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## IT AIN'T NECESSARILY SO: THE MISUSE OF "HUMAN NATURE" IN LAW AND SOCIAL POLICY AND THE BANKRUPTCY OF THE "NATURE- NURTURE" DEBATE

Justin Schwartz\*

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### *Abstract*

Debate about legal and policy reform has been haunted by a pernicious confusion about human nature: the idea that it is a set of rigid dispositions, today generally conceived as genetic, that is manifested the same way in all circumstances. Opponents of egalitarian alternatives argue that we cannot depart far from the status quo because human nature stands in the way. Advocates of such reforms too often deny the existence of human nature because, sharing this conception, they think it would prevent changes they deem desirable. Both views rest on deep errors about what kind of thing a "nature" is and how genetics works. Human nature, like the nature of anything else, is a set of potentials to behave certain ways in given environments, not a nonsocial genetic something that inevitably produces the same result in any environment. To say that existing inequalities are due to genetics, and therefore inalterable, ignores that genetic propensities may be manifested differently in different environments. Heritability has meaning only relative to an environment and a population, and implies nothing about inevitability. A better sort of inegalitarian argument is that a proposed reform, given our nature, would be too costly even if possible. However, this sort of argument is rarely supported by evidence and generally ignores the costs of existing inequalities. But egalitarians err in supposing that, if behavior is unconstrained by biology, the status quo is easily alterable. The environment may be extremely hard to change. Legal and policy debate should adopt a correct understanding of human nature as a set of propensities and ask of any proposed reform agreed to be otherwise desirable, what and how alterable are its causes: genetic, environmental, or more accurately, both.

### INTRODUCTION: "HUMAN NATURE" AND THE LIMITS OF THE POSSIBLE

The issue of human nature looms in the background of practical policy and legislative proposals for reform of social institutions. It plays an important role in the structure and interpretation of the law itself.<sup>1</sup> If we knew what human nature was, then plausibly, we would know something

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1. See *infra* Part II(A).

about the best sort of laws and society to have. At least we would know something about the sorts that we might possibly have and whether a proposed reform was in the feasible set of alternatives, whether it could actually be attained, in Rousseau's phrase, "tak[ing] men as they are and laws as they might be."<sup>2</sup> However, the conception of human nature as it is frequently deployed in policy and legal debate, expressly or implicitly, is more often than not profoundly incoherent, involving false and misleading assumptions and leading to grossly fallacious arguments by both opponents and proponents of the reform proposals at issue. Typically, the conception of human nature under discussion is offered in defense of certain aspects of the status quo against proposed changes, and advocates of the changes in question often say that there is no such thing as "human nature."<sup>3</sup> My goal here is to identify and critique this conception so that these errors can be avoided and real issues between the parties productively formulated.

I do not argue that there is no such thing as human nature. On the contrary, I aver that there *is* a human nature and explain what sort of thing it is. I critique a common erroneous conception of human nature and its misuse. My target is the view that human beings, or some of us, have certain intrinsic, universal, nonsocial behavioral and psychological traits that will be rigidly manifested in any circumstances. I call this the "abstractive" conception of human nature because, so conceived, the purported traits that constitute this nature always operate the same way in abstraction from the environment. This conception of human nature is related to policy and legal positions through the principle *ought implies can*: there is no point in advocating the impossible. Some proposed alternatives to the status quo are held to be inescapable or unattainable. It is argued or assumed, therefore, that problematic features of the status quo are justified or excused because of supposed facts about "human nature" that are due to "nature" rather than "nurture." A more sophisticated variant has it that proposed reforms might be realized, but given "human nature," only at an unacceptably high cost.<sup>4</sup> These rhetorical moves have encouraged the

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2. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT (1761) [hereinafter ROUSSEAU, SOCIAL CONTRACT], reprinted in THE BASIC POLITICAL WRITINGS 141, 163 (Donald Cress trans. & ed., Hackett Publishing Co. 1987).

3. Less frequently the claim is made that alternative social and legal arrangements are inevitable, so that change cannot be resisted. Something like this notion can be discerned in the "stagist" conception of historical progress formerly espoused by some traditional Marxists. See generally G.A. COHEN, KARL MARX'S THEORY OF HISTORY: A DEFENCE (2d ed. 2000) (predicting a transition to a post-capitalist society based on the progressive effects of an innate basic human drive to minimize necessary labor). However, the conceptions at issue are more typically deployed as objections to legal changes or social change than as arguments for them, the more so since the collapse of Marxism as an effective social force.

4. See, e.g., STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 288-89 (2002) ("We are fortunate enough to live in a society that more or less works, and our first priority should be not to screw it up, because human nature always

equally fallacious rejection of the very idea of human nature by some critics of the status quo.

To keep the discussion manageable, I largely restrict this discussion to how concepts of human nature affect debate about legal maintenance or reform of law and policy relating to two related sets of institutions: first, large class inequalities of wealth and income in a market economy, and second, traditional gender-specific inequalities that assign domestic labor, particularly child-rearing, to women at the cost of their foregoing opportunities available to men. For the purposes of this Essay, I call the policies and legal positions buttressed by the argument from nature "inegalitarian" and the contrary positions "egalitarian." For the sake of argument, we may take egalitarianism to be exemplified by the propositions that any inequalities of wealth and income should benefit the least well off<sup>5</sup> and that women should not be formally or otherwise limited in their life chances because of their sex. Although equality is a highly contested term, I will not offer further definition, nor do I suggest that equality is more important than, say, freedom, or even stability.<sup>6</sup> The argument from nature can be deployed against (or for) reforms with other aims than equality. However, a common structure of the argument from nature is a defense of various inequalities, including the ones discussed here.

For example, some legal economists contend that a well-functioning market economy requires large inequalities in income and wealth because people will not be productive unless motivated by opportunities for private gain. "Individual self-interest is seen largely as transforming itself into an optimal allocation of resources."<sup>7</sup> An even more extreme version of the

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leaves us teetering on the brink of barbarism."); ANDREW OLDENQUIST, *THE NONSUICIDAL SOCIETY* 175-76 (1984); E.O. WILSON, *ON HUMAN NATURE* 81 (1978).

5. This is Rawls' Difference Principle as applied to wealth and income. JOHN RAWLS, *A THEORY OF JUSTICE* 75 (1st ed. 1971) *passim*. I invoke this not to endorse his theory, which I do not, but as an example of one way to express the idea of economic equality.

6. Equality plays an indirect and complex role in the standard positions in political theory. See, for example, RAWLS, *supra* note 5, at 84-90 (favoring procedural fairness) and JOHN STUART MILL, *UTILITARIANISM* (1861), *reprinted in* *THE BASIC WRITINGS OF JOHN STUART MILL* 238, 244 (George Sher ed. 2d ed., Hackett Publ'g Co. 2002) (favoring maximization of happiness or well-being), both Rawls and Mill in principle permit substantial departures from equality of treatment or distribution of material wealth. For examination of aspects of (in)equality and its relation to freedom, see, for example, RICHARD NORMAN, *FREE AND EQUAL: A PHILOSOPHICAL EXAMINATION OF POLITICAL VALUES* (1987).

7. Sandra K. Miller, *Fiduciary Duties in the LLC: Mandatory Core Duties to Protect the Interests of Others Beyond the Contracting Parties*, 46 *AM. BUS. L.J.* 243, 249 (2009). Richard A. Posner has argued that the normative basis of legal rules is—or should be—the maximization of wealth regardless of distributive considerations. RICHARD A. POSNER, *The Ethical and Political Basis of Wealth Maximization*, in *THE ECONOMICS OF JUSTICE* 88, 98 (1983) (citing RICHARD A. POSNER, *THE ECONOMIC ANALYSIS OF THE LAW* 404-05 (2d ed.

theory holds that rational choice theory with its egoistic assumptions<sup>8</sup> explains all behavior.<sup>9</sup> It has been argued that a broadly Hobbesean account of this sort means that the common law system is a "natural law system . . . [that] should exhaust the universe of rules" regarding economic interactions.<sup>10</sup> Formerly, the legal exclusion of women and minorities from opportunities and positions reserved for men and whites was justified by arguments about their "natural" incapacities or social roles.<sup>11</sup> A more sophisticated variation is that while such institutional changes are in fact possible, human nature makes them highly undesirable.<sup>12</sup> On this view, intrinsic features ineradicably rooted in human nature would cause great suffering if society were to implement alternative, more highly egalitarian policies, and such policies therefore should be opposed.

On the other side, the concept of human nature—any human nature at all—is widely frowned upon among egalitarian critics of the status quo, who often contend that there is no human nature and hold the very idea to be a fiction designed to justify existing hierarchies. Their underlying rationale often involves the assumption, frequently unstated, that to concede that human nature exists would mean admitting that the defenders of the status quo are *right*. This is because these critics of the status quo share the same conception of a rigid human nature manifested in the same

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1977)) (arguing that judicial processes tend to suppress distributive considerations, and should do so to maximize efficiency conceived as wealth maximization). On the more liberal end, Rawls' Difference Principle, which limits inequalities of wealth and income to differences that would benefit the least well off, is justified by an assumption that greater rewards to some will benefit all because of such incentives. See RAWLS, *supra* note 5, at 75, 78. Although the argument for the Difference Principle depends on the imputed motivations of imaginary parties to a hypothetical "Original Position," *id.* at 19, 20, 16, Rawls must accept that self-interested motivations are effective, if not exclusive, in the real world. See G.A. COHEN, *RESCUING JUSTICE AND EQUALITY* 81 (2008).

8. The theory holds, in brief, that rational behavior involves maximizing the expected value of the selfish preferences of egoistic individuals. See, e.g., DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* 14–17 (1994) (characterizing the elements of the theory).

9. See, e.g., GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976).

10. RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 26 (1992) [hereinafter EPSTEIN, *FORBIDDEN GROUNDS*]. The quote appears in a chapter entitled "Human Nature," and it is in this sense rather than in a moral sense that Epstein considers the common law to be a "natural law system." See also RICHARD EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995) (further developing this view).

11. See *infra* Part I(A)(2) (citing cases, statutes, and statistics). Although such assumptions are now almost impossible to articulate in public debate since these groups have won a substantial measure of formal legal equality, the underlying ideas about the nature of women or human motivation and capacities continue to emerge, generally at a more abstract and indirect level, as documented throughout this article.

12. See *infra* Part III.

way in all circumstances. For this essentially political and erroneous reason, they contend that social arrangements are due purely to "nurture" and not at all to "nature," and are therefore alterable.<sup>13</sup>

For instance, feminist legal critics often contend that traditional gender roles allocating primary responsibility for domestic labor to women or laws based on the assumption of a "natural" female monopoly on childcare can be changed because no human nature stands in their way.<sup>14</sup> Postmodern theory, which has played a large role in feminist thought in recent decades, generally rejects "essentialism," "a universal essence as constituent of human beings . . . [in which] socially constructed male traits . . . [are treated as] essentially human . . . , while women are the other, the subordinate sex."<sup>15</sup> On both sides, the debate is too often cast as a matter of whether our existing institutions are due to nature or nurture, and to what extent.

I approach the subject of human nature and the nature-nurture debate in biological, specifically genetic, terms because that is the way these issues are framed in a "scientific" era. By this, I mean an era in which science, good or bad, provides the model for authoritative claims to knowledge. In this context, I discuss sociobiology or evolutionary psychology. I am more sympathetic in principle to these disciplines<sup>16</sup> than

13. In some cases, like that of Richard Rorty, the denial of human nature, "our glassy essence," RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979) 42-43 [hereinafter RORTY, *MIRROR*] (quoting WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 2, sc. 2, l.17), simply is a rejection of the idea of a fixed, inflexible set of behaviors rigidly manifested in all circumstances—a position differently motivated but based on the same false conception. See RICHARD RORTY, *OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS* 213 (1991) [hereinafter RORTY, *OBJECTIVITY*], discussed *infra* notes 97, 106-07, and accompanying text.

14. See, e.g., PATRICIA S. MANN, *MICROPOLITICS: AGENCY IN A POSTFEMINIST ERA* 46 (1994) (discussing and rejecting the idea that marriage and motherhood are "natural and necessary"); Nancy Chodorow, *Mothering, Male Dominance, and Capitalism, in CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM* 83 (Zillah R. Eisenstein ed. 1979) (recognizing female mothering as cultural near-universal but insisting that "[t]he organization of gender and male dominance are . . . historical products"); CAROL TAVRIS, *THE Mismeasure of Woman* 78 (1992) (arguing that the structure of work is a better predictor of gender relations than "explanation as based on male and female 'nature'").

15. STEVEN BEST & DOUGLAS KELLNER, *POSTMODERN THEORY: CRITICAL INTERROGATIONS* 206-07 (1991) (reviewing various postmodern feminist views of pure social construction of gender). In extreme versions of "difference" feminism, not only do "anti-essentialists" view femininity and the traits commonly associated with it (such as mothering) viewed as pure social construction, but "the subject of feminism, presumed in modernist discourse to be 'women,' is, in fact, an artifact produced by discourse." Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 *HARV. C.R.-C.L. L. REV.* 1, 31, 35 (2001) (criticizing this view, but urging that gender differences be "detach[ed] . . . as far as possible from biology"). See *infra*, Part I(C) for further discussion.

16. See, e.g., PHILIP KITCHER, *VAULTING AMBITION* (1985) (sorting out bad sociobiology from good in great detail).

many who share my policy views.<sup>17</sup> However, I come neither to praise nor to bury sociobiology, but to set it on its feet as regards policy and legal debate. If these debates are influenced by sociobiology, as they are and will be, the presuppositions, potential consequences, and argumentative uses of the research should reflect a correct understanding of the concept of human nature and the relationship between nature and nurture.

In Part I, I survey some inegalitarian arguments for the status quo with respect to women's roles and economic inequality, emphasizing the "scientific" turn these have taken in the last century or so. I note the too-quick move from supposed scientific "is's" to purported policy and legal "oughts" (Part I(B)), and then critique some *egalitarian* objections to the very idea of human nature (Part I(C)). In Part II, I argue that the abstractive conception of an unchangeable nonsocial nature underlying these arguments is deeply confused. Whatever behavior we see is a manifestation of potentialities in an environment. Human nature *is* this set of potentialities. It is not an odd sort of disposition that is rigidly manifested the same way regardless of the circumstances. The genetic component is never decisive by itself, or, *per impossible*, in abstraction from an environment (Part II(A)). The nature-nurture dichotomy is therefore a false one (Part II(B)), and genetic heritability in particular does not mean unchangeability (Part II(C)). Further, the historical or cross-cultural arguments from universality, based upon claims that some trait or behavior is ubiquitous, taking the environment into consideration, do not establish any claim about an unchangeable human nature (Part II(D)). In Part II(E), I remind egalitarians that locating the source of a trait in the environment is no assurance that it is easily changeable, because the environment may be no easier to alter than our biology. In Part III, I attack the most sophisticated inegalitarian argument—that egalitarian change would lead to **generalized unhappiness or impose other unacceptable costs**. In Part V, I sketch plausible alternative explanations for the kinds of inequalities discussed in the Essay that elucidate biological factors as understood by biologists, without retreating from the potentialities conception of human nature I advocate or waxing Panglossian about the susceptibility of such potentialities to change.

I do not regard this Essay as developing any startlingly novel theses.<sup>18</sup>

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17. Like almost everyone else, I have policy and legal views about these questions, which are, as will become evident, egalitarian and liberal, but my particular views on these topics are not the subject of this Essay. Here, I dispute whether *any* views on these or similar issues are usefully discussed in terms of the abstractive conception of human nature or the nature-nurture dichotomy. I would make precisely the same points in very nearly the same words if my substantive positions on the institutions, policies, and law were opposite of what they are.

18. For discussions along similar lines, though with different emphases, see KITCHER, *supra* note 16; LEON KAMIN, *THE SCIENCE AND POLITICS OF IQ* (1974); RICHARD C.



Most of my main claims, especially about biology and its implications, are fairly elementary and given at least lip service by advocates or critics of the status quo or egalitarian reform, even if these precatory admissions are thereafter ignored by those who make them.<sup>19</sup> But it is valuable to clarify the significance of some elementary points in philosophy of science and biology for important questions in law and policy. My excuse for saying things that ought to be obvious is that it is manifest that they are *not* obvious. Time after time, literally for millennia, the same sort of bad arguments, with necessary changes for intellectual social context, are repeatedly trotted out.<sup>20</sup> Recently, with the rise of a secular democratic culture, these arguments have been made in the face of repeated refutation, often with the same sorts of bad responses.<sup>21</sup> One essay cannot inter these errors for good, but may help in clearly exposing their underlying and often unexpressed logic.<sup>22</sup> I hope to further constructive debate on the real issues

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LEWONTIN ET AL., NOT IN OUR GENES (1984); PHILIP GREEN, THE PURSUIT OF INEQUALITY (1981); STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1981). For some feminist discussion, see also ALISON JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1983), and JANET RADCLIFFE RICHARDS, THE SCEPTICAL FEMINIST (1980).

19. See RICHARD HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 311 (1994) (stating that the authors are “resolutely agnostic” on what the mix between genes and environment might be); PINKER, *supra* note 4, at vii (quoting similar statements from “nature” theorists; Pinker is himself another example of a lip-service “nature” theorist); MATT RIDLEY, NATURE VIA NURTURE: GENES, EXPERIENCE, AND WHAT MAKES US HUMAN 3 (2003) (“[h]uman behavior has to be explained by both nature and nurture . . . no longer is it nature versus nature but nature via nurture.”).

20. Versions of the argument are literally ancient. Plato characterized his own argument for the need for social hierarchy, according to which social class is determined by metallic content (the philosopher kings contain gold, the warrior elite or guardians, silver, the artisanal and peasant masses, lead), as a “lie,” albeit, he thought, a “noble” and necessary one. PLATO, THE REPUBLIC (Paul Shorey trans.), in PLATO: THE COLLECTED DIALOGUES 414, at 575, 658–59 (Edith Hamilton & Huntington Cairns eds., Princeton Univ. Press 1961). Aristotle unblushingly put forward an unexplained natural inferiority as the true ground for the justification of slavery and the subordination of women. See ARISTOTLE, POLITICS (Benjamin Jowett trans.) in THE BASIC WORKS OF ARISTOTLE 1259b1-5, 1260b1, at 1127, 1143, 1145 (Richard McKeon ed., Random House 1941). Later, theological justifications came to the fore. See *infra* notes 32–33 and accompanying text.

21. Until the rise of liberal democracy with widespread freedom of speech, overt criticism of the status quo and its defenses was more often than not flatly unlawful and extremely dangerous to the critic. “The right to speak one’s mind freely about government and religion developed very late.” LEONARD LEVY, THE EMERGENCE OF A FREE PRESS 3 (1985) (discussing, *inter alia*, an 18<sup>th</sup> century English “consensus that maintenance of the established order required the silencing of subversive discussion,” *id.* at 102); see generally CHRISTOPHER HILL, THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION (1984) (discussing, *inter alia*, the repression of egalitarian ideas during a period and in a place more open to them than many before liberal democracy recently developed in the industrialized West).

22. Assessment of particular sociobiological and hereditarian claims in detail requires a good deal of mathematics. For this sort of treatment, see generally KITCHER, *supra* note 16.

about the obstacles and prospects that human nature poses for the possibilities and limits of alterations in policy and law. Specifically, I will focus on the main arguments based on human nature regarding alteration of law and policy in the areas of economic equality and women's work, and, by extension, other social arrangements.

## I. THE ARGUMENT FROM HUMAN NATURE

### A. *A Brief Survey of the History of the Argument*

#### i. The Argument in Philosophy, Religion, and Science

Appeals to human nature are often made to support hierarchical status quo arrangements, such as the traditional gender roles and class inequalities I discuss here. Aristotle claimed that some people are slaves by nature and that "the male is by nature fitter for command than the female."<sup>23</sup> Before the nineteenth century, social and legal theory was virtually unanimous on the naturalness and inevitability of women's subordination.<sup>24</sup> Despite the recent encroachments of liberalism with its commitment to at least formal egalitarianism, class inequalities have been explained and justified in the same way. And both the law and political theory, have, until recently, followed suit.<sup>25</sup> Locke wrote that "a great part of mankind are, by the natural and inevitable state of things in this world, and the constitution of

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But the underlying philosophy of science is, in fact, quite simple and nontechnical. The technical insights are necessary, but they remain politically idle if they cannot be expressed in accessible terms.

23. ARISTOTLE, *Politics*, in THE BASIC WORKS OF ARISTOTLE, *supra* note 20, 1260b1 at 1145; 1259b5 at 1143. With regard to women, Aristotle concedes that "there may be exceptions to the order of nature." *Id.* Plato is less absolute in his assertion of male supremacy. While "[m]any women . . . are better than many men in many things," still, "the masculine sex does . . . surpass the female," but Plato would not have denied capable women a share in the administration of the Republic. PLATO, *supra* note 20, 455c, at 694–95. Plato's "noble lie" explaining class stratification by metallic content was about class, not sex. *Id.*

24. See SUSAN MOLLER OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* (1979) (analyzing the views of women in Plato, Aristotle, Rousseau, and Mill); VERN L. BULLOUGH, *THE SUBORDINATE SEX: A HISTORY OF ATTITUDES TOWARDS WOMEN* (1974). Among the founders of the liberal tradition, only Hobbes, ruthlessly consistent and reckless of conventional opinion as ever, was utterly clear-eyed about the reasons for women's inequality, attributing it to the fact that men have the power to make the law. See THOMAS HOBBS, *LEVIATHAN, OR THE MATTER, FORME, AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL* 152 (Michael Oakshotte ed., Collier Books 1962) (1651), quoted *infra* note 206 and accompanying text.

25. See, e.g., 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 410 (Univ. of Chi. Press 1st ed. 1979) (1765), quoted *infra* note 74.

human affairs, unavoidably given over to invincible ignorance,<sup>26</sup> and are therefore doomed to be hewers of wood and drawers of water. While theoretically holding that all persons are naturally equal,<sup>27</sup> Locke assumed that the man is "Master of a family" and the woman is in a "subordinate relation," a "Wife," grouped together with "Children, Servants, and Slaves."<sup>28</sup> Since "the Rule should be placed somewhere, it *naturally* falls to the Man's share, as being the abler and the stronger."<sup>29</sup> Rousseau, insisting on equality among men both in nature and civil society, notoriously embraced a gynecological justification for women's subordination:

When woman complains . . . of the unjust man-made inequality, she is wrong. This inequality is not a human institution—or at least it is not the work of prejudice but of reason. *It is up to the sex that nature has charged with the bearing of children to be responsible for them to the other sex.*<sup>30</sup>

The bases of such claims in defense of subordination and inequality of women and working people, virtually universal until the last two centuries or less, have varied. The invocation of biology in particular and science in general is the main difference between traditional and modern arguments from nature. The ancients often baldly invoked "nature," without much further elaboration, as if what that meant were obvious.<sup>31</sup> From the Middle Ages through the early 19<sup>th</sup> century, and in many places still today, Scripture was and remains a favored ground.<sup>32</sup> In many cases, theological justifications of the status quo were also arguments from nature: God *made* us thus, and we should therefore obey his commands and act according to

26. JOHN LOCKE, AN ESSAY CONCERNING THE HUMAN UNDERSTANDING 443 (Alexander Campbell Fraser ed., Dover Publications 1958) (1690) [hereinafter LOCKE, ESSAY].

27. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT, bk. II, at 309 (Peter Laslett ed., New American Library rev. ed. 1988) (1698) [hereinafter LOCKE, TWO TREATISES] ("Creatures of the same species and rank promiscuously born to the same advantages of nature should also be equal among one another without subordination or subjection . . .").

28. *Id.* bk. II ¶ 86, at 366

29. *Id.*, at 364 (emphasis added). Locke adds a theological argument that God has ordained the "Conjugal . . . Power that every Husband hath to . . . have his Will take place before that of his wife. . . ." *Id.* at 210 ("Eve's Subjection"). See *infra* notes 32–33.

30. JEAN-JACQUES ROUSSEAU, EMILE, OR ON EDUCATION 361 (Allen Bloom trans., Basic Books 1979) (1762) [hereinafter ROUSSEAU, EMILE] (emphasis added). For brief discussion of this view, see *infra* notes 85–88 and accompanying text.

31. See generally ARISTOTLE, *Physics*, in THE BASIC WORKS, *supra* note 20, at 218ff.

32. See *Colossians* 3:22 ("Servants, obey in all things *your* masters according to the flesh; not with eye service, . . . ; but in singleness of heart, fearing God.") (emphasis in original); 1 *Corinthians* 12:12–31 (King James) (parable of the parts of the body) (cited in DON HERZOG, POISONING THE MINDS OF THE LOWER ORDERS 26 *passim* (1998) (providing a catalog of late 18<sup>th</sup> and early 19<sup>th</sup> century English justifications for subordination of disfavored groups, many based on the Bible)); ARTHUR O. LOVEJOY, THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA (1936, 1964) (study of medieval scholastic justifications for earthly hierarchy based on the Holy Writ).

our created natures. These theological justifications have not wholly lost their appeal.<sup>33</sup>

In the last two centuries, such claims have been given a scientific gloss.<sup>34</sup> Richard Herrnstein explains class structure in a "meritocracy," saying, "By removing artificial barriers between classes, society has encouraged the creation of biological barriers. When people can take their natural level in society, the upper classes will, by definition, have greater capacity than the lower."<sup>35</sup> Herrnstein and Murray's *The Bell Curve*,<sup>36</sup> a bestselling restatement of inegalitarian doctrines based on claims about human nature with regard to race and class, is a prominent recent instance of this pattern.<sup>37</sup> Matt Ridley claims that "[g]ender roles are at least partly automatic, blind, and untaught;"<sup>38</sup> genes make men less "empathetic" and

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33. In a country like the U.S. where the Christian right is a political force of considerable weight, the continued grip of theology can hardly be disputed. See, e.g., DANIEL K. WILLIAMS, *GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT* (2010); GARY WILLS, *UNDER GOD: RELIGION AND AMERICAN POLITICS* (1990). In the leading study of the failure of the Equal Rights Amendment ("[E]quality of rights under the law shall not be denied or abridged . . . on account of sex"), Jane Mansbridge reports that the core "antis" acted from "a literal belief in the Pauline passages from the Bible [*Ephesians* 5:22–23; 1 *Timothy* 2:11–12] stipulating that women should be subject to men." JANE J. MANSBRIDGE, *WHY WE LOST THE ERA, 175–76* (1986).

34. For a discussion of the rise of "scientific" inegalitarianism in the 19<sup>th</sup> and early 20<sup>th</sup> centuries, see generally GOULD, *supra* note 18.

35. RICHARD HERRNSTEIN, *IQ AND THE MERITOCRACY* 221 (1973) (attempting to explain class status by inherited differences in intelligence as measured by IQ scores). Herrnstein speaks carelessly when he says that society *creates* biological barriers. These, he thinks, are functions of genetics, not of society. He also assumes, without argument, that something like a *fair* economic system would result in a class-structured distribution of economic rewards or life chances according to differentially inherited capacities, a controversial proposition that both utilitarians and Rawls would regard with skepticism, see *supra* notes 5 and 6. Robert Nozick offers a way to generate class inequality without any such assumption, through luck and voluntary transfers generating entitlements, but this is no less controversial than the idea that a distribution based on ability is fair, and the resulting Nozickian distributions are not guaranteed, or even likely, to coincide with "capacity," however measured. ROBERT NOZICK, *ANARCHY STATE AND UTOPIA* 149–82 (1974). Nozick thinks that liberty upsets patterns, *id.* at 160–63, including patterns based on "merit" or intellectual capacity.

36. See HERRNSTEIN & MURRAY, *supra* note 19.

37. See also Arthur R. Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 39 *HARV. EDUC. REV.* 1 (1969). A writer of an altogether different and higher order is Christopher Jencks. See CHRISTOPHER JENCKS et al., *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* (1972); CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* (1993). While pessimistic about the possibilities for egalitarian social change, Jencks states his arguments with far more care, precision, and qualification than Herrnstein, Murray, or Jensen, and avoids any cheerful celebration of the inevitability of existing hierarchies. Jencks is without question a superb and serious scholar. Nonetheless I think his pessimism is based on some of the bad arguments criticized in this paper.

38. RIDLEY, *supra* note 19, at 58.

more "systematizing" than women, confirming stereotypes about the sexes.<sup>39</sup> Steven Pinker claims that "the new sciences of human nature" really do vindicate some version of what he calls the "Tragic Vision,"<sup>40</sup> in which "our moral sentiments . . . overlie a deeper bedrock of selfishness."<sup>41</sup> "[H]uman nature has not changed,"<sup>42</sup> including the primacy of "family ties,"<sup>43</sup> and the "partial heritability of intelligence . . . , implying that some degree of inequality will arise even in perfectly fair economic systems."<sup>44</sup>

39. *Id.* at 59–62 (Stating that people "come into the world" with a "tendency to pick the nurture that suits [their] nature"; thus boys are born with a predilection to like "toys weapons, competition, and action better than dolls, romance, relationship, and families.").

40. PINKER, *supra* note 4, at 293. The term "Tragic Vision" is derived from the neoconservative writer Thomas Sowell. See THOMAS SOWELL, A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES (1987) (cited in PINKER, *supra* note 4, at 287).

41. PINKER, *supra* note 4, at 288.

42. *Id.*

43. *Id.* at 294. Pinker's discussion of gender differences is more nuanced than many, for example, those of STEVEN GOLDBERG, WHY MEN RULE: A THEORY OF MALE DOMINANCE 64–65 (1993) (rev. ed. of THE INEVITABILITY OF PATRIARCHY (1974)) (arguing that "males occupying the overwhelming numbers of high status positions" is a result of "manifestations of neuro-endocrinological differences between men and women"), or MICHAEL LEVIN, FEMINISM AND FREEDOM 98–155 (1987) [hereinafter LEVIN, FEMINISM] (claiming that vocational and status differences between the sexes are explained by biology), summarized in Michael Levin, *Implications of Race and Sex Differences for Compensatory Affirmative Action and the Concept of Discrimination*, 15 J. SOC., POL. & ECON. STUD. 175 (1990) (also arguing that blacks are genetically inferior to whites in intelligence and motivation). Pinker "opposes sex discrimination" on moral grounds and denies that women "continue to be enslaved by a pervasive system of male dominance." PINKER, *supra* note 4, at 341 (citing the neoconservative writer Christina Hoff Sommers. See CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM?: HOW WOMEN HAVE BETRAYED WOMEN (1995)). While admitting that the gap in employment opportunities "favors men," he says that the biological evidence he cites for sex differences bearing on life chances does not "impl[y] that women will end up on the short end of the stick." *Id.* at 255.

He does think, however, that (possibly biologically related) "preferences may set the sexes on different paths"; for example, he says men are greater risk takers, *id.* at 356 (emphasis in original) (compare EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988)), *infra* notes 61–62), women are more attached to their children, and therefore more likely to make life choices that "allow them to spend more time with their children . . . in exchange for lower wages or prestige." PINKER, *supra* note 4, at 357. Formal discrimination is not necessary; biologically based or culturally universal sex differences will keep women, on average, happily on the short end of stick—working unremunerated at home with the children while employed at lower paid, less prestigious jobs. *Id.*; see also ARLIE HOCHSCHILD, THE SECOND SHIFT (1989) (documenting the facts and offering an alternative economic explanation of them).

44. PINKER, *supra* note 4, at 357. Pinker's express support for this proposition is the blanket assertion that all human traits are heritable. *Id.* at 373. In addition, he argues that the effect of being raised in the same family is less than the effect of the genes. *Id.* at 378. I address the issue of heritability in Parts II(C)(1)&(2), *infra*, but the reader may notice that the stated conclusion about the inevitability of inequality even in a fair economic system (whatever Pinker may think that might be) does not follow from the stated premises. A key

Pinker contrasts the "Tragic Vision" to the "Utopian Vision,"<sup>45</sup> which is essentially the denial of human nature that I have characterized as the obverse of the abstractive conception. Hence the title of his book *The Blank Slate*. For Pinker, the slate has been substantially filled in by genetically encoded scripts dictating behavior that make it impossible or dangerous to change social institutions in an egalitarian way, or even to eliminate acknowledged evils.<sup>46</sup>

Without a doubt there is a biological basis for, or contribution to, many important human behaviors, social institutions, and practices. Obviously, we are organisms, whatever else we are, and this fact is highly likely to be relevant to how we act and organize our lives. That we must eat to live is a biological fact of considerable explanatory weight in understanding economic inequality.<sup>47</sup> The biological fact that we reproduce sexually, with women as bearers of children, is almost certainly relevant, in ways hitherto unspecified, to gender inequality.<sup>48</sup> Any biological phenomenon will have, furthermore, a genetic component. Genes contain key information about the range and scope of the manifestation of biological traits. But biological egalitarians often hold that important features of current societies are "genetically determined" and therefore inalterable. "Biological constraints exist that define zones of improbable or forbidden entry."<sup>49</sup> Candidate features have included class and racial hierarchies, the subordination of women, egoism, competitiveness, and aggression. However, many sociobiologists, some with decidedly

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missing premise might be that a fair economic system distributes economic rewards according to inherited capacities, *see supra* discussion in note 35 (addressing Herrnstein's similar missing premise). Mill, Rawls, and Nozick would all reject this proposition.

45. PINKER, *supra* note 4, at 287

46. Similar doctrines are expressed in some versions of "pop" sociobiology. *See, for example*, DESMOND MORRIS, *THE NAKED APE* (1967); ROBERT ARDREY, *THE TERRITORIAL IMPERATIVE* (1966); LIONEL TIGER & ROBIN FOX, *THE IMPERIAL ANIMAL* (1971); DAVID BARASH, *THE WHISPERINGS WITHIN* (1979); and the more scientifically respectable presentations. *See, e.g.*, KONRAD LORENZ, *ON AGGRESSION* (1966); WILSON, *supra* note 4; RICHARD DAWKINS, *THE SELFISH GENE* (2d ed. 1989); HERRNSTEIN & MURRAY, *supra* note 19. The term "pop sociobiology" is due to Kitcher, who defines it as the appeal to "recent ideas about the evolution of animal behavior to advance grand claims about human nature . . ." KITCHER, *supra* note 16, at 14–15, with emphasis on the popularizing character of this work. Pinker, like a number of the other writers considered here, falls into both camps: he cites and does much solid scientific work, while still drawing spectacular policy and legal non sequiturs from this and related work. My point is not that these views are incorrect in part or whole, although I believe that they generally are. Rather, it is that they do not follow from the biological arguments advanced to support them.

47. "Erst kommt das Fressen, dann kommt die Moral" ("Grub first, then morals"), BERTOLT BRECHT & KURT WEILL, *DIE DREI GROBENOPER* (*THE THREEPENNY OPERA*) act 2, scene 10 (1928) (author's translation).

48. *See* ROUSSEAU, EMILE, *supra* note 30, at 361; *infra* notes 85–89 and accompanying text (discussing the inadequacy of the gynecological explanation).

49. WILSON, *supra* note 4, at 8.

egalitarian views in law and policy, allow for biologically based forms of altruism.<sup>50</sup>

ii. Society, Policy, and Law

The grip of inegalitarianism based on the argument from nature is not just a fact about the history of ideas. It has widespread practical influence in society and law.<sup>51</sup> In modern America, the official legal and political ideology is today generally set against such views, as befits a republic that proclaimed at its inception, if somewhat prematurely, "all men are created equal."<sup>52</sup> But inegalitarian policies and practices often find support in the law in ways that draw expressly or implicitly upon the argument from nature. Property qualifications for male suffrage, predicated on the Lockean identification of "the people" with "the propertied,"<sup>53</sup> were eliminated over the seventy-five years following the Revolution,<sup>54</sup> although slavery was only abolished after the Civil War, and women's suffrage instituted only in 1920.<sup>55</sup> Today, government policies disfavoring women receive a moderately searching "intermediate scrutiny" under the Equal Protection Clause of the Fourteenth Amendment,<sup>56</sup> and classifications based on wealth receive only deferential "rational basis" scrutiny.<sup>57</sup> Statutory law protects

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50. Among the inegalitarian sociobiologists who support or offer biological explanations of (limited) altruism are DAWKINS, *supra* note 46, at 202-33 and PINKER, *supra* note 4, at 241-47; for more egalitarian sociobiology of ethics, see *EVOLUTIONARY ETHICS AND CONTEMPORARY BIOLOGY* (Giovanni Boniolo & Gabriele de Anna eds., 2009); ELLIOTT SOBER & DAVID SLOAN WILSON, *DO UNTO OTHERS: THE EVOLUTION AND PSYCHOLOGY OF UNSELFISH BEHAVIOR* (1999); and PETER SINGER, *THE EXPANDING CIRCLE: ETHICS AND SOCIOBIOLOGY* (1981).

51. The reader may find some confirmation in the rapidity with which almost any interlocutor will invoke human nature as an objection to proposals for egalitarian change or take arguments about the variability of human nature at least in principle as a denial that there is any such thing as human nature.

52. THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776). Indeed, such ideas are widely disapproved, at least for public expression, throughout the modern liberal democracies.

53. For Locke, "the preservation of Property being the end . . . for which Men enter into society, it necessarily supposes and requires, that the People should have property . . ." LOCKE, *TWO TREATISES*, *supra* note 27, at 406. Those without property are not, therefore, among "the People." *Id.*

54. CHILTON WILLIAMSON, *AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY 1776-1860*, 272 (1960) (describing "gradual removal of property and taxpaying qualifications for voting in a majority of the states" during nineteenth century).

55. U.S. CONST. amends. XIII (prohibiting slavery) & XIX (providing for women's suffrage).

56. *Craig v. Boren*, 429 U.S. 190 (1976) (striking down sex differentials in minimum drinking age).

57. *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding the denial of welfare benefits to additional children in large families). The level of scrutiny is raised when

women from sex discrimination in various areas.<sup>58</sup> It also offers some very limited protection for workers' interests and even less protection still for restrictions on economic inequality. Nonetheless, while grossly stereotypical state policy or blatant private sex discrimination is now disfavored and often unlawful,<sup>59</sup> widespread discrimination persists,<sup>60</sup> and the argument from nature haunts even the interpretation of antidiscrimination law. For example, in *EEOC v. Sears, Roebuck & Co.*,<sup>61</sup> the Seventh Circuit approved a "lack of interest" defense to sex discrimination, legitimating what a dissenting judge called the "proposition that women are *by nature* happier cooking, doing the laundry, and chauffeuring the children to softball games than arguing appeals or selling stocks."<sup>62</sup> In *Dothard v. Rawlinson*, the Supreme Court allowed sex as a defense in the case of a woman denied a position as a prison guard.<sup>63</sup> The "employee's very womanhood" undermined her ability to do the job

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fundamental rights such as voting intersect with wealth. See *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (striking down poll taxes).

58. See, e.g., 42 U.S.C. § 2000(e) (2006) (employment) (Title VII); 20 U.S.C. § 1681(a) (2006) (federally funded education); 15 U.S.C. § 1691 (2006) (terms of credit).

59. This is a recent development, beginning in the mid-1960s. See, e.g., Title VII of the Civil Rights Act of 1964, *supra* note 58. Earlier, the law generally saw women as naturally subordinate. See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908). Here the *Lochner* Court upheld for women the sort of working hours limitations it had stricken for men because of the difference of the sexes, notably "woman's physical structure and the performance of maternal functions." *Id.* at 420-21. A woman "need[s] especial care that her rights may be preserved . . . [S]he is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained." *Id.* at 421. See also *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding a law granting women exemption from jury duty because they are "still regarded as the center of home and family life"); *Goesart v. Cleary*, 335 U.S. 464 (1948) (upholding Michigan law barring women from tending bar); *Bradwell v. State*, 83 U.S. 130 (1873) (upholding Illinois law barring women from practicing law).

60. In 2010, women still received only 77 cents for every male dollar in wages and salaries. *The Wage Gap Over Time: In Real Dollars Women See a Continuing Gap*, NATIONAL COMMITTEE ON PAY EQUITY, <http://www.pay-equity.org/info-time.html> (last visited Dec. 21, 2011). This situation has not much improved over the previous two decades. See DEBORAH L. RHODE, JUSTICE AND GENDER 162-63 (1989) (stating that women in the workforce received 70 cents for every male dollar). Three-fifths of all women in the workforce in the late 1980s were in occupations comprised of at least 75 percent female workers. *Id.* Women's representation in law, management, and academia increased from 3 to 7 percent in the early 1960s up to 20 to 40 percent in the late 1980s, but women were only half as likely as men to be partners in major law firms; women lawyers also earned 20 percent less than men; women held only two percent of corporate executive positions and women vice presidents and presidents earned half what their male counterparts did; and women had only 13 percent of tenured academic positions. *Id.*

61. 839 F.2d 302 (7th Cir. 1988). See also *supra* note 43 (discussing Pinker on the persistence of economic inequalities by sex and the female monopoly on childcare).

62. *Id.* at 361 (Cudahy, J., concurring in part and dissenting in part) (emphasis added). Compare discussion in *supra* note 43.

63. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).



because she might be sexually assaulted by rapists and “inmates[] deprived of a normal heterosexual environment.”<sup>64</sup>

If sex discrimination is now disfavored in law, the same cannot be said about discrimination based upon wealth or in general against working people. Private property is expressly protected in the Constitution,<sup>65</sup> but there is no constitutional or statutory right to employment, much less at above-poverty wages.<sup>66</sup> There is a moderate but decreasingly progressive income tax.<sup>67</sup> There is no constitutional right to welfare,<sup>68</sup> and the federal statutory “guarantee” of welfare has been abolished.<sup>69</sup> The public and

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64. *Id.* at 335–36. Justice Marshall, dissenting, objected that this decision “perpetuates one of the most insidious of the old myths about women—that [they] . . . are seductive sexual objects.” *Id.* at 345. The Court here oddly echoes Brownmiller’s radical feminist theory of rape: “By anatomical fit—the inescapable construction the genital organs—the human male was a natural predator and the human female served as his natural prey.” SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 16 (1975).

65. *See* U.S. CONST. amend. V, cl. 5 (“[N]or shall private property be taken for public use, without just compensation.”); amend. XIV, cl. 3 (“[N]or shall any State deprive any person of . . . property, without due process of law.”). It is of course true that the Takings Clause has not been given the expansive interpretation urged by some; see, for example, RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985), and the fact that the Lochner Court’s extremes of economic substantive due process in defense of constitutionally protected laissez faire economics have been disavowed since the New Deal Court. *See, e.g.,* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (extending federal power under the Commerce Clause, U.S. CONST. art I. sec. 8. cl. 3); *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938) (same, while heightening federal judicial power to review potentially discriminatory legislation), *Wickard v. Filburn*, 317 U.S. 111 (1942) (same with respect to the Commerce Clause). The significance of these changes has been extensively discussed. *See, e.g.,* 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (arguing that this shift amounted to an implicit constitutional amendment, or several); RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006) (similar, and setting forth a libertarian critique of the New Deal doctrines); HOWARD GILMAN, *THE LOCHNER COURT: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1992) (presenting a less ideologically loaded study of the background to New Deal jurisprudence); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 310 (arguing that the constitutional crises commonly attributed to the New Deal were underway in the late 1920s and not resolved until after the Second World War.)

66. The federal minimum wage currently is \$7.25 an hour, Fair Minimum Wage Act of 2007, 29 U.S.C. §§ 206(a)(c) (2007), coming to \$20,706 a year pretax (51 weeks of eight-hour days); the federal poverty line for a family of four is \$22,350. Notice, Annual Update of the HSS Poverty Guidelines, 76 Fed. Reg. 3637-02 (Jan. 20, 2011).

67. The top marginal income tax rate (married, filing jointly) was 35 percent in 2011, down from 91 percent in 1955. *U.S. Federal Individual Income Tax Rates History, 1913–2011*, THE TAX FOUNDATION, <http://www.taxfoundation.org/taxdata/show/151.html> (last visited July 27, 2011).

68. *Dandridge v. Williams*, 397 U.S. 471 (1970).

69. The “guarantee” provided by Aid to Families with Dependent Children (AFDC), Social Security Act, 42 U.S.C. §§ 601–44 (1996), was only a guarantee for states participating in AFDC and did not apply to childless persons. In 1997, it was replaced with the “workfare” program Temporary Assistance to Needy Families (TANF), Social Security Act, 42 U.S.C. §§ 601–19 (2007), which has a five-year lifetime cap on benefits. *Id.* §§

legislative debate around welfare policy is cast in the stereotypical language of the "undeserving poor."<sup>70</sup> This traces back to Locke's view that property is the due of "the Industrious and the Rational."<sup>71</sup> The propertyless are neither; if they were, they would have property. These debates reflect Herrnsteinian views about the natural sources of class divisions in the "greater capacity" of the upper classes.<sup>72</sup>

Assumptions about the natural subordination of workers also lurk in employment and labor law. In the common law, employees ("servants") were grouped with wives and children in what Blackstone called "the three great relations in private life"<sup>73</sup>—employment, marriage, and parenthood—which were for him "relations of formal inequality."<sup>74</sup> The law now regards employees as formally equal to their employers, but licenses substantive inequalities that are hard to justify on the whole as fair, utility-maximizing, or even somehow efficient (say, Pareto optimal) by anyone but the most complacent or ideological.<sup>75</sup> Hidden presuppositions of natural inequality undoubtedly contribute to legal toleration of the asymmetries.

Up through the 1920s, blatantly racist appeals to natural inferiority of immigrant workers as well as blacks played an unembarrassed role in lawmaking.<sup>76</sup> Happily that is no longer the case, but a more subtle

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607–08. See Kathleen A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990's Welfare Reform and the Exploitation of American Values*, 4 VA. J. SOC. POL'Y & L. 3 (1996).

70. Contemporary discussion, resulting in the abolition of "welfare as we know it," that is, the replacement of AFDC by TANF, was epitomized in President Clinton's contrast of those who "work hard and play by the rules" with welfare recipients, who presumably did not. See Sylvia A. Law, *Ending Welfare As We Know It*, 49 STAN. L. REV. 471 (1997) (attacking these myths). This echoes the language around early poor relief in America, which was intended to "compel lazy vagabonds to work"; and insisted on strict means-testing and work requirements lest the recipient spend her "days in idleness and her nights in debauchery." DAVID MONTGOMERY, *CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY* 77 (1993) (internal citations omitted).

71. LOCKE, *TWO TREATISES*, *supra* note 27, at 333.

72. See HERRNSTEIN, *supra* note 35.

73. BLACKSTONE, *supra* note 25, at 410.

74. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).

75. For example, the wealthiest one percent of households averaged 125 times the wealth of the median household in 1962, a gap that grew to 190 times in 2004. LAWRENCE MISHEL ET AL., *THE STATE OF WORKING AMERICA 2008/2009*, at 269 fig.5C (2009). The collective net worth of the Forbes 400 richest individuals was \$1.5 trillion in 2007, eleven percent of the GDP, *id.* at 26–70 fig.5D., while seventeen percent of households had zero or negative net worth and 29.6 percent had net worth of less than \$12,000 (combined, almost half of all households), *id.* at 270 tbl.5.4. The wealthiest five percent of households had fifty-nine percent of total net worth, while the bottom eighty percent had 15.3 percent. *Id.* at 273 tbl.5.6.

76. In the nineteenth and early twentieth centuries, immigrant workers in particular were regarded as "'animals' [the Irish] . . . 'depraved beasts' [Slavs] . . . , [who] pass

argument from nature has carried over to the present day. Sunstein calls the assumption of the naturalness of common law property rights and market results one finds, for example, in Blackstone "status quo neutrality."<sup>77</sup> Class hierarchy, differential ownership, and the consequent subordinate status of workers reflect the market's reward to the naturally "industrious and rational." Blackstonean assumptions may be discerned in the rule of at-will employment, which holds that workers may be fired for any reason or no reason at all.<sup>78</sup> The rule of at-will employment effectively codifies inequalities of power underwritten by disparities of wealth, and asymmetries of rights and duties, such that, for instance, employees owe their employers a duty of loyalty that controls over their statutory rights to organize for mutual aid and protection,<sup>79</sup> while employers owe their employees no corresponding duty. Respect for "the prerogatives of private business management" has been held to require an interpretation of the employer's duty to bargain collectively which excludes "managerial decisions[] which lie at the core of entrepreneurial control."<sup>80</sup> The unequal distribution of powers, rights, and duties under "the traditional principles of a free enterprise economy"<sup>81</sup> are treated as if they were a creation of nature rather than law. The way that natural capacities and luck play out in the

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through 'their brute-like existence [while] the rich and more intelligent classes are obliged to guard them with police . . . .' [immigrant workers generally]." HERBERT G. GUTMAN, *WORK, CULTURE, AND SOCIETY IN INDUSTRIALIZING AMERICA* 71-73 (1976) (citations omitted). Such attitudes informed the early development of IQ testing and helped rationalize laws restricting immigration in the early and mid-1920s. See GOULD, *supra* note 18, at 222-32. Few would use this rhetoric today—at least about persons of European descent. It persists in more sterilized and muted form in the context of welfare policy with respect to blacks and Hispanics. See, e.g., HERRNSTEIN & MURRAY, *supra* note 19.

77. See CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 45 (1993). He believes that it was the core of the economic substantive due process jurisprudence of the *Lochner* era, *id.* at 45-51, 62-67, rejected in the New Deal and since. *Id.* at 51-61. But while the modern regulatory state has made inroads on status quo neutrality, Sunstein overstates the degree to which it has been overthrown as a basis of law and policy.

78. The rule, strictly, is that an employee without a contract providing additional protection may be fired for any reason that is not otherwise expressly prohibited, such race and sex, or no reason at all. The rule is now so established that judicial use of it involves little express justification, but older statements make clear that under the formal equality lay a concern for the employer's superior prerogatives. "May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if not my domestic, why not my farm-hand, or my mechanic or teamster? And, if one of them, then why not all four? And if all four, why not a hundred or a thousand of them?" *Payne v. Western & Atlantic Ry. Co.*, 81 Tenn. 507, 518 (Tenn. 1884).

79. See, e.g., *NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953) (upholding firing striking unionized workers who attacked the quality of the employer's broadcasting); *In the Matter of Elk Lumber Co.*, 91 NLRB 333, 337 (1950).

80. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

81. *Id.* at 226.

market against a background of common law property rights are assumed to be part of the order of things. These institutions themselves are implicitly taken as given by nature, not as social policy choices or results embodied in and protected by positive law. The inegalitarian arguments from nature, then, have played an important role, sometimes open, sometimes hidden, in shaping social consciousness, policy, and the law itself.

### B. *Justifications and Excuses*

The argument from nature has a slightly different force depending on how it is formulated. To say that something is "natural" in the moral and political context often involves a commendation, as it does in advertising "natural foods." Calling something, e.g., homosexuality, "unnatural" or "against nature" is often intended as a criticism, as if heterosexuality would be good if it was natural or in accord with nature. In fact, in the common law, and within living memory in many state statutes, homosexual acts were *designated* as "abominable and detestable crime[s] against nature."<sup>82</sup> But to say that something is "human nature" is often more invoked as an excuse than a commendation, generally offered to explain why we do not institute some—typically egalitarian—changes that might seem otherwise attractive. Selfishness or competitiveness, for example, are "human nature," and that may be too bad, but there is nothing we can do about it.<sup>83</sup>

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82. As recently as 1975, in the case of *Rose v. Locke*, the United States Supreme Court upheld a conviction for committing a "crime against nature" (there, coerced heterosexual cunnilingus) against a constitutional vagueness charge. The Court wrote per curiam that the phrase "crimes against nature" is no more vague than many other terms used to describe criminal offenses at common law and now codified in state and federal penal codes. The phrase has been in use among English-speaking people for many centuries, see 4 W. BLACKSTONE, COMMENTARIES and a substantial number of jurisdictions in this country continue to utilize it." 423 U.S. 243, 244, (citing NOTE, THE CRIMES AGAINST NATURE, 16 J. PUB. L. 159, 162 n.19 (1967)). The Court noted that the term was "was derived from early English law and broadly embraced sodomy, bestiality, buggery, fellatio, and cunnilingus . . ." *Id.* at 245. "We [have] held that a Florida statute proscribing 'the abominable and detestable crime against nature' [there 'copulation per os and per anum'—oral and anal sex] was not unconstitutionally vague." *Id.* (citing *Wainwright v. Stone*, 414 U.S. 21, 22 (1973)). Needless to say, all these statutes, insofar as they involve consensual human sexual conduct, have been invalidated by *Lawrence v. Texas*, 538 U.S. 558 (2005), but the thing to note here is the use of "against nature" to imply "abominable and detestable."

83. "That [bedrock] selfishness is not the cruelty . . . of [a] psychopath, but a concern for our well-being that is so much a part of our [nature] that we . . . would waste our time lamenting it or trying to erase it." PINKER, *supra* note 4, at 288. Contrast the view of ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (R.H. Campbell & A.S. Skinner eds., Liberty Fund, Inc. 1976) (1776), who emphasized benevolence as a human motivation, asserting, for example, that it is "vain [for an individual] to "obtain [] the help of his brethren from their benevolence *only* . . . [without] interest[ing] their self-love." *Id.* at 26 (emphasis added). Smith wrote an entire treatise on the complexities of motivation, emphasizing sympathy and benevolence. ADAM SMITH, THE

The commendation too often involves the crude naturalistic fallacy of supposing that “natural,” in something like the sense of “not deliberately altered by human intervention,” means “good” or “right,” or at any rate is a reason that something is good or right. For example, the philosopher Elizabeth Wolgast argues that a “good society should take [the differences between the sexes] into account, and probably must do so.”<sup>84</sup> Perhaps, and so expressed, thus far, this is not necessarily objectionable, but note the “difference” that she has in mind is the female monopoly on childcare: “Society, in its need to recognize someone as responsible for a child, *rightly* makes use of this fact of reproduction, the *in utero* pregnancy, so it can identify one parent with reasonable certainty.”<sup>85</sup> The leap from *in utero* pregnancy to the *rightness* of traditional division of gender roles is breathtaking, although regrettably common.

But, as is often noted, hurricanes and plagues are “natural” in that they are not products of human intervention, and houses or medicines are “unnatural” in the same sense.<sup>86</sup> It is thus “natural” that women bear children, but even if society must make someone legally responsible for children, nothing follows about who, as matter of policy, should bear the main burdens of raising them, particularly to the exclusion of other opportunities. Why the biological parents?<sup>87</sup> Why, if the biological parents,

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THEORY OF THE MORAL SENTIMENTS (Arlington House 1969) (1759). Although Pinker is an empirical psychologist, he offers no evidence to support his assumption of “bedrock selfishness.” Modern psychological research tends to support Smith. See, e.g., C. Daniel Batson, Nadia Ahmad & E.L. Stocks, *Four Forms of Prosocial Motivation: Egoism, Altruism, Collectivism, and Principlism*, in SOCIAL MOTIVATION 103, 113 (David Dunning ed., 2011) (“[T]heory and data now being advanced” based on “recent literature in sociology, economics, political science, and biology . . . are more compatible [than the idea than altruistic behavior conceals hidden egoism] with the view that true altruism—acting with the goal of benefiting another—does exist and is part of human nature.”).

84. ELIZABETH WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN 28–29 (1980).

85. *Id.* at 26 (emphasis added). See ROUSSEAU, EMILE, *supra* note 30.

86. I do not suggest that mothering is on the order of a plague or a hurricane, although a case could be made that, for women, the traditional female monopoly on childcare, delegating women to that role or even allocating them exclusive responsibility for it is at the basis of women’s subordination. See DOROTHY DINNERSTEIN, THE MERMAID AND THE MINOTAUR (1976); NANCY CHODOROW, THE REPRODUCTION OF MOTHERING (1978). Moreover, it is worth noting that the *effects* of plagues and hurricanes may owe as much to human choice as nature’s wrath. See, e.g., NORMAN F. CANTOR, IN THE WAKE OF THE PLAGUE: THE BLACK DEATH AND THE WORLD IT MADE 17–22 (2001) (attributing the virulence of the infection in large part to conditions of urban living); JED HORNE, BREACH OF FAITH: HURRICANE KATRINA AND THE NEAR DEATH OF A GREAT AMERICAN CITY (2008) (discussing, *inter alia*, deliberate governmental choices to not build levees and breakwaters sufficient to withstand a hurricane of Katrina’s force).

87. Elsewhere I have argued that in *our* society the assignment of child-rearing responsibility to the biological parents is probably unavoidable today, but throughout much of human history, it has not been the norm, and therefore is not “natural” in the abstractive sense under criticism here. See Justin Schwartz, *Rights of Inequality: Rawlsian Justice*,

the mother? Merely because her relationship to the child can be identified with some certainty?<sup>88</sup> *Pace* Rousseau, this inequality is indeed man-made, and if it is rational, nothing about *in utero* birth bears on the matter. I set this mistake aside and address the justificatory uses of "natural" involved in the claims about impossibility or unacceptable costs. My target is the excuse rather than the commendation.

### C. Egalitarian Objections to Human Nature

Since appeal to human nature as an excuse is often inegalitarian, feminists, liberals, and other egalitarians have often been hostile even to the very idea of human nature. Many Marxists claim there is no such thing.<sup>89</sup> Marx himself is sometimes attributed this view on the basis of the Sixth Thesis on Feuerbach: "The essence of man is no abstraction inherent in the single individual. In reality it is the ensemble of social relations."<sup>90</sup> But this does not say there is no such thing as human nature. It rather states that there *is* a human nature and *what* it is, an "ensemble of social relations."<sup>91</sup> It is only if we insist that human nature is by definition a nonsocial abstraction, a "something" all individuals have in common apart from all social relations, that the thesis can be read to deny human nature exists. This proposition flies in the face of the old, obvious, and widely acknowledged truth, clearly stated by Marx, that human nature is social. Aristotle observed long ago that "man is by nature a *zoön politikon*,"<sup>92</sup> an animal who lives in society.

Some feminists and postmodern theorists tend towards extreme environmentalism or social constructionism, attributing any gender roles or behavioral differences between men and women to socialization.<sup>93</sup> To talk

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*Equal Opportunity, and the Status of the Family*, 7 LEGAL THEORY 83, 93 n.7 (2001).

88. Wolgast's 1980 rationale for the policy and legal use of the biological fact of *in utero* birth has been called into doubt by "scientific advances in DNA testing which can now determine, with an extremely high degree of accuracy, whether or not a particular man is genetically related to a particular child." Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 252 (2006).

89. See NORMAN GERAS, MARX AND HUMAN NATURE: THE REFUTATION OF A LEGEND 50-54 & nn.11-12 (1983) (citing many writers who understand Marx this way).

90. Karl Marx, *Theses on Feuerbach*, in 5 COLLECTED WORKS 3, 4 (Int'l Publishers 1976) (1845).

91. See GERAS, *supra* note 90, at 46-50, 54-58 (criticizing the no-human-nature reading and suggesting alternative readings). Marx himself was unashamed about using the term "human nature," arguing, for example, that even necessary labor should be done under conditions most worthy of and appropriate to [workers'] human nature [*ihrer menschlichen Natur*]. 3 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY (Frederick Engels ed., 1894), in 37 COLLECTED WORKS 959 (Int'l Publishers 1978).

92. ARISTOTLE, *supra* note 20, at 1129. Jowett gives the standard but misleading translation, "political animal."

93. See LEVIN, FEMINISM, *supra* note 43, at 16-54 (providing a useful if hostile survey

about human nature, they say, is to commit the sin of “essentialism.”<sup>94</sup> This is a term of art in postmodern theory. Sometimes it seems to mean “a pre-given, unified subject or unchanging human essence that precedes all social operations,”<sup>95</sup> which would appear to correspond to the notion I criticize, that there is a universal nonsocial human nature. But sometimes “essentialism” seems to mean something like the view that there is an objective (even if socially contingent) human nature apart from how we describe ourselves. The philosopher Richard Rorty says, “There is no human nature which was once, or still is, in chains. Rather our species has—ever since it developed language—been making up a nature for itself . . . .”<sup>96</sup> We should “abandon[] the notion of ‘essence’ altogether” because:

the descriptions of ourselves we find in . . . the [sciences are] on a par with the various alternative descriptions offered by poets . . . , sculptors, . . . and mystics. [They] are not privileged representations in virtue of . . . [the greater degree of ] consensus in the sciences . . . . [Given] the relativity of descriptive vocabularies to periods, traditions, and historical accidents . . . , we cannot take the notion of “essence” seriously.<sup>97</sup>

Laclau and Mouffe reject the “essentialist perspective” in “the anthropological assumption of a ‘human nature’ . . . .”<sup>98</sup> “Man,” they assert, “is a discursively constructed subject position” with an “infinite” range of possible articulations.<sup>99</sup> They insist on “the openness and indeterminacy of the social.”<sup>100</sup> The play of “discursive practices” is free of

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of feminist environmentalism); RICHARD A. POSNER, *SEX AND REASON* 23–36 (1992) (providing a clear, brief, and more sympathetic look at social constructionism which, however, tentatively, embraces a weak version of sociobiology). *See also supra* notes 14–15 and accompanying text, and *infra* note 95–96. Not all feminists agree. For a thoughtful and comprehensive account of various feminist views of human nature circa the early 1980s, see JAGGAR, *supra* note 18.

94. *See, e.g.*, Nancy Chodorow, *Gender, Relation, and Difference in Psychoanalytic Perspective*, in *GENDER* 25, 25–26, 38 (Carol C. Gould ed., 1997); Ann Ferguson, *A Feminist Aspect Theory of the Self*, in *GENDER, supra*, at 66, 70, 83; Ruth Ginsberg, *Audre Lorde’s (Nonessentialist) Lesbian Eros*, in *GENDER, supra*, at 128, 131–34.

95. BEST & KELLNER, *supra* note 15, at 51 (stating a conception of essentialism attributed by the authors to Michel Foucault).

96. RORTY, *OBJECTIVITY, supra* note 13, at 213 (citing ROUSSEAU, *SOCIAL CONTRACT, supra* note 2, at 141 (“Man is born free, and everywhere he is in chains.”)). Rorty misstates Rousseau’s point, which was that human nature must be transformed. Rousseau thought it was men and not their nature that was to be emancipated. *See supra* note 2 and accompany text.

97. RORTY, *MIRROR, supra* note 13, at 362–63.

98. ERNESTO LACLAU & CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS* 153 (1985).

99. *Id.* at 116.

100. *Id.* at 144–45.

"any a priori class [or other] character of struggles or demands."<sup>101</sup>

These formulations are not transparent, and their full exploration would lead us afield. If they imply that any account of how we are is as valid as any other, except those on which there is a fact of the matter about us, social or otherwise, they are incoherent. If anything goes, why not naturalism?<sup>102</sup> Even if such a view could be made coherent, however, nothing as exciting as the abandonment of objectivity is required by the fact that human nature must inevitably be conceived in some particular way ("discursively constructed") or that there are different ways of conceiving it ("alternative descriptions"). Some of the particular conceptions nonetheless might be true, and since some of them are mutually inconsistent, some of them *must* be false. The fact that art or religion may offer insights into human nature does not undermine the idea that science may offer such insights as well, or that it might be right where they are, in some sense, wrong.

Happily, we can avoid the metaphysics here. Even Rorty or Laclau and Mouffe do not really believe anything as radical social constructivism in any concrete context where it matters. Laclau and Mouffe profess a sort of democratic feminism and socialism.<sup>103</sup> Rorty advocates a "reformist left."<sup>104</sup> He holds that "women . . . are capable of more than . . . males had thought [and] that property is not sacred,"<sup>105</sup> although he would drop "the revolutionary rhetoric of emancipation . . . in favor of a reformist rhetoric about increased toleration and decreased suffering."<sup>106</sup> But these and similar writers *must* believe people really do have the potential to behave as they would hope in an environment changed in the ways they recommend. "Essentialism," in this sense, cannot be coherently denied.

Why do egalitarians have such a strong resistance to the notion of human nature? I suspect it is because the rhetoric of human nature has been so consistently invoked by inegalitarians as an obstacle to the sort of policy and legal reforms egalitarians advocate. Rather than contesting the asserted inegalitarian monopoly on the concept of human nature, egalitarians have

101. *Id.* at 86.

102. For similar criticisms, see, for example, Bernard Williams, *Auto-da-Fé: Consequences of Pragmatism*, in *READING RORTY* 26 (Alan Malachowki ed., 1990); Norman Geras, *Post-Marxism?*, in *DISCOURSES OF EXTREMITY: RADICAL ETHICS AND POST-MARXIST EXTRAVAGANCES* 127 (1990). For responses by Rorty and Laclau & Mouffe to such criticisms, see, for example, Richard Rorty, *Pragmatism, Relativism, and Irrationalism*, in *CONSEQUENCES OF PRAGMATISM* 160 (1982); Ernesto Laclau & Chantal Mouffe, *Post-Marxism without Apologies*, 166 *NEW LEFT REVIEW* 92 (1987).

103. See LACLAU & MOUFFE, *supra* note 99, at 199.

104. RICHARD RORTY, *ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH-CENTURY AMERICA* (1998).

105. RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 196 (1989).

106. RORTY, *OBJECTIVITY*, *supra* note 13, at 213.



tended to concede the point while denying that this piece of intellectual property has any value. They implicitly grant that if there *were* a human nature, it *would* frustrate their goals, and conclude, therefore, that there is no such thing. This political objection is, however, a mistake for at least two reasons.

First, it does not follow from the fact that talk of human nature is often deployed in an intellectually disreputable way for politically suspect purposes that the concept is tainted *per se*. A more plausible notion of human nature is in principle consistent with egalitarian goals and purposes. If human nature is a set of potentials for a range of behaviors that may be realized differently in different environments, there is no *a priori* reason to doubt that the behavior required by egalitarian ideals might be realizable in an attainable range of environments.

Second, it is a fallacy to assert that, e.g., phenomena such as the female monopoly on childcare or class inequality are and must be due to human nature because it would be awful if these things were true. Perhaps things *are* awful from an egalitarian perspective. It does not follow that the argument from nature, or at least its conclusion in a particular instance, is wrong simply because its wrongness is necessary for egalitarian goals. These may be, as matter of fact, unattainable, and as I shall show, perhaps because of human nature *properly conceived*. Politically motivated environmentalism is to be resisted. What possibilities human nature allows is an exceedingly difficult empirical question that I do not try to answer here. I believe that the inegalitarians are not, in general, right, but their conclusions, insofar as they are empirical theses, *might* be right.<sup>107</sup> Once the necessary clarifications are made about what is involved in having a nature, egalitarians and their opponents should be arguing about what human nature is and whether and at what price it allows for the changes in question, not whether there is such a thing.

## II. THE ABSTRACTIVE CONCEPTION AND UNCHANGEABILITY

### A. *The Incoherence of the Abstractive Conception*

If it is widely thought that knowing what human nature is would tell us what would count as a good society, it is also, and oddly, widely thought that to know what human nature is we must know what people would be

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107. The argument based on the abstractive conception, see Part II, *infra*, is incoherent. The unacceptable costs argument, see Part III, *infra*, is another story. Whether particular inegalitarian arguments are defensible depends on the argument and the claim asserted. No useful generalizations can be made without considering the specific issues and evidence offered in favor and against a particular view.

like in *abstraction* from society. The abstractive conception of human nature is the idea that human nature is the set of dispositions humans have to act apart from any social influences. If we knew this, the reasoning runs, we could make the appropriate sort of laws, policies, and institutions for creatures like that. In many cases, the "appropriate sort" turns out to be a lot like what we have.<sup>108</sup> The plausibility of this argument derives from the notion that those characteristics are what we have to work with and so constrain what we can do. One version of this argument goes back to the social contract myths of Hobbes, Locke, and, to some degree, Rousseau.<sup>109</sup> Among the purpose of these myths was to find the best sort of society, "tak[ing] men as they are [outside of society] and laws as they might be."<sup>110</sup> For Rousseau, human nature can be changed by social arrangements.<sup>111</sup> Hobbes, however, offers a fairly pure instance of the abstractive conception. He thinks that without social institutions of a specific sort, individual rational self-interest would leave us prone to conflict in a struggle for scarce resources.<sup>112</sup> He argues that given this nonsocial nature, the best alternative to a "state of war" is political absolutism<sup>113</sup>—in his day, the dominant, though contested, form of political society.<sup>114</sup> Modern incarnations of the abstractive conception are provided by the biological determinists mentioned above.<sup>115</sup> Some more liberal

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108. Arguments that a correct understanding of human nature often are offered to show that the status quo as it happens to exist at the time is the best or only possible alternative. Such arguments vary mainly with whatever happens to be the status quo at the time. Garfinkel calls this extraordinary correspondence of biological nature with the needs of a given form of social organization "[t]he Immaculate Conception of Social Roles." ALAN GARFINKEL, *FORMS OF EXPLANATION* 111 (1981).

109. It is implicit in the structure of Hobbes' argument that human nature is fixed. Entry into the civil state does not alter the "restless desire for power in all men." HOBBS, *supra* note 24, at 80. Rather, it merely overawes its manifestation. *See id.* at 100, 103.

110. ROUSSEAU, *SOCIAL CONTRACT*, *supra* note 2, at 141.

111. For Rousseau, the founder of society can "change human nature." *Id.* at 163. "The passage from the state of nature into civil society produces quite a remarkable change in man . . . [It transforms him] from a stupid, limited animal into a man." *Id.* at 150–51. Part I of, Rousseau's *Discourse on the Origins and Foundation of Inequality Among Men* is an account of the transformation of human nature. ROUSSEAU, *DISCOURSE ON THE ORIGINS AND FOUNDATION OF INEQUALITY AMONG MEN* (1755) [hereinafter *DISCOURSE ON INEQUALITY*], reprinted in *THE BASIC POLITICAL WRITINGS*, *supra* note 2, at 39.

112. *See* HOBBS, *supra* note 24, at 100. Men "naturally love Liberty and Dominion over others." *Id.*

113. *Id.* at 142–50. *See id.* at 155–67 (comparing monarchy favorably to aristocracy and democracy).

114. When Hobbes' *LEVIATHAN* was published in 1651, England was embroiled in a civil war to determine the fate of absolutism. *See generally* MICHAEL J. BRADDICK, *GOD'S FURY, ENGLAND'S FIRE: A NEW HISTORY OF THE ENGLISH CIVIL WARS* (2008).

115. *See, e.g., supra* notes 4, 19, 35, 43, 46, and accompanying text. It is not my intention to offer detailed discussion of arguments of particular writers. My strategy will be rather to analyze a common patterns of argument, citing only exemplary statements for

sociobiologists argue *for* certain social changes on these sorts of grounds.<sup>116</sup> Wilson urges increased tolerance for homosexuality because he thinks it is genetically determined, so gays and lesbians cannot choose their sexual preference, and therefore ought not be blamed for it; besides, it evolved because it was adaptive.<sup>117</sup> But egalitarian biological determinism is no less a mistake than the inegalitarian sort. I do not of course mean that all egalitarian, or for that matter, inegalitarian, invocations of our biological nature are *ipso facto* erroneous, merely those that commit the fallacies critiqued here.

The abstractive move is deeply problematic. The most important social behaviors cannot even be *described* abstractively. Class hierarchy, gender subjection, and other traits that describe social interactions can, as a matter of logic, only occur in a social context. The hereditarians, however, suppose that they are based on biological—specifically genetic—factors that are not themselves social and limit the scope of social change. “Biological constraints exist that define zones of improbable or forbidden entry,” Wilson asserts.<sup>118</sup> For both Hobbes and the biological determinists, the implications for change are generally pessimistic. The iron hand of nature bars the route to egalitarian destinations. Two questions arise here: (1) why accept such a view of human nature; and (2) why think it tells us what sort of society is best?

As to the first question, abstraction from society is a curious move. Why think that what makes, say, an ant an ant is something independent of a crucial commonality with actual ants, namely having a social or group character?<sup>119</sup> Many ants are after all social insects. The thought is that there

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illustrative purposes.

116. The anthropologist Ashley Montagu once argued that feminist changes were in order because women were biologically *superior* to men on a number of dimensions—they were more loving, nurturing, etc. ASHLEY MONTAGU, *THE NATURAL SUPERIORITY OF WOMEN* (1968). A number of cultural feminists have maintained such views more recently.

117. See WILSON, *supra* note 4, at 142–47. This view has been given some renewed impetus from dubious scientific studies, which have been received with mistaken enthusiasm in some sections of the gay and lesbian community. See Simon LeVay, *THE SEXUAL BRAIN* (1993) (arguing that homosexuality is inherited). One quick way to see that Wilson’s theory is mistaken, and his hope that if homosexuality were shown to be genetically determined, increased tolerance would result, is to reflect on the fact that racial differences, as normally understood (at least in terms of physical appearance), are known to be far more “genetically determined” than homosexuality; but this has not promoted interracial harmony in the slightest. On the contrary, it is often used to argue that certain races are genetically inferior. See HERRNSTEIN & MURRAY, *supra* note 19; LEVIN, *FEMINISM*, *supra* note 43. Moreover, the argument has the flavor of an excuse, as if homosexuality were something regrettable but inalterable, a notion that defenders of gay and lesbian liberation ought to be reluctant to concede.

118. WILSON, *supra* note 4, at 81.

119. To call ants “social” is a potentially misleading anthropomorphism, but I shall use this convention to refer to ants that live and cooperate in groups, with the caveat that ant

is something nonsocial, perhaps biological, which explains why it has that character. Even if so, though, why think that nonsocial something is its *nature* in a way that its social character is not? Turn the point around: take what an ant in a social context has in common with one that is not in a social context. Call that common trait  $P_1$ . Now  $P_1$  is no more or less *the nature of an ant* than are the features  $P_2 \dots P_n$ , which all ants share in a social context. Neither is  $P_1$  ant nature in a way that the features  $P_m \dots P_z$ , which an ant shares only with more restricted groups, such as its particular species or its kin, are not. And finally, it is no more especially ant nature than feature  $P_\phi$  that an ant may have independently of any social context, that is, regardless of whether it is in such a context. All these traits are equally ant nature in the sense that they are potentialities manifested in environments.

I have identified the nature of anything with the notion of a potentiality. When I say a trait of an ant or anything else is a potentiality, propensity, or disposition, I mean there are certain properties such as  $P_1$  that the thing has, in virtue of which it behaves in a certain way or manifests a trait,  $B_1$ , whenever the ant is exposed to appropriate triggering conditions  $C_1 \dots C_n$  in a given environment  $E_1$ .<sup>120</sup> These properties may be physical or biological, but in the case of sentient organisms like humans, they may also be psychological and social.<sup>121</sup> Conditions  $C_1 \dots C_n$  are causally relevant to manifestation of  $B_1$  in that environment. Together with the physical or biological properties of the ant underlying  $B_1$ , they produce, *ceteris paribus*, the behavior or trait in the ant when they occur together. They are jointly determinative of its manifestation.<sup>122</sup> The total set of such

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"society" is not much like that of humans. I use the example of ants because Wilson is an entomologist.

120. See Susan Mills & John Beatty, *The Propensity Interpretation of Fitness*, in *CONCEPTUAL ISSUES IN EVOLUTIONARY BIOLOGY: AN ANTHOLOGY* 36, 42–44 (Elliot Sober ed., 1st ed. 1984); Henry E. Kyberg, *Propensities and Probabilities*, 25 *BRIT. J. PHIL. SCI.* 358 (1974); J.A. Coffa, *Probabilities: Reasonable or True?*, 44 *PHIL. SCI.* 186 (1977).

121. Even if psychological or social properties are also physical or biological, they are nonetheless still psychological or social properties, just as water is still water even though it is also  $H_2O$ .

122. The term "determinative" should not be taken to mean that if the explanatorily relevant dispositional properties  $P_1 \dots P_n$  and the triggering conditions  $C_1 \dots C_n$  do jointly occur, then the behavior  $B_1$  necessarily occurs. Dispositions are notoriously probabilistic, and in many important cases, perhaps inherently and irreducibly so. See Peter Railton, *A Deductive-Nomological Model of Probabilistic Explanation*, in *THEORIES OF EXPLANATION* 119 (Joseph C. Pitt ed., 1988). Hence the expression "causally relevant." See *id.* at 125–26; Peter Railton, *Probability, Information, and Explanation*, 48 *SYNTHESE* 233, 239–44 (1981) (arguing that causal relevance is a matter of providing explanatory information). One need not accept Railton's quasi-empiricist theory of explanation to invoke this notion. Even where the manifestation is strictly deterministic *ceteris paribus*, *ceteris* may not be *paribus*. See Mills & Beatty, *supra* note 121, at 43.

dispositional properties that anything has is its nature.<sup>123</sup>

The kernel of truth in the abstractive conception is that what all ants share in any context may restrict the range of potential behaviors. "People change their attitudes consciously . . .," says Wilson. "Nevertheless this flexibility is not endless."<sup>124</sup> Fair enough. We cannot simply will, for instance, that men should bear children, or that after millennia of women's monopoly on childcare, people will turn on a dime to become feminist egalitarians. But knowing what we, or ants, will do in abstraction from a social context does not necessarily tell us what they or we will do when they or we are, as usual, in a social context. This brings us to the second question.

Why think whatever we are like in a nonsocial state bears on the proper sort of society for us, as Hobbes and contemporary biological determinists claim? The idea that it does depends on the view that human nature is the nonsocial core around which society is built, which nature is either realized or frustrated by laws and policies of different sorts. Such social factors, it is said, are exogenous to human nature. But more plausibly, they interact with whatever nonsocial nature we have in any setting or alone in ways that may affect the appropriate sort of laws and policies for us. As ant nature is group, human nature is social in the strict sense. This is the norm in most circumstances,<sup>125</sup> which raises doubts about the informativeness of abstraction for grasping what is the best sort of society.

Inegalitarians will reply that the relevance of the abstractive view of human nature lies in the issue of *unchangeability* as related to the nature-nurture controversy. The view is that our nature is what we have in

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123. Here I follow the view of the early Putnam, who identifies the "nature" of anything (gold, water, lemons) with its "hidden structure" or "essence" rather than its "superficial characteristics," that is, its manifested traits. See 2 Hilary Putnam, *The Meaning of "Meaning,"* in MIND, LANGUAGE, AND REALITY: PHILOSOPHICAL PAPERS 215, 235-41 (1975). This scientific realist account is inconsistent with empiricism, which rejects talk of underlying essences and restricts itself merely to the language of law like generalizations that explain observable events when their antecedents are true. This is not the place to defend realism against empiricism, but see, for example, Hilary Putnam, *Explanation and Reference,* in MIND, LANGUAGE, AND REALITY, *supra*, at 196; RICHARD W. MILLER, FACT AND METHOD: EXPLANATION AND CONFIRMATION IN THE NATURAL AND SOCIAL SCIENCES (1987) (setting forth, *inter alia*, the now generally accepted critique of logical empiricism).

124. WILSON, *supra* note 4, at 125.

125. Feral children who somehow survive to maturity outside human society, like the famous Kaspar Hauser (1812-33), unsurprisingly do not exhibit the normal range of human capabilities. Hauser was not a "true" feral child; he was raised alone in a dungeon, could speak some, and learned enough language to tell his story. See MICHAEL NEWTON, SAVAGE BOYS AND WILD GIRLS: A HISTORY OF FERAL CHILDREN (2002). See also JEFFREY MOUSSAIEF MASSON, THE WILD CHILD: THE UNSOLVED MYSTERY OF KASPAR HAUSER (1996); Bruno Bettelheim, *Feral Children and Autistic Children*, 64 AM. J. SOC. 455 (1959) (comparing the behavior of true feral children to extreme autism or Asperger's Syndrome).

abstraction from the social environment and is *therefore* unchangeable, so it unavoidably constrains any possible social arrangements. That "therefore" does a lot of work. Alternatively, inegalitarians invoke (rather better) arguments that the changes egalitarians want, while perhaps possible, would create immense unhappiness or impose unacceptable costs upon us.<sup>126</sup> Consider these kinds of argument in turn.

*B. Nature or Nurture: A False Dichotomy*

There is a tendency to ask, if we consider any human phenomenon such as women's subordination or economic inequality: is it nature or nurture? This is a false dichotomy. Explanations do not divide neatly into natural or nurtural, although we may emphasize one aspect or the other depending on our pragmatic concerns. Are the characteristics of a tomato the product of a plant *or* of soil, water, and sunlight? They are obviously the product of both. To explain a feature of tomatoes, we need to refer to both plant and environment. We cannot do without either. Now, someone might grant this, but want to know which is more important. This invokes the image of an explanatory continuum:

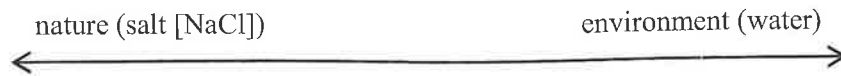


If the question amounts to an inquiry about what percentage of each we need for a tomato to manifest some trait that interests us, the reply must be that we cannot sensibly ask this. There is no explanatory question to which we could identify an answer that we could coherently state as a proportion. We cannot even say that the answer is equal proportions. There is just a necessary contribution from each. In view of this, it should also be obvious that how tomatoes behave will depend upon the circumstances. It is their nature to grow and reproduce if planted in fertile soil, watered, and given adequate light. Take away the conditions for growth and reproduction by uprooting the plants, failing to provide them water and light, and these phenomena will not occur. It is also the nature of tomatoes to die apart from sunlight, soil, and water.

Or if we ask why salt dissolves in water, the answer is because of how its chemical structure, NaCl, Sodium Chloride, reacts when it is immersed in water. What is the relative contribution of the salt and the water to the phenomenon of solubility (propensity to dissolve in water)? This evokes again the image of an explanatory continuum:

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126. See *infra* Part III.



Which is more important? Again the question is not sensible. Solubility is a *joint* property, a dispositional property of salt displayed in environmental circumstances, *i.e.*, immersion in water. It is not an incremental result of the nature of salt, such that the more water to salt, the more solubility. Like the potential of tomatoes for growth, that of salt for dissolving in water depends on the circumstances, here, the presence or absence of water. Given its chemical structure, salt will be a crystalline solid if kept apart from water and will dissolve if immersed in it.

The point of these examples is that the nature of any phenomenon or behavior, whether of tomatoes, salt, or human beings, consists in propensities of the thing to manifest themselves in certain specific ways depending on the circumstances. Whatever the manifested behavior, say, growth and reproduction for a tomato or dissolution for a salt, the trait is a function of the dispositional properties or propensities of the thing, based on its physical, biological or other characteristics, and of the circumstances in which it is found. It makes no sense to ask what is the nature of the thing *apart from any circumstances*, or which of these factors—the propensities or the circumstances—matters more for the manifested behavior.

### C. *The Fallacies of Genetic Determinism*

#### i. Heritability and the “Contribution of Nature”

But people talk about human nature in this incoherent way, invoking the concept of a nature that is rigidly manifested in the same way whatever the circumstances and cannot be changed however the circumstances vary. Since the development of genetics in the late nineteenth and early twentieth centuries,<sup>127</sup> “nature” in this context has often been identified with *genetic* nature, the contribution of the information-bearing proteins and amino acids governing the development of the cells of which organisms are constituted. Since we cannot at present easily change our genetic structure,

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127. See, e.g., GARLAND ALLEN, *LIFE SCIENCE IN THE TWENTIETH CENTURY* (1978); HORACE FREELAND JUDSON, *THE EIGHTH DAY OF CREATION: MAKERS OF THE REVOLUTION IN BIOLOGY* (2d ed. 1996). Watson and Crick’s 1953 discovery that genes are made of DNA came a hundred years after Mendel’s discovery of the gene and 40-some years after Thomas Hunt Morgan’s rediscovery and revitalization of Mendel’s work, tying genes to chromosomes. See *id.*, *passim*. Biological determinism and the “scientific” argument from nature, not until later invoking genetics, is least as old as Mendel. See GOULD, *supra* note 18.

many inegalitarians now think that it limits social hopes for egalitarian change. "The consequences of genetic history cannot be chosen by legislators,"<sup>128</sup> admonishes Wilson. Claims that genetic structure is itself inalterable by human effort may be becoming outmoded.<sup>129</sup> This may ultimately undermine the supposedly scientific basis of inegalitarian claims based on an inalterable genetic nature in a far more direct way than mere argument. However, today neither legislators nor scientists can choose the consequences of genetic history. Noting that science may yet moot the question, I proceed with that caveat.

Wilson's way of talking, repeated by more recent writers like Pinker, presupposes that we could segregate and quantify the relative contributions of nature and nurture to human behavior. One way to understand the confusion involved here turns on grasping the misuse of the distinction between genotype and phenotype. Intelligence, selfishness, nurturance, or any trait that might bear on the debate over the limitations our genetic nature may impose on ambitions for legal and policy reform, will be phenotypic. That means it is the manifestation in a given environment of the genetic possibilities encoded in the genotype, the naked genetic information inscribed in the DNA, to express the idea roughly. Various phenotypic traits, such as those mentioned, can be manifested from the same genotypes in different ways depending on the environment. Nature *or* nurture is a false dichotomy because the traits that interest us are necessarily environmentally manifested and vary in their manifestation depending on the environment. Is it nature or nurture? It is always and necessarily both. Neither, in the nature of things, can be more explanatorily important.

It *is* sometimes possible in principle to determine quantitatively the genetic contribution in a given phenotype. Holding an environment constant for a population, we can sometimes specify how much of the *variance* in the phenotype is explained, statistically, by genetic factors.<sup>130</sup>

128. WILSON, *supra* note 4, at 7.

129. See Christopher M. Holman, *Copyright for Engineered DNA, an Idea Whose Time has Come*, 113 W. VA. L. REV. 699, 720–21 (2011) ("[S]ynthetic biologists have made great strides in rationally engineering complex and original genetic sequences, as illustrated by examples such as the development of GAT [a commonly used genetically engineered pesticide]"). Synthetic chemicals are not the likely limit to these techniques. Andrew W. Torrance writes, "The ability of human parents to select genetic traits for their children is now more a question of when rather than if." Andrew W. Torrance, *Open Source Human Evolution*, 30 WASH. U. J.L. & POL'Y 93, 108 (2009). If so, this poses important ethical, policy, and legislative questions as well as more technical judicial ones about intellectual property. See JOHN H. EVANS, *PLAYING GOD? HUMAN GENETIC ENGINEERING AND THE RATIONALIZATION OF PUBLIC BIOETHICAL DEBATE* (2002).

130. In technical statistical terms, the variance is the mean average of the squared deviations from the mean of a data distribution. Although we cannot sensibly ask how much of an individual's height or IQ score is due to genes and how much to environment, we *can*



Surely, it will be said, this measurement tells us the contributions of naked genes and expresses precisely a notion of genetic determination. Even if in practice the determination cannot be made for many traits given our state of knowledge, for instance, with the genetic contribution to IQ because of the extreme scarcity of identical twins raised in appropriate circumstances necessary for reliable twin studies,<sup>131</sup> still in principle there is a determinate degree of variance due to the genotype in the case of each phenotypically manifested trait.

Heritability is the proportion of the variation in a trait in a population that is due, statistically, to the genetic variance.<sup>132</sup> To say that a trait has low or high heritability means that its manifestation by individuals in the population with the same genetic makeup or genotype, varies widely (low heritability) or little (high) from its average manifestation in a population in an environment. In some cases we can quantify the heritability of a trait in an environment and a population and determine, more or less precisely, the amount of variance in those circumstances that correlates with the genetic contribution. The variance of some traits, like speaking French or practicing law, has virtually no correlation with the genotype in any environment. That of others, like being a certain height or having eyes of a certain color, has a rather high correlation with the genotype in most environments. Inegalitarians like to argue that certain traits that they believe are linked to status quo inequalities, such as intelligence, purportedly measured by IQ tests (Herrnstein, Murray), or a propensity for nurturing children (Goldberg, Levin), are highly heritable. These claims are empirically suspect,<sup>133</sup> but here I address what heritability means and how

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ask what proportion of the deviation of the individual's height or IQ score from the mean of its measure in the sample of the population that we study can be ascribed to the deviation of her environment from the average environment and how much can be ascribed to the deviation of this genetic value from the mean genetic value. See Richard C. Lewontin, *The Analysis of Variance and the Analyses of Causes*, in *THE IQ CONTROVERSY* 179, 182 (N.J. Block & Gerald Dworkin eds., 1976). ELLIOT SOBER, *PHILOSOPHY OF BIOLOGY* 188-90 (1993) (providing an informal treatment).

131. See Kamin, *supra* note 18 (discussing the twin studies in detail); David Layzer, *Science or Superstition? A Physical Scientist Looks at the IQ Controversy*, in *THE IQ CONTROVERSY*, *supra* note 131, at 210 ("For [heritability] estimates to be meaningful, the relevant environmental differences between separated twins must be statistically indistinguishable from those between individuals selected at random from the general population. None of the major twin studies . . . come close to satisfying this requirement."). This underlines the inseparability of environmental factors from genetic explanation.

132. See N.J. Block & Gerald Dworkin, *IQ, Heritability, and Inequality*, in *THE IQ CONTROVERSY*, *supra* note 131, at 410, 474 (defining heritability as the variance caused by genetic variance divided by total variance).

133. For critical appraisals of the claim that IQ is highly heritable, see, for example, various essays in *THE IQ CONTROVERSY*, *supra* note 131. These criticisms have even more force against notions like nurturance or selfishness, which resist quantification even in the way that IQ purports to quantify intelligence. Without a reasonably precise definition of a

it affects claims about unchangeable human nature.

## ii. Heritability Depends on the Environment

High heritability is deployed in inegalitarian arguments as if it meant a larger contribution by nature and *therefore* greater unchangeability. This argument is a patent fallacy for at least two reasons. Even where we can determine heritability, doing so tells us nothing about unchangeability in *all* environments, much less about the contribution of "nature" versus "nurture" abstracted from *any* environment. Quantitative determination of the heritability of a well-defined term may sometimes be possible through the analysis of variance, but only if the environment is held constant for a given population. Even high heritability for a trait in a population and environment does not reflect what the possible range of environments might be and thus the range of phenotypical manifestations possible in that range of environments or for different populations.

Whether intelligence is a well-defined characteristic is controversial,<sup>134</sup> and the case is even worse for traditional gender roles. Consider height, however which is uncontroversially clearly defined and highly heritable. What does high heritability tell us about relative contribution of nature and nurture or about changeability? Suppose tall people do not feed their children well. Suppose short people do. The ratios of height of children will differ from cases where we hold diet constant. So the fact that height is (say) 95 percent heritable in some environment for some population does not tell us that it is 95 percent "determined by genes" in all environments for all populations, or that the heritability of height of some population is unchangeable. It is meaningless to talk of "the" heritability of height per se. The heritability of a trait depends on the environment and has meaning only with reference to a particular population.

But suppose that environmental change has reached a saturation point. We improve health and diet as much as possible, but the correlation between parents' and children's height remains fairly stable and constant. Is that not nature? It *is* nature, in that people have the potential to grow to certain heights given a certain diet. It is not nature *bare*, because height is phenotypical. When, given such a diet, children do grow to certain heights, we see the operations of a joint disposition manifested in the proper set of conditions in which regularities are sensitive to that genetic component. The manifestation of the genetic nature underlying the regularity, however,

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trait and an accurate way to provide a quantitative measure of the trait, it is impossible to determine its variance in a population.

134. See, e.g., GOULD, *supra* note 18, at 234 (arguing that a correct understanding of factor analysis shows that no psychological quantity answers to IQ).

varies in different environments, such as those where diet and health are less optimal.

I do not claim that genes impose no limits whatsoever on our potentials. I could not be eight feet tall even with “proper” food. The potential that I had to grow had certain genetic limits. “So,” says the inegalitarian, “in the end, genes enter with their iron hand!” But we might just as well say the environment has “iron limits.” If I had not been fed properly, I would not have grown to 5’9” (175.26 cm). If the inegalitarian says, “Good: two iron hands!” we must reply that the issue is not nature versus nurture, the iron hand versus the blank slate, but what variables are in the scope of change and how easily they can be changed. The limits themselves may change depending on how the variables interact.

The interplay between nature and nurture is famously illustrated by PKU, a genetic disease that causes severe neurological developmental problems if allowed to run its course.<sup>135</sup> The abnormalities arise from inability to metabolize a particular amino acid (phenylalanine). One gene does in fact cause PKU,<sup>136</sup> a fairly unusual situation. But the developmental pattern associated with PKU is alterable by changing the environment. PKU babies can grow up without problems if they are kept on a diet without the troublesome amino acid. “Nature”—genetic nature, anyway—does not do all the work. If we ask why a PKU baby is abnormal, the answer that the baby reacted to this amino acid (“nurture”) is just as accurate as the answer as that it has the PKU gene (“nature”). Which answer we give will depend on our explanatory and pragmatic interests. Both are correct.

Heritability, then, tells us little about changeability. That some characteristic is to some degree heritable in a given environment does not tell us what patterns hold if we shift the environment or consider a different population. We should not be asking whether human nature, *qua* potentialities or capacities for behavior, is “determined by genes.” In this way we mislead ourselves into thinking that there is a special genetic determinism which is unlike any other determinism in that it operates without boundary and initial conditions, and is rigidly manifested in all circumstances. Even the laws of physics are not like that. Classical mechanics does not say that matter will behave in the same way regardless of the circumstances, but only how it behaves if the boundary conditions include flat space-time and velocities relatively low compared to the speed

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135. See GARFINKEL, *supra* note 109, at 116–17; WILSON, *supra* note 4, at 57–58. Babies are routinely tested for PKU.

136. Seymour Kaufman, *A Model of Human Phenylalanine Metabolism in Normal Subjects and in Phenylketonuric Patients*, 96 PROC. NAT’L. ACAD. SCI. 3160 (1999); Robin A. Williams et al., *Phenylketonuria: An Inborn Error of Phenylalanine Metabolism*, 29 CLINICAL BIOCHEMICAL REV. 31 (2008).

of light. To get any specific predictions, we have to specify initial conditions, including a given distribution of masses with these and such velocities. The heritability of a trait is explicitly defined in terms of its boundary conditions. The two points to be emphasized are that (1) heritability has no meaning in the abstract, apart from an environment; and (2) heritability in one environment conveys little information about unchangeability because it does not take into account the possible range of environments.

### iii. Our Acquired Natures

Another reason to reject the argument that some trait is unchangeable because it is highly heritable is that our genetic nature, while part of our nature, is not the whole of it. Our nature is our full set of potentialities, not just our genetic potentialities.<sup>137</sup> Acquired capacities such as practicing law, speaking French, making war, or raising children are no less part of our nature. There are no genes "for" law, French, war, or childrearing in the way there are "for" height or PKU. Even if there were genes "for" law or French, that would not guarantee that their carriers manifested these traits in any environment regardless of circumstances. These traits are based in psychological and social structures instilled in social interaction—they are learned. But if "nature" is a set of potentialities for behavior in certain circumstances, these potentialities are no less products of our nature for being the result of nurture. Law school, a social institution, creates the psychological structures that enable the behavior associated with legal practice, as boot camp does those associated with war. These natures are localized and nonuniversal, but universality is not a necessary criterion for naturalness. Any potentialities shared by all humans are simply universal natures; those shared by smaller groups (lawyers, soldiers, French speakers, parents) are local natures.<sup>138</sup> All are dispositions that can be triggered to produce the characteristic associated behavior in the appropriate circumstances.

The significance of the fact that our nature is not merely genetic is that even if all of the traits that underwrite hierarchy are highly heritable in most known human environments and for all of humanity as a population, we are not necessarily "determined" to manifest them. We can shape our institutions as best we can to get around the less desirable parts of our

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137. Of course these acquired potentialities are biologically based in the sense that we have a biologically based potential to acquire these capabilities in certain environments.

138. The locality of our local natures is contingent. Anyone who could learn a language can learn French. Anyone capable of a certain minimum of physical activity can be a soldier or a parent. With proper training, anyone capable of a certain moderate level of intellectual activity could be, heaven forbid, a lawyer. Therefore, these are potentially universal natures.

genetic heritage. Should our universal genetic natures dispose us to sort women into the nursery and men onto the battlefield, we might use our acquired natures to counteract these predilections, unhappy or otherwise, depending on our values.

In general, locating a trait in the domain of "nature," or among basic genetic potentialities, does not mean that it is unchangeable. To the extent that a genotype explains a given phenomenon, it does so only relative to a particular environment. Talk of the genotype alone "determining" any fact or behavior is a biological fallacy.<sup>139</sup> If the environment is altered, the genetic contribution to the explanation of a trait's occurrence is likely to diminish. The color of peppers is a highly heritable trait, but if I wish to know why the ones on my table are green, the best answer is probably that they were picked before they fully ripened. Human nature may be such that there is an attainable range of environments we can choose or construct in which the cooperative characteristics egalitarians require can be manifested even if another range of environments encourages inegalitarian institutions.

#### D. *The Argument from Universality*

If our question is why people behave as they do in a given environment and how much this behavior can be changed, the abstractive move means we are comparing incomparable cases. How people would behave in abstraction from history or culture, if that notion is at all coherent, will not tell us much about how they will behave *in context*. This raises the issue of what *would* count as evidence for claims about human nature, properly understood as explained above. We must look at the contexts and see how people behave in them. One source of evidence is the observed range of human behavior revealed in history. Both advocates and opponents of particular policy and legal reforms quite properly cite history to make their points. Inegalitarians are fond of pointing to the universality of certain behavioral traits. Goldberg, for instance, insists that "all societies are patriarchal."<sup>140</sup> He wishes to conclude from this that all societies must be patriarchal. His hereditarian argument is intended to provide support for that universal claim. The leap from all observed environments to all possible ones, however, is a large one.

Given a coherent concept of a nature as a set of propensities, the evidence of history has very different sorts and degrees of explanatory

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139. Speaking in what were then science fiction terms, some radical feminists urged that genetic engineering and replacement of biology by technology might someday be possible. See, e.g., SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* 273-74 (1970). That day might be much closer to hand, for good or ill, than anyone might have imagined forty years ago. See *supra* note 130.

140. GOLDBERG, *supra* note 43, at 1.

force and relevance. Any way that people do behave is natural in that if they *do* so behave then they *can* so behave. That is why feminists are concerned to produce evidence of societies in which the relations between the sexes are not relations of female subjection. Even one such example shows that women's subordination is not inevitable. Likewise, critics of capitalism emphasize the brief time that it has existed to call our attention to the possibility of other forms of economic coordination. But egalitarians cannot draw the same comfort from the historical record. If their argument is that some social arrangements are *impossible*, this cannot be read off the purported fact that they have never been actual.

This is a point of *logic*. Even absent actual evidence of more equal gender or economic relations, these may be possible in circumstances that have not been realized. There is good reason to think the actual range of behavior is far smaller than the possible range. People are capable of a much wider range of behaviors than they have actually shown. Before the seventeenth century, no one would have imagined that capitalism was possible. Before the nineteenth century, few would have supposed that democracy was possible. Before the twentieth century, only a handful of dreamers thought that formal equality for women might be possible.<sup>141</sup>

So the common egalitarian argument<sup>142</sup> that all hitherto existing societies have had feature *x* (traditional gender roles, class inequality, etc.) does not provide more than a *prima facie* reason to think that all possible societies must have *x*. It does provide at least that much. It thus tends to shift the burden of persuasion to egalitarians to tell an alternative story.<sup>143</sup> However, while the pervasiveness of *x* gives us reason to seek an explanation of why *x* is pervasive, it provides no reason to think that the explanation lies in human nature abstractively understood. Instead, it could lie in features of social institutions shared by all actual societies, but not necessarily by all possible ones.<sup>144</sup> The features may have a biological component with higher or lower heritability. As we have seen, high heritability does not imply inalterability. If we find such a feature, it may be easy or hard to change, whatever its explanation.

If all hitherto existing societies do have feature *x*, a generalized reference to human nature is not a good explanation of this. Such an

141. One might also reflect on our darker potentials. No one could have imaged Auschwitz or the Gulag before the twentieth century either.

142. See, for example, Brown's list of "Human Universals" (cited in PINKER, *supra* note 4, at 435-39) (derived from D.E. BROWN, HUMAN UNIVERSALS (1991)).

143. See *infra* Part IV for some sketches of some alternative explanations.

144. Marx and Engels observed that "the history of all *hitherto existing* society is the history of class struggle," KARL MARX & FREDERICK ENGELS, MANIFESTO OF THE COMMUNIST PARTY (1848), in 6 COLLECTED WORKS 477, 495 (Int'l Publishers 1976), but argued that class struggle results from alterable structural characteristics of divided societies. See, e.g., *infra* Part IV(B). Hence the "*hitherto existing*."

explanation is on par with that offered by Molière's physician of why opium produces sleep: because of its "dormative potency."<sup>145</sup> Even if such an explanation is true, it is relatively uninformative. Feature *x*, if actual, *is* human nature in that human nature is the set of potentialities that can be so manifested, in the subordination of women, for instance, or class stratification. But this neither tells us little about why *x* is so widely manifested, nor does it suggest that human nature does not contain other potentialities, e.g., for greater women's or economic equality, realizable under some circumstances. Nor does the actual universality of *x* carry any particular normative implication, such as that *x* is good or right.

Negatives are hard to prove. Impossibilities are even harder. But egalitarians, if they rely on the impossibility argument, adopt the burden of proving negatives and impossibilities: that human nature *is not* and *cannot* be a certain way. This can be done, although its application to the case of legal and policy change is difficult. Consider ants again. Can they be ten feet tall, as in some science fiction movies? It can be shown that size and physical structure are so related that if an ant were "enlarged" beyond a certain rather small size, it would collapse or be unable to breathe. That ten-foot tall ants do not exist is no accident. They are opposed by established empirical regularities of structural engineering.<sup>146</sup> In general, we may say that something may be taken to be impossible if its actualization would violate demonstrated physical, biological, social, or psychological principles. We must specify, however, which principles. And the demonstration must be provided, not merely asserted. In the interesting cases—the social or psychological ones—producing violations of demonstrated principles that do not beg the question will not be easy.

#### *E. Changeability and the Environment*

Egalitarianism should refrain from rejoicing here, for two reasons. First, if supposing "natural" means "invariable" is a mistake, supposing that "environmental" or "social" means "easily changeable" is no less an error. How easy is it to improve tomatoes as plants by the sort of genetic "engineering" farmers have been doing time out of mind—crossbreeding—as opposed to giving them more sunlight? Sometimes it is easier to select by crossbreeding if the weather is inhospitable. The weather may be less

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145. THOMAS KUHN, *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* 24–25 (1977) (quoting JEAN BAPTISTE POQUELIN MOLIERE, *THE IMAGINARY INVALID*, Act III, Sc. XXIII (3d Interlude) (1673)).

146. See STEPHEN JAY GOULD, *EVER SINCE DARWIN: REFLECTIONS IN NATURAL HISTORY* 171 (1977); JOHN B. HALDANE, *ON BEING THE RIGHT SIZE AND OTHER ESSAYS* (1985). The classic "giant ant" film is *Them!* (1954), where the increased size of the ants is due to atomic radiation.

susceptible to control than our ability to crossbreed plants that will grow in the shade. In that case it is easier to change the genetic nature of the plant than to alter the environment. The same point holds for more controversial social behaviors that interest us, such as egoism, competitiveness, or female subordination, whether proximately due to preferences or not. If we are interested in how changeable some trait might be, we should address that issue directly. Even if we can determine how much of the variance in an environment is due to genetic factors, a large biological contribution will not establish unchangeability, nor will a large environmental contribution rule it out.

Women's subordination illustrates how exceedingly difficult environmental variables are to change. The subjection of women is perpetuated by powerful male interests and by the psychological investments of many women whose sense of self-worth is threatened by equality.<sup>147</sup> Changing the legal and social facts that constitute the practices and institutions of patriarchy, and especially those that contribute to its persistence, is exceedingly difficult. The campaign for women's suffrage in America took over seventy years, from Seneca Falls, N.Y., in 1845, regarded as the beginning of the movement for women's suffrage, to the enactment of the Nineteenth Amendment. Women have come further toward at least formal equality than anyone might have imagined in 1845 or even 1920, but we are still a long way from even the liberal feminist ideal of equality. Rhode estimates that at current rates of change it will take fifty to one-hundred years to achieve a sexually balanced workplace.<sup>148</sup>

Economic transformations involving reductions in material and social inequality also run up against environmental limits. Speaking of more radical sorts of changes than any contemplated in this Essay, and setting aside the question of their desirability, Marx thought that the obstacles to socialism were so severe as to require "violent overthrow of the bourgeoisie"<sup>149</sup> and he was fairly clear-eyed about the difficulty of organizing the working class to this end.<sup>150</sup> More modestly, consider the

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147. See KIRSTEN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 197–208 (1985) (explaining that female anti-abortion activists find the feminist ideals implicit in pro-choice politics a threat to their sense of identity and self-worth).

148. RHODE, *supra* note 60, at 163. Twenty years later, the longer estimate seems more plausible.

149. MARX & ENGELS, *supra* note 145, at 477, 495. Marx's skepticism about the parliamentary road to socialism has been supported by subsequent historical experience. See, e.g., ADAM PRZEWORSKI, *CAPITALISM AND SOCIAL DEMOCRACY* (1985) (arguing that the pressures of electoral politics undermine the working class militancy necessary for radical social transformation).

150. See MARX & ENGELS, *supra* note 145, at 492–93 (noting that competition among workers, among other obstacles, impedes working class activity). See also Allen Buchanan, *Revolutionary Motivation and Rationality*, in MARX AND JUSTICE 86 (1982) (arguing that socialist organization is a public good involving collective action problems because it is in



organization of labor unions: “half [of American workers] would like traditional union representation.”<sup>151</sup> In 2010, private union density was 6.9 percent,<sup>152</sup> down from about a third in the 1950s.<sup>153</sup> The causes are complex, including globalization,<sup>154</sup> harsh employer opposition to unions,<sup>155</sup> and the fact that, as Stephen Befort noted, U.S. “labor law is not kind to employees who desire union representation . . . .”<sup>156</sup> Befort continues:

the most significant impediment to the ability of employees to [unionize] flows from employer participation in the [union] election process. Given management’s natural economic leverage . . . , . . . employer opposition to activities is not lost on the employee electorate . . . . [These] tactics, moreover, frequently spill over to include illegal conduct, and the NLRA’s tepid remedies fail to deter such illegal tactics as the discharge of union supporters.<sup>157</sup>

The difficulties of organizing under such conditions, and of the weaker party implementing legislative reforms, underline that “socially constructed” does not imply “easily changed.”

Second, genetic variables may not interact with the environment in the way we might like. Consider a feminist ideal advocated by, e.g., Dinnerstein or Chodorow—more equal male parental care and increased female sexual freedom. Under some environments, men may become involved and loving parents; under others, women may develop dispositions to greater sexual freedom. But if the two sets of environments do not overlap, these desiderata may be mutually inconsistent. It may be that in the environments where women have greater sexual freedom, men will not be participatory caretakers of children, and vice versa. If we

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the interest of each worker that *others* act to bring it about, but not in the individual interest of each that *he* so act).

151. RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 14 ex. 7.2 (1999).

152. Steven Greenhouse, *Union Membership in U.S. Fell to a 70-Year Low Last Year*, N.Y. TIMES, Jan. 21, 2011, available at <http://www.nytimes.com/2011/01/22/business/22union.html>.

153. SAMUEL BOWLES ET AL., *UNDERSTANDING CAPITALISM: COMPETITION, COMMAND, AND CHANGE* 121–46, 226–311 (3d ed. 2005), 165–66 & fig.7.1 (citing U.S. BUREAU OF LABOR STATISTICS, *Historical Data Series*, <http://data.bls.gov> (last visited Mar. 2, 2012)).

154. See, e.g., Katherine V.W. Stone, *Flexibilization, Globalization, and Privatization: Three Challenges to Labor Rights in Our Time*, 44 OSGOODE HALL L.J. 77, 83–84 (2006) (stating that investment location is negatively correlated with levels of unionization).

155. See, e.g., James B. Atleson, *Law and Union Power: Thoughts on the United States and Canada*, 42 BUFF. L. REV. 463, 490 (1994) (discussing “the continued and often vehement opposition of American employers to unions”).

156. Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 410 (2002).

157. *Id.*

evolved a propensity for maternal nurturance that was adaptive in a wide range of environments, like those that our hominid ancestors encountered, it may be that "small fluctuations in the environment will not modify the behavior. An environment that allows us to reach states in which [it] is absent would have to be radically different from those for which selection has fashioned us. Ill-equipped by evolution for our new surroundings, we shall suffer much unhappiness."<sup>158</sup> We have no evidence for this particular pessimistic conclusion.<sup>159</sup> It does, however, suggest a more sophisticated egalitarian argument.

### III. UNACCEPTABLE COSTS AND THE LIMITS OF NATURE

#### A. Tradeoffs, Costs, and Benefits

The unacceptable costs argument says we can attain egalitarian aims, but only at such an extraordinary price that they would not seem desirable, all things considered. For instance, Wilson admits that "[s]ocieties can probably cancel the modest genetic differences [between the sexes] entirely by careful planning,"<sup>160</sup> but warns that "there is a cost, which no one has yet measured, awaiting the society that moves either from juridical equality of opportunity between the sexes to a statistical equality of their performance in the professions or back to deliberate discrimination."<sup>161</sup> Without explaining why it should be so or how he knows this, Wilson cautions that "[t]he amount of regulation required [for such changes] would certainly place some personal freedoms in jeopardy . . . ."<sup>162</sup> Oldenquist is likewise vague when he discusses increased sexual freedom: "That there is almost always a price to pay seems beyond doubt, although it is not easy to understand why this is or even what the exact nature of that price is."<sup>163</sup> Pinker claims the unchangeability of human nature and the unpredictability of the effects of social change means that "we should not attempt to solve social problems like crime or poverty, because in a world of competing individuals, one person's gain may be another person's loss. The best we can do is trade off one cost against another [while making incremental

158. KITCHER, *supra* note 16, at 129. Kitcher does not think that this has been established. He mentions it as a possibility that egalitarians must face even if they insist on the potentials view of human nature. *Id.*

159. See *infra* Part III(A) & (B).

160. WILSON, *supra* note 4, at 129.

161. *Id.* at 147. Wilson seems to assume that deliberate discrimination against women is a thing of the past.

162. *Id.* at 133. See also LEVIN, FEMINISM, *supra* note 43 (arguing more strongly that feminism and freedom are incompatible).

163. OLDENQUIST, *supra* note 4, at 176.

changes].”<sup>164</sup>

Talk of immeasurable or unmeasured costs or unspecified distributions of gains and losses is not decisive, particularly when the costs of discriminatory and oppressive practices are measurable and high.<sup>165</sup> Perhaps some desirable changes would incur too great a cost, creating “an invitation to calamity,”<sup>166</sup> but to know whether this is the case, we need to have precise arguments that link roughly plausible estimates of the costs to particular features of human nature as realized in particular circumstances, and which balance these against the costs of the alternatives. Sometimes these arguments are available. The wreck of Soviet Communism, for example, has taken that sort of attempt at realizing egalitarian ideals off the table,<sup>167</sup> although the extent and way its failures might be related to human nature is highly uncertain and debatable. Many egalitarian reforms, however, including those mainly discussed as exemplary here, face no such decisive resolution. As we have seen, inegalitarians often paint with a very broad brush. Two versions of the unacceptable costs argument might be called the “self-realization argument” and the “benefits argument.”

*B. Would Egalitarianism Make Us Miserable?*

The self-realization argument contends that women’s subordination, class inequality, or whatever unpleasant feature of society we might care to consider expresses deep human needs that can be frustrated, but only at the price of misery. Perhaps we could build a society in which men and women shared social benefits and burdens equally, or where any economic inequalities were to the benefit of the least well off, but, it is sometimes said, such changes would only make us unsatisfied and neurotic. “[O]ur Pleistocene genes have become our secret . . . inheritance,” Andrew Oldenquist writes, “[w]e experiment with social schemes and when we go too far, what makes us miserable is not the natural environment, which we have largely mastered, but the emotional needs and aversions we carry out of our tribal past.”<sup>168</sup> Traditional heterosexual marriage is one of his

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164. PINKER, *supra* note 4, at 289 (emphasis in original). Pinker then proceeds to quote conservative thinker Edmund Burke on the French Revolution. Pinker does not explain why it is a problem if a rich person’s loss is a poor person’s gain. *Id.*

165. *See supra* notes 60 (sex differentials in wages); 76 (inequalities of wealth), and *infra* notes 177–78 (psychological harms of class inequality).

166. PINKER, *supra* note 4, at 290.

167. *See, e.g.,* AFTER THE FALL: THE FAILURE OF COMMUNISM AND THE FUTURE OF SOCIALISM (Robin Blackburn ed., 1991).

168. OLDENQUIST, *supra* note 4, at 173 (emphasis omitted). Oldenquist offers no evidence or argument that toleration of homosexuality diminishes the happiness of children. The claim that we have largely mastered the natural environment seems like hubris. *See, e.g., supra* note 87 (discussing, *inter alia*, Hurricane Katrina).

primary examples; homosexuality, he says, is tolerated at a risk to the happiness of our children,<sup>169</sup> and "nonpossessive sexual relations" or the "liberated, permissive family" would frustrate our deepest inherited instincts.<sup>170</sup> Likewise, territorial instincts underlie the institution of private property, with which we tamper at our peril.<sup>171</sup>

We have no particular reason to think that increased tolerance for a wider range of sexual or familial behavior or greater or lesser alterations in property arrangements would lead to genetically induced disaster.<sup>172</sup> As Mill argued, it is not as if we are so certain about what conditions must hold for people to be happy that we can dispense with experimentation.<sup>173</sup> But even if egalitarian changes would make us unhappy in the ways he claims, we must balance the costs of neurosis and dissatisfaction against those of oppression. Freud argued in a different way that civilization was precisely a matter of repressing basic human drives and inherently involved *das Unbehagen*, discontent.<sup>174</sup> Expressing all the aspects of our nature might not be the best thing for us, all things considered. Since our nature includes potential for horror and oppression, expression of all its aspects would not be the best thing for *others*, a fact reflected in the criminal law, which exists to repress the uglier manifestations of our nature.

Suppose we could only be satisfied if we raped, murdered, and plundered even more than we already do. Then it might be best that we were dissatisfied by being restrained from such conduct. Likewise, if the alternative to misery and neurosis were subordination and oppression, we might reasonably choose to be unhappy, but free and equal. If we had to choose between expressing the hierarchical and domineering aspects of our nature or living in a Hobbesian state of nature, with "continual fear, and

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169. OLDENQUIST, *supra* note 4, at 177–79.

170. *Id.* at 195, 197.

171. *Id.* at 191. Oldenquist is rather guarded about this claim, unlike Hirschliefer, who derives the entire structure of capitalist relations of production and distribution from evolutionary biology. See J. Hirshliefer, *Economics from a Biological Viewpoint*, 20 J.L. & ECON. 1 (1977). He does not explain, if so, why it took so long for humans to get around to capitalism.

172. The general sort of argument surveyed here has a long and less than reputable history. See, e.g., ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* (1991) (surveying several centuries of conservative argument that any attempt to change the status quo, typically in an egalitarian direction, will be counterproductive). However, particular arguments from unacceptable costs must be analyzed on their own merits, and not be besmirched with guilt or inadequacy by association.

173. See JOHN STUART MILL, *ON LIBERTY* 54 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859) ("[I]t is useful that while mankind are imperfect, . . . there should be different experiments of living; . . . and that the worth of different modes of life should be proved practically, when anyone thinks fit to try them.").

174. See SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* (James Strachey trans., 1930).

danger of violent death, and the life of man, solitary, poor, nasty, brutish, and short,"<sup>175</sup> we would probably choose the former. That was, after all, Hobbes's point. But it would be unreasonable to assume, at least on the sort of hand waving arguments like those of Wilson, Oldenquist, and Pinker, that a better balance of discontents is impossible, or that alternatives to what we have are really so grim. Traditional gender roles and women's subordination do not make a good many of us happy, or we would not have feminism. Of course, not all women are feminists, and not all feminists are women. But if traditional gender roles did not cause substantial dissatisfaction among women, there would be no organized and systematic criticism of these roles.<sup>176</sup> Class stratification has also caused a certain amount of dissatisfaction.<sup>177</sup> Sometimes the dissatisfactions of class society have led to open conflict and even revolution. Although workers in the capitalist democracies have resisted the appeals of social revolution, there is abundant evidence that class divisions promote humiliation, resentment, anger, and other injury.<sup>178</sup>

C. *Would the Costs of Egalitarianism Be Too High?*

The benefits argument is that unpleasant features of our society produce benefits we are unwilling to give up—for example that acquisitiveness and class domination produces material wealth that cannot be produced without them.<sup>179</sup> High productivity requires the incentive of private gain, it is said, because people would not work hard unless there is

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175. HOBBS, *supra* note 24, at 100.

176. The reverse is not necessarily true, although it would be some evidence that it was true.

177. See TIBOR SCITOVSKY, *THE JOYLESS ECONOMY: THE PSYCHOLOGY OF HUMAN SATISFACTION* 91–100 (rev. ed. 1992) (providing empirical evidence that “workers still find their work unpleasant”); HARRY BRAVERMAN, *LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* (1974) (offering analysis of the effects of the deskilling of work). *But see* ROBERT LANE, *THE LOSS OF HAPPINESS IN MARKET DEMOCRACIES* 73–74 (2000) (surveying evidence that employees enjoy their work more than most leisure activities). These propositions are not logically inconsistent.

178. See RICHARD SENNETT & JONATHAN COBB, *THE HIDDEN INJURIES OF CLASS* (1972); LILLIAN B. RUBIN, *WORLDS OF PAIN: LIFE IN THE WORKING-CLASS FAMILY* (1976).

179. David Ramsay Steele, for example, argues that the failure of worker's self-managed enterprises or cooperatives to proliferate in a market economy shows that the “package” of hierarchical management and wage labor with the material advantages of an advanced capitalist economy shows that “the loss in utility to external consumers, which would arise from self-management, is not fully compensated by the concomitant gain in work-satisfaction.” DAVID RAMSAY STEELE, *FROM MARX TO MISES: POST-CAPITALIST SOCIETY AND THE CHALLENGE OF ECONOMIC CALCULATION* 336, 333 (1992). I do not endorse this view. See Justin Schwartz, *Voice Without Say: Why More Capitalists Firms Are Not (Genuinely) Participatory*, 17 *FORDHAM J. CORP. & FIN. L.* (forthcoming 2012), at Pt. II(A) (critiquing this argument).

something in it for them—profit for capitalists, avoiding starvation or immiseration for workers.<sup>180</sup> To give such incentives up would produce universal poverty. Such claims might be disputed, for example, by observing that the existing distributions of incentives are not the only possible ones. In one alternative arrangement, where the workers managed the enterprises, everyone might get the profits and no one need face the threat of starvation.<sup>181</sup>

Or consider equal care in childrearing. Perhaps this is possible only where parents care *very little* for children, so care is equal, but at a very low level. Consider the Ik, a people in East Central Africa whose society was devastated by persistent famine. The results were a terrifying quasi-Hobbesean system in which food was the only good, and children were “put out” of the family at three or four years old and not cared for by either parent.<sup>182</sup> Here, though, the very low concern for children is more likely a result of extreme scarcity than of equal parenting.<sup>183</sup>

Another common view is that our identities are so deeply bound up with traditional gender roles that abolishing these roles would involve an unattractive move to a society of sexless disencumbered selves, beings for whom, for example, Homer or Shakespeare—or indeed Lady Murasaki or Jane Austen, had no resonance or echo in experience. We could do it, perhaps, but given what it would cost us in view of the full range of things we care about now, we would not want to if we understood the net losses. Sommers says, “The androgynous society has always been a boring feminist fairy tale with no roots in psychological or social reality.”<sup>184</sup> This

180. Many who think that hard work requires material incentives also expect women to do the hard work of childrearing and homemaking without them. Perhaps the theory that women are genetically wired for nurturance is supposed to reconcile these propositions.

181. See DAVID SCHWEICKART, *AGAINST CAPITALISM* (1993) (developing a model of economic democracy in which enterprises are collectively managed by workers); see also JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY*, bks. IV & V, at 118–43, 349–67 (Donald Winch ed., Penguin 1970) (1848, 1871) (a similar model, without collective ownership). RAWLS, *supra* note 5, offers an argument for *limited* material incentives.

182. COLIN M. TURNBULL, *THE MOUNTAIN PEOPLE* 121 (1972).

183. A less drastic example addressing this topic, although one better classified as a self-realization rather than a benefits argument, involves the reversion to disproportionate maternal care among second generation kibbutzniks who were raised in a more equal-care setting by parents who were ideologically committed to this goal. “Kin selection triumphs after half a century of ineffective suppression,” says van den Berghe, emphasizing that “the reversion to standard family groups was overwhelmingly a response to the mounting dissatisfaction of women.” PIERRE L. VAN DEN BERGHE, *HUMAN FAMILY SYSTEMS: AN EVOLUTIONARY VIEW* 74 (1979). But as Wilson himself notes, “this reversion merely [may] represent[] the influence of the strong patriarchal tradition that persists in the remainder of Israeli society.” WILSON, *supra* note 4, at 134. It is not as if the only influences on these women were their genes and their parents.

184. SOMMERS, *supra* note 43, at 265. The artistic expression of which Sommers would miss our appreciation in an androgynous society is the “idea of ravishment,” as suggested in

argument tends to confuse the abolition of *traditional* gender roles that assign benefits and burden unequally on the basis of sex with the abolition of *all* sex or gender differences.<sup>185</sup>

Assessing any particular claims of excessive cost is beyond my scope. I have done no more than indicate lines on which answers might proceed. But the need to balance costs and benefits still applies. To have force, inegalitarian objections on these grounds require plausibly estimations of costs that are causally linked to particular policy or legal proposals that purportedly would produce or require them. Given the measurable costs of existing inequalities of the sort discussed in this Essay, the costs of the practices or institutions that eliminate them would have to be high indeed to warrant reconciliation to these sources of suffering and diminishment. If more economic equality would produce universal poverty, or if feminism were realizable only in a society like that of the Ik, those might well be good reasons to eschew such changes. It remains to be shown whether anything like this would result from egalitarian reform aimed at amelioration or eradication of these problems. Inegalitarian arguments of this sort, however, must be taken seriously if properly articulated.

#### IV. ALTERNATIVE EXPLANATIONS

##### A. *The Need for Comparative Analysis*

Like the unchangeability argument, the unacceptable cost argument tends to underestimate the actual range of human behavior and to overestimate the costs and time necessary for transformation. This is a natural error considering our tendency to generalize from our own circumstances.<sup>186</sup> Both versions of the argument also tend to locate the

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the movie *Gone with the Wind* (1939). *Id.* at 262–64. Speaking just for myself, I do not think that an inability to understand the appeal of rape fantasies would be much of a loss. But inability to grasp, for example, the expression of the emotion of jealousy in *Othello* would be a real cost, even if the loss of jealousy as an emotion might not. Still we can grasp ideals and emotions that we can no longer really share, such as honor. See, e.g., JAMES BOWMAN, *HONOR: A HISTORY* (2006) (arguing that honor has declined as an ideal in Western culture and we live in a largely post-honor culture).

185. The confusion is furthered by the adherence to the latter, androgynous ideal, far less common in recent decades with the increasing influence of postmodern “difference” feminisms. See, e.g., FIRESTONE, *supra* note 140, at 217; Alison Jaggar, *On Sexual Equality*, 84 *ETHICS* 275, 275–91 (1974) (setting forth a classic statement of the androgynous ideal); Richard Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 *UCLA L. REV.* 581 (1977) (same); ANN FERGUSON, *SEXUAL DEMOCRACY: WOMEN, OPPRESSION, AND REVOLUTION* 207 (1991) (presenting a more nuanced expression of androgyny).

186. Kahneman and Tversky analyze how cognitive heuristics such as familiarity or

source of resistance to change in human nature, biologically understood—or misunderstood—rather than in social structure. If some behavior is pervasive, it is reasonable to ask why it is pervasive. To show that inegalitarian arrangements are demanded by biological limits on our potentials, either because no alternatives are feasible or because no feasible alternatives would be tolerable, it must be shown that such explanations are better than ones which account for inegalitarian arrangements in terms of other factors, or, indeed, of biological ones that need not be manifested in all attainable environments.

*B. Hobbesian Behavior and Market Society*

With regard to the aggressive and competitive behaviors characteristic of market societies, which help reproduce class divisions, we can look at the anthropological literature on the range of human behavior in some hunter-gatherer societies to test the validity in claims that they are, for whatever reason, inalterable. On some versions of the inegalitarian argument from nature, we might expect hunter-gatherers to be Hobbesian, perhaps Ik-like. Their members live under conditions of what we would call extreme scarcity, low technology, and relatively simple culture—"no commodious buildings; no instruments of moving and removing . . . no arts, no letters."<sup>187</sup> They lack a government. Hobbes would have predicted that they would live in a state of war. But the anthropologist Marshall Sahlins found societies under these circumstances in which people are not competitive, aggressive, or suspicious. They spend three to five hours a day gathering food and the rest of their time telling stories and sleeping.<sup>188</sup>

I do not mean to romanticize such societies or suggest that they provide feasible or even attractive alternatives for us. I invoke them only as evidence that we do not have to be Hobbesian. Nor do we have to choose between destitution and mutual terror and wealth for some and poverty for many, with frenetic and ceaseless labor for all. The sort of behavior Hobbes invokes to illustrate his proposition about abstractive human nature tending towards a state of war is in fact based on human behavior in certain *social*

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availability and salience, according to which more familiar, accessible, or memorable instances are judged to be more typical and representative than objective data will support. Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 3, 11–12 (Daniel Kahneman et al. eds., 1982). This helps to explain why people overgeneralize from their own circumstances. *Id.*

187. HOBBS, *supra* note 24, at 100. Hobbes, who wrote before the development of modern genetics, simply assumed that egoism was "human nature." Pinker presents a modern, "scientific" version of the egoist thesis. See *supra* note 84.

188. MARSHALL SAHLINS, *STONE AGE ECONOMICS* 9, 15, 19 (1972).



contexts—fear of impoverishment or starvation, violence, civil war.<sup>189</sup> In a world without certain sorts of threats to our physical or economic security, our capacities could allow us to be quite different from the way we are today.<sup>190</sup>

We are too familiar with the more Hobbesean response to scarcity. A quite different account of this behavior is possible. Rousseau accused Hobbes of reading back into the state of nature the conditions of a particular sort of civil society.<sup>191</sup> The charge is fair.<sup>192</sup> Under capitalism,<sup>193</sup> the incentive structure is such that employers must make profits or go out of business, even if they are not personally greedy. Employees must compete with each other for jobs or starve, even if they are not personally competitive. Employers and employees must compete with each other for shares of the surplus and for political power for fear that the other will get a dominating share and dictate terms of coexistence. They are forced to strive for “power after power,” as Hobbes put it.<sup>194</sup> In this story, the incentive structure does almost all the work. Given a fairly free market in goods and services, including labor, private ownership of productive assets, and employees with nothing to sell but their ability to work, characteristic Hobbesean behavior results. This incentive structure practically guarantees inequality, competitiveness, and aggression. A different incentive structure might produce different behavior. This is a plausible hypothesis that any

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189. HOBBS, *supra* note 24, at 100–01. For Hobbes these examples were not “evidence” but illustrations. Hobbes did not argue from observed reality but from first principles. Nonetheless their social context is telling counter-evidence to Hobbes’ deductions.

190. William Morris presented a powerful picture of such a world, quite different from a hunter-gatherer subsistence society, in his utopian novel *News from Nowhere*, in which the inhabitants of his ideal society devote themselves with a great deal of discipline and concentration to cooperative production and cultural pursuits. This world is no more fantastic, if perhaps less dramatic, than Hobbes’ dystopian state of war. See WILLIAM MORRIS, *NEWS FROM NOWHERE* (1888), reprinted in *THREE WORKS OF WILLIAM MORRIS* 179 (A.L. Morton ed., Int’l Publishers 1968).

191. ROUSSEAU, *DISCOURSE ON INEQUALITY*, *supra* note 112, at 53.

192. As Karl Polanyi said of the market conception of human nature associated with Adam Smith, “no misreading of the past ever proved more prophetic of the future.” KARL POLANYI, *THE GREAT TRANSFORMATION* 43 (1944). A similar sort of charge in reverse can be leveled against the pop sociobiologists, for reading into society what they purported to find in nature. Here the intellectual history is revealing. Darwin drew inspiration for the theory of natural selection from Malthus, whose political economy justified inequality based on a “struggle for existence” over inherently scarce food resources in a world of increasing population. CHARLES DARWIN, *THE AUTOBIOGRAPHY OF CHARLES DARWIN AND SELECTED LETTERS* 42 (Francis Darwin ed., Dover 1958) (1892). Darwin thus read into nature, as it happens correctly, Malthus’ specious apology for the class hierarchies of late eighteenth century England. Like the “Social Darwinists” of the generation following Darwin himself (e.g., Herbert Spencer), the pop sociobiologists of our own day read back into society as the rule of nature something what like Malthus supposed to obtain in his society.

193. BOWLES, *supra* note 154, at 121–46, 226–311.

194. HOBBS, *supra* note 24, at 80.

inegalitarian invoking the argument from nature must address.

But people created this sort of environment—does that not show human nature is to behave in a Hobbesian way? It does indeed, just as the nature of salt is to dissolve in water. But for salt to dissolve, it needs water. Unusual social circumstances created Hobbesian people. They are atypical in history and uncharacteristic of humans generally. “[N]o misreading of the past ever proved more prophetic of the future,”<sup>195</sup> Polyani said of Smith’s conception of human nature, read in a Hobbesian light. Marx, writing in 1867, when England was arguably the only fully capitalist country in the world, warned over-complacent German readers, “*De te fabula narratur!*”<sup>196</sup> (This story is about you!) Capitalism is less than 400 years old, perhaps less than 100 years old globally. Capitalist conditions are not the only ones that provide incentives for Hobbesian behavior,<sup>197</sup> but they do provide such incentives. Other conditions, like those Sahlins discusses, do not. Arrangements more commodious than those of Sahlins’ stone-age societies, but which incorporate some of their attractive features, are not necessarily foreclosed by our genes, whatever other problems they might face.

### C. *Women's Subordination in the Commonwealth of Men*

The subjection of women is much older than capitalism and nearly universal in historical societies.<sup>198</sup> Explanations for this are far less articulated than explanations for Hobbesian behavior in a market society. Engels suggested, based on the anthropological research of his day,<sup>199</sup> that the “*world historical defeat of the female sex*”<sup>200</sup> is explained by the male overthrow of matrilineal inheritance and imposition of patrilineality in

195. POLANYI, *supra* note 93, at 43. *See also supra* note 193.

196. KARL MARX, *1 CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* iii (Samuel Moore & Edward Aveling trans., Int'l Publishers 1867), in 35 *COLLECTED WORKS* (1996). The quotation is from HORACE, *SATIRES* 1 (author's translation).

197. *See* TURNBULL, *supra* note 183 (describing the effects of starvation on the Ik); THUCYCIDES, *HISTORY OF THE PELOPONNESIAN WAR* 2:47–58 (hereinafter *Thucydides's History*) (describing, *inter alia*, the effect of an epidemic on Athenian society). Hobbes was a great admirer of Thucydides and translated his *History*. *See* *Thucydides's History*.

198. *See* *TOWARD AN ANTHROPOLOGY OF WOMEN* (Rayna Reiter Rapp ed., 1975) [hereinafter *ANTHROPOLOGY*]; GOLDBERG, *supra* note 43, at 31–35.

199. Anthropology has developed a great deal since then. *But see* Kathleen Gough, *The Origin of the Family*, in *ANTHROPOLOGY*, *supra* note 199, at 51 (suggesting that new data supports Engels in part); Karen Sacks, *Engels Revisited: Women, the Organization of Production, and Private Property*, in *ANTHROPOLOGY*, *supra* note 199, at 211 (defending Engels' conclusions as the best explanation of new data).

200. FREDERICK ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE IN LIGHT OF THE RESEARCHES BY LEWIS H. MORGAN* (1884), in 26 *COLLECTED WORKS* 129, 165 (Int'l Publishers 1990).

order to ensure male control over the new wealth created by the invention of agriculture.<sup>201</sup> Catherine MacKinnon subjects Engels' account to a sharp critique, the gravamen of which is that for Engels, male domination "is present before it is supposed to have happened."<sup>202</sup> This objection is fair since Engels assumed, probably correctly, that men controlled the new agricultural wealth to start with. MacKinnon does not herself attempt to explain the origins of patriarchy. She urges a distinction between the question, "How did it happen that women were first subordinated to men?"<sup>203</sup> and the more pressing question, "Why are women oppressed and how can we change it?"<sup>204</sup> MacKinnon's is the sounder approach here. To account for the persistence of patriarchy as opposed to its origin, we might start with Hobbes' observation that, however male domination was established, its reproduction is explained in large part by the fact that men made the laws:

And whereas some have attributed the dominion to the man only, as being of the more excellent sex, they misreckon in it. For there is not always that difference of strength, or prudence between the man and woman . . . . In commonwealths, this controversy is decided by civil law, and for the most part . . . , in favor of the father; 'because for the most part commonwealths have been erected by the fathers . . . .'<sup>205</sup>

For Hobbes, then, the institutions of patriarchy persist because they are convenient to those, namely men, with the power to maintain it, however this power was attained.<sup>206</sup> This explanation suggests that the

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201. *See id.* at 162-66.

202. CATHERINE MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE* 28 (1st ed. 1989).

203. We may speculate on the origins of the subjection of women. One common hypothesis is that men originally seized dominance in virtue of their greater physical strength. *See, e.g.*, JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 5 (Susan Moller Okin ed., Hackett Publ'g 1988) (1869) [hereinafter MILL, *SUBJECTION*]. This conclusion is supported by Gough, *supra* note 200, at 70. Other theories emphasize on the psychological effects on the social division of labor of the early dependence of infants on their mothers. *See* DINNERSTEIN, *supra* note 87, and CHODOROW, *supra* note 87. This theory has roots in Rousseau. *See* ROUSSEAU, EMILE, *supra* note 30, at 361, while rejecting Rousseau's approval of the supposed results. These explanations refer to biological factors which are in themselves in fact hard to change, but which carry little implication of any inevitability of male dominance.

204. *Id.* at 21.

205. *See* HOBBS, *supra* note 24, at 152. *See also* MILL, *SUBJECTION*, *supra* note 204, at 5.

206. This account does not address how women's *consent* to laws and other norms that often frustrate their interests is maintained. *See, e.g.*, MACKINNON, *supra* note 203, at 83-105, 171-83 (arguing that women are socialized into feminine subordination). A deeper and more nuanced approach is developed by Bartky, treating traditional femininity as a sort of alienation. *See, e.g.*, SANDRA LEE BARTKY, *FEMININITY AND DOMINATION: STUDIES IN THE*

persistence and universality of women's subordination is due not to a rigidly fixed "human nature" as some sort of genetically imposed constraint on human behavior in all circumstances, but to the incentives people, *with* their biological propensities, have in certain social relations, as is also seen with market-driven selfishness and competitiveness in divided societies. Whatever biology may contribute to women's subordination, its causal efficacy might be undermined where the incentive structure changed so that men had retained no unequal power over women. The unprecedented advance of women's rights in our own time suggests that this might be so, if not now, then in the foreseeable future. Clearly our biology allows for the subjection of women, or we would not have it. But it does not follow that biology demands patriarchy in all circumstances, or that abolishing patriarchy would exact from us an intolerable price.

Inegalitarian defenses of class hierarchies characteristic of capitalism and of gender hierarchies that define patriarchy are in tension. Market society operates as a corrosive force with respect to the subordination of women.<sup>207</sup> In liberal capitalist democracies, women can be wage workers, lawyers, jurors, bartenders, soldiers, and Secretaries of State. The market drives women into the workplace, and the formal equality of liberal democracy allows them to pursue their interests by seeking power as well as influence. Perhaps there is a context in which traditional gender roles, which making women primarily mothers at the loss of other opportunities, can be transcended without merely assimilating women to the traditionally male roles available in liberal capitalism. This has not been systematically attempted; it has barely been tried at all.

## CONCLUSION

It is widely held that "we cannot picture . . . a world that is essentially different from the present one, and at the same time better."<sup>208</sup> Law and legislative policy cannot depart very far from the status quo because human nature stands in the way. Today this argument comes in scientific garb: our genetic inheritance, has barred with its iron hand any significantly different arrangements, or imposed so high a cost on alternative and more egalitarian

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PHENOMENOLOGY OF OPPRESSION 33 (1990).

207. See EPSTEIN, *FORBIDDEN GROUNDS*, *supra* note 10, at 42 (arguing that employment discrimination is inefficient because the market disadvantages employers with a taste for discrimination; *but see id.* at 59–62 (suggesting that discrimination may be rational because decision making is less costly in homogeneous groups); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 16–21 (1975) (similar, using example of discrimination on ideological grounds).

208. FRANCIS FUKAYAMA, *THE END OF HISTORY AND THE LAST MAN* 46 (1992). Fukayama's argument for this status quo proposition is very different from the sort discussed here.

practices or institutions that we would not want them at that price. Egalitarian critics of the status quo too often respond by denying that there is any such thing as human nature; our behavior, they say, is only due to nurture. We are blank slates for reformist proposals. Both sides depend on a fundamentally flawed conception of human nature—the “abstractive” conception, a set of dispositions rooted in nonsocial fact (typically biological) rigidly manifested the same way in every environment.

This misconstrues what it is for something to have a nature at all. A nature is a propensity to behave in a given way in a given context: the nature of salt includes solubility, but salt dissolves only in water. In air it is naturally a solid. Human nature includes propensities for inequalitarian behavior in certain familiar social environments. In others, different behaviors do occur or might be possible. To say that economic or gender inequality is inscribed in our DNA, inalterable because it is highly genetically heritable, is a version of this error. Our genetic natures are not the whole of our natures, nor do they dictate a single outcome in all environments. Nurture and nature are inextricably intertwined. The heritability of a trait and degree to which it can be attributed to genetics can be determined only relative to a given population in a given environment, and so says nothing about the degree of genetic contribution or alterability of the trait in different populations and other environments.

Less confused, but generally no better supported, is the argument that our human nature means that egalitarian law or policy reform would impose unacceptable costs because the interaction of genes and environment might mean that, e.g., ending the female monopoly on childcare would intolerably lower the amount of care children receive or that greater economic equality would condemn us to universal poverty. While some such claims may be true (although few are well supported), the costs of existing inequalities are usually ignored. Inegalitarians must provide evidence of the balance of costs to benefits, and to offer serious arguments from nature, tie the specific natural features (properly understood as propensities for certain behaviors in given environments) to the manifestation of traits that tip the balance in their favored direction. Hand waving will not do. Egalitarians, of course, assume the burden of persuasion to make a case that the benefits of the changes they advocate outweigh the costs.

If the real question is how alterable are a given set of arrangements at issue, then that is what we should address. Egalitarians who deny that there is a human nature, either because it would be unfortunate for their ideals or as a reaction to inegalitarians who monopolize the concept, mistakenly concede the “abstractive” conception and the validity of fallacious arguments based on it. They need and should not do so. The “abstractive” conception is wrong, not because it is politically inconvenient, but because

it is scientifically incoherent. However, the "propensity" conception of human nature based in a genuinely scientific understanding of genetics will not by itself give a green light to egalitarian reform. In some cases, such as economic inequality and women's subordination, we might also plausibly contend that environmental factors do most of the explanatory work—although no reliable studies of the heritability of, or even the agreement on the nature of, the traits producing these arrangements exist. Nonetheless, even if the causes could be linked in a range of environments and for a range of populations primarily to the environment that offers no assurance that the environmental explanations identify factors that are easily changeable. The "blank slate" may be a brick wall. The environment may be less alterable than biology. However, if we consider what legal and policy changes are attainable by identifying the source and degree of alterability of the explanatory factors that bear on it, rather than being sidetracked into the venerable but discredited argument from nature, we will have made considerable intellectual progress. A correct understanding of human nature is essential for this purpose.