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REVIEW ESSAY

Sex, Reason, and a Taste for the Absurd

SEX AND REASON. By Richard A. Posner.* Cambridge, Massachusetts: Harvard University Press, 1992. Pp. 458. \$29.95.

REVIEWED BY ROBIN WEST**

Like much of Richard Posner's best work, *Sex and Reason*¹ does many things, and for that reason will no doubt attract a large and diverse readership. This heavily footnoted, exhaustively researched, and imminently accessible book is a welcome introduction to the interdisciplinary study of sex. For the lay reader it presents an arresting set of speculations about human sexuality, drawn from the author's evident familiarity with a sizeable library of studies representing at least half a dozen scientific and social scientific disciplines, assembled in a readable and lively way. Of more interest, perhaps, to academicians and social scientists familiar with the literature, the book also proposes an ambitious, counter-intuitive, and sure to be controversial sociobiological argument about the essential nature of sexuality. This argument aims to account for both the universality of some sexual behaviors, on the one hand, and the extraordinary diversity of sexual customs, beliefs, and practices, on the other.²

Of interest to lawyers, judges, legislators, legal academics, and others concerned with public policy about sex, the book also sets forth a moderately libertarian argument about the efficacy of the social control of private sexual behavior. Posner concludes on the basis of "cost-benefit analysis" (rather than principle) that we should, for the most part, abandon all attempts to steer or control purely private, consensual sexual behavior through the criminal law. However, for a range of self-styled "pragmatic" reasons, Posner concludes that we can and should do little else to create a social world more tolerant and accepting of nonheterosexual and nonmarital life styles.³ Thus, while the author advocates decriminalization of homosexual and heterosexual sodomy, for example, he counsels against

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1. RICHARD A. POSNER, *SEX AND REASON* (1992).

2. *Id.* at 85-110.

3. *Id.* at 291-323.

lifting the ban on homosexuals in the military⁴ and refuses to endorse extending the option of state-recognized marriage to homosexual couples.⁵ All of these projects—the socio-historical survey of sexuality, the socio-biological theory of sex, and the libertarian-pragmatic arguments for modest and, for the most part, uncontroversial legal reform—are sure to attract many interested readers and, because of the judicial and academic prominence of the author, large numbers of critics from a variety of legal and nonlegal disciplines as well.

As important as all of these projects may be, they are clearly secondary to the author's central purpose, which is neither sociological, biological, nor legal, but rather, economic. Above all else, *Sex and Reason* is an attempt by our most prominent rationalist to prove the absolute universality of economic reasoning in human choice and behavior by showing the rationality of our presumably most irrational choices and behaviors: those driven by our sexual urges. Thus, as the author states in his opening remarks,⁶ the large purpose of this book is to explain the rationality of our sexual behavior, and thereby limit, if not disprove the Aristotelian dictum, quoted in the book's opening epigram, that "[Sexual] pleasures are an impediment to rational deliberation, . . . it is impossible to think about anything while absorbed in them."⁷ The author's main target, in other words, is neither liberal nor conservative moralism, but rather the widespread intuition, shared by academicians, legislators, and the lay public alike, that whatever the value of economic reasoning in commercial and maybe even some noncommercial spheres of life, it certainly has no relevance—no explanatory power—in controlling behavior and choices so thoroughly irrational—so emotional, instinctive, biological—as our sexual inclinations and drives. On the contrary, Posner insists, although forces beyond our control heavily determine our sexual "preferences," this hardly distinguishes them from other preferences that are similarly given rather than chosen. Accordingly, the determinism of our sexual preferences hardly disqualifies them from the benefit of dispassionate study and control by the trained economist's eye.

The overarching purpose of this book, then, is to draw an analogy from areas of life in which Posner assumes there is some consensus that economic, or rational, choice governs conduct,⁸ to those areas of life touched by sexuality, in which it is largely but erroneously believed that rational choice plays no part. Posner concedes that our sexual preferences them-

4. *Id.* at 314-22.

5. *Id.* at 309-14.

6. *Id.* at 2-3.

7. *Id.* at 1 (quoting ARISTOTLE, NICHOMACHEAN ETHICS).

8. *Id.* at 85, 181.

selves are not rationally chosen but are given to us, probably by biological fiat.⁹ It does not follow, though, that our sexual *behaviors*, as distinct from our sexual preferences, are not rational.¹⁰ In commercial life as well, Posner reminds us, our preferences are given and hence irrational.¹¹ In *neither* case does the irrationality of our preferences imply the irrationality of our conduct. Rather, our conduct is rational within the parameters set by our preferences. Just as our “preference” for one bundle of commercial commodities over another determines not our choices, but the costs we assign to them, so our sexual preferences, Posner argues, also largely beyond either individual or social control, determine not who or what we choose—same sex, different sex, fetish, whatever—but the costs we place upon our available options. Our sexual choices are rational responses to the costs placed on various sexual acts just as our commercial choices are rational responses to other costs. In both spheres, our behavior reflects a thoroughly rational response to the perceived costs and benefits of the different courses of action open to us.¹² Therefore, our sexual behavior, no less than our commercial behavior, is controllable through the social and legal manipulation of the costs of various options.

Not surprisingly, Posner couples his substantive claim about the rationality of sexual behavior with a normative claim about the appropriate social and legal control of sexuality: we should, Posner repeatedly insists, be “morally neutral” in our regulation of sexual behavior. Both for purposes of study and for purposes of regulation, we should regard sexual preferences as of no greater moral moment than a preference for vanilla over chocolate ice cream.¹³ We should regulate the choices we make on the basis of those preferences, then, only to the degree and in the manner that we regulate other consensual and morally inconsequential conduct: only when such regulation is warranted by a careful tabulation of its relative costs and benefits to third parties.¹⁴ In the absence of such “externalities,” we should leave consenting individuals free to satisfy their preferences as they wish—not for the vaunted moral principles of “liberalism,” but for the hard-headed and intellectually rigorous reason that to do so is economically sound, wealth-maximizing social policy.¹⁵

Pulling the substantive and normative strands together, then, Posner’s overarching aim in this book, as he states repeatedly, is to demonstrate that the normative economist’s assumption of behavioral rationality and

9. *Id.* at 3-5.

10. *Id.* at 111-45.

11. *Id.*

12. *Id.*

13. *Id.* at 85, 436-37.

14. *Id.* at 85, 181-219.

15. *Id.* at 181-99.

tools of rational deliberation apply to the study and regulation of sex in precisely the same ways those assumptions and analytic methods apply to the science of traffic control or agricultural policy.¹⁶ Therefore, it is possible to understand sexual behavior and practice as the rational response of individuals to their given preferences and to biologically and socially imposed constraints, and, furthermore, it is possible to reform laws governing sexual practices in a dispassionate and scientific manner so as to maximize efficiency and minimize impediments on individual freedoms.¹⁷

I argue in this review that although Posner's descriptive claim about the rationality of our sexual behavior does indeed have an odd ring to it, it is Posner's normative claims—his rigid insistence on dispassion and “neutrality” in the study and regulation of sexual choice—that is ultimately the Achilles' heel of this book. It becomes quickly apparent on even a casual reading that Posner's insistence on “moral neutrality” goes well beyond his liberal sounding tolerance of “deviant” sexual preferences and practices. Rather, the “moral neutrality” Posner advocates requires a studied moral apathy toward a bewildering array of practices, customs, habits, and inclinations that cause inestimable amounts of human suffering and reveal the existence of manifest unjust subordination of large groups of persons—primarily, women. I suggest that “moral neutrality” is not the attitude we ought to take toward such behaviors, as either scientists or legislators.

Thus, what I argue in this review is that the great and indeed glaring flaw of this book is moral, not conceptual or factual: it is a failure to criticize where criticism is due and a failure to condemn where condemnation is called for. That flaw, I will argue, reveals deficiencies not so much in the author's understanding of human sexuality—peculiar though it may be—as in the normative economic approach to valuation that runs throughout the book: a neo-Darwinian insistence on valuing that which the strong members of a community, nation, or species already value, and hence, designate as “valuable” in the markets, conflicts, bargains, and transactions which they dominate. What this book most stunningly reveals, in other words, is the utter failure of normative economics as a moral theory of politics. We cannot and should not rely on the tools of economics to guide our individual moral judgments and intuitions about right and wrong or good and evil in matters of sexuality. And if Posner is right that our sexual behaviors are as rational as our other behaviors, then we should not rely exclusively on economics to guide our communitarian decisions about the rest of our social life either. What this book inadvertently proves is

16. *Id.* at 2-5, 85, 181-99.

17. *Id.* at 181-220. The last third of the book, entitled *The Regulation of Sexuality*, applies this general strategy to a range of regulatory topics. *Id.* at 243-435.

that normative economics does not well serve the legislative art of sexual regulation, in turn suggesting that normative economics does not well serve the regulation of other spheres of life either.

More specifically, I argue that the liberal sounding stance of “moral neutrality” toward sex that Posner advocates is, in practice, a profoundly illiberal refusal to engage in two particular moral practices, both of which are necessary to the task of doing justice: discerning and then responding to unjust subordination of one group by another, and empathizing with and appropriately responding to human suffering. Both moral practices—the recognition of patterns of unjust subordination and the empathic response to the pain of others—are central to social criticism of existing social structures. Social criticism, in turn, ideally is the first step toward morally responsible regulation of social life. The willingness and ability to identify and critically assess subordinating practices, and to empathize with the undue suffering of others, are not prejudices that impede rational deliberation and social control, as Posner believes them to be. They are, rather, essential aspects of our capacity for full understanding and moral judgment, which must inform any sensible, let alone justifiable, social attempt to control or influence our practices.

Accordingly, it is precisely Posner’s refusal to judge morally the sexual preferences, practices, laws, and customs he discusses that not only leaves his book stylistically flat and distasteful, but also renders his normative prescriptions unsatisfactory. Posner’s moral neutrality, in short, is not the strength of his book; it is its glaring weakness, and threatens to distort an appreciation of the book’s virtues. Moral neutrality and dispassionate inquiry are one thing, but moral apathy and disinterest in the face of suffering and cruelty are quite another. Ignoring the difference—not knowing which practices or behaviors cry out for censure and which could genuinely benefit from dispassionate inquiry—is not benign, scientific hard-headedness. It is, rather, a form of moral obtuseness. It is an attitude that should ground neither the study nor control of human sexuality. Because of this academic judge’s unwillingness, in this case, to judge his subject matter, Posner has not told a recognizably human story about where we have been, nor has he provided us any wisdom regarding where we ought to go.

This essay addresses each of three quite separate claims that Posner makes about the rationality of sexuality. The first claim, summarized above and addressed in detail in Part I, is that individuals act as rationally in their quest for sexual pleasure as they do in any other aspect of their lives. The second claim, which I take up in Part II, derives from the recent work of evolutionary sociobiologists, that the two sexes are genetically rational in pursuit of their biological urge to reproduce. Thus, just as individuals rationally choose among their options to maximize sexual plea-

sure, Posner argues, men and women also rationally choose among various mating “strategies” in order to maximize their reproductive success. A vast array of social customs that may otherwise appear irrational, malignant, or misogynist, are in fact purely rational responses to biological constraints imposed on our desire to reproduce. The third claim, discussed in Part III, is that not only are our individual hedonistic and reproductive strategies rational, but so too are our social customs, regulations, and beliefs regarding sex. Even the most apparently irrational sexual regulation—the regulation of entirely consensual sex—Posner contends, is a rational societal response to historically contingent conditions.

Thus, taken as a whole, Posner argues that our individual sexual choices reflect rational responses to our biological desires for sexual pleasure and the production of offspring, and that our social customs and laws regarding sexuality reflect rational responses to historical and cultural conditions. To all three of these aspects of human sexuality—individual choice, reproductive strategy, and societal customs—Posner proposes an attitude of “moral neutrality.” In each of the three Parts that follow, I argue that although there is surely a limited role for neutrality and dispassion in the study and regulation of sexuality, Posner has not made the case for it. Rather, by making “neutrality” all, and by aggressively eschewing any empathic engagement with the suffering of subordinate people, Posner has embraced a moral method that is not only incomplete but fundamentally unjust as well.

I. THE INDIVIDUAL’S RATIONAL PURSUIT OF SEXUAL PLEASURE

Posner begins the theoretical portion of *Sex and Reason* with a tabulation of our motives for engaging in sexual conduct. An individual will choose to have sex, Posner argues, for one of three reasons: to satisfy a sexual desire, to reproduce, or to achieve some other set of ends that Posner loosely labels “sociable.”¹⁸ Biological imperatives compel the first two reasons. We all have a desire for sex, although men have a far stronger one than women, that resembles the desire we have to scratch an itch: we satisfy this physical and often irritating need or “itch” through some form of sexual release.¹⁹ We also all have a genetic predisposition to reproduce, although, as I will discuss below,²⁰ men and women have radically different strategies for fulfilling that genetic desire. The third set of reasons for engaging in sex—the social—is not grounded in our “biology” but in our sociability. “Social” reasons for engaging in sexual conduct,

18. *Id.* at 111.

19. *Id.* at 85-95, 111-15.

20. *See infra* Part II.

Posner argues, range from the sex-for-money behavior of the prostitute to “communicative” sex between long term friends or spouses.²¹ Most important, for Posner, this category includes “companionate” sex, which he characterizes as serving the function of “cementing” relationships.²² Sex within a “companionate” relationship not only satisfies the sexual or reproductive desires of the two parties, but also cements or enriches the ongoing relationship.

Whatever the motive, our sexual choices, Posner argues, are “rational” in the sense meant by economists: they reflect the interplay between our given preferences and the costs of fulfilling those preferences. When engaged in to satisfy a desire—the first of the three reasons—sexual behavior is much like eating ice cream.²³ Our ice cream eating behavior is a function of our preferences for one flavor over another combined with the constraints, or costs, of fulfilling those preferences. If we prefer vanilla over chocolate and both flavors cost the same, we will choose vanilla; but if vanilla costs much more than chocolate, or is not available at all, we may choose chocolate instead, even though we prefer vanilla. That, Posner explains, is the essence of rational deliberation and choice, and the study of such rational choice is the essence of the science of economics.

Sexual behavior, when engaged in for the pleasure of satisfying sexual desire (scratching the itch), has the same analytic structure as ice cream consumption. We each have a given—probably innate, but at least hard-wired and unchangeable—set of sexual preferences.²⁴ Most of us, as it turns out, prefer sex with someone of the opposite sex, but a few of us prefer sex with someone of the same sex.²⁵ If the costs of either option are the same, our choices will reflect those preferences. If, however, the cost of having sex with an object of our preference is very high, or if the option is not available at all, then we may substitute the less preferred alternative. Thus a heterosexual man—a male who prefers sex with women—will choose to have sex with women unless the cost of fulfilling that preference is extraordinarily high, or not available. If, for example, because of his appearance, manner, or some other undesirable set of attributes, a heterosexual man has no success in attracting a woman, then his “search costs” for fulfilling his heterosexual preference will be high, and he may choose sex with a man or boy instead.²⁶ In the extreme, if he is in prison, his “search costs” for a woman will be “infinite,” so he may choose the

21. POSNER, *supra* note 1, at 111-13.

22. *Id.* at 112-13.

23. *Id.* at 436-37.

24. *Id.* at 98-108.

25. *Id.*

26. *Id.* at 119-26.

less-preferred homosexual option and have sex with a man.²⁷ We choose in accordance with our preferences as constrained by the costs imposed by natural or social conditions on fulfilling those preferences. That is all that Posner means by the claim that our sexual behavior is rational.

When we have sex for one of the more complicated “social” reasons—to cement relationships, or to fulfill some other social end—our choices are also rational. Thus a prostitute may choose to have sex for a particular price, reflecting her preference for the money over other uses of her time and sexuality. Or a woman may choose to have sex with the man who is the father of her children, even if she is not particularly attracted to him, in order to “keep him at home”: her availability renders monogamy and fidelity a more attractive option for him.²⁸ Similarly, a man may prefer to cement, or enrich, a relationship by having “social,” friendship-cementing sex with the woman who is the mother of his children. If there are too many constraints placed on his preferred option, however, he may substitute some less preferred alternative and, if he does so, his choices will not reflect his actual preferences. Thus, if the heterosexual male lives in a society that does not recognize companionate unions between men and women,²⁹ he may opt for the less preferred alternative and create such a relationship with a man instead.

A great deal of homosexual conduct, Posner argues, reflects not a “real” preference for homosexual over heterosexual contact, but rather precisely this strategy of substitution³⁰—a strategy that Posner labels “opportunistic homosexuality.”³¹ Opportunistic homosexuals, as opposed to “real” homosexuals, choose homosexuality over their preference for heterosexuality because search costs for women are too high: the man is unattractive to women,³² he is imprisoned,³³ women are sequestered,³⁴ or for some other

27. *Id.* at 121.

28. I have extrapolated this example from what Posner says in *Sex and Reason*. *See id.* at 112-13; *infra* text accompanying note 86. As several reviewers have noted, because Posner almost never presents his argument from a woman’s perspective, the rationality of women’s choices must be inferred from what he says about men’s choices. *See, e.g.,* Gillian K. Hadfield, *Flirting With Science: Richard Posner on the Bioethics of Sexual Man*, 106 HARV. L. REV. 479, 485-87, 496-503 (1992) (reviewing RICHARD POSNER, *SEX AND REASON* (1992)) (arguing that Posner’s male-centered vision and biological premises fail to analyze the effect of sexuality on economics).

29. *See, for example,* Posner’s discussion of ancient Greece in his chapter *Autre Temps, Autre Moeurs*. POSNER, *supra* note 1, at 38-45 (explaining higher rate of homosexuality in ancient Greece by the fact that women were not considered companions for men and were treated as inferiors).

30. *Id.* at 122-26.

31. *Id.* at 125.

32. *Id.* at 122.

33. *Id.* at 121.

34. *Id.* at 42-45.

reason women are either unavailable or too uninteresting to be worthy companions. Not only homosexuality, but most other nonheterosexual behavior, including so-called “perversions,” are also often “opportunistic” in that they are rational choices in the face of constraints imposed on the preferred heterosexual outlet. Masturbation is the simplest case: it is the cheapest and most widely practiced substitute for heterosexual contact; not surprisingly masturbation is most prevalent among adolescent boys from those cultures and classes that discourage premarital or teenage sex.³⁵ More significantly, perhaps, Posner argues that rape is not an expression of male contempt for women or an exercise of subordination,³⁶ as contended by some feminists, nor is it the sexual expression of a psychic abnormality.³⁷ Rape is simply a substitute for consensual sex, engaged in by normal (but for their willingness to incur the risk of criminal penalty) heterosexuals for whom the cost of consensual heterosex is simply too high—evidenced, in part, by the fact that most rapists are extremely unattractive (making their search costs high).³⁸

Therefore, Posner goes on to argue, the position (which he later endorses) that sexual preference, or “sexual orientation,” is genetically grounded is in no way undercut by the differing amounts of homosexual and heterosexual conduct found in different cultures throughout history.³⁹ The undeniable fact of extraordinary diversity across times and cultures does not imply, as presently insisted by a small army of Foucaultian sexual theorists,⁴⁰ that our sexuality, and in particular our sexual preferences for or orientations toward hetero or homosexuality, are “socially constructed.”⁴¹ Rather, our preferences are more likely than not genetically given, and as such, are more likely than not universal: Posner hypothesizes that about two percent of the male population is homosexual (and even fewer females) and that it has always been such.⁴² That fact is not belied by the wide differences between cultures and times in the amount of homosexual

35. *Id.* at 63-64, 99-100, 119-20.

36. *Id.* at 182-83, 384-85.

37. *Id.* at 183.

38. *Id.* at 106-07.

39. *Id.* at 105-06.

40. The classic is Michel Foucault's groundbreaking, brilliant, and unfinished three-volume work, *THE HISTORY OF SEXUALITY: VOL. I, AN INTRODUCTION* (Robert Hurley trans., 1978); *VOL. II, THE USE OF PLEASURE* (Robert Hurley trans., 1985); *VOL. III, THE CARE OF THE SELF* (Robert Hurley trans., 1984). For an introduction to the voluminous literature on the social construction of sexual orientation, see generally *THE MAKING OF THE MODERN HOMOSEXUAL* (Kenneth Plummer ed., 1981); *SEXUAL MEANINGS: THE CULTURAL CONSTRUCTION OF GENDER AND SEXUALITY* (Sherry Ortner & Harriet Whitehead eds., 1981) and *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* (Martin B. Duberman et al., 1990).

41. POSNER, *supra* note 1, at 29-30, 295-99.

42. *Id.* at 294-95.

behavior. That there may exist a society in which most people eat chocolate ice cream does not necessarily mean that most people prefer chocolate to vanilla, if vanilla is very costly or not available. Similarly, a society, like ancient Greece, in which there is a lot of homosexual conduct, does not imply that a large number of males are homosexual, if heterosexual women are not available (because, for example, they are sequestered), or if heterosexual companionate unions are not possible (because the women are uneducated, and, therefore, too uninteresting to be worthy companions).

As charged, controversial, and fascinating as it may be on its own accord, Posner's descriptive account of the rationality of individual hedonistic sexual choices is, for the most part, functional: it provides a necessary premise for his normative argument regarding the optimal regulation of consensual sexuality.⁴³ That argument combines his new claim of the rationality of individual sexual choices with his very old commitment, firm as ever after all these years, to wealth maximization as the proper and typical end of social control.⁴⁴ Indeed, Posner's description of sex might sensibly be regarded as simply providing the "can" prong of the "ought implies can" constraint on moral argument. Because sexual behavior is rational and we can, therefore, subject it to rational control, Posner argues, the end toward which we should control sexual behavior is no different than the end toward which we should control any behavior: the efficient maximization of wealth (i.e., the satisfaction of as many of our preferences as possible) and the minimization of associated costs. We can and should control sexual behavior with the traditional tools of the scientifically or economically savvy legislator.

In *Sex and Reason*, unlike his earlier work, Posner simply assumes a general consensus on the normative proposition that, for the most part, regulation of *public* behavior should proceed on the normative economist's assumptions: an agnosticism toward preferences, an assumption that choices are rationally made against a backdrop of given preferences and socially imposed constraints, and a hard-headed tabulation of the costs and benefits of behaviors on nonconsenting third parties. Posner then argues in the bulk of the book that, contrary to the intuitions of most of us, the economic approach toward regulation can and should apply to sexual behavior as well.⁴⁵ Because our sexual choices are rational responses to

43. *Id.* at 85.

44. See generally Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775 (1981); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980).

45. Posner expresses only one reservation. The efficiency of a practice, Posner concedes, does not preclude the "case for reform," in part because "[t]he assumption that efficiency

our preferences and social constraints, our sexual behavior can be controlled. And, although ignorance, fears, and false beliefs in the past generated a vast array of censorious and for the most part repressive moral attitudes toward sex, there is no longer any reason for such attitudes to taint and distort the rational regulation of sex. We should, rather, take a morally neutral stance toward sexual preferences and inclinations, and take a rational approach toward their regulation. Although we may rationally differ over what the costs and benefits of various regulatory policies may be, we should all agree on Posner's central normative contention that our sexual preferences should be regarded neutrally and our sexual behavior, no less than any other behavior, accordingly subjected to rational—meaning economic—study and control.

Posner's repeated insistence that we should be "neutral" toward sexual preferences, then, is by no means a liberal argument for greater sexual privacy or anything of the sort, although it is likely to be read as such, as I will discuss in some detail below. It is, rather, an inference from his larger and longstanding ethical claim that we should be neutral toward *all* preferences, or put differently, that the end of legal regulation of all aspects of social life should be the maximization of wealth. In all spheres of life, we should maximize wealth by satisfying preferences, and we should do so regardless of the content of those preferences. We have no more basis to judge some preferences as better suited to the good life than any other, and we have no reason to think of our sexual preferences any differently. Posner's normative thesis, then, is simply that, as is true of all behavior, we should regulate sexual behavior toward the efficiency governed end of satisfying as many sexual preferences as possible while minimizing their costs, regardless of the content of those preferences.

From this premise, Posner draws out a wide array of normative consequences, some of which are familiar to Posner's readers,⁴⁶ but which are re-argued, or argued in greater detail, in this book. We should permit, for example, the commodification and sale of reproductive services and babies because such transactions unproblematically maximize wealth and we have no legitimate basis, moral or otherwise, for interfering.⁴⁷ Similarly, we

should guide public policy is contestable," POSNER, *supra* note 1, at 214. He does not, however, even explain, nor at any point does he endorse, any argument against the position that efficiency should guide policy.

46. See, e.g., Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987) (advocating legalization of the sale of babies); Richard A. Posner & Elisabeth M. Landes, *The Economics of the Baby Shortage*, 7 J. OF LEGAL STUD. 323 (1978) (same).

47. POSNER, *supra* note 1, at 409-17, 420-29. For my fuller criticism, see generally Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986).

should refrain from censoring, on either feminist or social conservative grounds, obscenity and pornography, at least unless and until it can be much more clearly shown than it has been to date that pornography constitutes a threat to women's safety.⁴⁸ What is newly argued in this book, and what I will discuss in some detail below, is that we should decriminalize consensual sexual transactions of all sorts between adults if those transactions impose no costs on third parties.⁴⁹

My guess is that Posner's economic-driven insistence on "moral neutrality" with respect to sexual preferences will strike most readers—not just radicals, socialists, feminists, conservatives, and social constructionists—as simply bizarre, despite the sometimes liberal sounding tolerance that such neutrality implies. Labeling not only masturbation but also rape and pedophilia as rational substitutes for sex,⁵⁰ or regarding the commodification and sale of sexual and reproductive services and babies as morally unproblematic⁵¹ sounds not just stylistically odd, but morally deaf. For many readers squarely within the mainstream and resolutely centrist in their politics, sexual and otherwise, the positive conception of sexuality Posner puts forward, combined with the "agnosticism" he advocates with regard to our sexual "preferences," may have quite the opposite effect than that which he intends. To the extent Posner convinces the reader that our sexual choices are as "rational" as our choices in nonsexual matters, the book may suggest not the viability of the economic control of sexual behavior, but rather the questionable status of the concept of rationality generally, and the dubiousness of a morally neutral stance toward any and all "preferences," sexual and otherwise. There is simply no good reason to be "neutral" toward all held preferences, and this book constitutes an unintentional *reductio ad absurdum* of the position that there is.

The common intuitions shared by many of us that sexual commodification is in general not a good thing, that the commodification of babies would be a quite bad thing, and that rape evidences not a rational substitute for sex but a malignant impulse toward women are, indeed, grounded in moral practices. Those moral practices are not, as Posner assumes they are,⁵² simply blinders to the rational and hence preferable attitude that idealized social scientist kings ought take toward sexual regulation. Rather, they are part of a complex understanding, itself grounded in a general sympathy for the human condition, a general feel for human experience,

48. POSNER, *supra* note 1, at 351-82.

49. *Id.* at 309-14.

50. *Id.* at 106-07, 384-85.

51. *Id.* at 420-29, 409-17.

52. *Id.* at 30, 437.

and a general vision of an ideal social and personal world, that some of our preferences—for babies at any price; for money in exchange for the services of our wombs; for violent, coerced, nonconsensual, or unwanted sex—are *not* conducive to either our freedom or our welfare, even if there are no third party effects. This is so even if our felt satisfaction from having those preferences met is of a greater magnitude than the misery inflicted on others.⁵³ We engage in this critical examination of our preferences on the basis of that complex understanding of our humanity, and we engage in a critical examination of our understanding of humanity on the basis of our preferences. We do so, or we should do so, continually, both on an individual and on a societal level.

Our “preferences,” so understood, are not simply the given determinants of our choices, they are also the products of our social lives and interactions. Just as important, they are the objects of moral reflection and criticism, which we can and do change through moral critique. It is by no means only backwater social conservatives or totalitarian styled feminists who engage in this practice of moral critique; it is, rather, anyone responsibly engaged in public life and social change. By the same token, the wholesale abandonment of critical and reflective assessment is not “liberalism” in its best sense, no matter how frequent the citation to John S. Mill’s *On Liberty*⁵⁴ (although it is often confused as such). It is, rather, the abandonment of morality in public life, and Posner has given us no reason, in either the sexual or nonsexual sphere, to think we ought to follow that path.

There are, however, at least two implications of Posner’s account of the optimal regulation of sexual behavior that, because of their liberal sounding intentions, are likely to be highly regarded by many readers. They are accordingly worth addressing in some detail, because in each case the regard is misplaced.

The first such implication is a sort of principled defense of sexual libertarianism. *Assuming that we regard sex as “morally neutral,”* which Posner repeatedly enjoins us to do, then the same wealth-maximizing reasons that incline us to permit any sort of consensual transaction also apply to sexual transactions. In the absence of adverse third party effects, consensual transactions, or trades, maximize welfare by permitting each

53. For a general argument to this effect, see generally Robin West, *Taking Preferences Seriously*, 64 TUL. L. REV. 659 (1990) (arguing that a court’s moral role must include examination of and at times intervention into both private and public preferences). See generally Margaret J. Radin, *Market Inalienability*, 100 HARV. L. REV. 1849 (1987) (rejecting theories of universal commodification and noncommodification in favor of an evaluation of market inalienabilities based on a conception of personhood).

54. JOHN S. MILL, *ON LIBERTY* (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1853).

transactor to move to a preferred position.⁵⁵ If Sally wants John's bubble gum and John wants Sally's candy then they ought to trade, so long as no one else is hurt by the transaction. We ought to permit all such voluntary transactions between consenting adults for essentially the same reason. If Sally wants to have sex with John and John wants to have sex with Sally and no one else is affected one way or the other, they ought to have sex; both prefer having sex with each other over not having sex, and both would therefore be better off if they did so. In the absence of third party effects, consensual sexual transactions between adults ought to be permitted, then, not to honor the liberal principles of privacy and individual dignity,⁵⁶ but for the purely economic reason that to do so maximizes efficiency by honoring consumer preference.

The virtue of this approach from the viewpoint of anyone concerned with gay rights should be obvious: precisely the same result holds whoever might be the object—or whatever might be the gender of the object—of John's sexual desire. The economic approach to sexuality presents a strong argument, then, for the decriminalization of homosexual conduct. Indeed, many of Posner's repeated admonitions to treat sex as "morally neutral" are aimed at precisely that result: we should no more condemn homosexual preference than we condemn a preference for vanilla over chocolate ice cream.⁵⁷ It is a minority preference, to be sure, but it is one that is more than likely innate and for the most part harmless, and toward which we should be absolutely neutral. We should regard homosexuality as we presently regard left- or right-handedness: something that may from time to time be properly taken into account in designing rational social policies, but something that should invoke no censorial feelings, or, for that matter, strong feelings of any particular sort. Although animosity toward homosexuals and their lifestyles may be explicable—and Posner spends a great deal of time explaining this animosity—it is not justifiable.⁵⁸ Homosexual encounters maximize wealth to precisely the same degree and in the same way as do heterosexual encounters. Therefore, in the absence of identifiable costs the law should be changed to permit homosexual encounters.

There is, without question, a great deal to be said for liberalizing our attitudes toward homosexuality and decriminalizing homosexual behavior. Nevertheless, the particular argument for decriminalization that Posner makes—an agnostic tolerance for any and all preferences, sexual and

55. See RICHARD POSNER, *THE ECONOMICS OF JUSTICE* 88 (1981).

56. Posner goes to some lengths to distinguish his libertarian argument from liberal arguments for sexual autonomy, which he regards as a species of "moral" arguments. POSNER, *supra* note 1, at 230-32.

57. *Id.* at 436.

58. *Id.* at 203, 309.

otherwise—is not a good argument. It is one that, in the long run, would ill-serve the gay community. For while it follows from Posnerian assumptions that there is no reason to condemn homosexual preference, it also follows by the same logic that there is no particular reason to condemn homophobic preferences. From an economic, *morally neutral* standpoint, preferences for homosexual sex should be satisfied; but from the same perspective, our collective or communitarian “preference” that we rid our homes, schools, and armed forces of our homosexual sons, brothers, and fathers should *also* be honored and “satisfied” whenever the economic weighing of costs and benefits counsels that result.⁵⁹ When the two sets of preferences conflict, the conflict is resolved *not* by invoking a governing set of principles to tip the scales in one way or the other—on the side of privacy or on the side of community norms—for to do so would violate the mandate for moral neutrality. Rather, Posner would invoke a pragmatic tabulation of “costs and benefits” that purportedly point in the direction of “rational” social policy.

Not surprisingly, the costs and benefits *as tabulated by Posner* almost invariably dictate a reaffirmance of preexisting practice, although of course, for reasons of scientifically sound policy rather than communitarian moralism. The result—which should alert gay rights advocates of the profoundly conservative foundation of Posner’s superficially “libertarian” argument for decriminalization of homosexuality—is an astoundingly crisp endorsement of the sexual status quo. While Posner insists that our criminal law should be changed to reflect an agnostic attitude toward sexual orientation,⁶⁰ he cannot bring himself to condemn another single social practice or communitarian “preference” as unjustly harmful to the rights and freedoms of gays and lesbians. Accordingly, Posner cannot identify or endorse a single significant legal or social change that might enhance either homosexuals’ freedom or their overall well being.

Two examples should suffice. First, as a number of reviewers have already noted,⁶¹ and lamented, on the basis of a “cost-benefit” analysis, Posner ultimately fails to condemn or even seriously critique the exclusion of gays and lesbians from the armed services. That failure is a direct consequence not so much of his theory of sex, as of his more general methodological refusal to engage in moral inquiry: Posner fails *either* to engage sympathetically and thereby assess the magnitude of the felt pains and pleasures of peoples’ lives, or to take seriously the possibility, much

59. I say “sons, brothers, and fathers” because lesbians are indeed almost invisible from Posner’s account. See generally Ruthann Robson, *Posner’s Lesbians: Neither Sexy nor Reasonable*, 25 CONN. L. REV. 491 (1993).

60. POSNER, *supra* note 1, at 203, 309.

61. See, e.g., William N. Eskridge, Jr., *A Social Constructionist Critique of Posner’s Sex and Reason: Steps Toward A Gaylegal Agenda*, 102 YALE L.J. 333, 347-51 (1992).

less the costs, of systematic subordination of gays and lesbians by a predominantly heterosexual community. Posner's tally of the "costs" and "benefits" of the military exclusion, for example, shows not only an extreme deference to military judgments,⁶² but even more strikingly, almost no understanding of the psychic costs of this policy on the homosexual community, and even less understanding of the psychic costs of homophobia on the community at large. There is almost no discussion in this "cost-benefit analysis" of the psychic costs to homosexuals of being excluded from this pivotal rite of citizenship.⁶³ There is also no discussion of the degree to which precisely the homophobia that Posner believes lends discipline and morale to military troops might contribute instead to disorder and mayhem—not only in the form of harassment of gays and lesbians already in the military, but also in the form of violence and sexual harassment of women by males desperate to demonstrate their heterosexual masculinity to their homophobic selves and peers.⁶⁴

The second example arises not so much from what Posner says about homosexuality, as from what he fails to say about heterosexual life. Posner is opposed to any blanket rule prohibiting homosexuals from parenting. While in theory such a rule might make sense if it were shown that homosexuals make poor parents, there presently is no research, he argues, suggesting that is the case.⁶⁵ Posner qualifies this conclusion, though, with the observation that homosexuals who communicate to their children an intolerance for heterosexuality—by advocating lesbianism as a feminist practice, for example, or by attending a gay church—are unfit parents, even though there is no reason to think that *in general* the children of gays and lesbians are any more likely than anyone else to be homosexual themselves.⁶⁶ There is nothing per se objectionable about Posner's qualification: it may well be that homosexual parents who condemn heterosexuality out of hand are unfit parents of children who, for whatever reason, are more than likely destined to be practicing heterosexuals for at least some

62. POSNER, *supra* note 1, at 321.

63. The psychic cost warrants only one mention by Posner, included, inexplicably, in a laundry list of potential benefits to the military:

Among the benefits to the military would be saving the cost of administering a policy of excluding homosexuals, expanding the supply of soldiers, reducing the incentives to fake homosexuality when a draft is in force, and bolstering the self-esteem of homosexuals by deeming them fit to serve their country in positions of responsibility and danger.

Id. at 318.

64. See generally DONNA PETERSON, *DRESS GRAY: A WOMAN AT WEST POINT* (1990) (retelling one woman's account of life in the military academy during the late 1970s and early 1980s).

65. POSNER, *supra* note 1, at 417-20.

66. *Id.* at 419.

part of their lives. Common sense suggests that to do so is to undermine badly a child's or adolescent's fragile sense of self-worth. What is troubling, and again revealing, about Posner's use of this observation is that there is no similar condemnation of the widespread—indeed, near *universal*—practice of heterosexual parents condemning homosexuality, a practice surely as damaging, if not more so, to the homosexual child's or adolescent's developing sense of self and self-worth.⁶⁷ Indeed, there is very likely no single social practice more damaging to the happiness, productivity, freedom, self-understanding, and self-image of gays and lesbians than the pervasive parental practice of insisting on the desirability and necessity of heterosexual practice in adult life.

It may seem perverse, and it should surely seem unfortunate, that Posner, although devoted to “moral neutrality” with respect to sexual practice, cannot bring himself to criticize a social practice so profoundly damaging to the lives and fortunes of a sizeable number of citizens with so little—indeed, with no—justification. Were parents of vanilla-preferring children to impress upon those children the necessity, moral and otherwise, of eating chocolate ice cream their entire adult lives, surely Posner would be struck by the undesirability of the practice. Here as well, however, Posner's failure to criticize this pervasive harmful practice stems not from his views on sexuality, but from his insistence on moral “neutrality”—the same insistence that, ironically, leads him to advocate the decriminalization of consensual homosexuality. As Posner himself insists, the “moral neutrality” urged toward sexual orientation is *not* premised on any liberal or otherwise principled support of sexual liberty or privacy; indeed, he finds such arguments as spurious as conservative arguments for sexual repression.⁶⁸ Rather, sexual preferences should be respected because all preferences—homophobic as well as homosexual—should be respected, balanced, and tallied toward the end of efficiency. As a result, there is no more reason to second-guess the homophobic preference behind the social practice of “compulsory heterosexuality” than there is to second-guess the homosexual preference itself. On the contrary, the radical restructuring that a serious, critical confrontation with this society's homophobia would engender would unduly disrupt countless expectations, impose sky-high information costs, and, in short, so grossly interfere with the efficient accumulation of wealth as to make the prospect of such a critique quite genuinely unthinkable.⁶⁹

67. See generally Kathleen Lahey, *Feminist Theories of (In)Equality*, 3 WIS. WOMEN'S L.J. 5 (1987).

68. POSNER, *supra* note 1, at 230-31.

69. Thus, his discussion of homosexual marriage ends with the inconclusive observation that “the public hostility to homosexuals in this country is too widespread to make homosexual marriage a feasible proposal even if it is on balance cost-justified.” *Id.* at 313.

For all of these reasons, the “moral neutrality” that underlies Posner’s argument for decriminalizing homosexual conduct would not, in the end, well serve the gay and lesbian community. That neutrality does not derive from a liberal commitment to liberty, nor an egalitarian conviction that sexual orientation should not serve as an axis of subordination. Rather, it derives from an agnosticism toward revealed preferences, itself grounded in a refusal to empathically understand the human lives from which they emanate and a blindness to the inegalitarian political and social forces and structures that create, perpetuate, and reinforce those preferences. Posner’s sexual libertarianism, in short, is simply an abandonment of moral practice. To accept Posner’s various recommendations, whatever their incidental merit, would constitute not a liberalization or modernization of our understanding of sexuality, but a straightforward abandonment of our collective responsibility for the justice or injustice of the social structures that inform the quality of lives of both homosexual and heterosexual citizens.

I will comment only briefly on the second “liberal-sounding” implication of Posner’s conception of the rationality of individual sexual choice because I have addressed it in detail elsewhere.⁷⁰ From a Posnerian perspective, our sex, like our labor, our capital, or any other asset, should be understood as a commodity to be traded in social or intimate markets in exchange for some reciprocal bundle of goods—money, fidelity, pleasure—toward the personal and societal end of maximizing wealth. This “commodification” theory of sex, in turn, implies a particular conception of the wrongness of rape: to take the asset of sex by force instead of by a consensual transaction short-circuits the standard market mechanism—a face-to-face consensual bargain—for ensuring that wealth is maximized, and does so in circumstances in which there are no transaction costs that might justify a bypass of the market. A rapist, Posner insists, is essentially a “sex thief”;⁷¹ rape is the theft of one’s sexuality. Rape is therefore wrong, and criminal, for the same reason that any theft of property—any nonconsensual transfer of assets without transaction costs that might justify bypassing the market—is wrong and criminal. Whatever might have been believed in the past, or presently is believed by feminists or moralists, the wrongness of rape inheres in the property right of each individual to his or her own body and his or her own sexual services, and in the gain in wealth and efficiency that comes from permitting each individual sovereign power to decide how that commodity (like any commodity) might be put to use.⁷²

70. See Robin L. West, *Legitimizing the Illegitimate*, 93 COLUM. L. REV. (forthcoming 1993) (commenting on “commodity theories” of sex).

71. POSNER, *supra* note 1, at 182.

72. *Id.* at 182-83.

On first blush, this conception of sex and rape might seem appealing from a feminist perspective: the “commodity” theory of sex and the theft conception of rape evidence a clear strategic advance over traditional conceptions of sex, in which a woman’s sex was viewed as owned by someone else, and rape, when made criminal at all, was understood as a wrong not to the woman but to whomever was the owner of her sexuality.⁷³ Any theory of sex and rape that identifies the woman as the possessor of her body and the victim of its invasion is commendable for that reason alone.⁷⁴ Nevertheless, the commodity theory of sex and the property conception of rape that Posner puts forth would ultimately disserve women. The reason stems, again, from defects not so much in Posner’s view of sexuality as in the agnosticism toward preferences that is at its root.

The problem with Posner’s conception of rape as a form of theft and sex as a commodity is what critical theorists have labelled the problem of “legitimation.”⁷⁵ Just as the wrongness of theft implies, both in theory and in practice, the rightness of even grossly disparate distributions of property so long as those distributions are in some sense consensual, the commodity theory of sex and the property conception of the wrongness of rape, while clarifying, in a sense, the “wrongness” of rape,⁷⁶ by negative inference legitimate apparently consensual sexual transactions, *even in circumstances of grossly unequal distributions of sexual power*. If rape is wrong because it is theft, and theft is wrong because it is nonconsensual, then consensual sex must be as right as rape is wrong: it is a voluntary exchange wanted by both parties that thereby maximizes the well-being of each. The property conception of the wrongness of rape quite directly legitimates the consensual sexual transaction and thereby perpetuates our collective blindness to the pervasive systems of sexual coercion that render all of our heterosexual practices, and not just rape, morally suspect.⁷⁷

Again, it is Posner’s liberal sounding commitment to “moral neutrality” regarding consensual preferences that obviates the need for doing the sort

73. For a general discussion of the history of rape law, see Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1780-85 (1992).

74. For a lucid treatment of a commodity theory of sex and a challenging set of proposals for legislative change, see generally Dripps, *supra* note 73. I offer a limited endorsement and partial criticism of Dripps’s proposal in West, *supra* note 70 (arguing that commodification theory tends to legitimate morally problematic, albeit fully consensual, sexual transactions).

75. See generally Edward Greer, *Antonio Gramsci and “Legal Hegemony,”* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 304 (David Kairys ed., 1982).

76. The commodity theory of sex correctly identifies the woman as the victim of rape, but mischaracterizes the nature of the injury. As common intuition holds, rape is a violation of personhood in the deepest sense imaginable, not simply a violation of property.

77. I have discussed this at greater length in Robin West, *The Difference in Women’s Hedonic Lives*, 3 WIS. WOMEN’S L.J. 8 (1987); West, *supra* note 70.

of moral work required to see the possibly coercive nature of “consensual” sex: first, the work of empathically understanding the worth to the individual woman of this “consensual” activity, and second, the work of examining the political and societal hierarchical structures that might prompt a woman to “consent” to sex that, while not rape, might very well be unwanted, unenjoyed, invasive, painful, demeaning, and dehumanizing. And again, this refusal to undertake the moral work required to see the problematic nature of consensual no less than nonconsensual heterosexuality follows from Posner’s general ethical claim that preferences, including sexual preferences, are given and beyond critique. It is surely that premise—and not his view on the nature of sex—which implies that the act of consent whitewashes or absolves that to which, and the person to whom, consent is given. Given Posner’s insistence on “neutrality,” when consensual transactions reflect our preferences, the value of those transactions, in a quite literal sense, is absolutely insulated against any sort of political or moral doubt.

Let me end my discussion of Posner’s treatment of individual choice by commenting more impressionistically on the central metaphor he uses to describe both our quest for sexual pleasure and the moral attitude we should bring to it: that sex is like “eating ice cream.” I have already suggested the sense in which Posner’s ice-cream eating metaphor glorifies consensual hedonistic sex: it implicitly characterizes our sexual choices as unproblematic and free, as expressive of our individual and individuating psyches, and as somehow untouched by the unjust social and sexual hierarchies within which those choices are made. But Posner’s metaphor also trivializes consensual sex, and does so in spite of the obvious fact that, at least on some level, sex is indeed “like eating”: we need to eat to survive as individuals, and but for technological innovation, we need sex to survive as a species. It is manifestly not the case, however—not these days and not in this culture, anyway—that our sexual “preferences” or orientations are “like” our tastes for vanilla or chocolate ice cream. To compare or conflate the two is a truly comic falsification. We do not “know” our sexuality or our sexual preferences with anything like the clarity with which we know our tastes in ice cream. In fact, for many, if not all of us, our own “sexual preferences” are utterly mysterious in a way that our ice cream preferences simply are not; this mystery heightens rather than diminishes as we learn more about human sexuality. Many women, for example, have felt themselves to be heterosexual only to later discover a much richer, truer, somehow more authentic identity as a “woman-identified-woman.” Similarly, a significant number of gay men and women find themselves at some point in their lives “inexplicably” attracted to a man or woman of the opposite sex, and suddenly embroiled in an unexpected heterosexual relationship. Perhaps just as tellingly, gay men and women who have thought

long and hard about their sexual orientation differ profoundly over whether that orientation is socially constructed, freely chosen, or biologically given, and whether it can be changed in any meaningful way.⁷⁸ Even our “fetishes”—almost by definition sexual preferences with some degree of certitude—often turn out to be more certain in fantasy than in practice, and can even, on a seeming whim, disappear or transform themselves.

To put this point autobiographically, I know with utter confidence what flavors of ice cream I prefer, but I am no clearer now than I was twenty years ago in what direction my sexual orientation lies, or what my “preference” is, or even whether or not I “have” one. I have no idea whether I’m a “Kinsey one” or a “Kinsey three” or a “Kinsey six.”⁷⁹ I think the same is true of most of the people I know well, and I suspect that it is also true to some degree of most people I do not know well who are in some way “like me” in class, age, and cultural awareness. The social science method that Posner emulates and employs may indeed help us “know more” about our sexual *behavior*. But it brings us not one inch closer to “knowing” anything at all about our sexual *preferences*. On that illusive quest, all we know is how we feel. How we feel about our fluid and changing “sexual preferences,” and “sexual orientations,” I suspect, is as much unlike how we feel about our preferences for vanilla over chocolate ice cream as just about anything could possibly be.

Posner’s metaphor trivializes consensual sex in a second sense as well: in its stark denial of the transformative potential of sexual life. Eating ice cream may be fun but it does not transform us, at least not very often. Eating the ice cream we least prefer does not traumatize us, discovering we like a brand that we thought we disliked is not particularly enlightening,⁸⁰ and being required to eat some when we do not want to similarly will leave few scars. Much the opposite is true of sex: discovering and taking responsibility for one’s own homosexuality, by almost all reports is generally one of the most, and often the most transformative, defining, central experiences of a lifetime. It creates a person, not a preference. By the same token, mandatory, compulsory, violent, forced, coerced, or simply unwanted sex creates injuries and psychic wounds so deep that it can easily take a lifetime to transcend them. Ice cream does not. It is this difference that renders the first topic so morally charged and the second morally

78. For a short summary of the debate, recently sparked anew by research evidencing a biological basis for male homosexuality, see Darrell Yates Rist, *Sex on the Brain: Are Homosexuals Born That Way?*, 255 THE NATION 424 (Oct. 19, 1992).

79. See ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 638-71 (using scale of zero to six to locate sexual preferences from exclusively heterosexual (zero), to bisexual (three), to exclusively homosexual (six)).

80. *But see* DR. SEUSS, GREEN EGGS AND HAM (1960) (chronicling the culinary epiphany of a youth with a formerly discriminating palate).

neutral.⁸¹ Social and sexual conservatives may be wrong about any number of things, but they are certainly correct in insisting that sex, at least sometimes, is important.

II. THE RATIONALITY OF REPRODUCTIVE STRATEGIES

Just as we are generally rational in our pursuit of sexual pleasure, Posner argues, we are also generally rational in pursuit of our reproductive ends. All humans, according to Posner, are genetically programmed to reproduce—to see their genetic makeup replicated in healthy offspring. Because of their different reproductive organs, however, men and women have profoundly different strategies for achieving this genetically given end. Men's contribution to the biology of reproduction takes only a few minutes, and they can accordingly impregnate thousands of women over the course of a lifetime.⁸² Women's biological contribution is far more time consuming, and, consequently, each woman can at best expect to have no more than twenty babies during a lifetime. For the woman to maximize her reproductive potential, then, she must be far more concerned about the health and well-being of each of her relatively more scarce babies. One way to do so is to seek out sexual mates who will be helpful fathers and providers.⁸³ Therefore, while the male is naturally inclined toward promiscuity, the female is naturally inclined to mate only with males who appear to be "worthy":

The male cultivates the extensive margin, the female the intensive. The male has a vast potential reproductive capacity because his only absolutely indispensable role in reproduction is to inseminate the female, a task of minutes . . . , and because he can play the role with great frequency without substantial sperm depletion. The reproductive capacity of the individual female is so much more limited—twenty children a lifetime was a realistic maximum before *in vitro* fertilization . . .—that a male cannot realize his full reproductive potential with a single sex partner. The man who wants to father hundreds of children must practice some form of polygyny, and must have, therefore, a taste for variety in sexual partners. A person who indulges such a taste is called, in our society, promiscuous. We should expect many men to be promiscuous, in taste if not in action.

A woman who wants to maximize her reproductive success must be charier of her sexual favors than a man. She must try to make every

81. The stark absurdity of juxtaposing sex and eating in precisely the way Posner advocates has not been lost on comics. *See, e.g.*, KURT VONNEGUT, JR., *BREAKFAST OF CHAMPIONS* 59-61 (1973).

82. POSNER, *supra* note 1, at 90.

83. *Id.* at 91.

pregnancy count: every pregnancy, ideally, must have a reasonable probability of producing a child that will survive to adulthood. So, especially in the evolutionary period, . . . a woman had to be intensely concerned about the quality of her mate as a potential father. (Would he stick around after impregnating her? Had he the willingness and the ability to protect her and her offspring?) She had in a word to be choosy—choosier than a man—if she was to have reasonable confidence in the survival of her children to reproductive age. A taste for variety in sexual partners would tend, therefore, to reduce a woman's inclusive reproductive success Since a powerful sex drive would probably stimulate a taste for sexual variety, . . . it is plausible to expect natural selection against a powerful sex drive in women.⁸⁴

Biologically speaking, however, it clearly will not do for men to spend all their time impregnating as many women as possible. The human infant, unlike other mammals, has a protracted period of vulnerability, as does the nursing mother. There must be, then, some paternal involvement in the care, protection, and nurturance of the young, or the male's strategy of promiscuity becomes self-defeating: his children will die before they reach reproductive age. Although most of the mechanisms for ensuring that males will stick around and help with the care of children are social, nature has laid the groundwork. Human females, unlike other mammals, are "continually available" for sex, which is always enjoyable for men; therefore, male humans, unlike other animals, have a hedonistic incentive to stay with the mother of their children.⁸⁵

The character of female sexuality encourages the man to stay around. Unlike other mammals, the human female is available for sex not only during the few days a month that she is fertile but throughout the month. And since nature has encouraged reproduction by making sex a continual desire of men, the satisfaction of which is intensely pleasurable independent of any procreative motive, the male is continually rewarded by the female for staying with her after conception has taken place—indeed, after the child is born, which is a time when the woman and her offspring have particular need for protection. Thus the fact that human beings have sex far more frequently—and it might seem wastefully—than other primates is a consequence of the greater vulnerability of the human infant compared to other primate offspring.⁸⁶

A small minority of men, however, are genetically predisposed to pursue a quite different genetic strategy: for whatever reason, about four percent

84. *Id.* at 90-91 (footnote omitted).

85. *Id.* at 97.

86. *Id.* (footnote omitted).

of the male population are relatively incapable of successfully reproducing their genetic endowment and are instead better suited to pursue their genetic goal by aiding in the upbringing and care of nieces and nephews. Through a mix of nature and nurture, these “natural uncles” become true homosexuals. Probably because of a gene predisposing them toward precisely this pattern, the fathers of these incipient homosexuals tend to distance themselves from their “sissified” sons, while the mothers tend to smother them with affection. As a result, the grown homosexual is emotionally predisposed against what would be, from a reproductive perspective, a futile search for a heterosexual companion. Thus, he seeks out and comes to prefer homosexual contacts.⁸⁷

Posner uses this simple story of different sexual strategies for the successful reproduction of genes to account for a wide (although by now generally familiar) array of social, psychological, and cultural phenomenon. Men have a greater sex drive than women, for example, because a powerful sex drive in women would be a risky strategy—she needs to find *worthy* mates.⁸⁸ Similarly, women’s greater capacity and willingness to nurture life is a result of natural selection in favor of females who are nurturant and loyal, again, because nurturance and loyalty are necessary components of women’s but not men’s reproductive strategy. On the other hand, “the male’s primary role in hunting and fighting may result in a selection in favor of males who are bold and aggressive.”⁸⁹ Men are more likely than women to be aroused by the sexual organs of the opposite sex because:

Responsiveness to such visual stimuli ensures that the male will not miss an opportunity to impregnate a female, and the taking of such opportunities is necessary to maximize the male’s reproductive success. But as random mating is no part of the female’s optimal sexual strategy, it would be contrary to her interests to be sexually aroused by the sight of male sex organs. We expect her to be aroused by cues related to the male’s likely ability to protect her and her offspring.⁹⁰

Men are *universally* likely to find healthy looking women of childbearing years more sexually attractive than younger or older women, whereas women are universally less interested in the physical appearance of men and more interested in cues relating to their ability to protect and provide for themselves and their children.⁹¹

87. *Id.* at 102-03.

88. *Id.* at 90-91.

89. *Id.* at 93.

90. *Id.* at 92-93.

91. *Id.* at 93.

Furthermore, men are more likely than women to be possessive of the opposite sex and experience sexual jealousy, because those traits are adaptive as well.⁹² Social mechanisms designed to tie women down to ensure that a man is providing only for his own children include sequestration of women,⁹³ footbinding,⁹⁴ and, as I will discuss in a somewhat different context, the mutilation of female genitalia to reduce women's sexual pleasure.⁹⁵ Nature has also contributed to the effort by bestowing upon men a propensity toward sexual possessiveness and jealousy, all toward the end of ensuring that his children are his own:

Since conception and gestation take place within the female body, hidden from the male's view, he must monitor her activities in order to have warranted confidence that she is pregnant with his child rather than with some other man's. Here is an additional incentive for the father to stick around, not only before the birth of his child but afterward—for that after period is the before period of his next child. Here too lies the biological explanation for male sexual jealousy and for the fact that it is more intense than female sexual jealousy. Male sexual jealousy is adaptive because it reduces the probability that a man will assist in replicating the genes of another man to whom he is not related.⁹⁶

Finally, men's tendency to rape may be grounded in a fundamentally sound reproductive strategy:

Another exception [to the general principle that those forms of sexual behavior that are "deviant," meaning not conducive to reproduction, are simply safety valves for the satisfaction of the sexual drives of those men who for one reason or another cannot find a woman] may be rape. Given the female propensity to ration sexual access, we would expect natural selection in favor of some degree of male sexual aggressiveness (though not too much, for then female screening for genetic fitness would be circumvented). A reinforcing factor is that male aggressiveness has survival value because of its usefulness in activities such as hunting and defense, so that the allocation of females to aggressive men could promote genetic fitness.⁹⁷

Posner is deeply ambivalent about the importance of this story of the expensive egg and the cheap sperm to his overall description of rational

92. *Id.* at 97.

93. *Id.* at 112.

94. *Id.* at 256 n.35.

95. *Id.* at 112; *see infra* text accompanying note 111.

96. *Id.* at 97 (footnote omitted).

97. *Id.* at 107.

human sexuality. At times he highlights its centrality, calling his theory a bio-economic or sociobio-economic theory as opposed to an economic theory *simpliciter*, particularly when he wants to highlight the differences between his own view and that of more traditional economists. For example, Posner invokes sociobiology to explain the phenomenon of love, which he insists is a natural incentive for the male to help in the nurturance of children and which, he argues, cannot be explained in purely economic terms.⁹⁸ Similarly, he invokes the sociobiological story in his account of sexual preference: unlike the economist's general understanding of the relationship between preference and choice (according to which we choose what we prefer, and prefer what we choose, when the costs of the choices are equal), Posner is disinclined to simply define our sexual preferences for homo- or heterosexuality by reference to our behavior. Instead, Posner views sexual preferences as rooted in biological and natural fiat.⁹⁹ On the other hand, Posner is fully aware that, even among those expert in the field, there are a sizeable number of detractors who argue that sociobiology may well go the way of phrenology.¹⁰⁰ He is equally aware that, in large part because of the explicit, antifeminist bias of some of its practitioners, sociobiology is highly objectionable to many people for its apparent implications about the impossibility of equality between women and men.¹⁰¹ Accordingly, and at numerous points throughout the text, Posner inconsistently instructs the reader that the sociobiological argument is not really necessary to his main thesis: the rationality of sexual behavior and the libertarian case for less regulation of consensual sexuality.¹⁰² His strategy here is clear enough: while drawn to sociobiology for a host of reasons, Posner does not want to unnecessarily burden what he views as a fairly strong argument for the (limited) deregulation of sex with a view of the origins of sexual custom that may turn out to be false.

Posner is wise to hedge his bets. Sociobiology may well consist of some mix of sense and nonsense. But there is enough nonsense, circularity, "just-so" reasoning, and factual error in Posner's rendition of sociobiology to cheer anyone who is predisposed to regard it as a politically pernicious apology for the sexual status quo, to worry its serious propounders, to deter nonspecialists from taking it very seriously, and to trouble thoughtful

98. See *id.* at 98 (describing the connection between sexual or erotic love, which centers on the unique attributes of one individual, and the reinforcing effect such love has on relationships, which is more durable than sexual attraction alone, and thus gives the male a stronger protective incentive).

99. *Id.* at 119.

100. See, e.g., PHILIP KITCHNER, *VAULTING AMBITION: SOCIOBIOLOGY AND THE QUEST FOR HUMAN NATURE* (1987).

101. POSNER, *supra* note 1, at 108-10.

102. *Id.* at 7-8, 110.

sexual libertarians who would rather see their views put forward with more seemingly straightforward metaphors about nightwatchmen and minimal states than Posner's hypothesized genes. Much of Posner's story is simply too fanciful to elicit much of a "rational" response at all, critical or otherwise—is there really a *gene* predisposing fathers to be hostile and distant toward their homosexual sons?—and at least some of his story is grounded in transparently false assertions of fact.¹⁰³

The error and silliness of Posner's sociobiology is, I think, unfortunate, not only on its own account, but also because it is distracting: the far more serious problem with Posner's treatment of the range of customs and laws he attributes to biology is *ethical*, not conceptual. Indeed, the near-universal feminist antipathy to sociobiology notwithstanding, if we set aside for the moment postmodern presumptions against "essentialism," it is striking how well Posner's story accounts for both the universals and the particulars of patriarchy. It may indeed be true, for example, that men everywhere have restricted or at least have attempted to restrict the freedoms of women—this is what we call "subordination" and it explains why there has always been, in some form or other, a political impulse toward, as well as social opposition against, women's "liberation." It is not wildly fanciful to suggest, in light of the near-universality of this practice, that the tendency to restrict women's freedom is rooted in the male desire to feel secure in the paternity of his own children. Similarly, it is indeed the case, as Nancy Chodorow¹⁰⁴ and Richard Posner assert, that women almost everywhere have assumed greater responsibility for child care than men, and that men everywhere exhibit greater tendencies toward aggression, jealousy, violence, and child-abandonment than do women. Again, given the universality or near-universality of these practices, it is not wildly fanciful to attribute them to biological differences. Most strikingly, it is indeed the case, as both Catherine MacKinnon and Richard Posner believe, that rape, far from being simply an act of violence, is in essence a substitute for sex undertaken by "normal men" who cannot find a more consensual outlet for their sexual appetites. Posner shares with MacKinnon, in other words, a view of rape as being essentially continuous with sex, and of the rapist as being essentially nonpathological—psychologically indistinguishable from other men, and different only in his relative inability to secure voluntary sexual compliance from consenting women.¹⁰⁵ The

103. My personal favorite is Posner's claim that most men are attracted to women with large breasts because large breasts tend to correlate with excellence in breast-feeding, *id.* at 94 (wrong on both counts: men are not universally attracted to large breasted women and breast size has nothing to do with ability to breast-feed).

104. NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978).

105. See CATHERINE MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE* 173-83

apparent universality or near-universality of all of these practices, all of them terribly harmful to women, strongly suggests precisely what Posner unwittingly argues in his text: that far from being “socially constructed” by one society after another, repetitively, fetishistically, and monotonously across geography and time, patriarchy is indeed rooted in something common and universal to all—rooted in some aspect of our shared human nature.¹⁰⁶ That, at any rate, is the hypothesis suggested by much of the recent work in sociobiology, whatever may be the political impulse of its practitioners, and that is the hypothesis, it seems to me, that we ignore at our peril.

What Posner’s text inadvertently shows, I think, is that the profound political bias of sociobiology in favor of the sexual status quo stems not from the basic sociobiological narrative itself, but rather, from the moral “neutrality” that Posner and others bring toward its implications. Characteristically, the virtue of Posner’s exposition is its clarity: Posner, unlike other sociobiologists, explicitly insists that the biological naturalness and the strategic rationality of a practice acquit it of any possible charge of injustice, and, thus, immunizes the practice against moral judgment. If a practice or pattern is in some way rooted in reproductive strategy, Posner argues again and again, then it is simply wrong to think that it is misogynist, or sexist, or in any way directed at the subordination of women.¹⁰⁷

Posner puts forward two separate arguments to support his general claim that a practice rooted in or in some way motivated by a biological instinct cannot possibly be condemned as subordinating. The first argument is largely implicit and runs throughout much of the text: if an individual’s act is *motivated* by a biologically rooted desire, such as sexual appetite, then it cannot be motivated by any evil intent or malignancy toward women. Thus, for example, feminists are wrong, Posner argues, to consider rape to be a practice that subordinates women:

Contrary to a view held by many feminists, rape appears to be primarily a substitute for consensual sexual intercourse rather than a manifestation of male hostility toward women or a method of establishing or maintain-

(1989) (arguing that “rape is indigenous, not exceptional, to women’s social condition”); POSNER, *supra* note 1, at 106-08.

106. For a feminist treatment of much of the same material covered in Posner’s text, see MARY BATTEN, *SEXUAL STRATEGIES: HOW FEMALES CHOOSE THEIR MATES* (1992).

107. See POSNER, *supra* note 1, at 30, 184, 214, 216, 243, 370 (distinguishing economic analysis from the social construction approach; economic analysis assigns less weight to “power, exploitation, malice, ignorance, accident, and ideology” as behavioral influences, and assigns more weight to “incentives, opportunities, constraints, and social function,” thereby finding efficiency rather than subordination in a range of practices, including adultery laws, sequestration practices, female infanticide, and clitoridectomy).

ing male domination. . . . [M]ost rapists want to have sex, not to make a statement about, or contribute to, the subordination of women.¹⁰⁸

Similarly, when discussing pornography, Posner notes that although

[m]any feminists believe that even if pornography does not actually incite men to rape, it makes them devalue women and thereby contributes to sexual . . . oppression This is possible, but it is a suggestion in considerable tension with the aphrodisiacal thrust of pornography. The audience for pornography is interested in sexual stimulation, not in sexual politics. Pornography does present women as sexual objects, but in moments of sexual excitement even egalitarian men conceive of women in this way.¹⁰⁹

Relatedly, men do indeed “objectify” women, Posner makes clear, if objectify means that men place a high priority on women’s sexual appearance. But men do so because it is central to men’s sexual strategy, not because they seek to dehumanize women.¹¹⁰ “Objectification,” then, is simply a rational reproductive strategy, not emblematic of men’s control of women’s sexuality in any sort of objectionable way.

The discovery of a “Darwinian” biological rationality behind a societal, rather than individual practice, exonerates the society, for Posner, in much the same way that the discovery of a biological urge exonerates the individual. Not only does the sex drive of individual males rationalize what otherwise appear to be hostile or misogynist acts, but the species-wide urge to reproduce similarly rationalizes what otherwise appear to be brutally misogynist societal practices. Thus, to illustrate his by now familiar explanation of the “invisible hand” method by which societies willy-nilly hit upon efficient regulatory customs, and even before identifying efficiency as a desirable basis for regulation, Posner takes as an example, the rationality, and hence efficiency, of clitoridectomy:

What is the mechanism, akin to self-interest at the level of individual decision making, by which efficient laws and customs are generated? This question has puzzled economic analysts of law, but in some cases a Darwinian type of answer is plausible. Take a custom such as clitoridectomy. Suppose in some primitive society the role of the clitoris in female orgasm is noticed, and it is also noticed that women with a highly developed capacity for sexual pleasure are more susceptible to the

108. *Id.* at 384-85 (footnote omitted).

109. *Id.* at 371.

110. *See id.* at 92-93 (arguing that responsiveness to visual stimuli ensures that the male will not miss any reproductive opportunity and will thus maximize reproductive success).

blandishments of seducers. A polygamist, or for that matter the father of a girl, might tumble to the idea that a wife whose clitoris was removed would require less supervision by her husband. Such women would become more valuable in the marriage market—would command higher brideprices or require lower dowries—than other women, and polygamists whose wives were circumcised would prosper more than other polygamists. So the benefits of the practice would be perceived, and eventually it would become generalized and regularized in the form of a custom understood to be normative.¹¹¹

In a similar vein, Posner argues, female infanticide in poor societies in no way suggests hostility toward women—again, its rationality precludes the possibility of its malignancy:

[I]nfanticide, when viewed, as it should be, as a method of family planning rather than a species of motiveless malignancy, does not reduce the population by the number of infants killed. For in a poor society, the fewer children a woman has, the likelier they are to survive to adulthood. This is true even when most or even all infants killed are girls, the “efficient” form of infanticide because it limits the future growth of the population. . . . Hence—not today, of course, but in the radically different social conditions prevailing in earlier societies—a practice of female infanticide need no more bespeak hostility toward or a devaluing of women than the thinning of trees in a forest signifies a dislike of trees. It would be irrational from a genetic standpoint for a father to be indifferent to the procreative potential, and hence to the survival, of his daughters.¹¹²

This argument—that the efficiency of societal or individual acts taken in furtherance of reproductive strategies precludes the possibility of ill-will or malignancy toward women—is so absurd on its face that it is hard to believe that Posner really means it. Surely it is possible that although rapists do indeed want sex (I do not know of any feminist who thinks otherwise), their willingness to inflict tremendous pain on women to obtain it through force bespeaks some hostility toward women. Similarly, it is surely possible that even though female infanticide “thins the forest,” and hence makes life possible for the surviving female children, the refusal to practice other forms of birth control—less sex, for example—rather than

111. POSNER, *supra* note 1, at 214. Although a practice is efficient, Posner adds that its efficiency does not preclude the necessity of reform. He does not, however, explain on what basis we may reform presumably efficient regulations like clitoridectomy—an odd lapse in a book otherwise devoted to arguing that efficiency should be precisely the basis for sexual regulation, no less than for all other sorts of social regulation. *Id.* at 214-15.

112. *Id.* at 143-44 (footnotes omitted).

force women through pregnancies only to kill off the resulting female infants bespeaks some devaluing of female children and women's labor.¹¹³ Surely the willingness to inflict the unthinkable pain, the high risk of death, the deprivation of sexual pleasure, and the profound psychic injury that constitutes the practice of clitoridectomy, efficient though it may be, reflects some lack of concern for women's welfare.

At other points in the text, Posner suggests that his general claim that biological rationality (at either the species or individual level) precludes misogyny does not so much mean that a biological drive displaces misogynist motivation, but that, because these practices are biologically grounded, there is not much hope in changing them. In fact, this quite different argument is much closer to what one would expect from this resolutely antimentalist, pragmatic behaviorist. And indeed, although Posner explicitly disclaims this position at one point in the text,¹¹⁴ after distinguishing the methodological differences between his approach and those of feminists and other social constructionists, Posner goes on to make precisely the biological determinate argument:

To show that a practice serves a social function does not make it good in an ethical sense but does suggest that it may be difficult to change. Left-leaning constructionists—and that is the posture of most constructionists today—are not comfortable with the idea that institutions, customs, laws, and other features of the social world might be rational, and specifically might be durable adaptations to deep, though not necessarily innate or genetic, human capacities, drives, needs and interests. They prefer to think that the existing social pattern is fluid, contingent, plastic, because sustained by a ruling class, or by an ideology, or by some absurd misunderstanding, which might be swept away in a social or intellectual revolution that would turn the pattern inside out. . . . They dislike the functional outlook that economics shares not only with evolutionary biology but also with influential schools of political science, sociology, and anthropology, because that outlook is implicitly antiutopian.¹¹⁵

This too is nonsense, although it is nonsense widely accepted by sociobiologists and most of their critics. Just as it is obviously pointless to kick and swear at tripped-over rocks or to curse the winds and elements, it is

113. For discussions of female infanticide that recognize the calamitous attitude toward women that the procedure reflects, see John W. Anderson & Molly Moore, *Third World, Second Class: The Burden of Womanhood*, WASH. POST, Feb. 14-18, 1993, at A1; Armatya Sen, *More Than 100 Million Women Are Missing*, N.Y. REV. BOOKS, Dec. 20, 1990, at 61-66. See generally Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Toward (An)other Vision*, 23 COLUM. HUM. RTS. L. REV. 249 (1991).

114. POSNER, *supra* note 1, at 109-10.

115. *Id.* at 30.

equally obvious that there is no connection one way or the other between evolutionary biology and utopianism. That some testosterone-infected men may make life nasty, brutish, and short for everybody else does not mean that we cannot envision a utopia free of violence, or design our own society in accord with such a vision. That women may be more inclined than men to mother children does not mean that an ideal life does not have a substantial public dimension, or that we should not design our institutions to facilitate women's participation in that world. That men may be more inclined than women to abandon their children does not mean we should not insist on paternal involvement, or that we should not do so because of our utopian sense that in an ideal world children are fathered and men father. That biology is not destiny does not, of course, imply that biology does not influence behavior. It undoubtedly does. But when and where it does, all that follows is that we might have to take action—we might have to intervene, we might have to do something—if we are to bring our destiny closer to our envisioned utopian dreams. Excepting the sole and, more or less, irrelevant few remaining Rousseauian romantics amongst us, however, we have all always pretty much known that.

What is truly chilling about this book from a feminist perspective is *not* that Posner is blind to women's global and historic subordination. On the contrary, he sees and chronicles the dreary, numbing, sad story of women's subordination everywhere—from footbinding, to sequestration, to female infanticide, to clitoridectomy, to rape, to female "availability" for unwanted sex, to high heels, sexual objectification, and double standards. What is chilling is that he cannot and will not see these practices as practices of *subordination*. They are, rather, simply efficient practices. Posner insists upon this point:

The economic approach differs from the familiar constructionist approaches in assigning less weight to power, exploitation, malice, ignorance, accident, and ideology as causes of human behavior and more to incentives, opportunities, constraints, and social function. (This is partly a methodological consequence: concepts such as power, exploitation, and ideology are not concepts in economics.)¹¹⁶

Posner does not elaborate at this point or any other in the text why this should be the case—why a normative economics approach should resolutely blind itself to patterns of subordination. He is right, though, to insist that the difference is "methodological." Posner's methodology focuses relentlessly on objectively visible—and hence measurable—indicia of value.

116. *Id.*

Although there is nothing about the descriptive science of economics that necessitates doing so, the Posnerian *normative* economist uniquely *identifies* value—not just economic value, but moral value as well—with that which can be measured in objective markets. What can be measured in objective markets tends to be the highly visible and audible choices, views, and preferences of the relatively powerful. The experiences of the silenced—including sequestered, illiterate, intentionally uneducated, footbound, always sexually-available, mutilated, enslaved, raped, and killed women—are the very experiences not likely to be reflected in the choices of “market actors.”¹¹⁷ Because the experiences of pain felt by the “subordinate” are not reflected in objectively visible and measurable markets, they are not included in tabulations of what is or is not a “cost,” or what is or is not “efficient,” and, hence, in ethical judgments of what is or is not of value. Posner’s explicit refusal, in other words, to recognize patterns of subordination as patterns of subordination is a direct consequence of the refusal, central to his ethics, to look beyond objective criteria of value to the subjective meaning and worth of experience felt and lived by individuals. To do so would require him to empathically, contextually, and “intersubjectively” explore the subjective goodness, joy, happiness, sorrow, torture, and pains of people’s lives, rather than to “pragmatically” tabulate the economic costs and benefits of practices. That is the “moral work” this pragmatic economist simply refuses to do.

Viewed in the context of this explicit disavowal of the need or wisdom of any sort of empathic and intersubjective moral inquiry, it is not surprising that a book which, almost without qualification, trumpets efficiency as a regulatory ideal can unflinchingly identify clitoridectomy and female infanticide as examples of efficient regulatory apparatuses. The mind numbing pain of clitoridectomy, the infringement of liberty of sequestration, the societal tragedy of female infanticide, and the torture and terror of living in a society riddled by rape simply do not enter into the efficiency calculation. Those pains, those terrors, and those fears, because they are experienced by the powerless, are not manifested in the visible choices of market and societal actors. They do not register and are accordingly invisible. The objective and morally neutral methods for specifying what is or is not efficient precludes the difficult labor of understanding the experiences and subjectivities of those whose lives are not reflected in, much less respected by, the choices and reproductive strategies of those whose voices and views are heard. What to a feminist are glaring instances of subordinating practices, to Posner are simply successful adaptations to biological market

117. Indeed, as Posner’s language continually suggests, women are acted *upon*, both sexually and otherwise, by the rational economic and biological male; women, in a fairly literal sense, do not really act at all.

conditions for efficient evolutionary strategies: so successful, in fact, that they have indeed become “normative.”

Thus, what Posner assumes to be the ideal dispassion of his scientifically minded legislator toward reproductive sex is, in fact, a moral blindness toward pervasive subordination, injustice, and suffering, much of which is at least arguably caused by those reproductive “strategies.” It is worth noting that although I have focused on Posner’s arguments, that moral blindness is reflected stylistically and linguistically as much as argumentatively. Even casual readers, whatever their assessment of the merits of Posner’s arguments, will doubtless do doubletakes when confronted with the argument that female infanticide is like thinning trees (with a footnote that tells us that the Japanese word for infanticide is also the word for thinning trees), or that men might “tumble toward” the practice of clitoridectomy as an efficient method of keeping women loyal, or that, while unfortunately rape is a crime, it is underreported, which is *almost just as good*¹¹⁸ (Posner means here for purposes of scientific understanding). Interested *women*, though, are likely to react much more strongly to the tone and style of Posner’s presentation. Few women readers, even mildly conscious of gender inequality, will fail to feel assaulted, infuriated, or belittled by the relentless male perspective shamelessly employed in this book, or by the descriptions of women, when described at all, as passive, or by the general depiction of women as objects rather than subjects of sexual desire, as receptacles of sexual activity, and as breeders of children replicating some male’s genes. Where moral revulsion is appropriate and moral concern called for, Posner’s proud dispassion comes across as an amoral and decidedly distasteful reactionary blindness to pervasive injustice. His language, turns of phrase, and overall style, no less than the argument itself, reveal it as such.

In a similar but I think more complicated way, Posner’s treatment of reproductive sex reveals a blindness toward the moral issues concerning homosexuality. Here, the story is more complicated, because while there is little in Posner’s text to cheer feminists, there is a fairly obvious sense in which Posner’s sociobiological story of the naturalness of homosexuality is conducive to the liberation of gays and lesbians.¹¹⁹ Were it to be discoverable and provable that homosexuality is genetically determined, the showing would go a long way toward establishing the unconstitutionality of not just antisodomy laws but also a wide array of laws that burden gay life

118. See *id.* at 385 (noting that underreporting has led to victim-based studies that suggest rape is more sexually motivated than many feminists have admitted).

119. Darrell Yates Rist puts the point succinctly in *The Nation*: the argument gets your parents off your back. Rist, *supra* note 78, at 425-26. For that reason, the reaction of the gay-rights community to this book is likely to be different from that of the feminist community. See generally Eskridge, *supra* note 61.

styles—at least those that seem to do so intentionally (as most do). Nevertheless, I think it is fair to predict that Posner's account of the biological origins of homosexual preference is ultimately unlikely to win much admiration from gays and lesbians for the simple reason that he combines his essentialism with a generally gratuitous and almost relentlessly demeaning depiction of gay life. Furthermore, he does so in a manner that strongly supports the suspicion that the two are somehow linked.

For example, Posner's insistence on a sharp, biologically given, dualistic divide between "real" homosexuals and heterosexuals seems to be motivated by a virtual passion for rational differentiation: a fascination over who is and who isn't and how much, a stated fear of and dislike for the "masquerading" practices like transvestism and transexualism,¹²⁰ and, above all else, a distaste for ambiguity. This rational differentiation, should, and I am sure will, leave gay and lesbian readers feeling prodded, demarcated, labeled, and disciplined in near perfect Foucaultian fashion, and ought to leave the rest of us feeling at least perplexed, if not similarly assaulted. *Why*, for Pete's sake, does Posner have this extraordinary concern over the difference between, for example, real and opportunistic homosexuality, over who's *really* a homosexual, and who's just faking it because they can't get a girl, over who's a Kinsey 6 and who's a Kinsey 5,¹²¹ over whether an effeminate homosexual is "nelly," "swish," "blase," or "camp"?¹²² At times, the need for differentiation and demarcation is a function of his substantive argument: Posner is very concerned, for example, that allowing homosexuals to marry would impose disabling "information costs" on the rest of us.¹²³ In fact, the threat of "information costs" turns out to be a fairly definitive argument against homosexual marriage.¹²⁴ But this argument notwithstanding, as a general matter, Posner's interest in demarcation and disambiguation goes well beyond the needs of his thesis. It is hard to see why the "who is and who isn't" question matters so much to

120. See POSNER, *supra* note 1, at 25-27 (hypothesizing that for effective social interaction individuals need to be able to rely on the stable identities of people and things and that transvestism threatens that fundamental stability).

121. See *id.* at 105-06, 296-98 (explaining that the study of homosexuality is important both in its own right and because it sheds light on heterosexual strategies, and suggesting that strong societal disincentives compel the conclusion that free choice plays a relatively small role in the adoption of a homosexual lifestyle).

122. See *id.* at 122 (citing a typology set forth in an earlier study by C.A. TRIPPS, *THE HOMOSEXUAL MATRIX* (1975) and noting the correlation between effeminate behavior and homosexual behavior, but not necessarily with homosexual preferences).

123. *Id.* at 312. The problem, Posner explains, is that if homosexuals could marry, we would not be able to deduce from someone's marital status their heterosexuality, or deduce the sex of one's spouse from the information that they have one. *Id.*

124. *Id.*

him and why it should matter so much to us, other than for the extremely distasteful and utterly Foucaultian reason that successful demarcation and differentiation is the necessary prerequisite of state social or cultural control.¹²⁵

Similarly, Posner's naturalistic account of the origin of homosexual preference is coupled with a set of "speculations" and "predictions" about homosexual life that are only tenuously, if at all, connected with any of the book's central theses and that are on their face demeaning, insulting, and even dangerous—ideas really do have consequences and one wishes that this pragmatist had been at least somewhat more concerned about the possibility that his might have injurious ones. Thus we learn, for example, that good looking men are more likely to have homosexual experiences whether they are genetically homosexual or heterosexual, because all men, including homosexuals, are more interested in good looks than women, which, in turn, is because all men, apparently now including homosexuals, are genetically programmed to be sexually turned-on visually.¹²⁶ By the same token, we learn that

homosexual men and heterosexual women are better dressed than either heterosexual men or homosexual women. Since men are sexually more aroused by visual cues than women are, we expect both men who are sexually interested in men, and women who are sexually interested in men, to dress better than either men who are sexually interested in women or women who are sexually interested in women.¹²⁷

The extended discussion of these correlations between physical attractiveness and sexual activity is supposed to support the general argument that the biological model can correctly predict a range of social phenomenon. But the connection is so tenuous, and the stereotypical norms incidental to this argument so hurtful, that one would think that any level-headed writer would at least contemplate omitting it. The purpose of the extended discussion of homosexual effeminacy is even less clear. The speculations and scientific "predictions" about "masculine" and "feminine" behavior that Posner claims derive logically from his extensive discussion of homosexual effeminacy sound, at best, like parlor games. What Posner never acknowledges, and perhaps what he does not realize, is that games of this sort can be harmful.

125. See generally FOUCAULT, *supra* note 40; MICHAEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1977).

126. POSNER, *supra* note 1, at 92-93. Why gay men, who Posner insists are genetically programmed not to reproduce, and, hence, do not share in the heterosexual man's interest in big-breasted, fertile women, are nonetheless programmed to be turned on visually, is not made clear.

127. *Id.* at 106.

For all of these reasons, it is easy to conclude that Posner's demeaning depiction of gay life is indeed rooted in his essentialist conception of natural gay and lesbian identity. His dangerous obsession with identifying, demarcating, differentiating, and cataloguing people into homo and hetero boxes; his manifest discomfort and hostility toward sexual ambiguity, whether transvestitism, transsexualism, bisexuality, or simply weakly held preferences; and perhaps most strikingly, his insistence on minimizing the amount of "true" homosexual preference, while by no means *necessitated* by his naturalistic claims about the genetic basis of homosexuality, are all certainly *facilitated* by those claims. If homosexuality is a genetic trait of the sort Posner describes, then perhaps we can definitively categorize people, declare the disorienting and confusing phenomenon of bisexuality to be a distortion of a truer and simpler reality, and state with certainty that it is this percentage—and *only* this percentage—of the population disabled by the extraordinarily vast array of legal, cultural, religious, and social barriers to an equal or free gay and lesbian identity in a predominantly heterosexual world.

Nevertheless, it is ultimately Posner's ethical theory—his steadfast refusal to sympathetically engage in the subjectivity of people's lives in order to make moral judgments¹²⁸—and not his essentialism, demeaning though it may be, that skews his treatment of the political issues regarding homosexuality. In discussing same sex marriages, for example, Posner notes, almost as an afterthought to a full and detailed discussion of the various "information costs" that would be incurred were same sex marriages to be legalized, that the benefit would be an increase in the self-esteem of gay and lesbian individuals.¹²⁹ Although true enough, the gains in self-esteem are trivial compared to the overpowering and overwhelmingly positive changes in social circumstances, cultural awareness, and correlative sense of identity, full citizenship, civic equality, and recognition that would accompany the full legalization of same sex marriages. Posner collapses the transformation of the social and individual world that would flow from (and cause) such a profound change in our view of family and family law, into the generic concept of an "increase in self esteem." By doing so, he has badly misassessed the weight of the benefit that would accrue by the changes in the law he considers.¹³⁰ It is not his view of homosexuality as

128. The failure to empathize is at least a problem with his treatment of the issues, and it is one that is independent, both logically and practically, of his conception of homosexuality as genetically determined.

129. POSNER, *supra* note 1, at 311.

130. Posner does not, for example, consider the benefit *to women*, including heterosexual women, of legalizing same-sex marriage. For a discussion of the possibility that same-sex marriages could erode traditional gendered work roles in the home, and thereby ease women's now disproportionately high burden of domestic labor, see Eskridge, *supra* note 61, at 356-57.

genetically determined, however, that steers Posner away from a clear endorsement of same sex marriage. It is, rather, his near-absolute refusal to think imaginatively and empathically about the subjective lives of others.

Furthermore, although extraordinarily sensitive to the degree to which one's physical appearance may make it difficult to find a sexual mate of one's choice,¹³¹ Posner is seemingly blind to the degree—presumably at least as high—to which homophobic policies, attitudes, customs, and laws hinder one's ability to even perceive oneself as homosexual, much less find a willing and desirable partner. It is not unreasonable to suppose, to use Posner's language, that there are far more "true homosexuals" deterred from acting on their preferences than "true heterosexuals," or, to put it differently, that the amount of opportunistic *heterosexuality* swamps whatever opportunistic homosexuality may exist. Indeed, the evidence of opportunistic heterosexuality—the sheer numbers of people who discuss the often sizeable percentage of their lives spent "in the closet" as "opportunistic heterosexuals," and the needless anguish of those lives—is far less speculative evidence of the existence and extent of opportunistic heterosexuality than the fanciful set of hypotheses and inference chains Posner uses to build his case for the near nonexistence of true homosexual preference. This refusal to recognize that opportunistic heterosexuality may be more pervasive than opportunistic homosexuality is not facilitated by anything Posner says about the "nature" of homosexuality. This refusal is, rather, entirely a function of his methodological or ethical presumption against the significance, relevance, and existence of widespread practices of subordination. And finally, although Posner's essentialism facilitates his obsession with demarcation, it is his ethical failure—his inability to recognize social subordination as a constraint on choice—not his sexual essentialism, that grounds his cramped argument against meaningful social and legal reform. If, after all, only two or four percent of the population is unfairly burdened by a homophobic society, rather than the ten percent popularly believed (with the remainder engaging in "opportunistic" homosexuality), that is a different matter than if fifteen or twenty percent of the population is burdened, or heaven forbid, most or all of us.

III. THE RATIONALITY OF THE HISTORICAL REGULATION OF SEXUALITY

Finally, Posner argues that not only are individuals generally rational in their hedonistic and reproductive sexual strategies, but societies, cultures, and states are similarly rational, for the most part, in their sexual customs, beliefs, and regulatory apparatuses.¹³² Even the apparently irrational and

131. See, e.g., POSNER, *supra* note 1, at 92-94.

132. See *id.* at 243 (arguing that public policy has confined sex to marriage, and assessing the efficiency of such restrictions).

inefficient regulation of consensual sexuality—Posner's primary subject—consists of rational responses to various historical conditions. Such regulation has had the economically rational purpose of ensuring the well-being of children—an “externality” of sex. In what may be the most clever argument of this book, Posner argues that the apparently irrational regulation of consensual sex has largely consisted of rational responses to two historical conditions: the nature of the marital unit in that culture, and the economic dependence or independence of women.

Historically, Posner argues, cultures that heavily regulate nonmarital or deviant consensual sexuality—with laws against homosexuality, adultery, fornication, and the like—generally manifest two conditions: first, marriage is “companionate,” meaning that husband and wife are expected not only to reproduce but to nurture a friendship between them, such that their sexual relations serve both reproductive and “social” ends, and second, women are economically dependent upon men. In these cultures, (such as most “Christian” western societies up to and including modern U.S. culture) nonmarital and deviant sex seriously threatens the fidelity of husband to wife, and therefore, given the economic dependence of women upon men, seriously threatens the well-being of their offspring. Such sex is accordingly heavily regulated. By contrast, in societies in which women are economically dependent on men but the marriages are generally “noncompanionate”—husband and wife are neither expected to have, nor generally have, a friendship, and accordingly, sex between them is expected to serve only reproductive ends—“deviant” sexuality has generally not been heavily regulated. In these societies (such as ancient Greece), because sex between husband and wife serves only reproductive, rather than social ends, there is no need to deter nonmarital forms of sexuality that might otherwise threaten marriages. Deviant sex is, therefore, widely tolerated or encouraged, with few adverse effects on third parties, such as children. And finally, in cultures in which marriage is and is expected to be “companionate,” but women and children are economically independent of men, nonmarital and deviant sex may threaten the fidelity of husband to wife, but is far less of a threat to the well-being of children, and therefore, the external effects of sexual deviance are much lower. In these societies (such as modern Scandinavian countries), one will typically find a high divorce rate and very little regulation of sexuality.¹³³

Very generally, the chronological history of sexual regulation in western culture begins in ancient Greece, where there was little regulation of

133. This argument is presented in several chapters. See the discussion of the history of western sexual mores, *id.* at 37-66, and the chapter entitled *The History of Sexuality From the Perspective of Economics*, especially the subheading *Three Stages in the Evolution of Sexual Morality*, *id.* at 173-80.

deviant sex because although women were dependent upon men, the model of marriage was noncompanionate. Regulation increases during times of female dependency coupled with companionate marriage. This story finally ends in modern times with less regulation as women become increasingly involved in the paid labor market and, hence, less dependent upon men.¹³⁴

These regulations, Posner argues, are just as “rational” as are our individual sexual strategies and, as such, cannot possibly be the product of any injustice, toward women or otherwise. The rationality of historical and modern regulation of sex somehow proves for Posner that such regulation has never been motivated by subordinating or misogynist attitudes toward women. Rather, he argues, apparently misogynist or simply discriminatory sexual regulations are the product of either justifiable or unchangeable ends, and are entirely rational means to achieve them:

Since so much sex law seems harmful to women, or at least insensitive to their concerns, it is tempting to suppose that a good deal of that law must be a successful effort by men to redistribute wealth (in the broadest sense) from women to themselves. . . . But there are several problems with the suggestion. The first is that many legally sanctioned or even compelled practices that are superficially misogynistic may actually be in the best interests of women. This most dramatic example is female infanticide in societies in which women’s opportunities are severely limited (not necessarily as a result of discrimination). In such societies, infanticide may increase the number and wealth of females who survive to adulthood. The second problem with the suggestion is that neither all men nor all women are identically situated with respect to the benefits and costs of discrimination against the other sex. Fathers of daughters do not benefit from discrimination against women. . . . Male employees may gain from excluding women from certain employments, but male employers may lose from such exclusion. Some women benefit from sexual freedom, others lose. And women linked financially or through altruism to men (husbands, sons, fathers, brothers) may be harmed by measures that redistribute wealth from men to (other) women. Since men and women have overlapping interests, it is simplistic to attribute a particular law to the interests of men or the interests of women.¹³⁵

The problems with this formulation should be obvious: it may or may not be “simplistic” to attribute a particular law to the interests of men or the interests of women, but it is surely “simplistic” to infer that male employers do not benefit in non-labor market ways from excluding women

134. *Id.*

135. *Id.* at 215-16.

from the labor market, that fathers do not benefit from discrimination against women, or that women and men have identical or even “overlapping” interests simply because there appears to be a financial or altruistic link between them. Women excluded from the labor market are rendered that much more dependent upon the men in their private and intimate lives, including men who are employers. This dependence presumably benefits such men, even if they are precluded, from time to time, as “employers” from hiring the best person for the job. An altruistic link between a man and a woman may be the foundation of a genuinely overlapping interest, or it may be the outward mask of a private life of self-denial, denigration, and subordination, in which case the woman and the man upon whom she is dependent and toward whom she may appear to be “altruistic” have anything but shared interests. A look at the substance—the subjective reality—rather than the form of women’s lives, or an understanding of “dependency” as at least potentially a damaging status would alert Posner to precisely that possibility. Instead, Posner adopts a stance of blindness to the existence of either political subordination or personal misery in the private lives he objectively demarcates as “companionate” and characterized by altruism and benign dependency. The unsurprising consequence of assuming both the intransigence and the naturalness of women’s economic dependency upon men is simply that Posner can pronounce as “rational” the scores of sexual regulations that further entrench women’s dependency.

CONCLUSION

Posner ultimately leaves us with a simple formula for the optimal regulation of sexuality: we should, he insists again and again, regulate consensual sex only to maximize efficiency and minimize externalities (primarily, the effects of consensual sex on children). The only qualification—and then only occasionally and inconsistently noted—is that such regulation must also respond to the moral intuitions that are deeply held by a broad consensus of the community.¹³⁶ When these ends conflict (such as in the conflict over abortion), a presumption in favor of a minimum state, for Millian liberal or libertarian reasons, could properly be used as a tie-breaker.¹³⁷ In addition to the general moral failings I examined in the text, there are at least three other problems with this prescription, whether for the regulation of sex or of any other aspect of social life.

First, Posner’s insistence on the efficient satisfaction of given preferences, constrained only by a weak respect for strongly and widely held

136. *Id.* at 230-37.

137. *Id.* at 232-33.

moral intuitions, provides no means or reason for examining the worthiness of either preferences or the moral intuitions with which they conflict, and, hence, the worthiness of the social or natural structures that influence or determine them. His insistence on “neutrality” toward preferences, while unquestionably implying some libertarian reforms, rests on an underlying conservatism toward the inclinations of individuals, the compulsions and imperatives of nature, and the traditions of society that vests those inclinations, compulsions, and imperatives with a near-absolute authority. This is indeed, as Posner insists, antiutopian work, whether or not it is premised on a rejection of the “plasticity” of human nature advanced by those seeking more radical societal reform. But unless we share Posner’s firm belief that “rationality”—understood as the criterion by which we seek the most efficient means to satisfy ends that are themselves insulated from critique—is the best we have to offer and the most that we should seek from our own individual and societal behavior, there is nothing in this work that might lead us to think that this anti-utopian acceptance of the “way things are” is an attitude we ought to share, or that the insistence on the permanence of our individual and societal nature is a presumption we ought to embrace. We need not and should not be so satisfied with the way things are.

Second, although the relation of normative economics and liberalism is well beyond the scope of this essay, it is worth noting briefly that Posner’s insistence, in this work and others, that his prescriptions for efficient regulation and deregulation of sexuality are within the “liberal” tradition rests on a distortion of that political philosophy. Liberalism has never been committed to the view, itself quite modern and held in its purest form by maybe no one *but* Richard Posner, that the morally neutral satisfaction of as many preferences as possible will enrich everyone. Equating value with satisfaction of desire is arguably a proposition at the heart of normative economics, but it is not at the heart or periphery of liberalism. Both liberalism and Posnerian ethics do share a commitment to a strong antipaternalism, which implies, in part, the wisdom of deregulating consensual sex. But the antipaternalism common to liberalism typically rests on an understanding, itself foreign to Posnerian ethics, that the transformative and beneficial effect of forming, acting on, and then living with one’s choices will usually—certainly not by definition, and probably not always—outweigh the costs to the individual that her poor choices and counterproductive preferences might carry. It simply does not follow from liberal arguments against state paternalism that the behavior in question is itself conducive to individual enrichment, or that the social and private powers that engender a preference for or tolerance of the behavior are accordingly free from censure and change. Liberalism, no more than true conservatism, does not *define* value coextensively with satisfaction of given preferences. It is in no way, then, wedded to the ultimately reactionary

complacency incident to the normative commitment to efficient satisfaction of felt preferences that is unquestionably at the ethical core of Posnerian normative economics.

Nor is liberalism wedded to the assumption, implicitly assumed by Posner in this book as well as in the rest of his work, that antipaternalist arguments against state intervention into "private" or social behavior imply anything one way or the other about the wisdom of some other form of social intervention. Liberals can, and often do, harbor both a general skepticism regarding the wisdom of state intervention and at the same time a willingness to employ other social institutions, such as public education, to effectuate change. There is no reason, then, even for a "liberal" who shares Posner's distrust of the state and his conception of human sexuality, to concur as well with either his limited and libertarian arguments for moderate reform, or his conservative arguments against radical restructuring. Posner's refusal to engage in the moral inquiry that might prompt a plea for more serious radical change is required neither by his naturalistic conception of sexuality nor by his libertarian (and unargued) skepticism over the wisdom of state intervention. It is grounded, rather, in an "agnosticism" toward our presently held preferences, our felt inclinations, and the perceived "imperatives" of our nature. That agnosticism is no part of liberalism, indeed, it is antithetical to it.

The third and final problem concerns the role of knowledge and theory in Posner's world view. Posner argues, at both the beginning and end of this book, that the proper role of theory and knowledge in a liberal society is instrumentally and pragmatically to facilitate "control" over that which is known.¹³⁸ He does not tell us, at least in this work, what "control" might mean, or toward what end he might wish to put it. Nevertheless, given his insistence on "moral neutrality" and his repeated resistance to claims of inequality and suffering, the urge to know-so-as-to-control that animates this book might be restated, crudely but fairly, as the urge to render more efficient through the acquisition of knowledge the deliverance to the powerful of that which they desire, and will obtain willy-nilly in any event. We seek to know so that we might control, and we seek to control so that we might render the social world more efficient. We render that world more efficient by facilitating, not by challenging or impeding, the structures of desire established by those whose voices are heard and whose will is felt.

I have written elsewhere on what I regard as the terrible barrenness of this ethical theory,¹³⁹ and I will not repeat those arguments here. All I

138. *Id.* at 442.

139. See generally Robin West, *Authority, Autonomy, and Choice*, 99 HARV. L. REV. 384 (1986) (contrasting Posner's consent-based normative structure, which purports to legitimate transactional outcomes, with the horrific consequences of certain forms of consent as portrayed in Kafka's literature).

want to note here is that the explicit and explicitly instrumental role accorded to knowledge and theory in the service of “efficiency” renders that ethic all the more embracing, and accordingly, all the more unsettling: efficiency governs not only the question “how should we act,” and particularly “how should we use our power,” but it also, apparently, governs the question “what should we seek to know.” My own reaction to Posner’s repeated acknowledgment of his instrumentalist epistemology is at heart simply that I wish it were not so, both of this author and of all who share his insatiable “urge to know.” Surely there are more noble reasons to want to know the “other,” and more noble reasons to theorize about our nature, and more noble reasons to search out the truth about ourselves—perhaps to alleviate misery, perhaps to achieve some hard-won intimacy, perhaps simply because we are curious beings.

It is also discomfiting, even alarming, at least to me—and to anyone else?—how *precisely* Posner’s professed motive for acquiring knowledge about sex converges with his account of men’s motives for acquiring knowledge about women: men, according to Posner, are driven to control women because of their overpowering need to know their paternity. In a parallel fashion, what drives the thirst for knowledge, according to Posner, is neither a benign curiosity nor a desire for intimacy—the urge to “know and be known” posited by feminist writer Jessica Benjamin¹⁴⁰—but rather, the urge to control. Perhaps more revealingly, if true, Posner’s account of the quest for control through knowledge converges not only with feminist indictments of the motive of knowledge in law and in science, but also with the personal accounts of so many women about the nature of the need for knowledge characteristic of the men in their lives: he “cares” about my well-being and seeks knowledge of it only when and to the degree that he’s afraid I’ll leave him; he wants to know me only to control and possess me; paradoxically, and tragically, because of that blinding need, he does not see me or know me at all. Whatever may be true of men in general, one simply wishes, in the end, that at least *this* man’s insatiable and phenomenally productive desire “to know” was borne of other reasons; that *his* urge to know stemmed not from any need or desire to control, but from the need and desire to care—for all of us, for women, and for women *equally*. It is *that* desire which inspires, or will inspire, a “theory of sex,” whether naturalist or constructionist, biological or sociological, that will point us in the direction of reforms that might in turn promise a more humane and more just sexual future.

140. JESSICA BENJAMIN, BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM, AND THE PROBLEM OF DOMINATION 11-50 (1988).