

Boston University School of Law

Scholarly Commons at Boston University School of Law

Faculty Scholarship

2010

Chapter 5: What's So Hard About Sex Equality?: Nature, Culture, and Social Engineering

Linda C. McClain

Boston University School of Law

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship



Part of the [Law and Gender Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Linda C. McClain, *Chapter 5: What's So Hard About Sex Equality?: Nature, Culture, and Social Engineering*, in *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* 67 (Martha Albertson Fineman ed., 2010).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/848

This Book Chapter is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.



WHAT'S SO HARD ABOUT SEX EQUALITY?: NATURE, CULTURE, AND SOCIAL ENGINEERING

Boston University School of Law Working Paper No. 10-30
(Tuesday, September 21, 2010)

Linda C. McClain

This paper can be downloaded without charge at:

<http://www.bu.edu/law/faculty/scholarship/workingpapers/2010.html>

What's so hard about sex equality?: Nature, culture, and social engineering

From: TRANSCENDING THE BOUNDARIES OF LAW:
GENERATIONS OF FEMINISM AND LEGAL THEORY
(Martha Albertson Fineman, ed., Routledge 2010
Chapter 5, pp 66-82)

Linda C. McClain^{*}

INTRODUCING THE PROBLEM

In the United States, evidence of the success of legal feminism's equality project is visible in the constitutional commitment to equal opportunity and prohibitions against legislating based on fixed notions about gender roles (Case 2009; *United States v. Virginia* 1996) and in the move toward greater sex equality in family law and other areas of private law (McClain 2006). However, sex inequality persists, and substantive equality remains elusive (Fineman 2001, 2009; McClain and Grossman 2009). Social cooperation between women and men in various domains of society is assumed to be a fundamental and necessary building block of society, but it proves hard to secure on terms of equality.

Why is sex equality so hard to achieve? One answer is that feminist quests for equality in private and public life are a form of misguided social engineering that ignores natural sex difference. I argue that equality within and among families should help guide family law and policy, supporting a more inclusive, egalitarian definition of marriage and more respect for family diversity (McClain 2006). Prominent figures in the marriage movement critique this argument for enlisting family law's channeling function for feminist equality goals but resisting marriage's channeling function of securing responsible paternal investment (Browning 2007).

This chapter examines arguments that nature and culture constrain feminist law reform. Appeals to *nature* argue that brain science and evolutionary psychology find salient differences between women and men, limiting what social engineering can achieve in fostering sex equality or reforming family law. Appeals to *culture* argue that constructions of masculinity and femininity are tenacious; challenging them threatens women's and men's sense of identity and causes resistance to equality. Contemporary society may espouse a commitment to a "gender neutral society," but men's and

^{*} Linda C. McClain is a Professor of Law and Paul M. Siskind Research Scholar at the Boston University School of Law.

women's "unofficial desire" stands in the way (Mansfield 2006: 13). These contemporary claims may signal a new form of the sameness–difference debate. As such, they invite scrutiny by legal feminists.

Often at work in discussions about sex inequality is the notion of a proper equilibrium between the sexes that is upset when sex roles change or differences are minimized. However, even as critiques of feminist social engineering invoke nature and culture, problems posed by nature feature as a reason to embrace social engineering in the form of the social institution of marriage. This view of nature is distinct from the conservative religious argument that because marriage—"the natural family"—*reflects* the created order, feminist social engineering of the family is dangerous (McClain 2009).

APPEALS TO NATURE

Male and female brains and evolutionary psychology

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

In the 1990s, a flurry of books, including Robert Wright's *The Moral Animal* (1995) and David Buss's *The Evolution of Desire* (1994) introduced basic concepts of evolutionary psychology and sociobiology, proposing that science shed light on sex difference, why men and women had different views about the harm of rape and sexual harassment, and why they made different choices about work–family balance (Wright 1994). Wright criticized feminist legal theorists for avoiding science. He argued that:

[M]any of the differences between men and women are more stubborn than most feminists would like, and complicate the quest for—even the definition of—social equality between the sexes.

(Wright 1994: 34)

In the early twenty-first century, brain science rivets popular attention. Once again, evolution presents limits to social engineering and affirms sex difference. Enthusing about neuropsychiatrist Louann Brizendine's work in popular science, *The Female Brain* (2006), journalist David Brooks opines, "Once radicals dreamed of new ways of living, but now happiness seems to consist of living in harmony with the patterns that nature and evolution laid down long, long ago" (2006: 14).

What are these differences and what patterns do they prescribe? Brizendine (2006: 1) declares, “more than 99 percent of male and female genetic coding is exactly the same,” but the one percent difference “influences every single cell in our bodies.” The inside flap of the book cover promises neurological explanations for such sex differences as:

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

Brizendine turns to evolutionary theory to explain the roots of brain differences. However she is not quietist about human nature. Biology need not be destiny *if* we understand how evolutionary, biological, and cultural forces shape us (2006). Social engineering *informed* by biology holds promise:

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

(Brizendine 2006: 6)

What does this interplay of biology and human will suggest about social cooperation on terms of equality? I focus on Brizendine’s use of evolutionary theory to interpret brain difference and its implications for intimate and family life. I do not assess whether Brizendine gets the science of brain difference right, though some scientists argue she does not (Lieberman 2006; Rivers and Barnett 2007). Scientists caution against letting “dubious science” give credibility to stereotypes and ignore “decades of legitimate findings” about male and female similarity (Rivers and Barnett 2007). “Inflated claims of gender differences,” they warn, have costs to children, adults, and society, as they “reify stereotypes,” limit opportunity, and ignore that “males and females are similar on most, but not all, psychological variables” (Hyde 2005: 581–89). These concerns echo questions about sameness, difference, and

stereotypes long posed by feminist legal theory (*Mississippi University for Women v. Hogan* 1982; Littleton 1987).

“STONE AGE” BRAINS

Contemporary females, Brizendine (2006: 42) asserts, inherit the “ancient circuitry” of “our most successful foremothers.” Teenage girls’ drive for social connection with each other has biological and hormonal reasons. Intimacy “activates the pleasure centers in a girl’s brain,” triggering a near-orgasmic “major dopamine and oxytocin rush” (37). Girls are motivated “on a molecular and a neurological level” to “ease and even prevent social conflict” and to “maintaining the relationship at all costs” (40). These findings sound similar to those made by Carol Gilligan and her colleagues (1990) on how girls work to maintain connection.

Connection among females has evolutionary roots as a strategy of protection against aggressive males, evident in studies of female mammals that develop stress responses to “tend and befriend” and to form social groups “that promote safety and reduce distress for the self and offspring” (Brizendine 2006: 42). “These female networks” also share infant care, “information about where to find food,” and model “maternal behavior for younger females” (42–43). Social connectedness, thus, contributes to reproductive success (43). Today’s teen females, as they “reach” optimal fertility, undertake similar strategies (43).

Competition is as hardwired as cooperation. Brizendine (2006: 54) attributes the “biology of mean girls”—the harsh tactics of teen-girl cliques—to a “survival” strategy of “sexual competition” for the best male mates, a “biological imperative to compete for sexual attractiveness.” Success, for both sexes, requires “some aggression,” and relevant hormone levels rise during puberty (55).

Our “Stone Age brain” also shapes mate selection, sex, and motherhood (60). Brizendine repeats evolutionary psychology’s familiar story of the male who chases and the female who chooses, claiming that it is “not sex stereotyping,” but “the brain architecture of love, engineered by the reproductive winners in evolution” (59–60). Contemporary couples proceed “down an ancient pair-bonding path,” over which they have “little control” (60).

Brizendine draws on David Buss’s influential work (1994) on the different qualities women and men seek in mates. Women are “less concerned with a potential husband’s visual appeal and more interested in his material resources and social status” and prefer a slightly older partner (Brizendine

2006: 61). “Scientists conclude” that these “universal” mate preferences are part of the “inherited architecture of the female brain’s mate-choice system” and are “presumed to serve a purpose” (62).

What purpose? Brizendine turns to evolutionary biology scholar Robert Trivers, who explains female mate selection as a sound investment strategy stemming from their limited number of eggs and greater investment than men in bearing and raising children. A man “can impregnate a woman with one act of intercourse and walk away;” a woman is “left with nine months of pregnancy, the perils of childbirth, months of breast feeding,” and “trying to ensure that child’s survival” (Brizendine 2006: 62). Ancient necessities led females to seek long-term male partners to ensure reproductive success; those who “faced these challenges alone were less likely to have been successful in propagating their genes” (62). Brizendine is skeptical about whether contemporary “single motherhood...will succeed,” noting that, even today, “in some primitive cultures,” a father’s presence enhances a child’s survival rates, making a female’s “safest bet” a long-term male partner to offer protection and improved access to “food, shelter and other resources” (62). In effect, women’s need for protection and provision explains the so-called sex contract posited by evolutionary theorists.

Men’s ancient brain circuitry, according to Buss, leads them to seek wives who are “physically attractive, between ages twenty and forty,” and with “clear skin, bright eyes, full lips, shiny hair, and curvy, hourglass figures” (Brizendine 2008: 63). These traits are “strong visual markers of [female] fertility,” which offers men “the biggest reproductive payoff for *their* investment” (63, emphasis in original). But “the most reproductively successful males also need to pick women who will mate only with them,” ensuring their paternity (64).

Men’s concern with paternity supposedly explains their concern with women’s social reputation. Brizendine explains that if a woman had sex with a man on a first date or “showed off” about former bed partners, “his Stone Age brain might have judged that she would be unfaithful or had a bad reputation” (64). But male “seduction and abandonment” is an old problem (64–65). Thus, male and female reproductive strategies put them at odds. Evolution, in effect, explains the sexual double standard. High paternal investment requires men’s certainty of paternity.

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

Male sexual jealousy, thus, has evolutionary roots and “adaptive functions”—preventing infidelity and ensuring paternity (Buss 1994: 125–29; Posner 1992: 97; Wright 2005: 66–72); it also has enormous costs, evident in domestic violence (Buss 1994). Drawing on evolutionary science, Judge Richard Posner (1992: 97, 112) argues the “biology of sex” explains men’s mate-guarding behaviors such as “physical sequestration of wives, disparagement of female sexuality,” and female genital mutilation. The sexes are in conflict rather than in cooperation; these male behaviors subvert female choice (Batten 1994).

EVOLUTIONARY PSYCHOLOGY AND MARRIAGE LAW AND POLICY

Two ways evolutionary psychology and sociobiology feature in contemporary discussions of family law and policy are (1) arguments about why promoting “healthy marriage” and restoring a “marriage culture” are an appropriate task for government; and (2) arguments against redefining marriage to include same-sex marriage.¹ This embrace of social engineering is intriguing: because the social institution of marriage is necessary to address basic problems presented by nature, law and culture should reinforce it. Marriage is fundamental, yet fragile. Thus, marriage movement² authors criticize work like mine for ignoring sex difference and the purposes of marriage (Browning 2007).

These authors argue that marriage civilizes men by channeling them into socially productive roles as fathers and husbands (McClain 2006). Marriage addresses men’s inclination toward procreating without taking responsibility for children and women’s inclination toward procreating and rearing children, even in the absence of adequate resources and commitment by fathers (Browning et al. 2000; McClain 2006). Marriage is the social institution that *uniquely* addresses the regulation of heterosexuality and its procreative consequences, ensuring that children have a mother and a father to care for them (Blankenhorn 2007).

The marriage movement appeals to evolutionary psychology’s account of men’s and women’s differential investment in offspring and conflicting reproductive strategies to explain society’s vital interest in marriage. Marriage “closes this gap between a man’s sexual and fathering capacities” (Coalition for Marriage, Families and Couples Education et al. 2000: 9). National Marriage Project

¹ Another example is the argument against moving “beyond marriage” to recognize alternative legal forms and de-emphasize the conjugal marriage model.

² The Institute for American Values, founded by David Blankenhorn, is a central organization in the marriage movement.

Director David Popenoe (2001) testified in a congressional hearing on marriage promotion that the father–child bond is weaker than the mother–child bond and that men, naturally, tend to stray from mothers and children without the commitment of marriage.

A rationale that marriage movement authors offer for limiting marriage to one man and one woman is marriage’s role in ensuring maternal *and* paternal investment in children. This argument stresses family law’s channeling function (McClain 2007; Schneider 1992) and warns against altering marriage’s social meaning. This argument has migrated into amici briefs and some judges’ opinions in litigation over challenges by same-sex couples to state marriage laws.

One example is a dissent in *Goodridge v. Department of Public Health* (2003), where the Massachusetts Supreme Judicial Court opened the door to same-sex marriage. The *Goodridge* majority rejected the state’s argument that because procreation was the central purpose of marriage excluding same-sex couples from marriage was rational. It identified “exclusive and permanent commitment,” rather than procreation, as marriage’s indispensable feature (*Goodridge* 2003: 961). The majority argued that the state had facilitated avenues other than marital sex for “bringing children into a family” (961–62). Dissenting, Justice Cordy contended that “the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized” (995). Although in contemporary society “heterosexual intercourse, procreation, and child care are not necessarily conjoined,” an “orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth” (995).

The institution of marriage is, in effect, a form of social engineering that “fills a void” in nature: a process for “creating a relationship between the man and a woman as the parents of a particular child” (*Goodridge* 2003: 996). The marriage movement agrees that marriage resolves the “biologically based sexual asymmetry” between the sexes and “the problematic of fatherhood” by meeting the mother’s and child’s need for a mate and father and giving men a family role. It “helps create a greater equality between parents than nature alone can sustain” (Institute for American Values 2006: 15).

Regulating the consequences of heterosexuality also features in the majority and concurring opinions in *Hernandez v. Robles* (2006), where New York’s high court upheld as constitutional excluding same-sex couples from marriage. The majority stated that the legislature could rationally conclude that same-sex couples do not need marriage as much as heterosexuals do because they are less sexually unruly, and their sexual unions do not *naturally* have procreative consequences. Moreover, the majority

argued that since most children are born as a result of heterosexual relationships, which are “too often casual or temporary,” the state could “choose to offer an inducement—marriage and its attendant benefits—to opposite couples making a long-term commitment to each other” (*Hernandez* 2006: 7).

By contrast, because same-sex couples must deliberately plan parenthood, they—and their children—do not need the added security and stability marriage affords because they are more likely to have family stability (*Hernandez* 2006: 7). This apparent reversal of past prejudices about homosexuals as promiscuous and irresponsible led law professor Kenji Yoshino (2006b: A19) to quip that gays and lesbians are “too good for marriage.”

Marriage movement arguments about “conjugal” marriage’s evolutionary significance and fragility also feature in *Lewis v. Harris* (2005), where the Appellate Division of New Jersey rejected the constitutional challenge brought by several same-sex couples.³ Judge Parrillo, concurring, wrote that the purpose of marriage is “not to mandate procreation but to control or ameliorate its consequences” and that the “deep logic” of gender should remain as a “necessary component of marriage” (*Lewis* 2005: 276–78). Quoting marriage movement scholar Daniel Cere, Parrillo contended that *Goodridge*’s characterization of the essence of marriage as a permanent and exclusive commitment misses that, historically, marriage has embraced:

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

(*Lewis* 2005: 276)

Marriage is “conjugal,” not just a “close personal relationship” because of pair-bonding’s evolutionary significance. Allowing same-sex couples to marry would strip marriage of this richer meaning so that it would become “non-recognizable and unable to perform its vital function” (276).

³ The New Jersey Supreme Court overturned the appellate court (*Lewis v. Harris* 2006), and the legislature enacted a civil union law in response to that ruling.

These arguments against same-sex marriage are not persuasive (McClain 2007). They rest on assumptions about sameness and difference—between men and women and between opposite-sex and same-sex couples. Allegedly, marriage ameliorates sex difference for the sake of children and has “nothing to do” with sexuality that does not have natural reproductive consequences. But courts ruling in favor of opening up civil marriage reach different conclusions about sameness and difference and eschew such a narrow focus on marriage’s purposes. In *Hernandez* (2006: 32), Chief Justice Judith Kaye dissented that the state “plainly has a legitimate interest in the welfare of children” and appropriately links “tangible legal protections and economic benefits” to marriage. “The state’s interest in a stable society is rationally advanced when families are established and remain intact irrespective of the gender of the spouses” (32). Family law’s channeling function is served by expanding the reach of marriage to same-sex parents.

These issues also feature in the newest wave of challenges to state marriage laws: whether the creation of a legal status alternative to marriage, such as civil unions, provides equality to same-sex couples. In *Kerrigan v. Commissioner of Public Health* (2008), the Supreme Court of Connecticut concluded that civil unions did not afford same-sex couples equal protection and that their exclusion from civil marriage lacked constitutional justification. The court determined that same-sex couples “share the same interest in a committed and loving relationship” and “in having a family and raising their children in a loving and supportive environment” as opposite-sex couples (*Kerrigan* 2008: 424). The legislature recognized these “overriding similarities” when it enacted the civil union law (424), and even though same-sex couples “cannot engage in procreative sexual conduct,” the method of conceiving children is an insufficient difference to negate “fundamental and overriding similarities” (424, note 19).

Notably, the state did *not* appeal to procreation or optimal childrearing as rationales. However, the court noted that the procreation rationale raised by several amici did not satisfy an “exceedingly persuasive justification requirement”: allowing same sex couples to marry “in no way undermines any interest that the state may have in regulating procreative conduct between opposite sex couples” (477, note 79). The court also argued that expanding marriage will not “diminish the validity or dignity of opposite-sex marriage,” but instead reinforce “the importance of marriage to individuals and communities” (474). Citing to these amici’s procreative purpose argument, dissenting Justice Zarella disagrees: “The ancient definition of marriage as the union of one man and one woman has its basis in biology, not bigotry” (*Kerrigan* 2008: 515–16).

This examination of case law and of marriage movement writings illustrates how biology, sex difference, and evolution are used to argue against expanding the definition of marriage. Because marriage is a form of social engineering that addresses problems posed by nature, it is a fundamental and fragile institution. I now turn to consideration of how some work in evolutionary science that more squarely asks “the woman question” (Bartlett 1990) may aid feminist legal theorists pondering how best to respond to these kinds of arguments. This scientific work may help with identifying different “facts” about human nature and human society.

NATURE AND THE POLITICS OF PREHISTORY

In this chapter, I can only sketch a few ways that feminist or female-centered work on evolutionary science may challenge the presentation of nature and evolution in popularizing accounts and in public policy arguments. Feminist legal theory should heed the politics of prehistory, or how certain gender biases or stereotypes may shape the study of human origins and impose a “paleolithic glass ceiling” (Zihlman 1997: 91). Too often, females feature only as passive participants in accounts of human origins rather than as “agents of evolutionary change” (Hager 1997: ix). As more female scientists study human origins, they have corrected this misconception and help in evaluating contemporary appeals to evolution both to oppose and to support social engineering.

For example, the marriage movement stresses the pair bond, noting female and infant dependency on male help, just as evolutionary science has asserted female dependency upon male provisioning (Hager 1997). However, the assumption of a prehistoric pair bond is “a projection back in time to a narrow Western view of marriage and mating, a formulation too rigid to account for the variation that exists cross-culturally” (Zihlman 1997: 99). The Man as Provisioner thesis assumed that to increase the human population by having a lesser interval between births, “females reduced their mobility, stayed near a home base, and became dependent upon males who provisioned their own mates and offspring,” since they could be relatively certain about paternity (102). This model seems “preoccupied with questions/anxieties about male sexuality,” at the expense of recognizing females’ roles in human evolution (Falk 1997: 115). Female scientists have noted flaws in this model, in light of fossil evidence and studies of contemporary primate and human hunter-gatherer societies (Zihlman 1997). The pair bond may have less to do with male provisioning than with solving the problem of male mate competition, freeing a female to care for her offspring.

As primatologists put females more at the center of evolutionary study, the image of female primates has been “fleshed out to include much more than just their roles as mothers and sexual partners of males” (Fedigan 1997: 65). Scientists have studied “the significance of female bonding through matrilineal networks,” “female sexual assertiveness, female long-term knowledge of the group’s local environment, female social strategies, female cognitive skills, and female competition for reproductive success” (65). This “female-centered ‘world view’” among primatologists makes sense: “many primate societies are female-bonded; thus kin-related females are the permanent core of the social group” (68). These facts were “not immediately recognized by primatologists,” but are now “facilitating a strong focus on females as well as attracting more women to the discipline” (68).

Sarah Blaffer Hrdy’s recent book, *Mothers and Others: The Evolutionary Origins of Mutual Understanding* (2009: 22) proposes that the human species is more adept at cooperation than other species because of the evolution of “cooperative breeding”: the pattern of relying on “allomothers,” or “alloparents,” to help mothers care for their children. An “alloparent” is any non-parent who helps parents raise their young (22). While stories of human origins stress competition, Hrdy looks at cooperation.

The marriage movement ponders the male–female problematic; Hrdy (2009: 159) identifies her own “perplexing paradox”:

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

(Hrdy 2009: 162)

While the marriage movement stresses the problem of fatherlessness and looks to marriage as the solution, Hrdy looks at the way that human and nonhuman mothers enlist alloparents to assist in raising young. “These alloparental safety nets provided the conditions in which highly variable paternal commitment could evolve” (166). “Evolutionary interpretations of male behavior” have an “obsessive focus” on certainty of paternity as a prerequisite to paternal investment, but there is wide variation among men with “relatively high certainty of paternity” in terms of actually engaging in “direct care” of infants as well as instances where men who do not share a child’s genes invest in child care (167–68).

Evolutionary theory tends to project the nuclear family back in time. By contrast, Hrdy (2009: 166) describes “the typical or natural Pleistocene family” as “kin-based, child-centered, opportunistic, mobile, and very, very flexible.” Like Brizendine, she would worry about single mothers but would look to the vital role of alloparents and social supports, instead of assuming male protection and provision as the best option. Indeed, “the preeminence of the man-the-hunter/sex-contract paradigm, with its accompanying stereotypes about nuclear families and maternal caregiving” have been “obstacles” to recognizing the evolution of cooperative breeding (239–40). Removing these obstacles came in part from the efforts of Hrdy and other sociobiologists (“many of us women”) to “expand evolutionary theory to include selection pressures on both sexes,” including postmenopausal females (258). The “grandmother hypothesis,” is that “new opportunities to help kin generated selection pressures favoring longer lifespans among postmenopausal women” (255).

Assuming that hominids and early humans were patrilocal has hindered appreciation of the extent to which early residence patterns may have been matrilineal (241–43). As starting assumptions of “evolutionary-minded anthropologists” about residential patterns changed, it became possible to ask new questions about cooperative breeding and the role of alloparents (245). Studies indicate the preeminence of grandmothers among alloparents: “having a grandmother nearby has a significant impact on the childrearing success of younger kin” and may sometimes more greatly enhance child well-being than the presence of a father (253, 261). In patrilocal societies, a paternal grandmother’s contribution may be more to her son’s success, measured in shorter intervals between births; the presence of maternal grandmothers seems to correlate more with greater child well-being (261–64). Hrdy also refers to young human females’ adeptness at communication and making friends, linking it not only to tending and befriending to obtain support, but also as a way to manufacture allomothers: “Whether consciously or not, women seek ‘sisters’ with whom to share care of our children” (271).

On the conflict between male and female reproductive interests, Hrdy (264–65) speaks of “patriarchal complications since the Pleistocene,” suggesting earlier practices were less patriarchal. Concern with ensuring paternity and preserving the patriline leads to “practices detrimental to the well-being of mothers (and children too);” she mentions sequestering women and genital infibulations (265).

Hrdy’s hypothesis about the evolution of cooperative breeding offers a corrective to evolutionary psychology’s emphasis on competition and on male and female strategies. The focus on an agonistic struggle between the sexes that is bridged only through marriage detracts from a broader focus on the range of social networks and supports that contribute to successful child rearing and well-

being. While the marriage movement stresses integrating sexual and parenting bonds, some feminist legal theorists (e.g. Fineman 1995, 2004) argue that focusing on the “sexual family” diverts attention from the family’s important intergenerational caretaking function. It takes, Hrdy paraphrases, alloparents to raise a child. A prominent contemporary example is available: First Lady Michelle Obama’s mother moved into the White House because of her crucial role caring for the Obama children (Swarns 2009). Hrdy’s emphasis on the role of alloparents could support arguments made in favor of greater family diversity—it is not the genetic tie so much as providing nurture to children that contributes to their well-being.

CULTURE: RESISTING EQUALITY

Culture is another reason often given for the difficulty of achieving sex equality. Women and men reportedly worry that sex equality pushes beyond cultural limits by requiring a kind of androgyny or sameness that denies their gendered identities. Feminist legal theorist Wendy Williams (1982) identified the problem of cultural limits decades ago, asking feminists to think “as deeply as they can about what we want the future of women and men to be” — “equality of the sexes” or “justice for two kinds of beings who are fundamentally different.” In his recent book, *Manliness*, Harvey Mansfield (2006: 13) argues that there is a gap between the official commitment to a gender neutral society and men’s and women’s “unofficial desire.” I focus briefly on two examples of cultural resistance to social cooperation on terms of sex equality: the possibility of egalitarian marriage and popular culture depictions of heterosexual romance.

Does marital happiness require inequality? Evolutionary accounts of mate selection stress men’s and women’s diverging criteria. More recent studies of marriage patterns suggest the growing practice of “assortative mating”: rather than marrying up or down, well-educated and economically resourceful people choose to marry their peers (Paul 2006; Schwartz and Mare 2005). Meanwhile, lower-income men and women may cohabit rather than marry because they want a threshold level of economic resources before they marry (Cherlin 2009).

Egalitarian or “peer” marriage is a more just form of marriage, from a feminist or liberal perspective, than traditional marriage and more likely to be happy and stable (Schwartz 1994). Marriage equality is a factor contributing to marriage quality, particularly for women (McClain 2006). However, other scholars point out that marriages with a traditional gendered division of labor may also be quite stable so long as spouses’ expectations do not change (Hetherington and Kelly 2002). Spouses may also

accept an unequal division of labor even if they think it is unfair (Brinig and Nock 2002). Thus, considerable disagreement exists about whether social cooperation best takes place on terms of equality or inequality.

This debate over the desirability of egalitarian marriage surfaced recently when New York's governor Elliot Spitzer resigned after disclosure that he was a customer of a high-priced prostitution service. Spitzer apologized for his "failings" and spoke of the need to heal himself and his family as his wife, Silda Wall Spitzer, stood by his side. The image of Spitzer's wife by his side during this scandal was in stark contrast to a photo of the two of them that previously appeared on the cover of the magazine, *02138*: "Power Couples: See What Happens When Harvard Meets Harvard" (McCormack et al. 2007). Love between equals can work, and even be fun and sexy, the story and accompanying photos seemed to announce.

After the scandal, a model for happy marriage different from that of the power couple was offered by conservative self-help author, Dr. Laura Schlessinger. Stunning her host on the *Today* show, Schlesinger laid the problem of men's cheating at the door of any wife who failed to make her husband feel "like a man...like a success...like her hero," so that he was "very susceptible to the charm of some other woman." Schlessinger holds women "accountable" for not giving "perfectly good men" the love, kindness, respect, and attention they need, charging that "these days, women don't spend a lot of time thinking about how they can give their men what they need..." (Armstrong 2008).⁴ In Silda Wall Spitzer's case, this diagnosis seems particularly inapt, given that she put her own career aside to help her husband in his. But it does suggest cultural resistance to equality. Dr. Laura is a provocateur and her comments drew criticism; however, she is also a popular author. Her book, *The Proper Care and Feeding of Husbands* (2004: 3), indicts the women's movement as a "core destructive influence" and advises wives to treat their husbands with respect, reinforce them as head of the household, and celebrate difference. Admiration and deference will yield a wife more power and happiness than direct challenge. Mansfield (2006: 18) also speaks about admiration—"look[ing] up to someone in control"—as a proper response to manliness.

In this view, equality is a turn-off. Inequality is sexy. In the wake of recent infidelity scandals involving prominent politicians, some commentators look to evolutionary science's hypothesis that men's "philandering increases their reproductive success" (Porter 2009). The Spitzer scandal also played

⁴ Readers may view the show at www.msnbc.msn.com/id/235752221/.

as a story of marital failure and a cautionary tale to wives about how to keep their marriages sexy and their men from straying. However, resistance of this diagnosis may be evident from many women finding “a catharsis” in First Lady Jenny Sanford’s “hard hitting” public statements about Governor Mark Sanford’s confessed infidelity—and her absence from his press conference (Kaufman 2009).

Another illustration of cultural limits concerning egalitarian marriage is the continuing issue of work–family conflict and the division of labor in the home. Laws and policies have moved us closer to a world where mothers and fathers have equal rights and responsibilities, as a legal matter, for their children and where, as a matter of social norms, women work outside the home and men play an active role in nurturing children. But the division of labor in families remains a flashpoint, as is evident from the news stories every several months about the so-called “opt-out revolution” where highly educated women are choosing to stay home rather than pursue professional success. All three generations of feminist legal theorists represented in this volume have devoted attention to these issues about care, work, and family; my focus is on what the debate suggests about cultural limits.

One cultural limit is that while workplaces have come a long way toward recognizing that workers may have caretaking responsibilities, cultural perceptions of male workers still differ from those of female workers. Many men aspire to a more flexible balance between family life and work but may rationally perceive that they will pay a higher cost in terms of seeming committed to the job if they take advantage of employment policies designed to help parents (Jacobs and Gerson 2004).

Part of the unfinished business of feminism is that men’s lives have changed to a lesser degree than women’s. Some feminist theorists argue that instead of pushing the state for more public policy, wives and mothers should direct their energy toward persuading men to change (Hirschmann 2008). Legal feminist Mary Anne Case (2001) argues for directing effort toward a redistribution of responsibility from women to men rather than to employers or the state. Certainly, government is not the only relevant actor when it comes to advancing sex equality. Thus, political theorist Nancy Hirschmann (2008) raises a useful question: how can men be persuaded to change and how can women be persuaded to insist on that change? This is a basic premise of “how to” books such as Joshua Coleman’s *The Lazy Husband: How to Get Men to Do More Parenting and Housework* (2005). While Dr. Laura’s book promises marital happiness by accepting role differentiation and resisting feminist ideology, Coleman’s book promises to save marriages and increase marital happiness by *increasing* equality.

Mansfield proposes a different cultural limit: manliness. Manly men have a disdain for women’s work, including housework. “Manliness prevents men from giving equal honor to women: this is the

issue behind inequality in housework” (2006: 9, 13). If this is the case, then it suggests limits to feminist social engineering. On the other hand, alternative models of men’s relationship to the home and to family life may suggest greater success of the feminist project. The marriage movement itself attributes women’s discontent with the household division of labor as a reason why young women are less optimistic than young men about having a happy marriage and why women today are more willing to exit marriages (Popenoe and Whitehead 1999). While some marriage proponents argue that a “cultural script” of a gendered division of labor in the home is better than “endless negotiation” over roles, others support “equal rights and responsibilities” in and outside of the home (McClain 2006: 142–51).

Equality is important to marriage quality and to addressing work–life conflict. After the death of Betty Friedan, some commentators asked if feminism was a failure because women were choosing to stay home rather than juggle career and family. One response was that women were making a *choice*, and wasn’t feminism, after all, about women being able to make choices? No, said feminist scholar Linda Hirshman (2005, 2006), arguing that women who were opting out were in fact making bad choices not to be celebrated as a feminist triumph. This debate about feminism’s goals suggests one complication in theorizing and achieving equality. Friedan’s emphasis on women getting out of the home and having careers, while paid household workers took up the slack, risked devaluing the importance of family and home life and suggested only one model of a good life to which women should aspire. However, when feminists assess the issue of choice, issues like how cultural expectations for boys and girls shape their life prospects, whether social institutions make it equally possible for women and men to pursue certain life plans, and whether problems of unequal bargaining power constrain the exercise of choice are appropriate concerns.

Popular culture offers examples of cultural resistance to sex equality even as it suggests progress toward equality. Popular books and films seem to ask, what if women don’t want to have it all? What if an equilibrium between the sexes is disturbed by sex equality? What if women and men find sex inequality easier and sexier than equality?

Consider the contrast between the 2004 and 1975 films, *The Stepford Wives*, based on the best-selling novel by Ira Levin. The 1975 film, a cult classic, chronicled the marital tension arising from a suburban housewife’s fledgling steps toward liberation in a photography career. Portrayed by Katherine Ross, she wonders why all the other wives in Stepford focus so blissfully and robotically on homemaking and pleasing their husbands sexually. She bonds with another wife who has dabbled with consciousness raising and “women’s lib,” but they cannot interest the other wives in questioning their lives. She

discovers the formula for marital happiness after her friend is inexplicably transformed and just before she meets her own fate: the men's club to which the husbands belong kills the wives and replaces them with robots.

In the 2004 remake, the world is different. Women have formal equality of opportunity and are such superachievers that their husbands feel threatened. Replacing them with robots restores the gender equilibrium. The protagonist wife (Nicole Kidman) is a ruthless entertainment executive, whose proposed reality television show is a battle of the sexes show, with the premise that anything men can do, women can do better. She loses her job when a humiliated husband kills his wife and tries to assassinate her. She and her husband (Matthew Broderick) relocate to a new community where average-looking husbands have pleasant, compliant wives wearing floral dresses. Broderick is on the verge of replacing his wife with a robot because, as he puts it, she is superior to him in every way. By contrast to the original film, he cannot go through with it because, as Kidman tells him pleadingly, a robot can't say, "I love you," and mean it.

In merely three decades, the battle of the sexes has shifted from husbands made uneasy by women bristling at the constraints of the housewifely role to husbands who feel inadequate in the face of their wives' success. In each case, an equilibrium is upset by changes in gender relations. But a strange plot twist in the remake complicates the question of cultural resistance: the mastermind behind the robot scheme is a *wife* who killed her husband and replaced him with a robot when, hurt by his marital betrayal, she sought to return to a simpler, more beautiful time.

My second cultural example is Helen Fielding's wildly popular book, *Bridget Jones's Diary*, a forerunner of the "chick lit" genre. Fielding modeled her book on Jane Austen's *Pride and Prejudice*. Though separated by nearly two centuries, these books share a common theme: how does a young woman laboring under gender-based constraints negotiate the path to a happy marriage, or, at least to a successful heterosexual relationship?

Fielding's self-conscious appropriation of Austen and the frequent description of *Bridget Jones's Diary* as "post-feminist" invite feminist inquiry into how the cultural scripts of these books differ. One trajectory is from *Pride and Prejudice's* heroine, Elizabeth Bennett, an intelligent, astute critic of social conventions, to Bridget Jones, a zany diarist of and participant-observer in such conventions. A second is from the wealthy, enigmatic, and proud gentleman, Mr. Darcy to the wealthy, stiff, eminent human rights lawyer Mark Darcy.

As an Austen fan, I find the trajectory from Elizabeth to Bridget distressing. In interviews, Fielding has said that her novel is ironic. Bridget Jones is “really about trying too hard, trying to be too perfect”—to have it all; it’s okay to be like Bridget, “normal” and “fun” (Penguin.com 2009). Perhaps. But another reading may be that sex equality is a bore, and sex inequality is more fun and sexier. Bridget seems too flawed to end up with the exemplary Mark Darcy. Awash in self-help books, cataloging daily her excessive intake of alcohol and cigarettes, Bridget makes foolish choice after foolish choice. She seems a much-diminished Elizabeth Bennett. In *Pride and Prejudice*, Mr. Darcy can’t help his attraction to Elizabeth despite her class standing and embarrassing family; her criticism of him ultimately humbles him enough to reform his pride better to reveal his basic good character. By contrast, Bridget embarrasses herself and seems to be the only one in need of reform, even as her hapless quest for self-improvement amuses readers and film viewers.

The book inspired a popular film that further heightens the distance between Bridget and Mark by contrasting her ineptitude and inappropriateness with that of his law partner and apparent girlfriend, Natasha, his equal in education, professional achievement, and height. But Mark does not want his equal, who summons him by snapping her fingers. He wants antic, inept, and sexy Bridget, who wears a Playboy bunny costume to a costume party, accidentally shows her “bum” on television, and is a terrible public speaker. Why is Mark attracted? Bridget seems to be Mark’s reward for his moral rectitude, a burst of color and chaos enlivening his steady path toward greater success. He loves Bridget, just as she is.

Trying to put a positive spin on Bridget, a feminist might argue that in *Pride and Prejudice*, women and their families pay a high price in terms of social reputation and marriageability for choosing the wrong man. Lydia, Elizabeth’s flirtatious younger sister, runs off with Wickham, a scoundrel to whom Elizabeth was initially attracted, and the Bennett family avoids ruin only when Mr. Darcy forces Wickham to marry Lydia. Bridget Jones, by contrast, fuses Elizabeth and Lydia: she gets to fall for and have sex with Mr. Wrong and still end up with Mr. Right. Even Bridget’s mother is allowed—temporarily—to leave her husband for the wrong man and still end up all right. In both books, the hero rescues the heroine and her family, suggesting some men’s superior competence and power in getting things done in the world.

Lighten up, some might say; can’t feminists take a joke? Sure, but is there a take-home message about not looking for love on terms of equality?

CONCLUSION

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

Chapter References

- Armstrong, Jenice. (March 20, 2008) "The Sleaze-fest Continues." *Philadelphia Daily News*. 35
- Bartlett, Katharine T. (1990). Feminist Legal Methods. *Harvard Law Review* 103: 829 - 888.
- Batten, Mary. (1994) *Sexual Strategies: How Females Choose Their Mates*. New York: Jeremy P. Tarcher/Putnam Book.
- Blankenhorn, David. (2007) *The Future of Marriage*. New York: Encounter Books.
- Brinig, Margaret and Steven Nock. (2002). "Weak Men and Disorderly Women: Divorce and the Division of Labor," in Antony W. Dnes and Robert Rowthorn, eds. *The Law and Economics of Marriage and Divorce*. New York: Cambridge University Press.
- Brizendine, Louann. (2006). *The Female Brain*. New York: Morgan Road Books.
- Brooks, David. (September 17, 2006). "Is Chemistry Destiny?" *New York Times*. Section 4:14.
- Browning, Don S. et al. (2000). *From Culture Wars to Common Ground*. Louisville, KY: Westminster John Knox Press, 2nd edition.
- Browning, Don S. (2007). "Linda McClain's *The Place of Families* and Contemporary Family Law: A Critique from Critical Familism." *Emory Law Journal* 56:1383-1405.
- Buss, David M. (1994). *The Evolution of Desire: Strategies of Human Mating*. New York: Basic Books.
- Case, Mary Anne. (2009) "Feminist Fundamentalism and Constitutional Citizenship." in Linda C. McClain and Joanna L. Grossman, eds., *Gender Equality: Dimensions of Women's Equal Citizenship*. Cambridge and NY: Cambridge University Press.
- Case, Mary Anne. (2001). "How High the Apple Pie? A Few Troubling Questions about Where, Why, and How the Burden of Care for Children Should be Shifted. *Chicago-Kent Law Review* 76:1753-1786.
- Cherlin, Andrew J. (2009) *The Marriage-Go-Round: The State of Marriage and the Family in America Today*. New York: Random House.
- Coalition for Marriage et al. (2000). "The Marriage Movement: A Statement of Principles, <http://www.americanvalues.org/pdfs/marriagemovement.pdf>
- Coleman, Joshua. (2005). *The Lazy Husband: How To Get Men to Do More Parenting and Housework*. New York: St. Martin's Press.
- Falk, Dean. (1997) "Brain Evolution in Females: An Answer to Mr. Lovejoy." Lori D. Hager, ed., *Women in Human Evolution*. London and New York: Routledge.

- Fedigan, Linda Marie. (1997) "Is Primatology a Feminist Science?" Lori D. Hager, ed., *Women in Human Evolution*. London and New York: Routledge.
- Fielding, Helen. (1996) *Bridget Jones's Diary*. New York: Viking.
- Fineman, Martha Albertson. (2009) "Equality: Still Illusive After All These Years." in Linda C. McClain and Joanna L. Grossman, eds., *Gender Equality: Dimensions of Women's Equal Citizenship*. Cambridge and NY: Cambridge University Press.
- Fineman, Martha Albertson. (2004) *The Autonomy Myth: A Theory of Dependency*. New York: New Press.
- Fineman, Martha Albertson. (1995) *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*. NY: Routledge.
- Fineman, Martha Albertson. (2001) "Why Marriage?," *Virginia Journal of Social Policy and the Law* 9:239.
- Gilligan, Carol et al., ed. (1990) *Making Connections: The Relational Worlds of Adolescent Girls at Emma Willard School*. Cambridge, Mass: Harvard University Press.
- Goodridge v. Department of Public Health. (2003) 798 N.E.2d 941 (Mass.).
- Hager, Lori D., ed. (1997). *Women in Human Evolution*. London and New York: Routledge.
- Hernandez v. Robles. (2006) 855 N.E.2d 1 (N.Y.)
- Hetherington, E. Mavis and John Kelly. (2002). *For Better or for Worse: Divorce Reconsidered*. New York: W.W. Norton.
- Hirschmann, Nancy. (2008). "Wed to the Problem? The Place of Men and State in Families." *The Good Society* 17 (1): 52-55.
- Hirshman, Linda R. (2006). *Get to Work: A Manifesto for Women of the World*. New York: Viking.
- Hirshman, Linda. (December 2005). "Homeward Bound." *The American Prospect* 16 (12):20-26.
- Hrdy, Sarah Blaffer. (2009). *Mothers and Others: The Evolutionary Origins of Mutual Understanding*. Cambridge, MA and London: Belknap Press of Harvard University.
- Hyde, Janet Shibley. (2005). "The Gender Similarities Hypothesis." *American Psychologist* 60 (6):581-592.
- Institute for American Values et al. (2006) *Marriage and the Law: A Statement of Principles*. New York: Institute for American Values.
- Jacobs, Jerry A. and Kathleen Gerson. (2004) *The Time Divide: Work, Family, and Gender Inequality*. Cambridge, Mass: Harvard University Press.

- Kaufman, Leslie. (June 27, 2009) "Political Wife's Hard Line Strikes Chord." *New York Times*: A12
- Kerrigan v. Commissioner of Public Health. (2008) 957 A.2d 407 (Connecticut).
- Lewis v. Harris. (2005) 875 A.2d 259 (N.J. App. Div.)
- Lewis v. Harris. (2006) 908 A.2d 196. (N.J.)
- Lieberman, Mark. (2006). "Neuroscience in the Service of Sexual Stereotypes." *Language Log*.
<http://158.130.17.5/~myl/language-log/archives/003419.html>
- Littleton, Christine A. (1987). "Reconstructing Legal Equality." *California Law Review* 75: 1279-1337.
- Mansfield, Harvey C. (2006). *Manliness*. New Haven, CT and London: Yale University Press.
- McClain, Linda C. (2009). "Child, Family, State, and Gender Equality in Religious Stances and Human Rights Instruments: A Preliminary Comparison." Martha Albertson Fineman and Karen Worthington, ed., *What's Right for Children? The Competing Paradigms of Religion and Human Rights*. Farnham, England: Ashgate Publishing Ltd..
- McClain, Linda C. and Joanna L. Grossman. (2009). *Gender Equality: Dimensions of Women's Equal Citizenship*. Cambridge and New York: Cambridge University Press.
- McClain, Linda C. (2007). "Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law." *Cardozo Law Review* 28:2133-2183.
- McClain, Linda C. (2006). *The Place of Families: Fostering Capacity, Equality, and Responsibility*. Cambridge, MA and London: Harvard University Press.
- McCormack, Lindsey et al. (2007). "Power Couples: See What Happens When Harvard Meets Harvard." *02138*, Winter 2007: 62-78.
- Mississippi University for Women v. Hogan (1982). 458 U.S. 718.
- Paul, Annie Murphy. (November 19, 2006) "The Real Marriage Penalty." *New York Times* (Magazine, Section 6:22).
- Penguin.Com (2009). "Book Clubs/Reading Guides: Bridget Jones's Diary/Helen Fielding."
http://us.penguin-group.com/static/rguides/us/bridget_joness-diary.html
- Popenoe, David. (May 22, 2001). "Testimony of David Popenoe." Hearing on Welfare and Marriage, House Ways and Means Committee.
- Popenoe, David and Barbara Dafoe Whitehead. (1999). "The State of Our Unions."
<http://www.marriage.rutgers.edu>

- Porter, Eduardo. (July 3, 2009). "Tales of Republicans, Bonobos and Adultery." *New York Times* A20.
- Posner, Richard A. (1992). *Sex and Reason*. Cambridge, Mass: Harvard University Press.
- Rivers, Carly and Rosalind C. Barnett. (October 28, 2007). "The Difference Myth." *Boston Globe*, www.boston.com/news/globe/ideas/articles/2007/10/28/the_difference_myth/
- Schlessinger, Dr. Laura C. (2004). *The Proper Care and Feeding of Husbands*. New York: Harper Collins.
- Schneider, Carl. (1992). "The Channelling Function of Family Law." *Hofstra Law Review* 20:495-532.
- Schwartz, Christine R. And Robert D. Mare. (2005) "Trends in Educational Assortative Marriage From 1940 to 2003." *Demography* 42: 621.
- Schwartz, Pepper. (1994) *Love Between Equals: How Peer Marriage Really Works*. New York: The Free Press.
- Swarns, Rachel L. (May 4, 2009) "An In-Law Is Finding Washington To Her Liking." *New York Times* A11.
- United States v. Virginia.(1996). 518 U.S. 515.
- Williams, Wendy Webster. (1982) "The Equality Crisis: Some Reflections on Culture, Courts, and Feminism." Katharine T. Bartlett and Rosanne Kennedy, eds., *Feminist Legal Theory: Readings in Law and Gender*. New York: Westview Press.
- Wright, Robert. (November 28, 1994). "Feminists, Meet Mr. Darwin." *The New Republic*, 211 (22):34-36.
- Wright, Robert. (1995). *The Moral Animal: Why We Are the Way We Are: The New Science of Evolutionary Psychology*. New York: Vintage Books.
- Yoshino, Kenji. (July 14, 2006). "Too Good for Marriage." *New York Times*, A19.
- Zihlman, Adrienne. (1997) "The Paleolithic Glass Ceiling: Women in Human Evolution." In Lori D. Hager, ed., *Women in Human Evolution*. London and New York: Routledge.