account of how the brain, urged on by hormones, makes men and women act completely differently”: “you’d never know from reading Brizendine that beneath the sea she blithely sails are depths that researchers have only just begun to chart.”⁹⁷ Another review faults Brizendine’s reliance on MRI data to claim that men’s “sexual pursuit area” is 2.5 times larger than that in the female brain. This, the reviewer notes, begs the question: “Where exactly is this ‘pursuit area’?”, a question to which an answer with scientific validity is unlikely because “in all likelihood no such ‘area’ exists.”

Scientists caution against letting “dubious science” give credibility to stereotypes and ignore “decades of legitimate findings” about male and female similarity.⁹⁸ “Inflated claims of gender differences,” they warn, have costs to children, adults, and society, as they “reify stereotypes,” limit opportunity, and ignore that “males and females are similar on most, but not all, psychological variables.”⁹⁹ These concerns echo questions about sameness, difference, and stereotypes long posed by feminist legal theory.¹⁰⁰ Critics of Brizendine and other popularizing accounts of brain difference do not deny that there are *some* differences between male and female brains. But they urge caution against overinterpreting such differences. For example, Brizendine’s account of fundamentally different male and female brains relies heavily on the proposition that prenatal exposure to hormones is the source of these differences. Such research supposedly demonstrates that early hormonal exposure “organizes” the brain to “channel our fundamental interests into masculine or feminine directions.”¹⁰¹ Rebecca Jordan-Young, who exhaustively reviewed all the relevant

studies on brain organization theory in her book, characterizes Brizendine's *The Female Brain* as offering "the most extreme claims about sex differences in the human brain that I've seen in some time."¹⁰² Young concludes that "evidence that human brains are hormonally organized to be either masculine or feminine turns out to be surprisingly disjointed, and even contradictory—and the stakes involved in prematurely promoting this theory to a 'fact' of human development are high, both for the advancement of science and for social debates that draw on science."¹⁰³ Young offers the example of aggression, which is linked with "a presumed masculine interest in social domination" and which is viewed by evolutionary psychologists as having "adaptive significance because it encourages success in competition with other males for female sexual partners." She states: "The link between male dominance and reproductive success is almost an article of faith in evolutionary psychology, but it is not consistently supported by empirical research on either humans or other primates."¹⁰⁴

Sometimes, major conclusions about sex difference and how it translates into social structure rest on highly problematic experiments. For example, Fine talks about the significance given to an experiment that underlies Simon Baron-Cohen's distinction between men as "system-builders" and women as "empathizers." Baron-Cohen and colleagues studied babies who were one and a half days old to compare how long they looked at a human face versus at a mobile (presented one at a time): "empathizing versus systematizing."¹⁰⁵ Popularizers of brain difference draw on this work to argue that "girls are born prewired to be interested in faces while boys are prewired to be more interested in moving objects" and to draw implications for career choices. Yet, critics of this study point out a number of flaws in its design and execution, with perhaps the most "striking design flaw" being that it was not gender neutral: the experimenter knew the sex of the baby, which, in our society, may well have shaped the way she or he looked at the infant or held the mobile.¹⁰⁶

Critics contend that language about "hardwired" gender differences is misleading and inapt when applied to the brain. Hines uses the evocative phrase "engendering the brain" to capture the idea that "expectations and beliefs, as well as hormones, can engender the brain." Rather than draw a sharp—and "false"—line

Jordan

She

between biological and social/cultural causes, we should instead, she contends, recognize that:

All of our psychological and behavioral characteristics . . . have a biological basis within our brain. No matter whether hormones or other factors, including social factors, caused us to develop in a certain way, the hormonal or social influences have been translated into physical brain characteristics, such as neurons, synapses, and neurochemicals. Thus, the distinction between biological and social/cultural causes is false.¹⁰⁷

By contrast, work like Brizendine's, which stresses a fundamentally different "male reality" and "female reality" fixed, as it were, by hormones, minimizes such social influences.

Skeptics of such gender essentialism in the brain offer a different model of "neuroplasticity" that seeks to capture the idea that brain circuits are a product of the interplay of the physical, social, and cultural environments: "what we experience and do creates neural activity that can alter the brain, either directly or through changes in gene expressions."¹⁰⁸ Here, Fine quotes Anna Fausto-Sterling on the idea that the steady interplay of the biological and the social means that "components of our political, social and moral struggles become, quite literally, embodied, incorporated into our very physiological being."¹⁰⁹ Similarly, Hines concludes that "our gender schemas, or stereotypes about sex differences and their causes, have sometimes led us to believe that hormones have behavioral influences where none exist, or that, where they do exist, they are more immutable and limiting than is the case." Instead, "recent research suggests that the adult brain is remarkably responsive, even in terms of its structure, to experience, as well as to hormones."¹¹⁰

Why does this matter for a consideration of obstacles to securing greater equality in society? As noted earlier, Fine warns that "neurosexism" is harmful because it encourages us to throw up our hands in the face of "hardwired" and innate differences. Social engineering seems futile and wrongheaded in the face of "stability and unchangeability."¹¹¹ The risk of neurosexism, Fine argues, is that it can shape how people view male and female potential, as well as the status quo and the possibility or desirability of change. This also presents ethical concerns. Merely presenting theories of gender

difference as “biological, stable, and immutable”—as scientifically established “facts,” rather than as claims “under debate in the scientific community”—can lead people to “more strongly endorse biological theories of gender difference, to be more confident that society treats women fairly, and to feel less certain that the gender status quo is likely to change.”¹¹² Moreover, gendered expectations attributed to “innate, biological, and genetic difference” can shape performance, which, in turn reinforces claims about hardwired differences.¹¹³ Fine concludes that “our minds, society, and neurosexism create difference” and “wire gender,” but “the wiring is soft, not hard,” and “flexible, malleable, and changeable.”¹¹⁴

3. EVOLUTIONARY PSYCHOLOGY AND MARRIAGE LAW AND POLICY

Two ways evolutionary psychology and sociobiology feature in contemporary discussions of family law and policy are through (1) arguments about why promoting “healthy marriage” and restoring a “marriage culture” are an appropriate task for government; and (2) arguments against redefining marriage to include same-sex marriage.¹¹⁵ This embrace of social engineering is intriguing: because the social institution of marriage is necessary to address basic problems presented by nature, law and culture should reinforce it. Marriage is fundamental, yet fragile. Thus, marriage movement¹¹⁶ authors criticize work like mine for ignoring sex difference and the purposes of marriage.¹¹⁷

These authors argue that marriage civilizes men by channeling them into socially productive roles as fathers and husbands.¹¹⁸ Marriage addresses men’s inclination toward procreating without taking responsibility for children and women’s inclination toward procreating and rearing children, even in the absence of adequate resources and commitment by fathers.¹¹⁹ Marriage is the social institution that *uniquely* addresses the regulation of heterosexuality and its procreative consequences, ensuring that children have a mother and a father to care for them.¹²⁰

The marriage movement appeals to evolutionary psychology’s account of men’s and women’s differential investment in offspring and conflicting reproductive strategies to explain society’s vital interest in marriage. Marriage “closes this gap between a man’s sex-

ual and fathering capacities.¹²¹ National Marriage Project Director David Popenoe testified in a congressional hearing on marriage promotion that the father-child bond is weaker than the mother-child bond and that men naturally tend to stray from mothers and children without the commitment of marriage.¹²²

A rationale that marriage movement authors offer for limiting marriage to one man and one woman is marriage's role in ensuring maternal *and* paternal investment in children. This argument stresses family law's channeling function¹²³ and warns against altering marriage's social meaning. This argument has migrated into amicus briefs and some judges' opinions in litigation over challenges by same-sex couples to state marriage laws.

One example is a dissent in *Goodridge v. Department of Public Health*,¹²⁴ where the Massachusetts Supreme Judicial Court opened the door to same-sex marriage. The *Goodridge* majority rejected the state's argument that, because procreation was the central purpose of marriage, excluding same-sex couples from marriage was rational. It identified "exclusive and permanent commitment," rather than procreation, as marriage's indispensable feature.¹²⁵ The majority argued that the state had facilitated avenues other than marital sex for "bringing children into a family."¹²⁶ Dissenting, Justice Cordy contended that "the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized."¹²⁷ Although in contemporary society "heterosexual intercourse, procreation, and child care are not necessarily conjoined," an "orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth."¹²⁸

The institution of marriage is, in effect, a form of social engineering that "fills a void" in nature: a process for "creating a relationship between the man and a woman as the parents of a particular child."¹²⁹ The marriage movement agrees that marriage resolves the "biologically based sexual asymmetry" between the sexes and "the problematic of fatherhood" by meeting the mother's and the child's needs respectively for a mate and a father and by giving men a family role. It "helps create a greater equality between parents than nature alone can sustain."¹³⁰

amicus
("friend of
the court")

Regulating the consequences of heterosexuality also features in the majority and concurring opinions in *Hernandez v. Robles*,¹³¹ where New York's high court upheld as constitutional the exclusion of same-sex couples from marriage. The majority stated that the legislature could rationally conclude that same-sex couples do not need marriage as much as heterosexuals do because they are less sexually unruly and because their sexual unions do not *naturally* have procreative consequences. Moreover, the majority argued that, since most children are born as a result of heterosexual relationships, which are "too often casual or temporary," the state could "choose to offer an inducement—marriage and its attendant benefits—to opposite couples making a long-term commitment to each other."¹³²

By contrast, because same-sex couples must deliberately plan parenthood, they—and their children—do not need the added security and stability marriage affords because they are more likely to have family stability.¹³³ This apparent reversal of past prejudices about homosexuals as promiscuous and irresponsible led law professor Kenji Yoshino to quip that gays and lesbians are "too good for marriage."¹³⁴

Marriage movement arguments about "conjugal" marriage's evolutionary significance and fragility also feature in *Lewis v. Harris*, where the Appellate Division of New Jersey rejected the constitutional challenge brought by several same-sex couples.¹³⁵ Judge Parrillo, concurring, wrote that the purpose of marriage is "not to mandate procreation but to control or ameliorate its consequences" and that the "deep logic" of gender should remain as a "necessary component of marriage."¹³⁶ Quoting the marriage movement scholar Daniel Cere, Parrillo contended that *Goodridge's* characterization of the essence of marriage as a permanent and exclusive commitment misses that, historically, marriage has embraced:

the fundamental facets of [traditional] conjugal life: the fact of sexual difference; the enormous tide of heterosexual desire in human life, the massive significance of male-female bonding in human life; the procreativity of heterosexual bonding; the unique social ecology of heterosexual parenting which bonds children to their biological parents; and the rich genealogical nature of heterosexual family ties.¹³⁷

Marriage is “conjugal,” not just a “close personal relationship,” because of pair-bonding’s evolutionary significance. Allowing same-sex couples to marry would strip marriage of this richer meaning so that it would become “non-recognizable and unable to perform its vital function.”¹³⁸

These arguments against same-sex marriage are not persuasive.¹³⁹ They rest on assumptions about sameness and difference—between men and women and between opposite-sex and same-sex couples. Allegedly, marriage ameliorates sex difference for the sake of children and has “nothing to do” with sexuality that does not have natural reproductive consequences. But courts ruling in favor of opening up civil marriage to same-sex couples reach different conclusions about sameness and difference and eschew such a narrow focus on marriage’s purposes. In *Hernandez*,¹⁴⁰ Chief Justice Judith Kaye dissented that the state “plainly has a legitimate interest in the welfare of children” and appropriately links “tangible legal protections and economic benefits” to marriage. “The state’s interest in a stable society is rationally advanced when families are established and remain intact irrespective of the gender of the spouses.”¹⁴¹ Family law’s channeling function is served by expanding the reach of marriage to same-sex parents. Indeed, in 2011, when New York’s legislature passed the Marriage Equality Act, opening up civil marriage to same-sex couples, legislators stressed marriage’s role in securing not only personal happiness but also social stability—by providing a “comprehensive structure of state-sanctioned protections, benefits, and mutual responsibilities for couples who are permitted to marry”: in so doing, “the institution of marriage produces incalculable benefits for society, by fostering stable familial relationships. . . . Granting legal recognition to these relationships can only strengthen New York’s families.”¹⁴²

These issues also feature in the newest wave of challenges to state marriage laws: whether the creation of a legal status alternative to marriage, such as civil unions, provides equality to same-sex couples. In *Kerrigan v. Commissioner of Public Health*,¹⁴³ the Supreme Court of Connecticut concluded that civil unions did not afford same-sex couples equal protection and that their exclusion from civil marriage lacked constitutional justification. The court determined that same-sex couples “share the same interest in a

committed and loving relationship” and “in having a family and raising their children in a loving and supportive environment” as opposite-sex couples.¹⁴⁴ The legislature recognized these “overriding similarities” when it enacted the civil union law,¹⁴⁵ and, even though same-sex couples “cannot engage in procreative sexual conduct,” the method of conceiving children is an insufficient difference to negate “fundamental and overriding similarities.”¹⁴⁶

Notably, the state did *not* appeal to procreation or optimal child rearing as rationales. However, the court noted that the procreation rationale raised by several amici did not satisfy an “exceedingly persuasive justification requirement”: allowing same-sex couples to marry “in no way undermines any interest that the state may have in regulating procreative conduct between opposite sex-couples.”¹⁴⁷ The court also argued that expanding marriage will not “diminish the validity or dignity of opposite-sex marriage” but instead reinforce “the importance of marriage to individuals and communities.”¹⁴⁸ Citing to these amici’s procreative-purpose argument, dissenting Justice Zarella disagreed: “The ancient definition of marriage as the union of one man and one woman has its basis in biology, not bigotry.”¹⁴⁹

This examination of case law and of marriage movement writings illustrates how biology, sex difference, and evolution are used to argue against expanding the definition of marriage. Because marriage is a form of social engineering that addresses problems posed by nature, it is a fundamental and fragile institution. I now turn to consideration of how some work in evolutionary science that more squarely asks “the woman question”¹⁵⁰ may aid feminist legal theorists pondering how best to respond to these kinds of arguments. This scientific work may help with identifying different “facts” about human nature and human society.

4. NATURE AND THE POLITICS OF PREHISTORY

In this chapter, I can sketch only a few ways that feminist or female-centered work on evolutionary science may challenge the presentation of nature and evolution in popularizing accounts and in public policy arguments. Feminist legal theory should heed the politics of prehistory, or how certain gender biases or stereotypes may shape the study of human origins and impose a “paleolithic

glass ceiling."¹⁵¹ Too often, females feature only as passive participants in accounts of human origins, rather than as "agents of evolutionary change."¹⁵² As more female scientists study human origins, they have corrected this misconception and helped in evaluating contemporary appeals to evolution both to oppose and to support social engineering.

For example, the marriage movement stresses the pair bond, noting female and infant dependency on male help, just as evolutionary science has asserted female dependency upon male provisioning.¹⁵³ However, the assumption of a prehistoric pair bond is "a projection back in time to a narrow Western view of marriage and mating, a formulation too rigid to account for the variation that exists cross-culturally."¹⁵⁴ The Man as Provisioner thesis assumed that to increase the human population by having a lesser interval between births, "females reduced their mobility, stayed near a home base, and became dependent upon males who provisioned their own mates and offspring," since they could be relatively certain about paternity.¹⁵⁵ This model seems "preoccupied with questions/anxieties about male sexuality" at the expense of recognizing females' roles in human evolution.¹⁵⁶ Female scientists have noted flaws in this model in light of fossil evidence and studies of contemporary primate and human hunter-gatherer societies.¹⁵⁷ The pair bond may have less to do with male provisioning than with solving the problem of male mate competition, freeing a female to care for her offspring.

As primatologists put females more at the center of evolutionary study, the image of female primates has been "fleshed out to include much more than just their roles as mothers and sexual partners of males."¹⁵⁸ Scientists have studied "the significance of female bonding through matrilineal networks," "female sexual assertiveness, female long-term knowledge of the group's local environment, female social strategies, female cognitive skills, and female competition for reproductive success."¹⁵⁹ This "female-centered 'world view'" among primatologists makes sense: "many primate societies are female-bonded; thus kin-related females are the permanent core of the social group."¹⁶⁰ These facts were "not immediately recognized by primatologists," but they are now "facilitating a strong focus on females as well as attracting more women to the discipline."¹⁶¹

Sarah Blaffer Hrdy's recent book, *Mothers and Others: The Evolutionary Origins of Mutual Understanding*, proposes that the human species is more adept at cooperation than other species because of the evolution of "cooperative breeding": the pattern of relying on "allomothers" or "alloparents" to help mothers care for their children.¹⁶² An "alloparent" is any nonparent who helps parents raise their young.¹⁶³ While stories of human origins stress competition, Hrdy looks at cooperation.

The marriage movement ponders the male-female problematic; Hrdy identifies her own "perplexing paradox":¹⁶⁴

If men's investment in children is so important, why hasn't natural selection produced fathers as single-minded and devoted to children as [in some species]? And given that male care is so idiosyncratically and contingently expressed, how could natural selection have favored human mothers who invariably produced offspring beyond their means to rear alone?¹⁶⁵

While the marriage movement stresses the problem of fatherlessness and looks to marriage as the solution, Hrdy looks at the way that human and nonhuman mothers enlist alloparents to assist in raising young. "These alloparental safety nets provided the conditions in which highly variable paternal commitment could evolve."¹⁶⁶ "Evolutionary interpretations of male behavior," she observes, have an "obsessive focus" on certainty of paternity as a prerequisite to paternal investment, but there is wide variation among men with "relatively high certainty of paternity" in terms of actually engaging in "direct care" of infants, as well as instances where men who do not share a child's genes invest in child care.¹⁶⁷

Evolutionary theory tends to project the nuclear family back in time. By contrast, Hrdy describes "the typical or natural Pleistocene family" as "kin-based, child-centered, opportunistic, mobile, and very, very flexible."¹⁶⁸ Brizendine worries about single mothers and their lack of male protection and provision. Hrdy frames the issue differently: "[a]s always, . . . mothers still need a tremendous amount of help to successfully rear their kin," but in the modern postindustrial era, they face greater challenges in finding adequate alloparents and social supports (such as high quality paid child care) to ensure the nurture of children.¹⁶⁹ She worries whether the human species, as a whole, may be "losing the art of nurture," that

is, rearing children so that they develop empathy and understanding and other “prosocial tendencies” that foster human survival.¹⁷⁰ Indeed, “the preeminence of the man-the-hunter/sex-contract paradigm, with its accompanying stereotypes about nuclear families and maternal caregiving,” has offered “obstacles” to recognizing the evolution of cooperative breeding.¹⁷¹ Removing these obstacles came in part from the efforts of Hrdy and other sociobiologists (“many of us women”) to “expand evolutionary theory to include selection pressures on both sexes,” including postmenopausal females.¹⁷² The “grandmother hypothesis” is that “new opportunities to help kin generated selection pressures favoring longer lifespans among postmenopausal women.”¹⁷³

The assumption that hominids and early humans were patrilocality has hindered appreciation of the extent to which early residence patterns may have been matrilocality.¹⁷⁴ As starting assumptions of “evolutionary-minded anthropologists” about residential patterns changed, it became possible to ask new questions about cooperative breeding and the role of alloparents.¹⁷⁵ Studies indicate the preeminence of grandmothers among alloparents: “having a grandmother nearby has a significant impact on the child-rearing success of younger kin” and may sometimes more greatly enhance child well-being than the presence of a father.¹⁷⁶ In patrilocality societies, a paternal grandmother’s contribution may be more important to her son’s success, measured in shorter intervals between births; the presence of maternal grandmothers seems to correlate more with greater child well-being.¹⁷⁷ Hrdy also refers to young human females’ adeptness at communication and making friends, linking it not only to tending and befriending to obtain support but also to the need to manufacture allomothers: “Whether consciously or not, women seek ‘sisters’ with whom to share care of our children.”¹⁷⁸

On the conflict between male and female reproductive interests, Hrdy speaks of “patriarchal complications since the Pleistocene,” suggesting that earlier practices were less patriarchal than more modern ones.¹⁷⁹ Concern with ensuring paternity and preserving the patriline leads to “practices detrimental to the well-being of mothers (and children too);” she mentions sequestering women and genital infibulations.¹⁸⁰

Hrdy’s hypothesis about the evolution of cooperative breeding

offers a corrective to evolutionary psychology's emphasis on competition and on male and female strategies. The focus on an agonistic struggle between the sexes that is bridged only through marriage detracts from a broader focus on the range of social networks and supports that contribute to successful child rearing and well-being. While the marriage movement stresses the integration of sexual and parenting bonds, some feminist legal theorists argue that focusing on the "sexual family" diverts attention from the family's important intergenerational caretaking function.¹⁸¹ It takes, Hrdy paraphrases, alloparents to raise a child. A prominent contemporary example is available: First Lady Michelle Obama's mother, Marion Robinson, moved into the White House because of her crucial role caring for the Obama children.¹⁸² Hrdy's emphasis on the role of alloparents could support arguments made in favor of greater family diversity—it is not the genetic tie so much as providing nurture to children that contributes to their well-being.

5. NATURE, MARRIAGE, AND EQUALITY

Egalitarian Marriage

Popularizing accounts of "ancient" male and female brain circuitry contend that men and women—universally—seek certain qualities in mates that complement their different reproductive strategies. Such accounts, we have seen, marshal evolutionary psychology. Marriage movement appeals to evolution stress that the social institution of marriage solves certain natural, sex-based problematics and asymmetries. In this section, I consider the import of such appeals to brain difference for the ideal of egalitarian marriage. I also consider how recent sex scandals involving married male political leaders trigger appeals to evolution and hardwiring to explain why men stray. I then turn to another area in which the appeal to male and female differences often features as a supposed limit on social engineering: work/family conflict and the continuing problem of women doing more caregiving and housework than men. Here, I note how portrayals of recent economic conditions (dubbed the "he-cession") stress the need for men to "adapt" or "evolve" in ways that seem resonant with feminist social engineering goals.

Does marital happiness require inequality? Evolutionary accounts of mate selection stress men's and women's diverging criteria. However, more recent studies of marriage patterns suggest the growing practice of "assortative mating": rather than marrying up or down, well-educated and economically resourceful people choose to marry their peers.¹⁸³ Meanwhile, lower-income men and women may cohabit rather than marry because they want a threshold level of economic resources before they marry.¹⁸⁴

Egalitarian or "peer" marriage is a more just form of marriage, from a feminist or liberal perspective, than traditional marriage and is more likely to be happy and stable.¹⁸⁵ Marriage equality is a factor that contributes to marriage quality, particularly for women.¹⁸⁶ However, other scholars point out that marriages with a traditional gendered division of labor may also be quite stable so long as spouses' expectations do not change.¹⁸⁷ Spouses may also accept an unequal division of labor even if they think it is unfair.¹⁸⁸ Thus, considerable disagreement exists about whether social cooperation best takes place on terms of equality or inequality.

This debate over the desirability of egalitarian marriage surfaced in 2008 when New York's governor, Eliot Spitzer, resigned after disclosure that he was a customer of a high-priced prostitution service. Spitzer apologized for his "failings" and spoke of the need to heal himself and his family as his wife, Silda Wall Spitzer, stood by his side. The image of Spitzer's wife by his side during this scandal was in stark contrast to a photo of the two of them that previously appeared on the cover of the magazine *O2138*: "Power Couples: See What Happens When Harvard Meets Harvard."¹⁸⁹ Love between equals can work and can even be fun and sexy, the story and the accompanying photos seemed to announce.

After the scandal, a model for happy marriage different from that of the power couple was offered by the conservative self-help author, Dr. Laura Schlessinger. Stunning her host on the *Today* show, Schlessinger laid the problem of men's cheating at the door of any wife who failed to make her husband feel "like a man . . . like a success . . . like her hero," so that he was "very susceptible to the charm of some other woman." Schlessinger held women "accountable" for not giving "perfectly good men" the love, kindness, respect, and attention they need, charging that "these days, women don't spend a lot of time thinking about how they can give

their men what they need."¹⁹⁰ In Silda Wall Spitzer's case, this diagnosis seems particularly inapt, given that she put her own career aside to help her husband in his. But it does suggest cultural resistance to equality. Dr. Laura is a provocateur, and her comments drew criticism; however, she is also a popular author. Her book *The Proper Care and Feeding of Husbands* indicts the women's movement as a "core destructive influence" and advises wives to treat their husbands with respect, reinforce them as head of the household, and celebrate difference.¹⁹¹ Admiration and deference will yield a wife more power and happiness than direct challenge. Harvey Mansfield also speaks about admiration—"look[ing] up to someone in control"—as a proper response to manliness.¹⁹²

In this view, equality is a turn-off. Inequality is sexy. In the wake of recent infidelity scandals involving prominent politicians, some commentators look to evolutionary science's hypothesis that men's "philandering increases their reproductive success."¹⁹³ The Spitzer scandal also played as a story of marital failure and a cautionary tale to wives about how to keep their marriages sexy and their men from straying. However, resistance to this diagnosis may be evident from many women finding "a catharsis" in South Carolina First Lady Jenny Sanford's "hard hitting" public statements about Governor Mark Sanford's confessed infidelity—and her absence from his press conference.¹⁹⁴

With each new wave of sex scandals involving prominent male politicians (former governor Arnold Schwarzenegger, Representative Chris Lee, and Senator John Ensign), actors (Jesse James), and athletes (Tiger Woods), media pundits seem to return again to evolution, nature, and the male brain for explanation. For example, David Buss explains that men crave "sexual variety. . . . They've evolved the desire to be with different women." Because their reproductive strategy is to mate with as many women as possible, thus creating as many offspring as possible, with a higher "payoff" (than women have) from a "short-term mating strategy, this has forged in the male brain a desire for sexual variety."¹⁹⁵ Marital unhappiness and the easy availability of extramarital sex are other factors. But power is a big factor. An evolutionary psychologist reports on NPR: "There's good evidence that men with great power and status are, in fact, more prone to affairs."¹⁹⁶ To get at the "why" of cheating, an evolutionary psychologist explains that

"power has been and will forever be entangled with corruption for various reasons," and leaders have "more opportunities for corruption and for lying-cheating-stealing behaviors."¹⁹⁷ Moreover, Buss adds, "women are attracted to men who have power and status, so public figures usually have plenty of opportunity."¹⁹⁸ At least Buss acknowledges that men have some agency in not acting on such desires, "because they don't want to jeopardize social reputations or marriages."¹⁹⁹

Media efforts to get at the "why" of powerful men's marital infidelity also turn to Brizendine's account of the male brain. Brizendine explains, in one story: "The way Mother Nature made us, the man's job on the planet is to look for, search for and seek out fertile females to mate with."²⁰⁰ Women need to understand that a man watches attractive women because "this is how he is wired," and so ogling women (which is within the "normal range of behavior") does not mean he will be like Woods or James, whose behavior was "pathological" and "crossed over the line."²⁰¹ One news story, "Why Powerful Men (Like Arnold) Cheat," provides a link to a related story, "10 Things Every Woman Should Know about a Man's Brain," drawn largely from Brizendine's pop science claims (for example, "Hard-wired to check out women").²⁰²

In the midst of so many appeals to evolution to explain dramatic failures of marital happiness, it is important to recognize cultural evolution toward an ideal of egalitarian marriage as a firm foundation for marital happiness. It is striking, for example, that a recent Time magazine article, "Who Needs Marriage?," led with the contrast between the marriage of Britain's Prince Charles and Lady Diana Spencer and the more recent royal wedding between their son William and Catharine Middleton.²⁰³ The gist of the article is that, by contrast to the earlier royal couple, William and Catharine are similar in age (she is six months older) and education (she went to the same university as William and would be the first English queen with a university degree). "[T]heirs is a union of equals" and, as such, reflects "the changes in the shape and nature of marriage that have been rippling through the Western world for the past few decades."²⁰⁴ The sociologist Stephanie Coontz notes how this basic equality between the partners in this new royal union signals the emergence of a "more modern, egalitarian version of the love match," in which persons choosing mates "increasingly sought

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shared interests rather than adherence to rigid gender roles."²⁰⁵ She observes that the very fact that they are close in age and education conduces to marital stability, rather than divorce. A recent Pew Research Center report, *The Decline of Marriage and Rise of New Families*, reports that social norms about spousal roles and what makes for a more satisfying marriage have changed, with public opinion, in 2010, "endors[ing] the modern marriage in which the husband and wife both work and both take care of the household and children."²⁰⁶ (However, as I discuss later, there is still a strong belief that men—more than women—should be providers.) Strikingly, by contrast to the gender differences stressed as "universals" by evolutionary psychologists, the report finds remarkable similarity in views of what qualities make one a good husband/partner and a good wife/partner.²⁰⁷

Work-Family Conflict

Another illustration of cultural limits concerning egalitarian marriage is the continuing issue of work-family conflict and the division of labor in the home. Laws and policies have moved us closer to a world where mothers and fathers have equal rights and responsibilities, as a legal matter, for their children and where, as a matter of social norms, women work outside the home and men play an active role in nurturing children. But the division of labor in families remains a flashpoint, as is evident from reports that, in the home, women still do more child care (or care work) and household work than men.²⁰⁸ This is true within the United States and more globally, leading a recent United Nations report on men in families to conclude: "one of the core enduring symptoms of gender inequality globally is the unequal work-life divide—stemming from the fact that men are generally expected to be providers and breadwinners (who work outside the home) and women and girls are generally expected to provide care or to be chiefly responsible for reproductive aspects of family life."²⁰⁹ Moreover, within the United States, news stories appear every several months about the so-called opt-out revolution, where highly educated women are choosing to stay home rather than pursue professional success. Three generations of feminist legal theorists have devoted

attention to these issues about care, work, and family; my focus is on what the debate suggests about cultural limits.

One cultural limit is that while workplaces have come a long way toward recognizing that workers may have caretaking responsibilities, cultural perceptions of male workers still differ from those of female workers. Many men aspire to a more flexible balance between family life and work but may rationally perceive that they will pay a higher cost in terms of questions about their commitment to the job if they take advantage of employment policies designed to help parents.²¹⁰

Part of the unfinished business of feminism is that men's lives have changed to a lesser degree than women's. Some feminist theorists argue that, instead of pushing the state for more public policy changes, wives and mothers should direct their energy toward persuading men to change.²¹¹ The legal feminist Mary Anne Case argues for directing effort toward a redistribution of responsibility from women to men, rather than to employers or the state.²¹² Certainly, government is not the only relevant actor when it comes to advancing sex equality. Thus, the political theorist Nancy Hirschmann raises a useful question: how can men be persuaded to change, and how can women be persuaded to insist on that change?²¹³ This is a basic premise of "how to" books such as Joshua Coleman's *The Lazy Husband: How to Get Men to Do More Parenting and Housework*.²¹⁴ While Dr. Laura's book promises marital happiness if women will accept role differentiation and resist feminist ideology, Coleman's book promises to save marriages and increase marital happiness by *increasing* equality.

Mansfield proposes a different cultural limit: manliness. Manly men have a disdain for women's work, including housework. "Manliness prevents men from giving equal honor to women: this is the issue behind inequality in housework."²¹⁵ If this is the case, then it suggests limits to feminist social engineering. On the other hand, alternative models of men's relationship to the home and to family life may suggest that the feminist project has had greater success. The marriage movement itself identifies women's discontent with the household division of labor as a reason why young women are less optimistic than young men about having happy marriages and why women today are more willing to exit marriages.²¹⁶ While

some marriage proponents argue that a "cultural script" of a gendered division of labor in the home is better than "endless negotiation" over roles, others support "equal rights and responsibilities" inside and outside the home.²¹⁷

Equality is important to marriage quality and to addressing work-life conflict. After the death of Betty Friedan, some commentators asked if feminism was a failure because women were choosing to stay home, rather than juggle career and family. One response was that women were making a *choice*, and wasn't feminism, after all, about women being able to make choices? No, said the feminist scholar Linda Hirshman, arguing that women who were opting out were in fact making bad choices not to be celebrated as a feminist triumph.²¹⁸ This debate about feminism's goals suggests one complication in theorizing and achieving equality. Friedan's emphasis on women getting out of the home and having careers, while paid household workers took up the slack, risked devaluing the importance of family and home life and suggested only one model of a good life to which women should aspire. However, when feminists assess the issue of choice, questions such as how cultural expectations for boys and girls shape their life prospects, whether social institutions make it equally possible for women and men to pursue certain life plans, and whether problems of unequal bargaining power constrain the exercise of choice are appropriate concerns.

6. CONCLUSION

Responding to assertions that "natural" differences or cultural imperatives limit the possibility of equality or necessitate particular institutional forms for the family requires that feminist theorists generate and contribute to well-informed visions of the interplay of nature and culture.²¹⁹ We should ask what sorts of social cooperation are possible and valuable in the areas of sexuality, reproduction, and parenting. Appeals to "bridging the gender divide" in ordering human society invite feminist counternarratives. As such narratives theorize ~~on~~ the proper role of social engineering and institutions, a feminist commitment to substantive equality should remain a guiding ideal. Perhaps a fitting coda to this essay on evolution and equality is an observation that, even in the

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comparatively brief time period on which this essay focuses (that is, comparatively brief when compared to the processes of evolution!), it is possible to detect what may be the beginning of a pendulum swing away from skepticism about feminist social engineering in the name of hard-wired differences and evolutionary constraints and toward the view that feminist social engineering may actually work and be beneficial for society. I refer to calls, in the wake of the present economic recession (dubbed the “he-cession” or “man-cession” because men have lost more jobs than women) for men to “man up!” by becoming more like women in the workplace and in the home and for public policy to help them do so.²²⁰ Journalists, aided by pundits, prescribe that “it’s time to reimagine masculinity at work and at home,” by which they mean that men should seek out more “girly” jobs in the economy (less vulnerable to the recession) and do more parenting and housework at home (to make them more desirable intimate partners). Most pertinent to this essay, American observers look to Sweden and other Western European countries for examples of successful social engineering—“smart” public policies (such as the “daddy month”) that nudged new fathers to take time off work by a use-it-or-lose-it approach to paid leave.²²¹ Public policy, these observers conclude, actually can shift social expectations about men’s roles at work and at home, leading a newer generation of young men to “feel competent at child-rearing” and to “simply expect to do it.”²²² Public policies, these reports suggest, can and do lead to shifts in the culture, so that employees and employers have different expectations about gender roles.²²³ Thus, the United Nations report to which I referred above notes the ~~import~~ ^{impact} of the global economic recession on men, who “globally derive their identities and chief social function from their role as providers,” while also noting the ~~the~~ ^{that} “social expectations about men’s involvement in the care of children, reproduction in general and fatherhood are also changing, albeit slowly.” It stresses the important role of public policy in “supporting” these “evolving roles of men in families.”²²⁴

NOTES

This chapter incorporates a revised portion of my chapter in Martha Albertson Fineman, ed., *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* (New York: Routledge, 2010), 66–82.

1. Mary Anne Case, "Feminist Fundamentalism and Constitutional Citizenship," in *Gender Equality: Dimensions of Women's Equal Citizenship*, ed. Linda C. McClain and Joanna L. Grossman (New York: Cambridge University Press, 2009); *United States v. Virginia*, 518 U.S. 515 (1996). ital

2. Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Cambridge, MA: Harvard University Press, 2006).

3. Martha Albertson Fineman, "Why Marriage?," *Virginia Journal of Social Policy and the Law* 9 (2001): 239; Martha Albertson Fineman, "Equality: Still Illusive after All These Years," in McClain and Grossman, eds., *Gender Equality*, 251; Linda C. McClain, "Child, Family, State, and Gender Equality in Religious Stances and Human Rights Instruments: A Preliminary Comparison," in *What's Right for Children? The Competing Paradigms of Religion and Human Rights*, ed. Martha Albertson Fineman and Karen Worthington (Farnham, England: Ashgate, 2009), 19.

4. McClain, "Child, Family, State, and Gender Equality in Religious Stances and Human Rights Instruments."

5. Cordelia Fine, *Delusions of Gender: How Our Minds, Society, and Neurosexism Create Sex Difference* (New York: Norton, 2010). See discussion of examples in Part 2.

6. *Ibid.*, 147.

7. Louann Brizendine, *The Female Brain* (New York: Morgan Road Books, 2006); Louann Brizendine, *The Male Brain* (New York: Broadway Books, 2010).

8. Robert Wright, *The Moral Animal: Why We Are the Way We Are: The New Science of Evolutionary Psychology* (New York: Vintage Books, 1995).

9. David M. Buss, *The Evolution of Desire: Strategies of Human Mating* (New York: Basic Books, 1994).

10. Robert Wright, "Feminists, Meet Mr. Darwin," *The New Republic*, November 28, 1994, 34–36.

11. *Ibid.*, 34.

12. Brizendine, *The Female Brain*.

13. David Brooks, "Is Chemistry Destiny?," *New York Times*, September 17, 2006, http://www.rolereboot.org/system/storage/153/4b/b/122/is_chemistry_destiny.pdf (discussing Brizendine, *The Female Brain*, 14).

14. Brizendine, *The Female Brain*, 1.

15. *Ibid.*, 6.

16. Mark Liberman, "Neuroscience in the Service of Sexual Stereotypes," *Language Log* (2006), <http://158.130.17.5/~myl/languageelog/archives/003419.html>; Carly Rivers and Rosalind C. Barnett, "The Difference Myth," *Boston Globe*, October 28, 2007, http://www.boston.com/news/globe/ideas/articles/2007/10/28/the_difference_myth/.
17. Brizendine, *The Female Brain*, 42.
18. *Ibid.*, 37.
19. *Ibid.*, 40.
20. Carol Gilligan, *Making Connections: The Relational Worlds of Adolescent Girls at Emma Willard School* (Cambridge, MA: Harvard University Press, 1990).
21. Brizendine, *The Female Brain*, 42.
22. *Ibid.*, 42–43.
23. *Ibid.*, 43.
24. *Ibid.*
25. *Ibid.*, 54.
26. *Ibid.*, 55.
27. *Ibid.*, 60.
28. *Ibid.*, 59–60.
29. *Ibid.*, 60.
30. Buss, *The Evolution of Desire*.
31. Brizendine, *The Female Brain*, 61.
32. *Ibid.*, 62.
33. *Ibid.*
34. *Ibid.*
35. *Ibid.*
36. *Ibid.*, 63.
37. *Ibid.*
38. *Ibid.*, 64.
39. *Ibid.*
40. *Ibid.*, 64–65.
41. Buss, *The Evolution of Desire*, 125–29; Richard A. Posner, *Sex and Reason* (Cambridge, MA: Harvard University Press, 1992), 97.
42. Buss, *The Evolution of Desire*.
43. Posner, *Sex and Reason*, 97, 112.
44. Mary Batten, *Sexual Strategies: How Females Choose Their Mates* (New York: Jeremy P. Tarcher/Putnam Book, 1994).
45. Brizendine, *The Female Brain* (book jacket); Brizendine, *The Male Brain* (book jacket).
46. Brizendine, *The Male Brain*, 2.
47. *Ibid.*, 7.
48. *Ibid.*, 19.

49. Ibid., 18.
50. Ibid., 131.
51. Ibid., 52.
52. Ibid., 54–55.
53. Ibid., 57.
54. Ibid.
55. Ibid., 58.
56. Ibid., 63.
57. Ibid., 62–63.
58. Ibid., 65.
59. Ibid., 64.
60. Ibid., 66.
61. Ibid., 82.
62. Ibid.
63. Ibid.
64. Ibid., 84.
65. Ibid., 87.
66. Ibid., 87–88.
67. Ibid., 93.
68. Ibid., 99.
69. Ibid., 39.
70. Ibid., 100.
71. Ibid., 101.
72. Ibid., 97.
73. Ibid., 98. This resonates with the “you just don’t understand” type of books by Deborah Tannen, where men want to help women by solving their problems, not realizing that women want to engage in a certain amount of “troubles talk.” See Deborah Tannen, *You Just Don’t Understand: Women and Men in Conversation* (New York: William Morrow, 1990).
74. Brizendine, *The Male Brain*, 102.
75. Ibid., 104.
76. Ibid.
77. Ibid., 107.
78. Ibid.
79. Ibid.
80. Ibid., 110.
81. Ibid.
82. Ibid., 111.
83. Cordelia Fine, “Will Working Mothers’ Brains Explode? The Popular New Genre of Neurosexism,” *Neuroethics* 1 (2008): 69–72.
84. Ibid., 69, 70.

85. *Ibid.*, 71.
86. Fine, *Delusions of Gender*, 131 (quoting George J. Romanes, evolutionary biologist and physiologist (1887)).
87. *Ibid.*, 141.
88. *Ibid.*, xix-xx.
89. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872).
90. Sandra Day O'Connor, "Portia's Progress," *New York University Law Review* 66 (1991): 1546-58; Ruth Bader Ginsburg, "Constitutional Adjudication in the United States as a Means of Advocating the Equal Statute of Men and Women under the Law," *Hofstra Law Review* 26 (1997): 263-71; Ruth Bader Ginsburg, "Sex and Unequal Protection: Men and Women as Victims," *Journal of Family Law* 11 (1971-72): 347-62 (criticizing Bradley's "now notorious concurring opinion").
91. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). In *Gonzales v. Carhart*, 550 U.S. 124, 185-86 (2007), Justice Ginsburg warned, in an impassioned dissent, that the majority opinion's paternalistic picture of protecting women from abortion decisions they may regret by banning a procedure was a "way of thinking" that "reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited" (citing, *inter alia*, to Justice Bradwell's concurrence in *Bradwell*).
92. Fine, *Delusions of Gender*, 154.
93. For example, Susan A. Albrecht, "An Owner's Manual for Women . . . and Men," *Sex Roles* 61 (2009): 286-87; Lay See Ong, "Book Review: A Roadmap of the Male Brain," *Evolutionary Psychology* 8 (4) (2010): 776-78, <http://www.epjournal.net>.
94. Rebecca M. Young and Evan Balaban, "Psychneuroindocrinology" (reviewing *The Female Brain*, by Louann Brizendine), *Nature* 44 (2006): 634.
95. "Neuroscience in the Service of Sexual Stereotypes," *Language Log*, August 6, 2006, <http://itre.cis.upenn.edu/~myl/languagelog/archives/003419.html>. For another refutation of this claim, see Matthias R. Mehl et al., "Are Women Really More Talkative Than Men?," *Science* 317 (2007): 317, <http://www.sciencemag.org>.
96. Mehl et al., "Are Women Really More Talkative Than Men?," 322.
97. Emily Bazelon, "A Mind of His Own," *New York Times*, March 28, 2010, Book Review, 17.
98. Rivers and Barnett, "The Difference Myth."
99. Janet Shibley Hyde, "The Gender Similarities Hypothesis," *American Psychologist* 60 (2005): 581-89.
100. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

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Christine A. Littleton, "Reconstructing Legal Equality," *California Law Review* 75 (1987): 1279-1337.

101. Rebecca M. Jordan-Young, *Brain Storm: The Flaws in the Science of Sex Differences* (Cambridge, MA: Harvard University Press, 2010), 198-99.

102. *Ibid.*, 50.

103. *Ibid.*, 3.

104. *Ibid.*, 210.

105. Fine, *Delusions of Gender*, 112.

106. *Ibid.*, 113-14.

107. Melissa Hines, *Brain Gender* (New York: Oxford University Press, 2004), 214.

108. Fine, *Delusions of Gender*, 236.

109. *Ibid.*

110. Hines, *Brain Gender*, 228.

111. Fine, *Delusions of Gender*.

112. *Ibid.*, 185.

113. Fine cites a study in which women "given a journal article to read that claimed that men are better at math because of innate, biological, and genetic differences performed worse on a GRE-like math test than women shown an essay saying that men's greater effort underlies their superior performance." *Ibid.*, 172-73.

114. *Ibid.*, 239.

115. Another example is the argument against moving "beyond marriage" to recognize alternative legal forms and to deemphasize the conjugal marriage model.

116. The Institute for American Values, founded by David Blankenhorn, is a central organization in the marriage movement. 117. Don S. Browning, "Linda McClain's *The Place of Families* and Contemporary Family Law: A Critique from Critical Familism," *Emory Law Journal* 56 (2007): 1383-1405. 118. McClain, *The Place of Families*, 135-36.

119. Don S. Browning et al., *From Culture Wars to Common Ground*, 2d ed. (Louisville, KY: Westminster John Knox Press, 2000); McClain, *The Place of Families*, 135-36.

120. David Blankenhorn, *The Future of Marriage* (New York: Encounter Books; 2007).

121. Coalition for Marriage et al., "The Marriage Movement: A Statement of Principles," 2000, 9, <http://www.americanvalues.org/pdfs/marriagemovement.pdf>.

122. David Popenoe, "Testimony of David Popenoe," Hearing on Welfare and Marriage, House Ways and Means Committee (May 22, 2001).

123. Linda C. McClain, "Love, Marriage, and the Baby Carriage: Re-

visiting the Channelling Function of Family Law," *Cardozo Law Review* 28 (2007): 2133-83; Carl Schneider, "The Channelling Function of Family Law," *Hofstra Law Review* 20 (1992): 495-532.

124. *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 983-1005 (Mass. 2003).

125. *Ibid.*, 961.

126. *Ibid.*, 961-62.

127. *Ibid.*, 995.

128. *Ibid.*

129. *Ibid.*, 996.

130. Institute for American Values et al., *Marriage and the Law: A Statement of Principles* (New York: Institute for American Values, 2006), 15.

131. *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

132. *Ibid.*, 7.

133. *Ibid.*

134. Kenji Yoshino, "Too Good for Marriage," *New York Times*, July 14, 2006, A19.

135. *Lewis v. Harris*, 875 A.2d 259 (N.J. App. Div. 2005). The New Jersey Supreme Court overturned the appellate court, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), and the legislature enacted a civil union law in response to that ruling.

136. *Lewis*, 875 A.2d at 276-78 (Papillo, J., concurring).

137. *Ibid.* at 276 (quoting Daniel Cere, "The Conjugal Tradition in Post Modernity and the Closure of Public Discourse" (unpublished manuscript, 2003).

138. *Ibid.*

139. McClain, "Love, Marriage, and the Baby Carriage," 2155-83.

140. *Hernandez*, 855 N.E.2d at 32.

141. *Ibid.*

142. Marriage Equality Act, A08354 Memo, June 29, 2011, http://www.assembly.state.ny.us/leg/?default_fid= (accessed October 27, 2011).

143. *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Connecticut 2008).

144. *Ibid.*, 424.

145. *Ibid.*

146. *Ibid.*, 424 n.19.

147. *Ibid.*, 477 n.79.

148. *Ibid.*, 474.

149. *Ibid.*, 515-16.

150. Katharine T. Bartlett, "Feminist Legal Methods," *Harvard Law Review* 103 (1990): 829-88.

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151. Adrienne Zihlman, "The Paleolithic Glass Ceiling: Women in Human Evolution," in *Women in Human Evolution*, ed. Lori D. Hager (New York: Routledge, 1997), 91.
152. Hager, *Women in Human Evolution*, ix.
153. Ibid.
154. Zihlman, "The Paleolithic Glass Ceiling," 99.
155. Ibid., 102.
156. Dean Falk, "Brain Evolution in Females: An Answer to Mr. Lovejoy," in Hager, ed., *Women in Human Evolution*, 115.
157. Zihlman, "The Paleolithic Glass Ceiling."
158. Linda Marie Fedigan, "Is Primatology a Feminist Science?," in Hager, ed., *Women in Human Evolution*, 65.
159. Ibid.
160. Ibid., 68.
161. Ibid.
162. Sarah Blaffer Hrdy, *Mothers and Others: The Evolutionary Origins of Mutual Understanding* (Cambridge, MA: Belknap Press of Harvard University, 2009), 22.
163. Ibid.
164. Ibid., 159.
165. Ibid., 162.
166. Ibid., 166.
167. Ibid., 167-68.
168. Ibid., 166.
169. Hrdy, *Mothers and Others*, 288-90.
170. Ibid., 290-94.
171. Ibid., 239-40.
172. Ibid., 258.
173. Ibid., 255.
174. Ibid., 241-43.
175. Ibid., 245.
176. Ibid., 253, 261.
177. Ibid., 261-64.
178. Ibid., 271.
179. Ibid., 264-65.
180. Ibid., 265.
181. Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (New York: Routledge, 1995); Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: New Press, 2004).
182. Rachel L. Swarns, "An In-Law Is Finding Washington to Her Liking," *New York Times*, May 4, 2009, A11.

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183. Annie Murphy Paul, "The Real Marriage Penalty," *New York Times*, November 19, 2006, Magazine, Section 6, 22; Christine R. Schwartz and Robert D. Mare, "Trends in Educational Assortative Marriage From 1940 to 2003," *Demography* 42 (2005): 621.
184. Cynthia Grant Bowman, *Unmarried Couples, Law, and Public Policy* (New York: Oxford University Press, 2010), 106–11.
185. Pepper Schwartz, *Love between Equals: How Peer Marriage Really Works* (New York: Free Press, 1994).
186. McClain, *The Place of Families*, 134–35, 141–47.
187. E. Mavis Hetherington and John Kelly, *For Better or for Worse: Divorce Reconsidered* (New York: Norton, 2002), 30–31.
188. Margaret Brinig and Steven Nock, "Weak Men and Disorderly Women: Divorce and the Division of Labor," in *The Law and Economics of Marriage and Divorce*, ed. Antony W. Dnes and Robert Rowthorn (New York: Cambridge University Press, 2002), 171, 188.
189. Lindsey McCormack et al., "Power Couples: See What Happens When Harvard Meets Harvard," *02138* (Winter 2007): 62–78.
190. Jenice Armstrong, "The Sleaze-fest Continues," *Philadelphia Daily News*, March 20, 2008, 35. Readers may view the show at <http://www.msnbc.msn.com/id/235752221/>.
191. Dr. Laura C. Schlessinger, *The Proper Care and Feeding of Husbands* (New York: HarperCollins, 2004), 3.
192. Harvey C. Mansfield, *Manliness* (New Haven: Yale University Press, 2006), 18.
193. Eduardo Porter, "Tales of Republicans, Bonobos and Adultery," *New York Times*, July 3, 2009, A20.
194. Leslie Kaufman, "Political Wife's Hard Line Strikes Chord," *New York Times*, June 27, 2009, A12.
195. "9 Reasons Why Men Cheat," *lifescrypt: healthy living for women*, February 11, 2011, http://www.lifescrypt.com/Life/Relationships/Wreckage/6_Reas.
196. Alan Greenblatt, "Are Politicians Especially Prone to Affairs?," National Public Radio, May 17, 2011, <http://www.npr.org/2011/05/17/136395606/are-politicians-especially-prone-to-affairs>.
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198. "9 Reasons Why Men Cheat."
199. *Ibid.*
200. Mark Egan, "Tiger, Jesse Are Exceptions, Not Rule; Looking at Other Women Not a Sign That a Man Will Stray, Author Says," *Times Colonist* (Victoria, British Columbia), April 15, 2010.
201. *Ibid.*

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202. "Why Powerful Men (Like Arnold) Cheat," *FoxNews*, May 17, 2011, <http://www.foxnews.com/health/2011/05/17/powerful-men-like-arnold-cheat/print> (linking to Robin Nixon, "10 Things Every Woman Should Know about a Man's Brain," April 9, 2010, <http://www.livescience.com/6327-10-woman-man-brain.html>).
203. Belinda Luscombe, "Marriage: What's It Good For?," *Time*, November 29, 2010, 48–56 (featuring magazine cover, "Who Needs Marriage?").
204. *Ibid.*
205. United Nations Department of Economic and Social Affairs, *Men in Families and Family Policy in a Changing World* (New York: United Nations, 2011), 11; see also Jennifer L. Hook, "Care in Context: Men's Unpaid Work in 20 Countries, 1965–2003," *American Sociological Review* 71 (2006): 439 (literature review).
206. *Men in Families*, 11 ("[r]ecent multi-country study including lower, middle, and higher-income countries found that mean time spent on unpaid care work by women is from 2 to 10 times greater than that spent by men").
207. Stephanie Coontz, "British Monarchy Catches Up with Modern Marriage Trends," April 26, 2011, <http://www.stephaniecoontz.com/articles/article64.htm>.
208. Pew Research Center, *The Decline of Marriage and Rise of New Families* (November 18, 2010), ii, 26.
209. *Ibid.*, 30–31. There are, however, some "significant differences by race."
210. Jerry A. Jacobs and Kathleen Gerson, *The Time Divide: Work, Family, and Gender Inequality* (Cambridge, MA: Harvard University Press, 2004).
211. Nancy Hirschmann, "Wed to the Problem? The Place of Men and State in Families," *The Good Society* 17 (2008): 52–55.
212. Mary Anne Case, "How High the Apple Pie? A Few Troubling Questions about Where, Why, and How the Burden of Care for Children Should be Shifted," *Chicago-Kent Law Review* 76 (2001): 1753–86.
213. Hirschmann, "Wed to the Problem?," 52–55.
214. Joshua Coleman, *The Lazy Husband: How To Get Men to Do More Parenting and Housework* (New York: St. Martin's Press, 2005).
215. Mansfield, *Manliness*, 9, 13.
216. David Popenoe and Barbara Dafoe Whitehead, "The State of Our Unions," 1999, <http://www.marriage.rutgers.edu>.
217. McClain, *The Place of Families*, 142–51.
218. Linda Hirshman, "Homeward Bound," *American Prospect* 16 (December 2005): 20–26; Linda R. Hirshman, *Get to Work: A Manifesto for Women of the World* (New York: Viking, 2006).
219. I must leave that task to another day. However, a helpful approach

to learning about how evolutionary theory could guide thinking about law and policy making is found in Owen Jones, "Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology," *Northwestern University Law Review* 96 (2001): 1141–1205. Jones contends that, once we appreciate that our current brains have a "tool box" that was "ecologically rational" in "ancestral times" but that may not be as adaptive as times change, then we can better understand what seems to be sometimes irrational behavior. Notably, Jones does not espouse the view that social engineering is doomed because it comes up against hardwired constraints on the brain. Rather, he suggests that "we can usefully consider law to be a lever for moving human behavior in directions it would not go on its own." *Ibid.*, 1187. He identifies the dilemma that the human brain "tends to process information in ways" that tend to yield an adaptive solution to a problem "encountered in the environment of evolutionary adaptation," and this may account for seeming irrationality today. Explanation, he stresses, is not justification, but it can help us to appreciate the evolutionary "underpinning" to certain areas of behavior, including those discussed in this essay.

220. The September 27, 2010, *Newsweek* cover depicted a man holding a child, with the headline "Man Up! The Traditional Male Is an Endangered Species. It's Time to Rethink Masculinity." For the accompanying story, see Andrew Romano and Tony Dokoupil, "Men's Lib," *Newsweek*, September 27, 2010, 43.

221. *Ibid.*, 45–46.

222. *Ibid.*, 46.

223. See Katrin Bennhold, "Flexible Workweek Alters the Rhythm of Dutch Life," *New York Times*, December 30, 2010, A10 (reporting on success of the "daddy day" in shifting men toward part-time work).

224. *Men in Families*, 1, 12.