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What Does Evolution Have To Do with Legal Enclaves?

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While we applaud Hudson, Bowen, and Nielson (2011) for demonstrating the correlation between two modes of contemporary sexist oppression (inequality in family law and violence against women), we are concerned about how they embed a contested narrative of human evolution into otherwise straightforward findings. We argue that claims about human evolution are unnecessary to their argument, and, more importantly, that the version of feminist evolutionary analysis they describe is less feminist than it could be.

Introducing family law as a key site of contestation over power and authority, the authors set out to address the "relationship between inequity in family law [. . .and. . .] physical violence against women" (Hudson, Bowen, and Nielson 2011, 455). Pertinent to our critique, they next describe unequal family law as a legacy of "persistent patterns of patriarchy throughout human history" whose explanation benefits from evolutionary hypotheses about the "ultimate causes" of men's and women's different and conflicting reproductive strategies (Hudson,

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Bowen, and Nielson 2011, 464). The most substantive section of their paper draws on the "WomanStats" database to analyze the association between family law and violence against women cross-nationally. They end the article by arguing against legal pluralism in family law, on the basis of their findings.

Unequal legal standing and physical violence are both attributes of the package of unequal gendered relations commonly called *patriarchy*. Hudson, Bowen, and Nielson argue that the correlation between these two conditions indicates that "states more closely tied to the human evolutionary legacy of male-dominance hierarchies and structural control of women by men are also states in which templates of violence and domination continue to be perceived as being 'functional'" (Hudson, Bowen, and Nielson 2011, 479). Citing several feminist biologists, but building largely upon the work of anthropologist Barbara Smuts (1995), the authors attribute patriarchal legal structures to an evolutionarily selected male strategy of dominating females. They thereby reproduce a narrative of patriarchy as universal and timeless — the old "boys will be boys" perspective (Crane-Seeber and Crane 2010).

Although numerous footnotes acknowledge scholarly support for a more historicist explanation for patriarchal relations, Hudson, Bowen, and Nielson instead describe patriarchy as driven by evolved characteristics. This choice has consequences, as the primordialist reading of patriarchy reinforces the common narrative about human evolution and "caveman masculinity" (McCaughey 2008), which makes women's sexuality appear, if anything, as a source of male jealousy and competition in human evolution (Small 1993). Hudson, Bowen, and Nielson repeatedly state that "proximate causes" (actual historical behavior) and "ultimate causes" (adaptations of human bodies) are "not mutually exclusive" (Hudson, Bowen, and Nielson 2011, 464). Without denying the existence of patriarchal social relations, we are nonetheless concerned about evolutionary narratives that read contemporary patriarchal practices into prehistory. We believe that unnecessary and controversial assumptions should be avoided wherever possible.

Following Smuts, the authors assert that human evolution is driven by the fact that "male reproductive success centers on control of female sexuality" since, without women, "men cannot reproduce" (Hudson, Bowen, and Nielson 2011, 465). They then cite Trivers' (1972) rehashing of Darwin's assumption that the more "eager" sex "invests less in reproduction." These two statements are made as though they are settled scientific axioms. Reproductive success, however, depends on

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linking males and females sexually, and males need not exert control, given female primates' demonstrated sexual enthusiasm (Small 1995: 63–154; Hrdy, 2000). Furthermore, the differential investment hypothesis presumes an exchange of female sexuality for male protection of a "wife" with children, naturalizing monogamous nuclear families. Yet because human infants are so dependent on nonparental support for survival, humans and other primates with highly dependent offspring usually live in groups, where aunts, uncles, and others provide care (Small 1998).

Precisely because of evolved adaptations like hidden fertility that obscure paternity, humans have physical and emotional responses that can be parsimoniously explained as selected adaptations to "sperm competition" (Gallup et al. 2003). This is a form of reproductive competition that occurs when females are sexually active with multiple partners and is typical of highly social primates. Unlike strongly polygamous baboons and gorillas with large size differentials between male and females, bonobos and chimpanzees (our closest genetic relations) have less dimorphism and show strong evidence of female sexual initiation strategies (Parish, De Waal, and Haig 2000).

This relates to Hudson, Bowen, and Nielson's second assumption about human evolutionary history — that males are *naturally* more sexually aggressive than females. This is not a universally accepted fact, leading some feminists to wonder if patriarchal institutions serve to control women's evolved disposition toward nonmonogamous sexual expression in order to bring them in line with patrilineal norms (see the "coy female myth" in Hrdy 2006). The narrative that Hudson, Bowen, and Nielson borrow from Smuts sees males as motivated to dominate and control females in order to ensure sole paternity in an evolutionarily selected pattern.

Evolutionary psychologists have used surveys (mostly of college students) to explain contemporary human sexual preferences in terms of evolved characteristics (cf. Ellis and Symons 1990), but many observed differences in male and female characteristics appear to result from methodological choices. In a cross-cultural analysis of men and women's behavior, Wood and Eagly (2002) found that their "biosocial" model better accounted for the diversity of human cultures and sexual relations than the standard evolutionary psychology approach. They noted that ecological and other conditions varied so greatly, that assuming an "adapted" basis for such complexity makes little analytical sense: "Sex-typed behavior reflects culturally shared social expectations and self-related processes, which are shaped by socialization and accompanied by

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biological processes, especially hormonal changes" (2002, 718). Finding a particular pattern to be widespread and then postulating an evolutionary selection mechanism is not a sound basis for theorizing either history or biology.

Interestingly, Hudson, Bowen, and Nielson do nuance their evolutionary explanation for patriarchal relations, noting how patriarchy may have grown out of economic and ecological conditions (notably, increasing inequality following agricultural settlement). This makes their choice of evolutionary theory as explanatory schema even more surprising. As Wood and Eagly note, "the behavior of women and men is sufficiently malleable that individuals of both sexes are potentially capable of effectively carrying out organizational roles at all levels [. . .] as substantiated by the considerable variability that we found across societies" (2002, 722). Indeed, had Hudson, Bowen, and Nielson built on a database of human cultures, as anthropologists commonly do, they may not have given primacy to evolutionary theory as an explanatory basis for their findings because they would have seen far more diversity.

We concur with their normative argument that women's human rights should not be compromised in the name of "traditional' family structures. That said, the WomanStats database codes the presence of polygyny itself as a sign of inequality. We would argue that the problem is not the number of spouses, but what legal tools and social solidarities women can access to protect themselves. Outlawing polygamy, like assuming heterosexual monogamy as natural, does not seem like the only implication of the complex and disputed legacy of human evolution. As Yanca and Low (2004) note, the density of connections between females best protects their security and social standing. Promoting those connections as a strategy of defending women's rights makes more sense, to us, than trying to push polygamous communities underground through legislation.

Ultimately, we are concerned that Hudson, Bowen, and Nielson assume an unpleasant primordial patriarchal order against which to measure progress. By accusing nations of adhering to a backwards "evolutionary legacy of male dominance" (Hudson, Bowen, and Nielson 2011, 486), they produce a teleology that posits liberal states' support for nuclear families as the vanguard of humanity. While we agree that women's human rights must not be surrendered in creating legal enclaves, we see the assumption that patriarchy is innate and universal as leading attention away from communities, ancient and postmodern, where economic abundance and dense social connections allow people a

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much freer set of possibilities for how to live, who to love, and how to procreate. We would remind would-be feminist Darwinians that:

> Our mating and sexual history is nonexistent and we must rely on a mix and match of clues. In that sense, scenario builders who weave complex tales of our evolutionary past are like mystery writers who know the end of the story, have a few hints about how the event occurred, but no real evidence. As a result, the stories of human mating evolution are as varied as the storytellers. (Small 1993: 190–91)

So let us be careful about the stories we tell about our past, lest they constrain our options in the present and *foreclose* desirable futures.

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The Retelling of Tales: Disentangling the Feminist Evolutionary Analytic Approach, Legal Pluralism, and Gender Justice

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Globally, women's movements share the twin concerns of equality within the family and freedom from domestic violence. The following questions conjoin and animate these debates: Given that violence against women is a global phenomenon, why are some states more effective at controlling domestic violence than others? What is the correlation between inequality encoded in family laws and the rate of violence against women in society? Are legally plural states more likely to demonstrate a higher degree of institutionalized inequality and gender-based violence within the family? The analytical peg for Hudson, Bowen, and Nielsen (2012) is the feminist evolutionary analytic approach (FEAA) that explains the almost universal prevalence of male dominance among humans during the course of formation of societies. It suggests that violence against women is greater in legal systems that design family law to maximize men's rights.

If, following the authors, we were to leave aside poststructuralist and feminist psychoanalytic approaches but consider social constructivism as a rival theory, then it could be argued that gender inequality and male power are intrinsic to violence against women in patriarchal societies and that biological differences are irrelevant. The counterfactual for social constructivists is that domestic violence would be eradicated under conditions of gender neutrality and the dismantling of patriarchy. In contrast, the FEAA is more ambiguous: It posits that male aggression is not biologically rooted but that it arises to ensure male reproductive

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