Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence

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Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence

Jeanne L. Schroeder*

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When I first read Robin West's essay *Jurisprudence and Gender,* I felt within me an undeniable resonance. Yet the "radical" theories she described did not accurately represent my own experiences or my observations of the men and women that I knew. Was this, I wondered, my recognition of a dimly perceived personal truth that I was trying to repress? It was only after rereading certain historical works in preparation for a book review that I realized why these theories seemed so elemental to me. They were eerily reminiscent of the theories of sexuality and female personality of my Roman Catholic upbringing. Here were the voices of Jerome, Augustine, Thomas Aquinas, and the Church Fathers and Doctors I had read as a teenager while trying to understand the vulgarized versions taught to me by local priests and nuns. My experience was not the recognition of a dimly perceived truth, but the imperfect recollection of lies told to me in my childhood, which I since have consciously tried to forget.

In the Middle Ages, a version of certain values which West recognizes as uniquely feminine was experienced by men as uniquely masculine. History shows that if a society reevaluates characteristics formerly labelled "feminine," men are capable of adopting these values and relabelling them "masculine." From the view of patriarchy, the formerly "masculine" characteristics—having been deprivileged—must, by definition, be relabelled "feminine." Women in a sense "become" the opposite of what they once "were," and patriarchy is perpetuated. Patriarchy does not depend for its existence on any one particular conception of masculine or feminine

1. West, *Jurisprudence and Gender,* 55 U. Chi. L. Rev. 1 (1988). For this article I have for my convenience adopted West's dichotomy of cultural feminism and radical feminism. See id. at 3; infra text accompanying notes 28-35. I realize that, like most attempts to categorize, the cultural/radical dichotomy results in oversimplification. In some cases, it may force misstatement of views to fit its categories, as well as ignore those theorists who do not fit into either category, including Ruth Colker, Drucilla Cornell, Angela Harris, and Joan Williams. It may also incorrectly suggest that feminist jurisprudence has degenerated into rigid, competing schools. Despite these limitations, I find this dichotomy to be a useful analytical tool for the task I wish to undertake.


3. I refer to the period approximately from 1050 through 1250 as the "high Middle Ages," the centuries preceding that period as the "early Middle Ages," and the period following it, through about 1500, as the "late Middle Ages." When referring to Italy, I sometimes refer to the latter portion of the high Middle Ages as the Renaissance. Although the labeling of time periods is controversial among historians, my characterization is not uncommon. See, e.g., J.W. Thomson, *Economic and Social History of Europe in the Later Middle Ages* (1900-1550) (1960); J. LaMonte, *The World of the Middle Ages* (1949). As with the cultural/radical dichotomy, I have adopted this historic periodization only for analytical convenience.
nature. Rather, it has in the past existed and continues to exist in different societies accepting differing definitions of these natures.

In this essay I argue that any sophisticated theory of jurisprudence and gender requires not only inspection and analysis of contemporary society and its stereotypes of the self, but also a recognition that contemporary stereotypes are culturally contingent. Women simply must define themselves, and not merely accept men’s definitions of them as the opposite or complement of men. A feminism historicized embraces this recognition as a step toward feminine freedom and a just jurisprudence for both sexes.

II. CONTEMPORARY “ESSENTIALIST” FEMINISM

A. The Ahistorical and Conservative Nature of Contemporary Feminist Theories

The contemporary feminist theories described by Robin West are ahistorical and surprisingly conservative in their explanation of both feminine and masculine nature and the bases for contemporary sexual law.

By ahistorical, I mean two things. First, these theories are based on the sense of self personally experienced by late twentieth-century American white professional-class individuals, and do not take into account the very different selves experienced by people living in other cultures and other historical periods. This sense of the “self”—the mediating experience of individuality and community—has been perceived differently in past societies, and to a large extent may be culturally determined. To derive essentialist theories of human nature and gender from only our own personal experience and the experiences of our contemporary intellectual neighbors is an act of cultural hubris, doomed to error and historic triviality.

Second, insofar as it accepts modern cultural descriptions of personality as universal, modern feminist jurisprudence fails to recognize the historical roots of the prejudices on which it is based. Indeed, if all we had to go by were our own experiences, the distinction between universal and

4. By “essentialist” I am referring to the notion that a single, universal women’s experience is isolated without reference to the realities of our experience—such as race, class, sexual orientation, and particularly, our shared past as reflected in history. Angela Harris makes a related argument concerning essentialism and the contingent nature of the “self” in Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 585 (1990). Unfortunately, charges of essentialism have become a standard feminist insult. Naomi Schor recently has characterized such charges as a form of “intellectual terrorism” used to silence or excommunicate rivals. Schor, This Essentialism Which is Not One: Coming to Grips With Irigaray, 1 Difference 38, 40 (1989). To reject “essentialism” totally is itself a form of neo-essentialism. That is, woman’s lack of essence becomes her essence. Drucilla Cornell makes this critique of simplistic anti-essentialist feminism in D. Cornell, Beyond Accommodation: Ethical Feminism, Sexual Difference, and Utopian Possibility (forthcoming 1991) [hereinafter D. Cornell, Beyond Accommodation]. I am not critiquing here any and all attempts to locate woman’s essence. Rather, I am critiquing what I perceive to be an unacknowledged and ingenuous confusion of what is at most an empirical description of women of a certain race, class, and culture with the universal condition of Woman, with a capital W.

5. See West, supra note 1.
historical descriptions would be very difficult to grasp. While it may be true that the theories described by West explain many of our social institutions, that may be so only because we have inherited many of these institutions from the Middle Ages. That is, the theories described by West may merely mirror the historical rationales for the very institutions these theories are attempting to critique. It is poor methodology to examine our own jurisprudence without also examining the culture and thought of the intellectual grandparents who gave birth to many of the ideas and cultural

6. Catherine MacKinnon has tried to obviate this essentialist problem by declaring her theories to be ahistorical—culturally restricted and "non-objective" by design. She thereby ostensibly avoids a definition of female or male nature, per se—which would be necessary for either a sameness or difference theory of sex discrimination—in favor of her dominance theory of sex discrimination. See, e.g., C. MacKinnon, Toward a Feminist Theory of the State 190-31 (1989) [hereinafter C. MacKinnon, Theory of the State]; C. MacKinnon, Feminism Unmodified 32-45 (1987); MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 Signs 635, 636 (1983) [hereinafter MacKinnon, Feminism, Marxism, Method II]. Many authors have criticized this approach because the very identification of what constitutes domination and subordination requires a theory, implicit if unstated, of human nature. For example, Silvia Law has argued that although the dominance approach may provide a useful structure for analysis, it may be too cumbersome to apply because different people may disagree as to what reinforces or undermines a sexual underclass. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1005 (1984). To recharacterize Law's point, a determination of what is dominance or subordination requires an external theory of human nature. If we rely merely on our individual subjective experiences, we may come to different conclusions as to what behavior is dominating or subordinating. See also Colker, Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity, 68 B.U.L. Rev. 217, 258 (1988) (discussing non-subordination as a pre-condition of intimacy); Finley, The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified, 82 NW. U.L. Rev. 352, 356 (1988) (suggesting that an underlying principle of MacKinnon's thesis is that inequality of power is "bad," which is similar in view to classic liberalism); Harris, supra note 4, at 582 (describing an instance in which unique, subjective life experiences dramatically altered an individual's intellectual and perceptual skills); West, The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 3 Wis. Women's L.J. 81, 132 (1987) [hereinafter West, Women's Hedonic Lives] (discussing sexual submission as the expression of a universally human desire to trust and depend on someone). I particularly admire MacKinnon's dominance analysis because she, unlike West, recognizes that the feminist claim to equality of women (much like the classical liberal claim of the equality of men) is political and philosophical, and is neither grounded in, nor can it be reduced to, a claim of empirical similarity of individuals. See infra note 25. I am also sympathetic to the dominance approach as a means of testing the application of certain laws, but would agree that without a "mega-theory" of human nature and a historical appreciation of the effect of alternate legal and social theories, the dominance approach gives no guidance as to how to "cure" a subordinating law. That is, as a practical matter, what does it mean to transform the political claim of equality into reality in the empirical world? See also Harris, supra note 4, for a critique of the unacknowledged racial hegemony underlying much feminist writing.

7. My emphasis on the influence of Western European Christian traditions could be criticized as a form of cultural imperialism. I believe that such a characterization would be incorrect. First, the critique of the unacknowledged Eurocentric bias of much feminist literature made by Harris and other women of color should cause European-American feminists to re-examine European history precisely so that we begin to recognize the culturally specific nature of ideas which we often incorrectly assume are universally feminine. Second, I do not wish to suggest either that other cultural traditions have not had a profound influence on the development of our law and culture or that our contemporary society is the result of an inevitable, mechanistic evolution from medieval European society. I am suggesting that medieval society is one of the historical antecedents of modern American society and that I find suggestive parallels and differences between the two societies which I believe may enrich
presuppositions of contemporary law and society. We may find that modern theories are not a discovery of universal metaphysical truths, but merely a repetition of the same old lies in modern dress. What has been called “feminism unmodified” may well be old fashioned “masculism” with minor modifications. On the other hand, these old stories might be repeated because they are partly constituted by some universal truths that can be recognized cross-culturally, even if previously imperfectly understood and distorted. In either case, historical analysis will enrich the analysis.

On the one hand, I suggest that there are parallels between medieval theories of female sexuality and contemporary radical feminism, but this does not require a conclusion that the latter is merely a historical throwback to the former, although I do find this to be an interesting proposition. These theoretical similarities might flow from certain “essential” constants of human nature or psychology. See R. Bell, Holy Anorexia (1985) (arguing interestingly, although not quite convincingly, that the psychological sources of medieval feminine spirituality, as evidenced by the great woman mystics such as St. Catherine of Siena, St. Clare of Assisi, and Andrea of Foligno, are the same as those of the modern disease of anorexia nervosa suffered by modern American girls). But see C. Bynum, Holy Feast and Holy Fast 194-207 (1987) (medieval women theologians devised a uniquely feminine theological theory of spirituality, women’s nature, and the body which was recognized and honored by the medieval Church as an acceptable alternative to the dominant masculine theories of the time).

On the other hand, I suggest that there are differences between the stereotypes of female personality adopted by medieval men and by cultural feminists, but this does not require the conclusion that either the medieval or the modern theories are wrong or right. It does suggest, however, that we should be very careful in our assumptions. 8

In an initially interesting but ultimately disappointing article (disappointing precisely because it starts so incitingly), Suzanna Sherry begins a historical analysis of the similarities between certain strains of modern feminist (or, as Sherry says, “feminine”) jurisprudence and classical Jeffersonian Republicanism. Sherry explains how Republicanism was supplanted by the liberalism of the Federalists which then became the dominant masculine political tradition in the United States. Sherry, Civic Virtue and The Feminine Voice in Constitutional Adjudication, 72 Va. L. Rev. 543 (1986). Rather than explore this interesting observation further, she suddenly switches gears in the middle of the article and discusses child psychology research that suggests that girl children value relationships and boy children value individualism. Id. at 584-85. For an earlier and more complete discussion of this same material, see C. Gilligan, In a Different Voice (1982). In her discussion Sherry seems to have drawn the lesson that many concepts which characterize classical Republicanism come more “naturally” to women than men (in the sense of deriving from the nature of our psychological development, not in the sense of genetic determinism). Sherry, supra. However, other than her attempt to compare the development of political philosophy in the West to Kohlberg’s description of the stages of moral development in the male child, Sherry makes no attempt to explain how Jefferson and his colleagues—who, as I remember from my high school history class were all male—came to have the views she now labels as feminine. (As though the classical Greeks, Romans, and enlightened Republicans were intellectual children?) Id. at 576-77. Nor does she suggest, as I thought that she was preparing to, that feminists should consider exploring Republican theory either as a basis for the development of a feminine jurisprudence or on a more mundane and instrumental level. See id. at 543-44. Because of the perceived similarity between modern feminine theory and one strain of political theory reflected in the U.S. Constitution, lawyers might consider using this classical Republican interpretive tradition as a tool to advance feminine objectives in constitutional adjudication. For example, as Martha Minow has pointed out, Supreme Court adjudication on sexual discrimination and pregnancy has tended to rely overwhelmingly on the concept of empirical equality, an individualistic value which presupposes a “norm,” or modern male experience, against which women are judged. See Minow, Justice Engendered, 101 Harv. L. Rev. 10 (1987). One alternative Lucinda Finley proposes is that child-rearing could be considered a civic good requiring personal
Now when I say that these feminist theories are conservative, I mean that despite their protestations of being a new and radical reconceptualization of feminine nature, these theories in fact accept a contemporary American intellectual masculine view of both male and feminine self. In patriarchal societies privileged values are characterized as masculine by definition. Following the precedent of their Western intellectual grandfathers, the American intellectual community has postulated what they believe to be virtuous in their society, identifying those virtues as peculiarly masculine in nature. The notions of virtue and of the male self have been defined by reference to their opposites—the “other,” woman. Hence, if aggressiveness is prized, men are aggressive as compared with innate female passivity; if intelligence is prized, men are smarter than women; if rationality, logic, and the scientific method are prized, men are less emotional than women, and hence boys do better on standardized math tests than girls.

sacrifice entitling mothers to certain benefits over the childless, just as we give veterans certain benefits over civilians. See Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 Colum. L. Rev. 1118 (1986). Could not such an alternate approach be supported by arguing that the Constitution not only protects the Liberal value of equality, but also the Republican value of civic virtue?

For the balance of her article, Sherry ignores Republicanism and analyzes Justice Sandra Day O’Connor’s opinions for their femininity. Sherry, supra at 592-613. Joan Williams has pointed out the disturbing tendency of many feminists to analyze other women in light of a preconceived concept of “femininity” and to criticize women who do not fit this stereotype as “male-oriented.” She amusingly, but accurately, says that this is reminiscent of our mothers’ (literally and figuratively in the sense of nineteenth-century feminists) criticisms of certain behavior as “unladylike.” Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 813 n.61 (1989).

9. I am not suggesting that the tendency to sexualize (or genderize) and hierarchize qualities and characteristics has not been noted by many feminists. Indeed, Carrie Menkel-Meadow points out that the variant equal-treatment and substantive equality (special treatment) schools of feminist policy may be seen as alternative responses to this observation. Menkel-Meadow, Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go To Law School,” 38 J. Legal Educ. 61, 73-75 (1988).

10. Christine Littleton and Carol Gilligan have suggested that in our society men and women have different values, and male values are more highly valued. C. Gilligan, supra note 8, at 16 (quoting Virginia Woolf); Littleton, Reconstructing Sexual Equality, 75 Calif. L. Rev. 1279, 1281-83 (1980). I agree, but am also suggesting something more. The values that are more highly valued are labeled as male values. But different values may be privileged (defined as masculine) in different societies. For example, because we prize rationality, men call their “characteristic” emotions (such as pride, anger, resentment, and other “hard” emotions) examples of cold logic and call women’s “characteristic” emotions (pity, sorrow, and other “soft” emotions) examples of uncontrolled emotionality. Since our society prizes rationality and objectivity, men tend to characterize their thought as rational and women as irrational or subjective. Disappointingly, many feminists have embraced this masculine characterization of feminine thought without reevaluating the definitions of these terms. See J. Schroeder, Abduction From The Seraglio 155 (1990) (manuscript on file with the University of Iowa College of Law Library).

Contemporary male intellectuals, especially those who identify themselves with the left-leaning trends of academia, have become sensitized to avoid such obvious sexist characterizations. Indeed, “she” has nearly superseded “he” as the indefinite personal pronoun in law review articles. As West and other feminist scholars have correctly pointed out, in spite of superficial changes in pronoun gender—now so easily accomplished by word-processing global search functions—masculine jurisprudence has continued its proud gender-exclusive tradition in its assumptions concerning human nature.
Medieval etymological scholars admitted as much when they construed the word virtue from *vir*, the Latin word for man, because he has more strength and rectitude than woman and, therefore, rules over her. The noblewoman most admired by secular society, the ruling queen or lady who led her people in battle, was "honored" with the title "virago"—man-like woman. Similarly, medieval theologians taught that women could only achieve the heights of spiritual perfection if they rejected their sexuality and became spiritual men—virgin viragos.

Contemporary legal feminism, by accepting both the dominant masculine definition of the self and the masculine assumption that femininity can only be defined as the negative or complement of masculinity, limits itself to accepting and reacting to the masculine identification of the dominant female stereotype with the feminine archetype. Consequently, if feminists belong to what West calls the cultural school they not only accept the male/female dichotomy of virtue versus the "other," but also adopt the view of female nature implicit in the masculine jurisprudence. Or, if

11. G. Duby, The Knight, the Lady and the Priest 146 (B. Bray trans. 1983); Bullough, Medieval Medical and Scientific Views of Women, 4 Viator 485, 489 (1973) [hereinafter Bullough, Medieval Medicine]. Modern etymologists agree that *Vir* and *Virtue* are related, but in the sense that they both derive from a root meaning strength or force. See generally Oxford Unabridged Dictionary 673, 676 (2d ed. 1989). St. Isidore of Seville, one of the Fathers of the early Christian Church, argued that, in contrast, *mulier* (woman) derives from *molites* (softness, but also evasiveness). He derives from this a conclusion similar to Catherine MacKinnon's instrumental theory of why women have historically been excluded from sports—to keep them weak and rapable. Bullough, Medieval Medicine, supra, at 489; see C. MacKinnon, Feminism Unmodified, supra note 6, at 118 ("If you ask, not why do women and men do different physical activities, but why has femininity meant physical weakness, you notice that someone who is physically weak is more easily able to be raped, available to be molested, open to sexual harassment. Feminine means violable."); MacKinnon, Feminism, Marxism, Method II, supra note 6, at 651 ("To be rapable . . . defines what a woman is.")

Isidore maintained that woman was soft and weak so that she had to submit to man's sexual aggression. "If a man easily could be repelled by a woman, his lust might lead him to turn to his own sex for satisfaction." Bullough, Medieval Medicine, supra at 489.


One of the most striking examples of the dream of symmetry in feminist literature is also one of the best known and influential examples of cultural feminism: Carol Gilligan's analysis of two children's responses to the Heinz dilemma (i.e., whether Heinz should steal a drug to save his dying wife). In the famous case study, a test of the moral development of children designed by Lawrence Kohlberg is applied to two children. In this test, the Heinz hypothetical was presented to a girl named Amy and a boy named Jake who give two very different answers. Jake unequivocally announced that Heinz should steal the drug because life is more important than property. Amy rejected the validity of the hypothetical. She asked whether or not Heinz had tried other solutions, such as getting a loan or negotiating with the druggist, and she questioned whether the woman would really be better off if she received one dose of a drug and her husband is sent to jail. According to the grading system developed by Kohlberg, the results were supposed to show that the girl's moral development was inferior to the boy's. 

As is well known, Gilligan rejected these conclusions as to the superiority of Jake's moral development and used this case study to develop her thesis that girls' moral development follows a different, not inferior, pattern than boys'—that girls initially value relations and develop an ethic of care, while boys initially value autonomy and develop an ethic of justice (women develop a sense of individuality and men of compassion later in their lives). Unlike West, who ascribes these differences to anatomy, Gilligan, as a psychologist, attributes them
primarily to the different relationships girl and boy babies have with their mothers. C. Gilligan, supra note 8, at 7, 26-39.

Gilligan should be applauded insofar as she claims that she is debunking the unexamined presumptions of gender hierarchy underlying Kohlberg's theory—that is, assuming the male as the norm, any difference in the female is a priori defined as an inferior deviation. I am truly amazed, however, that she accepted the masculine characterization of Jake's response. I was not surprised that a male psychologist in a society which considers "rationality" to be both valuable and masculine (or, more accurately, masculine because it is valuable) found that the boy's response was more rational, logical, and mathematical than the girl's. Gilligan completely agrees. Others have criticized Gilligan on this ground. See Williams, supra note 8, at 802-13, 840-45. But how could one who actually reads the two children's responses not recognize that Amy's response could just as easily be interpreted as being more analytical than Jake's, if such an analysis served one's thesis?

Amy recognized that the hypothetical does not involve a simple question. Rather, it involves at least three moral values which are highly prized in our society: the sanctity of life, the recognition of property rights, and obedience to the law. Consequently, a "moral" or "just" solution could not be achieved by abandoning any one of these for the sake of any other. Indeed, as Amy well knew, our society would not allow Heinz to steal the drug and would punish him if he did. As a young child, she would probably have presumed that this was the moral answer (even if she had not yet worked out why) because it was, in fact, the rule of adult society. Seeing that there were competing moral values, she did not accept the questioner's assertion that there was an irresolvable bipolar conflict, but explored whether or not there were alternatives which preserved the competing moral values. She also tried to identify the parties' goals in order to analyze what course of action would best serve these goals. For example, did Heinz and his wife want to obtain a miracle drug which would cure her at one shot? This seemed inconsistent with Amy's experience that drugs generally must be taken in repeated doses over time. Rather, she recognized that if "Mrs. Heinz" only took the drug once, she would almost certainly become ill again and she might be worse off if her husband was imprisoned. C. Gilligan, supra note 8, at 28. It was, after all, one of the terms of the hypothetical that Heinz was her sole economic and presumably primary emotional support in a time of terminal illness.

In other words, Amy's response can be explained as the more logical, rational, and mathematical of the two responses and, insofar as it tried to preserve the rule of law and balance competing moral values, more concerned with abstract justice. And Jake's response, which found that the love of a husband for his wife is superior to all other societal values and that a husband must be willing to forego his autonomy (i.e., go to prison) for the sake of his wife, can be analyzed as being more concerned with relationships, and valuing care over individuality. More importantly, I have no question in my mind that had the children's answers been reversed, Kohlberg's analysis (and perhaps Gilligan's response) would have been the same.

I am also amazed that feminist legal scholars have accepted Gilligan's characterization of this case study. For example, Carrie Menkel-Meadow not only characterizes Jake's response as being mathematical, but also as being characteristic of our legal system. She compared Amy to the "bad" law student who could not "get" the hypothetical. Dubois, Dunlap, Gilligan, MacKinnon & Menkel-Meadow, Feminist Discourse, Moral Values, and the Law—A Conversation, 34 Buffalo L. Rev. 11, 49-54 (1985) [hereinafter Buffalo Conversation]. I find this incomprehensible because, as a practicing attorney for over 11 years (and an academic lawyer for two years), I consider Amy's method to be an almost archetypical example of legal analysis, at least as law is really practiced. That is, Amy strikes me as the "too good" law student who points out to the embarrassed professor that the professor has formulated a bad hypo.

Although this is a topic for another article, I suspect that Gilligan's analysis is accepted because legal education is concerned almost entirely with litigation (i.e., the studies of cases) and a disproportionately large number of law professors' only practice experience has been in litigation (either through judicial clerkships and/or as litigators or regulators). Litigation, once commenced, tends to concentrate on competition between two warring and irreconcilable interpretations of law or fact, much as Jake saw Heinz's dilemma as choosing between two competing irreconcilable alternatives. In contrast, attorneys who advise clients, whether in
feminists belong to what West calls the radical school, they agree that "feminine" qualities are inferior and call on women to become viragos, adopting one or another "male" values. In order to assert their image of a positive feminine selfhood, feminists may merely be turning the morality of masculine jurisprudence on its head. The cultural feminists are stating: "We agree to be defined by you, but we think we're better than you." To use bad medieval etymology, femtue (woman's nature) should supersede virtue on the scale of moral superiority. On the other hand, the radical feminists (and liberal feminists of the equality school) are stating: "We agree that we have been defined by you as inferior. Accordingly, we wish to be like you. We want to be viragos." Both approaches, in fact, restate the assumptions of contemporary patriarchy.

The study of medieval canon law of sexuality and marriage suggests that in the Middle Ages, society—reflecting the dominant masculine optique—envisioned certain essential aspects of the male self in many of the ways feminists now see as either uniquely female or defined by men as being essentially feminine. Men saw themselves not as autonomous indi-

contract negotiation or business or estate planning, or whether or not to commence litigation or settle ongoing litigation, work with their client like Amy; they try to help their clients make difficult decisions by enabling them to identify and prioritize their goals and analyze whether they have, in fact, considered all alternatives. Indeed, most of the practicing attorneys that I know recognize this difference in approach to problem-solving adopted by litigators and deal lawyers and consider it to be the basis of the frequent conflicts that develop between the litigation and business departments of law firms.

I shall put my cards on the table as to one reason why I have remained skeptical of Gilligan's conclusions. West has stated that every woman she knows has recognized herself in In a Different Voice. West, supra note 1, at 20. I literally recognized myself in the book and not in the way West suggests. When I was a college student I participated in one of the psychological surveys discussed in the book. (The one in which subjects were asked to make up a story about a photograph—of course, I have no way of knowing whether or not my response wound up in the final study.) I was one of the women who gave the "archetypical" masculine response—one of the pictured trapeze artists in my story died in a murder disguised as an accident arranged by the other. My "different voice" and the voices of the other women in the study who gave similar unladylike responses (and the male subjects who gave "sissy" answers) even if we were in the minority, apparently were not worthy of discussion because we did not fit her story.

13. West makes this latter point elsewhere by criticizing liberal feminists who want women to adopt the masculine value of choice and radicals who want women to adopt the masculine value of power. West, Women's Hedonic Lives, supra note 6, at 83-85. "I think that men are the way they are because they have power, more than they have power because they are the way they are. If this is so, women who succeed to male forms of power will largely be that way too." C. MacKinnon, Feminism Unmodified, supra note 6, at 220. Of course, it is implicit in the way she chose to word this sentence that MacKinnon suggests that women could succeed to some alternative, non-male form of power.

14. The tendency towards viragoistic dualism among certain feminists is partly what Jacques Derrida is referring to when he says that "Feminism is nothing but the operation of a woman who aspires to be like a man." J. Derrida, Spurs: Nietzsche's Styles/Eperons: Les Styles de Nietzsche 65 (B. Harlow trans. 1978). It is common to interpret this statement as anti-feminist or anti-woman. For example, Nancy Spero's painting, Notes in Time on Women, Part 2: Women's Appraisals, Dance, and Active Histories (1978), includes this quote from Derrida among virulently misogynist statements and accounts of the torture of women among mythic feminine imagery, including a nude female figure jumping in a leap-frog fashion. See Robins, Words and Images Through Time: The Art of N. Spero, Arts Magazine, Nov.-Dec. 1979, at 103, 104; see also Nancy Spero: Works Since 1950 (B. de Niege ed. 1988). I believe that this interpretation of Derrida is incorrect.
viduals, but as creatures bound by their very nature to the community. Men felt bound not only by ties of lineage and feudal obligation, which were believed to be both natural and divinely ordained, but also by actual physical dependence.

The medieval male view of the feminine self that underlies early medieval law—as the other, the opposite of virtue—is similar to the modern male view of the masculine self. Women were viewed as selfish, arrogant, competitive, individualistic, and outside of the order of society. Meanwhile, the contemporary feminine values of autonomy and sexual equality were adopted by canon jurisprudences in the high Middle Ages as the basis for revolutionizing medieval marriage law.

The concept of sexuality that underlies the canon law of sex developed throughout the Middle Ages. This explicit, essentially male perspective of sexuality contains evocative parallels to the view of female sexuality characterized by West as the radical feminist view. In addition, the medieval concept of the virago—the woman who could achieve virtue equal to a man by expressly rejecting her male-defined femininity, particularly as expressed in sexuality and motherhood—has striking parallels to aspects of the radical feminist agenda.

In other words, the study of history suggests that the potentially fatal errors of the current feminist agenda are twofold. First, the feminist agenda is ethnocentric and modernistic: it fails to recognize the cultural basis for its theories of masculinity and femininity. The second error of the current feminist agenda is that it implicitly or explicitly assumes that adoption of a feminine jurisprudence that takes into account (by either unquestioning acceptance or rejection) values because they have been labeled (by men) as feminine, will lead to a less patriarchal and more free feminine world. These same “feminine” values, however, have been adopted in the past as “masculine” and have been embraced to perpetuate patriarchy and oppression.

Suppose that the cultural feminists were able, through logical argument or moral suasion, to convince the masculine power structure of the higher “virtue” of “feminine” values. We have reason to believe that males would once again adopt these as masculine and embrace them as the bulwark of a new patriarchy. Similarly, we have no reason to believe that if women tried to acquire certain “masculine” traits—as the radical feminists would like—that the majority of women would be better off.

I am by no means denigrating the recent work of feminist scholars, which I believe has served as a powerful critique of masculine jurisprudence and the masculine power structure. Women as outsiders can perhaps see men and the society they created more clearly than men can see themselves and can, therefore, add a “different voice” to jurisprudence. In Kristeva’s transformation of Lacan’s notorious proposition that “woman does not exist,” if the “feminine” is negativity, then women are uniquely positioned to analyze and criticize society. Nor am I suggesting that a truly

radical feminist jurisprudence needs to adopt the dubious proposition that there are no differences between men and women—that gender is illusory.\(^7\)

What I am suggesting is that the analysis of female and male nature must not be based solely on an examination of late-twentieth-century, white, upper-middle-class American culture and the assumption that this represents the essence of human nature. I am also suggesting that patriarchy is not dependent on any one particular conception of masculine and feminine nature, but has existed in different societies accepting differing definitions of this nature. Patriarchy\(^8\) should not, therefore, be

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\(^7\) I lean towards MacKinnon's concession that there are identifiable differences between men and women, mainly because there has been gender differentiation in every human society. But this does not necessarily imply that these differences are inherent (or, even if they are inherent biological differences, that they are controlling) because our personalities are so culturally contingent. MacKinnon calls this view the “dominance approach,” because she believes women and femininity have been defined by male dominance. C. MacKinnon, Feminism Unmodified, supra note 6, at 37. Although I agree that male domination is an important factor, I believe life and human nature are probably more complicated, and agree with Katherine Bartlett’s observation that there is an implicit assumption in MacKinnon’s writing, that she does perceive some “true” feminine nature hidden under and disfigured by the male definition which will blossom forth if women are empowered. Bartlett, MacKinnon’s Feminism: Power on Whose Terms, 75 Calif. L. Rev. 1559, 1566-67 (1987). I explore MacKinnon’s hidden essentialism in Schroeder, Abduction From the Seraglio, supra note 10, at 127-38. West has also criticized MacKinnon for having a preconceived idea of female sexuality, despite her avowed agnosticism on women’s “true” nature in a hypothetical world free of masculine domination. This idea of female sexuality is reflected in MacKinnon’s rejection of the view that sexual submissiveness in at least some women might be inherent, not culturally determined, which is implicit in the definition of pornography in the model statute which she drafted with Dworkin. See West, supra note 6, at 113-16, 134-39, 141-42.

MacKinnon has argued that the very fact that a “feminine” personality trait serves to disempower women demonstrates that it is imposed by men and is culturally, not naturally, determined. See Buffalo Conversation, supra note 12, at 49-54. I admit that this is what I would like to believe, but a theory is needed to explain why the fact that something subordinates women is proof that it is created and imposed by men in any specific fact situation. An alternate explanation is that societal institutions serve to reinforce “natural” gender differences, rather than impose “unnatural” sexual dominance. Without a theory, it is at best evidence of masculine imposition, or at worst wishful thinking. In Women’s Hedonic Lives, West has very forcefully and disturbingly argued that we must consider the possibility that certain “feminine” traits are related to the subordination of women not because they are imposed by men, but because they are, in fact, inborn (or, as Gilligan would suggest, an inevitable result of the development of the female psyche in a society where women are the primary child caregivers) characteristics which make us susceptible to exploitation. See generally West, Women’s Hedonic Lives, supra note 6. Bartlett, Colker, Finley, and Rhode suggest that MacKinnon’s own “feminist method” neither supports nor detracts from her theories because it is itself a product of her theories. That is, MacKinnon considers as valid only women’s experiences which support her theories. She does not state an independent theory as to how to distinguish between valid and invalid experiences. Bartlett, supra at 1563-64; Finley, supra note 6, at 380-81; Colker, Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom, 77 Calif. L. Rev. 1011, 1032-35 (1989); Rhode, Feminist Critical Theories, 42 Stan. L. Rev. 627, 635 (1990).

18. For this article I have rather reluctantly adopted the term “patriarchy” to describe male-dominated social structures because it is the term customarily used in feminist discourse. This anthropological term refers more accurately to a society organized in family groups ruled by fathers specifically, not a society dominated by men, generally. As feminists, we should coin a new word to describe our perception of a male-dominated society, rather than misusing a term borrowed from another field. "Androcentrism" would probably be more accurate.
expected to disappear merely because we propound the adoption or rejection of "feminine" values, so long as we accept the masculine agenda of defining virtue by comparing it to the other, as identified by gender.

I am suggesting that any truly liberating theory of female nature must concentrate on finding concepts of human nature and the interrelationship between the self and the other, whether the other is different because of sex or some other reason. It does not suffice—and it is self defeating—to focus exclusively on women's wombs. To the medieval mind, the difference between men and women was that women bore children. The medieval definition of woman was limited solely to her sexuality, to the exclusion of all other possible aspects of her personality. Virtually all medieval stereotypes of woman were described in terms of her sexual and reproductive functions and were justified by anatomical analogies and medical science. I fear that many contemporary feminists are doing the same thing in their search for the "lowest common denominator" of femininity. They are

Drucilla Cornell has pointed out that West has concentrated on our biology precisely because it is the lowest common denominator of femininity, although Cornell is much more gracious than I and does not use this term. That is, West has rejected examination of personal experience precisely because it varies so widely woman by woman and culture by culture. Cornell, The Doubly-Prized World: Myth, Allegory and The Feminine, 75 Cornell L. Rev. 64, 649-50 (1990). West identifies the potential for penetration during heterosexual intercourse and childbearing as the lowest common denominator that all biologically female persons share and no biologically male person possesses. From this she tries to identify, by anatomical metaphor, personality and psychic traits which seem analogous to these common physical traits. She believes that these traits are connectedness, relational thinking, and intimacy. West concludes that these must be the most important defining factors in women's personalities. Consequently, since men do not possess the feminine common denominator, lack of these traits must be the most important defining factor in men's personalities. West, supra note 1, at 13-21.

To do so, however, is to rob us of our complexity as women and as people. As Cornell and Thurschwell have written elsewhere, "The gynocentric response reinscribes itself in the same repressive logic of identity that it criticizes . . . We condemn a reified gender differentiation not in the name of some 'universal human nature,' but because it would confine us to certain socially designated personality structures, . . ." Cornell & Thurschwell, supra note 16, at 500.

It does not follow from the fact that all members of a class have one common characteristic, that the one common characteristic is, or should be, the most important factor in defining the selfhood of its members. It could be, but it need not be. An independent theory is needed to support this inference.

Joan Williams has previously pointed out that West's argument is little more than metaphor. Williams, supra note 8, at 800-01 n.11. I think that West implicitly acknowledges the weakness of the metaphoric approach in that she does not apply it directly to men. She makes no attempt to identify masculine personality traits from their sexual biology—they are merely excluded from having those traits which West has appropriated for women, and, unlike us who must now be shoehorned into this stereotype, men are left the wide range of leftover traits from which to choose. Despite the fact that West claims to base her analysis of feminine and masculine nature on her "connectedness thesis" metaphors of the feminine body, I am arguing that her conclusions in fact are predetermined by her acceptance of the standard liberal
developing essentialist theories of feminine and masculine nature based solely on the biological difference between men and women, justified by crude anatomical analogies. I do not believe this was justified in the past when most women lived most of their adult lives engaged in reproductive functions. And I believe that it is even less justified in modern times of post-reproductive sex and post-sexual reproduction, when women will live the majority of their lives engaged in other functions.

I am specifically suggesting that the adoption of a new, sophisticated theory of jurisprudence and gender requires more than introspection and analysis of contemporary society. It requires historical and cross-cultural analysis, not merely to understand the origins of our current society, but to understand how people's perception of their nature—and perhaps also their "true" nature (if, indeed, such a thing could exist apart from our perceptions)—has been culturally determined.

B. Robin West's Feminist Dichotomy

In her article, Robin West describes in detail the dichotomy of the two major trends of feminist jurisprudence, which she compares to a parallel dichotomy between two major trends in masculine jurisprudence.

To describe these dichotomies very crudely, there are two dominant theories of masculine jurisprudence: liberal legalism and critical legalism. They are both based on the masculine experience of life: that people are separate, autonomous individuals who confront themselves in the state of definition of human (i.e., masculine) nature which requires an acceptance of its negative as female nature. In this light, the "connectedness thesis" becomes a post hoc explanation of a foregone conclusion. I will also argue that the number of different metaphors which the human imagination can develop from any biological fact are probably unlimited. Specifically, the Fathers of the early Christian Church and medieval theologians used precisely this metaphorical approach to arrive at an entirely different stereotype of women.

20. Luce Irigaray and Drucilla Cornell in particular have warned against adopting the masculine error of identifying woman's sexuality with her reproductive organs. See, e.g., L. Irigaray, supra note 12, at 146; Cornell, supra note 19, at 650. Cornell sees all such attempts at locating the feminine as restrictive and, instead, seeks to "affirm" the feminine as a deconstructive allegory, the myth of the not yet which women constantly seek to rewrite. Id. Medieval theorists frequently tried to justify their misogyny by reference to "scientific" anatomy. See id. Bullough, Medieval Medicine, supra note 11, at 492-96.

21. In The Dialectic of Sex, a book which has otherwise not aged well and contains many superseded theories about historic family structure, Shulamith Firestone makes a point which I think is extremely well taken. It has become fashionable to criticize Firestone's emphasis on reproductive technology as an acceptance of masculine contempt for women's sexuality and acceptance of the masculine belief that women are inferior to men. Nevertheless, I believe she is right that technology has forever changed the "reality" on which family structure has been based. The very fact that feminists can discuss pregnancy/motherhood and heterosexual intercourse as two separate issues show this. This distinction would have been inconceivable (to use a poor pun) to our ancestresses. I believe that Firestone is correct in concluding that this and future reproductive technological developments have led, and will continue to lead, to profound changes in family structure and living arrangements and profound changes in women's selves. See S. Firestone, The Dialectic of Sex (1970).

22. West, supra note 1.

23. It is not within the scope of this article to restate Professor West's paradigms in any detail. The discussion in the text is intended as a brief description. I regret any unnecessary oversimplification.

24. West, supra note 1, at 4-13.
nature from a position of equality. Because of this equality, men in nature find themselves in a position of aggression, competition, and struggle for dominance. The primary difference between these two theories is that while liberal legalists value autonomy and individual rights and fear annihilation and frustration of their autonomy, critical legalists experience the fundamental tension of autonomous individuals simultaneously longing for connection and fearing alienation from others.

West contrasts these theories with what she labels cultural feminism and radical feminism. Both theories of feminist thought accept the masculine legalists' theory of autonomous equal individuality as describing masculine nature. West also relates both theories as implicitly sharing the same conception of women's existential lives. She calls this shared conception the "connectedness thesis." Women's bodies are penetrated during sexual intercourse, women have babies, women nurse babies, and women menstruate. Therefore, women are by their nature fundamentally connected. They approach other people, specifically their babies, in the state of nature from a position of inequality. They approach their unequal, weak children with nurture and care.

According to West, the cultural feminist, like the liberal legalist, values these natural conditions. For women, this means valuing intimacy and fearing separation from the other. For the cultural feminists, these conditions of connectedness and community, so long as they are freely chosen rather than imposed by patriarchy, are glorified for their intimacy.

25. Id. at 12. West conflates the political claim of classical liberal philosophy that "all men are created equal" with an empirical claim that all men are demonstrably similar to each other. What made liberalism so remarkably radical when it was first developed, however, was its insistence on the truth of the former statement despite the obvious falsity of the latter. West's confusion is not surprising. It is precisely this conflation of political equality with empirical similarity which dominates contemporary jurisprudence of sexual (and racial) discrimination and which has fueled the sameness/difference debate among feminists, which MacKinnon has forcefully criticized on similar grounds. See supra note 6.

26. Id. at 27.

27. Id. at 12.

28. "W[omen are actually or potentially materially connected to other human life. Men aren't." Id. at 14. As discussed infra in note 38, West's gender dichotomy is based in large part on American object relations psychological theory (although she goes a step further by insisting on an anatomical component in addition to the psychological). As Cornell has eloquently explained, an almost reversed conceptualization of gender psychology is propounded by Continental Lacanian psychological theory, which has strongly influenced not only Cornell but such French feminists as Kristeva and Irigaray. Lacanians see men as overly-connected and women as overly individuated. Masculine macho attempts at self-assertion and feminine clinging behavior are both pitiful attempts to achieve the impossible. Cornell, supra note 19, at 664-65.

29. Id. at 27-28.

30. Id. at 28-29.

31. Id. at 36-38.

32. Id. at 18. If, as I will argue, MacKinnon's theories of sexuality have similarities to medieval Catholic misogyny, West's theories also have similarities to modern Catholic misogyny. In the words of Pope John Paul II:

The unique contact (of the mother) with the new human being developing within her gives rise to an attitude towards human beings—not only toward her own child, but every human being—which profoundly marks the woman's personality. It is commonly thought that women are more capable than men of paying attention to
The radical feminist, like the critical legalist, finds a fundamental contradiction in the state of nature, because she longs for individuation and fears invasion and intrusion. For the radical feminist, the most obvious intrusions and violations experienced are the violations of the body in the institutions of heterosexual intercourse, pregnancy, and motherhood. Intimacy is merely a patriarchal apologia for violation.

Because men cannot understand the reality women experience, laws are written in language men can understand and are oppressive of women. West discusses two examples, which display that men can understand violence but not invasion, a feminine fear. Men see rape only as a crime of violence. Consequently, law only recognizes rape where there is violence. It legitimatizes a wide variety of invasive sex which women, but not men, understand as rape experiences. Similarly, because a man cannot understand or dread the invasion of his body, the debate over abortion law has not recognized the violation and aggression involved in the invasion of a woman's body by an unchosen fetus. Consequently, the legal arguments in Roe v. Wade were framed in terms that men can understand: the right of privacy of a woman and her doctor (i.e., the value of autonomy) versus the right to life of the fetus (i.e., the fear of annihilation).

The amazing part of the arguments expressed by West is their essentialist or naturalist nature. West is not arguing that because of another person and that motherhood develops this predisposition even more. The man . . . always remains "outside."

Excerpts from John Paul II's Apostolic Letter "On the Dignity of Women," N.Y. Times, Oct. 1, 1988, § 1, at 6 [hereinafter John Paul II, On the Dignity of Women]. Although the Pope condemns the subordination of women, and insists on their equal dignity, his analysis of female connectedness leads him to the conclusions that women must not adopt male characteristics and that they are limited to only two vocations: motherhood or virginity (i.e., the religious vow of celibacy). See Pope, Defending Women's Dignity, Sets Narrow Role, N.Y. Times, Oct. 1, 1988, § 1, at 1, 6.

33. West, supra note 1, at 29-30, 36-38, 42. I am trying to express what I believe that West's descriptions of these schools of thought are. It might be more correct to describe radical feminism, at least as epitomized by MacKinnon, as seeing a conflict between the state of how things are (i.e., defined by men), rather than the state of nature, and the need for empowerment and individuation. But, as discussed supra note 6, I agree with West that there seems to be an underlying unadmitted strain of essentialism running through MacKinnon's work.

34. West, supra note 1, at 29-35.
35. Id. at 49-50.
36. Id. at 59.
37. Id. at 59-60. West's recognition that the contemporary legal discourse contains no language to describe contemporary women's pain is brilliant. She has argued that because many forms of sexual oppression do not fit within traditional causes of action, the masculinist legal community can pretend that these harms do not exist by definition. See also West, Women's Hedonic Lives, supra note 6, at 82-108 (moving evocation of unspeakable female violation). I am critiquing West for her implications that not only don't men recognize women's pain, and not only is phallogocentric legal vocabulary incompetent to express our pain, but that men are essentially incapable of understanding it.

38. West does admit that Carol Gilligan and Nancy Chadorow, whom West considers the foremost proponents of cultural feminism, claim to base their concepts of feminine nature on American object relation theories of developmental psychology, as opposed to mere anatomical destiny. West concludes that, while Gilligan's explanation might be partially true, it is incomplete because it does not explain why women are the primary caregivers to children.
feminine sexuality or pregnancy women have a tendency to, or on the average are more likely than men to, cherish intimacy or fear invasion. Nor does she argue that it is harder for women to ignore the inherent connectedness of people that men, in the classical liberal tradition, tend to deny. Nor is she arguing that the “masculine” contractarian theories that humans in the state of nature confront each other from a position of equality is incorrect as a biological and anthropological matter, as shown by the obvious inequality in strength between the sexes and between adults and children (not to mention the obvious inequality between specific individuals within the same age and gender cohorts).

Rather, West accepts what she identifies as the male theory on its face and in its own terms as relevant to men. And she adopts an alternate theory of women which, in fact, is consistent with and complements the masculine view of himself. Yet these feminist theories seem fundamentally conservative because they do not use what they perceive to be women’s experience to challenge the assumptions of existing jurisprudence.

Having accepted the masculine characterizations, these feminist theories are forced to accept or reject “femininity” as so defined. The cultural feminists, implicitly, assume that if society would adopt those values and personality traits that cultural feminists (and many, if not most, contemporary American men) accept as uniquely feminine, society would become less patriarchal, and individuals, specifically female individuals, would become more free. The radical and liberal feminists implicitly assume that if women could reject those values and personality traits which men have defined as feminine and acquire those traits which radical feminists (and many, if not most, contemporary American men) believe men possess, women would become more free.

My point is that West, like the masculine jurisprudes she criticizes, ignores history, which shows that autonomy, individuality, and equality, far from being the state of nature, are extremely modern. In the Middle Ages, a version of the values which West recognizes as uniquely feminine was experienced by men as being uniquely masculine. Community and connectedness, even the concept of sex as violation, were once the language of patriarchy and oppression of women. Individuality, autonomy, and a positive view of sex were considered feminine traits and instruments of feminine power in the patriarchal establishment. Medieval men saw themselves as the opposite of what West presents men as now thinking, and medieval men saw women as being the opposite of what West now says women are.

At different times in history and in different cultures, men have adopted radically different views of the masculine and feminine self.

West believes that this is explained by her connectedness thesis, the physical, anatomical, real, or potential connectedness of women and other people. West, supra note 1, at 17-18, 20-21. I am inclined to agree with West that, despite their protestations to the contrary, both Gilligan and MacKinnon seem to implicitly accept a form of anatomically-determined female nature. See supra notes 12, 17.


40. Such as autonomy and choice, if one is a liberal feminist, or individuation and power, if one is a radical feminist.
Nevertheless, in each society of which I am aware, the society has been patriarchal and oppressive of women. We should be wary of West's analysis, for history shows men capable of adopting what were formally labeled as feminine qualities and using them to perpetuate patriarchy, so that women "become" the opposite of what they once "were." Instead of being selfish and individualistic, women become caring and nurturing, but only once men become attracted to the qualities of individualism.

C. How Medieval Men Defined Medieval Women

The radically communal nature of medieval society has been described often. The medieval community was organized in a rigidly hierarchical fashion. Society was conceived as divided into inherently unequal rigid orders, each having its own function. Equality was not an important norm in this society, and inequality between men and women was thought to be particularly obvious. Hierarchy and inequality on earth were considered divinely ordained, echoing the rigid hierarchy of heaven.

41. See, e.g., M. Bloch, Feudal Society (L. Manyon trans. 1961); G. Duby, The Three Orders (A. Goldhammer trans. 1982); G. Duby, The Knight, the Lady and the Priest, supra note 11; G. Duby, II A History of Private Life: Revelations of the Medieval World (A. Goldhammer trans. 1988) [hereinafter II A History of Private Life]. The cultural history of the Middle Ages can be characterized as a transition from the communal values of the early period to the more individualistic and private values that we associate with the Renaissance. To state the obvious, even to identify such trends can lead to gross simplification. There was no "turning point" that marked the ascendancy of individualism over community. Such broad cultural changes proceed in fits and starts, and differ from country to country—as well as from individual to individual. See also infra note 53.

42. See G. Duby, The Three Orders, supra note 41, for an exhaustive study of the concepts of the "orders" of society as developed primarily in the high Middle Ages and theological belief in the divinely instituted hierarchy, inequality, and repression; see also J. LeGoff, Time, Work and Culture in the Middle Ages 53-57 (A. Goldhammer trans. 1988).


44. The inequality of men and women was seen as so natural that no medieval writer discussing the orders of society and political inequality bothered to even mention it. G. Duby, The Three Orders, supra note 41, at 76; G. Duby, The Knight, the Lady and the Priest, supra note 11, at 113. In the thirteenth century, Jean de Vitry identified two "orders" of women—married and virgin—as outside of the three male orders. G. Duby, The Knight, the Lady and the Priest, supra note 11, at 312-13; see also infra note 57. This concept of the two medieval "orders" based solely on their sexual activity is echoed today in Pope John Paul II's insistence that there are only two "vocations" open to women: motherhood or consecrated virginity. See supra note 32.

45. "Whoever says hierarchy means thereby an order that is perfectly holy." G. Duby, The Three Orders, supra note 41, at 113 (quoting Pseudo-Dionysius the Areopagite, in Celestial Hierarchy 65 (M. de Grandinlac trans. 1943)). The early Christian pseudonymous writings attributed to Dionysius the Areopagite, who was confused in the medieval mind with Saint Denis, the first bishop of Paris, were translated into Latin in the so-called "Carolinian Renaissance" of the ninth century and served as a justification of divinely ordained hierarchy and inequality on Earth as a reflection of the angelic hierarchy in heaven. Pseudo-Dionysius' was the most popular of the various theories of celestial and terrestrial hierarchy. Indeed, when Dante reached the Primum Mobile in Paradise, he was able to confirm that Dionysius had in fact gotten it right—a fact with which Dionysius' rival in hierarchal speculation, Gregory the Great (also then living in the Primum Mobile) had to agree. Dante Aligheri, The Divine
marriage was the "cornerstone of the social edifice." The very concept of equality in all but one very limited instance was considered heretical, and many people were subject to inquisitions and executed precisely because they propounded equality.

This concept of hierarchy was not conceived as merely one of autonomy and individuality of the ruling male or repression of subjects. The hierarchy was understood as a complex system of mutual responsibility and friendship between lord and vassal. All men were bound together in

Comedy, Paradiso, Canto XXVIII, 130-39 (J. Ciardi trans. 1957) [hereinafter Dante, The Divine Comedy]. However, the specific nature of the hierarchy existing on earth may have been punishment for original sin. See infra note 84.

That is, unlike West, who sees hierarchy (i.e., dominance) as a result of the competitive struggle of naturally equal male individuals, medieval theorists saw natural inequality as the starting point, and equality as a violent deviation. See supra text accompanying note 84.

46. G. Duby, The Knight, the Lady and the Priest, supra note 11, at 215.
47. According to Duby:

Contemptuous of all the corporeal envelope of the created, these spiritual beings [i.e., members of the heretical movements of the eleventh century] wished, quite naturally, to pay no heed to any distinctions in human society, least of all to that distinction embodied in the flesh, separating the two sexes. Receiving women as full-fledged members of their community, they eliminated the primordial social barrier. This was not done without impurity: to abolish the difference between masculine and feminine was to justify the worst calumnies and was, I think, principally responsible for the sect's failure. The heretics filled in another yawning abyss: rejecting the privileges of the sacerdotal "calling," they confounded clericus and populus; they invited all Christians to fast and to pray in the same way. Since, moreover, they urged that offenses be pardoned and that vengeance and punishment be curtailed, they were in effect proclaiming the uselessness of the specialists in repression and the use of brute force: the military. Finally, in the sect everyone worked with his hands, no one expected to be fed by others, no one toiled in the service of a master: the line of demarcation between the workers and others, the lords, judges, protectors, and avengers, were eroded. The wish to see this barrier—nearly as high as the wall between the sexes—levelled was utopian, in any case audacious: it had been raised up by the mode of production. Heresy proposed equality, total equality [emphasis added]. . . . At all levels, in houses rich and poor. Heresy 'rejected outright the imaginary structure of society [l'imaginaire social] . . . by opposing to it the reality of an essential equality among men.'

G. Duby, The Three Orders, supra note 41, at 132 (quoting C. Castoriadis, L'Institution Imaginaire de la Societe (1975)); see also G. Duby, The Knight, the Lady and the Priest, supra note 11, at 109-10.

Bynum suggests that women flocked to the heretical movements of the twelfth and thirteenth centuries "at least until they too developed hierarchal structures that tended to exclude female leadership," but questions the standard interpretation as to why women joined these groups. According to her: "... women may have flocked to these heresies not (as some have argued) because they felt neglected by or alienated from the Church but because certain spiritual impulses appealed especially to women and were generated in significant part by them." Consequently, Bynum believes that the heretical/non-heretical dichotomy is not very useful in analyzing the religiosity of medieval women theologians. C. Bynum, supra note 7, at 17.

48. Even though today we might interpret it as a rationale for oppression and subjugation. Duby states:

'Thus in the representational system imagined by the bishops . . . trifunctionality, in conjunction with the principle of necessary inequality, served in the name of 'charity,' in the name of reciprocity of services, to justify seigniorial exploitation . . . . In the third decade of the eleventh century the need to stress this division of roles asserted
a web of personal relations, mutual obligations, and rights that we now call feudalism. Society was conceived of variously as a body or a household where each organ or member had its function and its respective dignity and no organ or member could survive unless the others performed their respective tasks. The bonds of feudalism were not conceived in a legalistic contractarian or "political" sense, but as overwhelmingly strong emotional bonds of love and intimacy. In the writings of the time they were described in words like love and friendship, as being emotionally stronger than the bonds of family. Indeed, it is anachronistic to say that the feudal bond seems similar to love, because the concept of courtly love, the forerunner of the contemporary ideal of romantic love, was modeled after the relationship between a vassal and his lord.

The concept of privacy, let alone individuality, was unknown; the ideal, and as far as we can tell the reality, was that no one was ever alone, from the moment of birth to the moment of death. At all intimate moments and at sleep, one was surrounded by one's companions.

More importantly the human interrelatedness of society, importance of relations, and inequality of individuals were all male views of a male-dominated society. Medieval literature—particularly medieval legal literature—was written overwhelmingly by males for a male audience. Furthermore, most of what was written and most of what survives was written by the clergy, an exclusively male and misogynist institution. In itself with even greater urgency than before, as the heresiarchs were suggesting that everyone in this world be put to work. Their minds were fixed exclusively on heaven; but among those who heeded their words were many, no doubt, who were thinking of earth; heresy, calling for equality, therefore, fostered resistance to oppression.

G. Duby, The Three Orders, supra note 41, at 160. According to McLaughlin: "We are certain that the rationale of hierarchy, superordination and subordination no longer is convincing, at least for those on the bottom. Yet hierarchal modes of thinking still dominate our feelings, if not our thinking about our relationships between the sexes." McLaughlin, supra note 43, at 257.

49. M. Bloch, supra note 41, at 145 ("... the principle of this human nexus permeated the whole life of society ... ").

50. See G. Duby, The Three Orders, supra note 41, at 70-72.

51. Vassalage was considered the most cherished of bonds. Not only did affection flow upwards to the lord, but the lord's friendship flowed downward to the vassal. The literature of the time echoes the formal language of legal documents that the tie was one of affection: "... the true union of hearts in which life is inconceivable for one without the other[]." The bond was one of absolute devotion and willingness to die for the lord and to disregard the most terrible of sins. "This bond was felt to be so strong that the idea of it dominated all other human ties ... " M. Bloch, supra note 41, at 231-33. "... [I]nequality was rationalized and perhaps even softened by a strong sense of mutual responsibility; God for the Soul, lord for the serf, man for woman." McLaughlin, supra note 43, at 256.

52. "When the Provençal poets invented courtly love, the devotion of the vassal to his lord was the model on which they based their conception of the fealty of the perfect lover." M. Bloch, supra note 41, at 233.

53. Duby & Braunstein, Solitude: Eleventh to Thirteenth Century, in II A History of Private Life, supra note 41, at 509, 509-11 [hereinafter Duby & Braunstein, Solitude]. Bynum has persuasively argued that even in the twelfth century, where many cultural historians like to identify the "discovery of the individual," the appearance of certain individualistic concepts should not obscure the fact that the overwhelming ethic of society and sense of personality identifiable in the writings (overwhelmingly by men) of the time was still community. C. Bynum, Jesus as Mother 82-109 (1982).
order to study in the cathedral schools of the early Middle Ages at the universities which were founded in the twelfth century, one not only had to be male, but at least outside Italy, whether by compulsion or custom, one also needed to be admitted into one of the minor clerical orders.54 Even though literacy among medieval laywomen may have been higher than among laymen,55 the female voices which remain from the time—women poets, diarists, correspondents, mystics, and theologians—are remarkable because they are so rare.56

Not surprisingly, virtually all medieval descriptions of human nature and society were expressly limited to discussion by men of the male self and male society. Discussions of women by men were an afterthought.57 For

54. See F. Artz, The Mind of the Middle Ages 317 (1953).

55. McLaughlin, supra note 43, at 223-24. Other writers have suggested the opposite, that illiteracy was higher in women than men. See, de la Roncière, Tuscan Notables on the Eve of the Renaissance, in II A History of Private Life, supra note 41, at 157, 253 [hereinafter de la Roncière, Tuscan Notables]. I do not know if this difference of opinion results from the examination of different countries (France versus Italy), from the inclusion of the clergy (who had higher literacy than the laity and, of course, were all male) by de la Roncière, or from the inclusion of Latin literacy by de la Roncière (McLaughlin limits her statement to the vernacular). Perhaps the degree of literacy in the Middle Ages is a matter of pure speculation and Ms. McLaughlin and Mr. de la Roncière are merely revealing their gender prejudices. There seems to be agreement, however, that female literacy among the nobility and the bourgeoisie was the norm, rather than the exception.

56. This "rareness" is due in large part to the fact that the materials which do remain from women were largely ignored by historians until the late twentieth century. As Elaine Kolb has written (specifically concerning ancient Roman women, but in a context discussing the works of women authors in medieval Europe and Japan as well), "it is incorrect to say that women were silent—they were merely unrecorded until the medieval Christian tradition of vernacular literature broke their silence." Kolb, When Women Finally Got the Word, N.Y. Times, July 9, 1989, § 7 (Book Review), at 1, 28.

Bynum has written extensively on the writings of medieval women theologians, particularly during the thirteenth and fourteenth century. See C. Bynum, supra note 7; C. Bynum, supra note 53, at 170-262.

In the last few decades there has been a flurry of "cultural" or "economic" historians of the Middle Ages who have delved into the demographic materials, diaries, and correspondence that exist from this period in order to hear the voices of the women at the time who rarely wrote books for general publication, but did have voices. One particularly ingenious example of this type of work which is being done is Barbara Hanawalt's study of the everyday life of peasants in thirteenth and fourteenth century England. See B. Hanawalt, The Ties That Bound (1986). Hanawalt uses a variety of documentary sources to reconstruct peasant life but concentrates on coroner reports of unusual deaths. Under medieval English law, as in modern England, an inquest had to be taken in any unusual death (i.e., one not obviously natural, such as death by disease or old age) and the coroners had to produce reports based on the juries' findings. These reports describe what the deceased was doing at the time of death with some detail and contain the jury's evaluation as to whether this activity was normal or unusual enough to bear comment or further investigation. These records, therefore, allow us to see what people did on a day-to-day basis.

57. MacKinnon has also pointed out this tendency in contemporary masculine theory. See C. MacKinnon, Feminism Unmodified, supra note 6, at 34. Gilligan makes a more sophisticated statement of this point in the field of developmental psychology. She maintains that male psychologists have based their research on the unexamined and unjustified assumption that the male is the norm. Consequently, they have examined the development of the male child, and have applied these theories to female children. This assumption mandates the characterization of any feminine difference as female deficiency. Gilligan attempts to examine the female child on her own terms and argues that moral development of females may have a different, as opposed to a priori inferior, path than males. See supra note 12. Although a
example, even though medieval theorists accepted a concept of society that was rigidly divided into orders—those who prayed, those who fought, and those who worked—women were not considered to fall within any of these orders. Instead, women were quite literally thought to be outside and below society.

The nature of women was discussed purely in terms of how they differed from men. Feminine nature was conceived as being the opposite of male nature: individualistic, selfish, cunning, and sexually voracious. In many cases female stereotypes expounded by individual theologians seemed mutually inconsistent. Women were sexually voracious and aggressive, yet sexually shy; women could not feel strong emotions like love, but they were too emotional; women had no sense of morality, yet women were most ardent in insisting on justice (in the medieval form of vendetta) to punish wrongs. These stereotypes were consistent, however, in the fact that they projected all negative qualities onto women. The stereotypes embraced the opposite of the virtues admired in men and, therefore, had to possess the qualities of women.

criticism of psychological theory is beyond the scope of this article (as well as beyond the scope of my competence), I would suggest that she is also being very conservative in assuming that the male psychologists' view of masculine development is correct for male children and by not considering the possibility of different patterns in different cultures. For just one example in a field I do know quite a bit about—fairy tales and folk law—Gilligan accepts Bruno Bettelheim's analysis of fairy tales reflecting child development as saying that in order for women to take on adventures in fairy tales she must dress like a man. C. Gilligan, supra note 8, at 13; see also B. Bettleheim, The Uses of Enchantment (1976). Bettelheim's book is wonderful in many ways, and he has many insightful things to say about those tales he did analyze. However, anyone who reads folklore can tell you that he stacked the deck to support his theories. He chose as archetypal stories those stories, and those versions of stories, which fit his stereotypes of male and female child development and ignored those that did not. The reason I, and I expect many other girls, became an avid reader of fairy tales, is that it is (or was until fairly recently) one of the only fields of literature available to children which typically revolve around active female protagonists. Fairy tale collections are full of stories of princesses who go on arduous adventures to rescue enchanted princes—usually held captive by other female characters—and they do so as women, not in drag. Even in stories in which the heroine seems passive and insipid, such as Snow White and The Sleeping Beauty, the villains are strong and exciting, albeit evil, women: the evil stepmother queen in Snow White, and the wicked fairy and ogre mother-in-law in Sleeping Beauty.

Interestingly, as discussed infra note 281, because of the medieval concept of virginal viragoism there was a tradition of holy female-to-male transvestism—in order to embark on arduous spiritual adventures, women might want to disguise themselves as men. Bullough, Transvestism in the Middle Ages, in Sexual Practices and the Medieval Church 43, 43-45 (V. Bullough & J. Brundage eds. 1982).

58. Woman was considered to be by her nature:

... sexually boundless in her appetites, ever after greater riches, subject to violent rages and irrational inconsistency, careless of all law or social order, of loyalty and steadfastness, the destroyer of men, rich and powerful as well as the poor. Deceit and indirection are the woman's weapons, for she lacks the force to proceed otherwise. McLaughlin, supra note 43, at 253; see also C. Erickson, The Medieval Vision 184-85, 198-200 (1976).

59. Erickson notes that "mutually contradictory models of female behavior were to be found in the writings of theologians, poets and preachers . . . . Only in their degree of caricature did these images meet on common ground." C. Erickson, supra note 58, at 198.
One influential medieval interpretation of original sin strikingly illustrates the individualistic nature of women and the communitarian and relational nature of men. Eve ate the fruit from the tree of knowledge of good and evil because she wanted to be like God, autonomous. Adam, on the other hand, was satisfied with the order of the Garden and understood that not only would he never be like God, but also that he did not want to be so. He took the fruit from Eve because he knew she was damned, but he loved her so much that he could not let her go to Hell alone: he abandoned his duty to God out of his connectedness to his wife. 60

It was the rare woman who could control her natural individualistic and selfish desires and remember the honor of the family and community, which was a natural desire of men. Women, by their nature, were a constant threat to the order of society and to the purity and holiness of men. Paternal affection, and love of the child for its father, were not only considered natural, but the strongest and most noble emotions a human could feel. 61 Women, however, lacked the moral, intellectual, and emotional strength to be capable of true love and friendship, which came so naturally to men. 62

Most significantly, because women were defined in terms of their difference from men, they were defined exclusively in relationship to their sexual nature and reproduction. The emphasis was on their role in the physical production of children, at the exclusion of their role in the nurturing and education of children. 63 The very existence of maternal affection in most women was seen as highly dubious because women lacked

60. McLaughlin, supra note 43, at 218-19. We see this concept as early as Augustine, who stated that Adam was not deceived by Satan, but sinned out amicabilis benevolentia, which may be translated as “social love to [Eve],” Augustine, The City of God XII, XI, at 28 (J. Healey trans. 1931), or “the good nature of a friend [so as to share her life at all times in every way].” P. Brown, The Body and Society: Men, Women and Sexual Renunciation 402 (1988) (citing De Genesi ad litteram II.42.59:454). And it survives at least through John Milton in the seventeenth century. In Paradise Lost, Adam reacts with horror and sadness when he sees that the charming but simple Eve has been deceived by the Serpent into thinking that she will become godlike:

... som cursed fraud
Of Enemie hath beguil'd thee, yet unknown,
And mee with thee hath ruind, for with thee
Certain my resolution is to Die.
How can I live without thee, how forgoe
Thy sweet Converse and Love so dearly joyn'd . . .

J. Milton, Paradise Lost bk. IX, ll. 904-10 (F. Patterson ed. 1931) (1667).

61. “As for paternal love, everyone knew how deep, tenacious and even violent it could be. Nothing in this world was greater, more constant, or more all embracing.” de la Roncière, Tuscan Notables, supra note 55, at 274. But see infra note 67 for a discussion of medieval imagery of the nurturing mother.

62. McLaughlin, supra note 43, at 229. West states that women find it strange to read of men’s struggle for intimacy whereas it is natural for women. In her words: “It is ridiculously easy [for women]. It is also, I suspect, qualitatively beyond the pale of male effort.” West, supra note 1, at 40. Putting aside for a moment the question of her assumption that she can speak for all women, I would point out that medieval theologians and jurisprudes would have agreed with West’s sentiment—if she had reversed the sexes.

the intellectual and moral capacity for true love and friendship.\(^6\)\(^4\) Duby notes that one of the two late eleventh- through early twelfth-century hagiographies of historical married women and mothers, intended as models for women, points to the fact that one woman actually nursed her own child as among her paradigmatically saintly virtues. A third panegyric biography of a mother in the twelfth century (although the lady was not canonized) considered it noteworthy that she actually stayed in the same room when her adopted infant child cried, even though she was a wealthy noblewoman who could have afforded to avoid this unpleasantness.\(^6\)\(^5\) Mary was adored as the Blessed Mother because of her very uniqueness.\(^6\)\(^6\) Indeed, the lack of artistic depictions of nurturing mothers\(^6\)\(^7\) other than the

\(^6\)\(^4\) Id. at 229.

\(^6\)\(^5\) G. Duby, The Knight, the Lady and the Priest, supra note 11, at 136-37, 145 (relating other contemporary edifying stories involving married women, but the women were not deemed saints). Both St. Godelive and St. Ide were historic people whose biographies were written as models for married women—how to persevere a horrible marriage in the former (St. Godelive was eventually murdered by her husband and mother-in-law) and how to be a good mother in the latter. Of course, many other medieval saints and holy women had been wives and mothers, but unlike Godelive and Ide, their saintliness included the rejection of these roles. For example, St. Cunegonde, the wife of Emperor Henry II, a historical individual who lived at the turn of the tenth and eleventh centuries, was said to have convinced her husband to take a mutual vow of chastity and the marriage was never consummated. Actually, she was childless but Henry refused to divorce her, either out of love or religious scruples, despite the urgings of his advisors. The chaste aspect of the marriage was apparently added by twelfth-century moralists who believed saintliness and marriage were incompatible. Id. at 57-58. Angelo of Foligno, the thirteenth century, mystic was a wife and mother who rejoiced upon the death of her family because it left her free to pursue her religious vocation. According to her writings, Margary Kempe, a fifteenth-century English mystic, was very married and pregnant with her fourteenth child when she persuaded her husband to join her in a vow of chastity. She regularly bemoaned her married and maternal state in her writings and finally had a vision (during one of her pregnancies) when God told her that because of her loathing of sexuality she would be treated as a sort of "honorary" virgin and be permitted to dance in heaven. Atkinson, "Precious Balsam in a Fragile Glass:‖ The Ideology of Virginity in the Later Middle Ages, J. Fam. Hist., Summer 1983, at 131, 140-42. The third lady described was the mother of the author, an abbot named Guibert.


\(^6\)\(^7\) The lack of artistic depictions of mother and child other than the Virgin and Child may result, in part, from the fact that relatively little secular art survives from this period. An exception to this generally negative stereotype of women has been identified by Bynum: She identifies a strain of imagery in the twelfth and thirteenth centuries which identifies Jesus, God the Father, and/or abbots with the nursing, and sometimes pregnant, mother. This seems to be related to a positive stereotype of the gentle nurturing mother, and contradicts my thesis. Bynum points out, however, that this imagery was used almost entirely by male Cistercian monks, and was rarely used by, or recommended to, women. The gentle nurturing stereotype of the ideal mother conflicted with the monkish stereotype of actual women (who often used wet nurses). The Cistercians seemed to use the imagery in two ways. The abbot called himself mother in order to temper the image of his authority over the monastery with an image of his love and care for the monks in his charge. The imagery was an attempt for men to appropriate for themselves the one positive image of women they had. That is, the nurturing nature of women was robbed of its reality—nursing became a metaphor for the male monks' sense of love and community. Second, the Cistercians, like most mystics, sought images to describe the union of the soul with God. Although medieval male mystics occasionally used female sexual imagery to describe the soul's experience of religious ecstasy, for the most part they rejected identification with the cursed woman, especially in her sexual function. Identifying God as female in the sex act would have been anathema. Homoerotic images of union were also generally unacceptable, although they occasionally occurred. The image of suckling was
Virgin Mary in medieval literature and art has prompted a debate among historians as to whether medieval women loved their children, or whether maternal love was a later invention. 68

Consequently, secular society and law recognized that women had to be more carefully watched and controlled than men. 69 So much so that statutory law and legal theorists often considered a husband to be at fault and subject to punishment for the adultery of his wife and of other females in his household. Because the woman was recognized as naturally selfish and sexually uncontrollable, the husband should have understood her mutual duties to the honor of society and the family by keeping her from temptation and chastising her if necessary. 70

In other words, the values of interconnectedness and intimacy in the Middle Ages—the concept that men were inherently communal and

adopted as a way for the monk to describe a type of union with God without either sacrificing the monk's sexual identity or attributing unacceptable female sexuality to God. C. Bynum, supra note 53, at 110-69; see also Bynum, "... And Women His Humanity:’” Female Imagery in the Religious Writing of the Later Middle Ages, in Gender and Religion 257, 263 (C. Bynum, S. Harrell & P. Richman eds. 1986).

Bynum also argues that if one reads the writings of female mystics of the twelfth century in their own words, without projecting modern sensibilities into them, one will find a striking absence of modern sexual stereotypes. If the women did occasionally use female nurturing imagery and male judging imagery, they just as frequently used female judging, ruling, and educating imagery and male nurturing imagery and did not associate nurturing with femininity. Id. at 264-65.

In Holy Feast and Holy Fast, supra note 7, Bynum has further developed this thesis by arguing that women theologians of the thirteenth through fifteenth centuries rejected both the misogyny of their male counterparts and the limitations of a dualistic theory which ascribed specific characteristics as feminine or masculine. Rather, they adopted a vision of woman which was more fully human, and consequently more fully Christlike, than man.

An excellent example of how the medieval reproductive vision of the nursing mother and “mother love” differs from our contemporary nurturing vision is contained in a hagiography of St. Ide, Countess of Boulogne, who was considered a paragon of motherly and wifely virtue. In order to protect them from being “led into wicked ways,” St. Ide insisted on nursing her sons rather than, as customary, giving them to a wet nurse. Once, in violation of St. Ide's express orders, the dry nurse turned one of the children in her charge over to a wet nurse. The Saint returned in time to see her son at the breast of another woman. St. Ide snatched away the child and shook and beat him until he vomited the foreign milk, and then nursed him herself. It was not gentle nurturing love that a nursing mother imparted to her children, but her genetic material. Regnier-Bohler, Imagining the Self, in II A History of Private Life, supra note 41, at 311, 336; G.Duby, The Knight, the Lady and the Priest, supra note 11, at 136-37; see also supra note 65.

68. See B. Tuchman, A Distant Mirror (1984) (which relates primarily to fourteenth century France). Tuchman, who specializes in the history of later periods, was perhaps particularly struck by the difference between the sentimental depictions of mothers and children in the nineteenth and twentieth centuries with the hard-hearted depictions of medieval times.


70. J. Brundage, Law, Sex, and Christian Society in Medieval Europe 165 (1987) (referring to religious, as opposed to legal, sanctions); id. at 519 (referring to the survival of those laws into the late medieval period and even the sixteenth century). There were Roman and early Christian precedents for making a husband legally responsible for his wife's adultery. Id. at 45, 72. Brundage does note that such liability might have been theoretical as he has not been able to locate cases where these penalties were invoked. Id at 519.
concerned about relations and that women were incorrigibly individualistic—legitimated the patriarchal social order and jurisprudence of the early and high Middle Ages.

As the Middle Ages progressed, ideas of individuality and privacy developed. Initially, this developing emphasis was perceived as feminine values and instruments of feminine liberation against the patriarchal feudal system. These values were propounded by the Church of the high Middle Ages as part of their reform of society. This reform included subverting the structure and power of the existing patriarchal political structure, which the Gregorian Reformist72 party in the Church believed stood in the way of the power of the Church. The demise of the hierarchical and patriarchal structures can be seen in the working out of the role of consent in sexual relationship, as shown in theories of the definition of marriage and rape, and in the ideals of chastity and fear of sexual pollution.

71. Despite extremely interesting demographic work by medieval historians, especially that by Herlihy and Duby, our understanding of the economic and political status of women in the Middle Ages is still relatively primitive. It is interesting to note that the “discovery” of the self, autonomy, and privacy in law, literature, religion, politics, and family structure in the eleventh and twelfth centuries coincided with what at least some historians have identified as the height of the economic and political status of women in the eleventh and twelfth century. Herlihy, Land, Family, and Women in Continental Europe, 701-1200, in Women in Medieval Society 13 (S. Stuard ed. 1976) [hereinafter S. Stuard, Women in Medieval Society]. It is also interesting that women’s power may have peaked and began a period of decline by the end of the twelfth century, when women began to be “privatized” and began to lose legal control over their property—the same time when individuality and autonomy started to become the dominant masculine ideology.

This is an area which needs more historical research and analysis. For example, Duby believes that French wives began to lose control over their property around the mid-eleventh century. See G. Duby, The Knight, the Lady and the Priest, supra note 11, at 99-104. The data Herlihy presents in Land, Family, and Women in Continental Europe, 701-1200, supra, tends to indicate the highest economic status of women in the eleventh century, with some fall-off by the twelfth century (and much regional variation). He expresses the theory elsewhere that the position of medieval women declined with the rise of the patrilineal family in the twelfth and thirteenth century which, in turn, resulted in large part from the Gregorian Reform of marriage in the late eleventh and twelfth centuries. Herlihy, The Making of the Medieval Family: Symmetry, Structure, and Sentiment, J. Fam. Hist., Summer 1983, at 116, 124-26 [hereinafter Herlihy, Medieval Family]. Stuard describes the eleventh and twelfth century as the “watershed” of women’s economic status. S. Stuard, Women in Medieval Society, supra, at 10. Does this suggest that autonomy was initially a feminine value, or at least one that served women’s needs in their struggle to maintain their economic rights? And as this value became more generally accepted by masculine society starting around the so-called “discovery of the self” during the “Renaissance of the twelfth century,” it was “coopted” by patriarchy and became a masculine value used to subordinate women.

72. For lack of a better term, I refer to the movement starting in the mid-eleventh century in the Catholic Church to “free” itself from secular control, to challenge the power of the Holy Roman Emperor over Church property and the investiture of bishops, and to assert hegemony over a wide sphere of medieval life as the Gregorian Reform, and its proponents as Reformists. Of course, the “Reformist” would have preferred this term, since it implies that the preexisting order needed to be reformed, and that their movement was a positive one. I am sure that there were many neutral and negative terms used at the time to describe this movement, but since the Reformists essentially “won,” they got to choose the name by which they are remembered.

I use the term broadly to include not only the late eleventh-century movement specifically identified with Gregory VII (Pope from 1073-1085), but also the twelfth-century Churchmen who continued the reform of marriage law, as well as the wars against the Emperors.
III. THE DEVELOPMENT OF THE LAW OF MARRIAGE

A. Consent in Marriage and Rape

A frequently heard misconception of the medieval attitude towards women is that women were viewed as merely chattel. This fact often is thought to be reflected in the modern marriage ceremony, in which the father hands over the bride to the groom.\(^73\) I would expect both cultural and radical feminists to explain this as deriving from the masculine exercise of hegemony over the female, who was treated as property to be owned. Without defending in any way the low status of women in modern or medieval society, or proposing a psychological theory of what values these institutions actually promoted, a study of medieval sex law suggests that these institutions are the remnants of institutions that were in medieval times perceived as quite different and more complex.

During the high Middle Ages, the (masculine) concept of the communal and hierarchal nature of sexuality—as reflected in the law of marriage and rape—was eventually replaced with the (feminine) concepts of individuality, equality, and autonomy in sexual matters, which preceded the replacement of the extended family with the conjugal family.\(^74\) A legal marriage ceased to be a communal decision and became a matter of individual choice for the wife. Rape became a question of whom a woman chose to have sex with. Even the forerunner of the modern law that a woman cannot be raped by her husband—the concept of conjugal debt (i.e., that a spouse was not permitted to refuse intercourse upon the demand of the other)—was a legal right which allowed a woman to sue for support and enforcement of her husband's career and movements.

\(^73\) In unequivocally asserting that men and women shared a common spiritual destiny and dignity, the Christian Church undoubtedly helped prevent the woman from anywhere becoming a chattel of her husband; in seeking to establish the sanctity and permanence of marriage, the Church helped confirm her importance as established mistress of her household.

\(^74\) J. Goody, The Development of the Family and Marriage in Europe 103-56 (1983); D. Herlihy, Medieval Households 56-156 (1985); Herlihy, Medieval Family, supra note 71. Although this article concentrates primarily on marriage in the upper classes (because most of the extant medieval literature concerns the aristocracy), Hanawalt has argued that despite the romantic theories of other historians of medieval peasantry, at least in England by the thirteenth century the conjugal marriage had become not merely the ideal but the reality of peasant family organization as well, and extended families were rare. B. Hanawalt, supra note 56, at 90-104. Hanawalt suggests further that the conjugal family might have been the norm for English peasant families at even earlier date. Id at 80.
This radical change in marriage law and family structure seems to have started at the time that the economic power and status of women in medieval society had reached its height. At the same time, the male nobility was wresting control over wealth (in the form of dowries and inheritance rights) from women. Unfortunately, but predictably, by the late Middle Ages the new marriage law was accepted by secular society; individuality was recognized as a more positive, "masculine" value. Women had been largely privatized—relegated to the house and family to be admired for nurturing and motherhood—and women's economic and political status began to fall throughout the high Middle Ages. Agnatic lineage replaced cognatic lineage and the noblewoman's importance in her family declined.

Consequently, I would warn modern cultural feminist jurisprudences that it is not enough to propound a set of values that one labels as "feminine" (even if they are values which are perceived as feminine in late twentieth-century American culture) and assume that if these values are adopted by the law that it will then be liberating of women. Suppose that women were successful at convincing our male-dominated society that these values were valuable. It may well be the case that men would merely adopt these values as their own values. Soon communitarianism, nurture, and intimacy would become the apologia to build a slightly different form of an equally oppressive patriarchal society.

Before I continue I must step back and qualify what I am trying to say. I am not going to argue that medieval legal theory was a battleground upon which women and men fought it out for ideological dominance. Rather, there was a great deal more going on at this time, both culturally and politically. The change in marriage law was an important part of the strategy of the Catholic Church to increase its spiritual, political, economic, and social power vis-a-vis the secular arm of the noble class. What I am proposing is that there was a tendency of the people who were writing in

75. See supra notes 71-72 and accompanying text.
76. Both Duby and Herlihy have related the decline in women's economic power to the changes in European family structure which they, in turn, relate to the changes in marriage law. See supra note 71.
77. MacKinnon has pointed out this tendency in MacKinnon, Feminism, Marxism, Method I, supra note 19, at 530-32. She notes that women who seek individuation are attacked as selfish and individualistic. She attributes this to the male tendencies of defining women as what men are not and attacking women who try to be like men. There is some truth to this. However, as a professional woman, I see a disturbing tendency of professional men to try to coopt "traditional" feminine virtues. The nurturing father and the sensitive guy are the new Yuppie role models, as compared to the selfish professional woman who "wants it all." The hallways of our country's law firms and other elite places of business are filled with young fathers, who despite the fact that they work late hours and are not the primary caretakers of their children, are talking about their "active" role in raising their children and how this has enabled them to bring out their natural nurturing tendencies. Very few of their female counterparts have children, for which they are criticized as being selfish for not having, wanting, or loving children like their male counterparts. That is, women who seek individuation are no longer merely being criticized for not being feminine, they are being criticized as not being sensitive like men. On the other hand, women lawyers who do have children are frequently treated as second-class citizens. See, Kingson, Women in the Law Say Path is Limited by "Mommy Track," N. Y. Times, August 8, 1988, § 1, at 1.
78. See supra note 72 and accompanying text.
medieval times to associate certain values with one gender which we now associate with the other. This can be seen in the debate over changes in sex law.

I am also not going to argue that in fact men were communitarian and women were individualistic in the Middle Ages or now. Rather, I wish to say two things. First, different values, or the rhetoric of different values, can and have been used to support patriarchy or to support women's rights in different cultures. Second, people in different cultures have perceived their reality differently from how we perceive our reality, and this should serve as a warning to us that we may not be perceiving ourselves accurately.

B. Individualist Legal Reform in the Service of Women

In the Middle Ages the connectedness of women did not clash with the selfish individualism of men. Rather, claims to female autonomy were posed against strong male claims to communitarian hierarchy. The story of sex law is not so clean and obvious as a simple account of how men of the Middle Ages defined themselves and women, but is greatly complicated by the role of the Church. In fact, the history of sex law is not a battle between men and women, but a battle between sacred and secular authority, in which women were pawns. In the Church/state struggle, women were assigned certain attributes by the protagonists. These attributes are inconsistent with the essence of femininity that West perceives today.

During the early Middle Ages, the Church was not involved directly in the promulgation and enforcement of laws governing sexuality.79 The Church did have strong views on what was licit or illicit, but these views

79. J. Brundage, supra note 70, at 135-43, 173-75, 179-87 (discussing limited nature of Church's role in regulation of sexual behavior); G. Duby, The Knight, the Lady and the Priest, supra note 11, at xix ("[o]ur previous research had brought out the coexistence of two matrimonial moralities, one imposed by the priests and the other put into practice by the warriors who then formed the ruling class.") (emphasis added); see also Sheehan, Choice of Marriage Partner in the Middle Ages: Development and Mode of Application of a Theory of Marriage, 1 Stud. Medieval & Renaissance Hist. 5 (J. Evans ed. 1978).

By adopting Duby's clerical/noble dichotomy neither I (nor Duby) should be understood as simplistically implying that all members of the clergy held one theory and that all members of the nobility another. Indeed, the clerical hierarchy consisted largely of the younger brothers of the ruling nobility, and the scribes and legal advisors of the nobility were clergymen. Consequently, many, if not most, of the individual members of the clergy probably supported the status quo at any given time. On the other hand, many noblemen, either out of religious sincerity or political opportunism, supported the Gregorian Reformist attack on Imperial and Royal authority (as evidenced by the support of the Church in its civil war against the Holy Roman Emperor by so many German nobles).

Duby's central thesis is that the theory of marriage dominating the earlier Middle Ages was not based on Christian sexual ideals, in large part because the Church did not engage in sexual legislation. He therefore calls this model of marriage a secular theory. As the Middle Ages progressed, the Gregorian Reformist (i.e., Papal Supremacist) wing of the Catholic hierarchy began to exercise increasing control over sexual legislation. They eventually developed and tried to impose an alternate Christian model which Duby identifies as ecclesiastical. The result was less a total replacement of the secular model by the ecclesiastical model than a synthesis, where the former was superimposed on the latter. Like all dichotomies, Duby's secular/ ecclesiastical model should not be mistaken for an empirical description of reality, but a potentially useful analytical tool. Perhaps it is useful to view the dichotomy as two extremes of a spectrum, with most cases falling somewhere between them.
were moral guidelines and not enforceable laws. A confessor could prescribe an appropriate penance, but an ecclesiastical court could not impose punishment. The Church exhorted the people with rules suggesting that certain behavior was or was not permitted. Violation of these rules was a sin, not a crime enforceable by the Church. Sexual regulation was primarily a secular affair and, in the case of marriage, largely a private affair determined more by families and custom than legislation. Even though early medieval Church moralists were very concerned with sexual offenses, episcopal courts occasionally declined expressly to intercede in disputes concerning sex and marriage. Sex was a secular issue and bishops, who professed celibacy, were singularly lacking in expertise in this area. The law of sexuality, as practiced by custom or legislated and enforced by the king, differed markedly from the principles that were promoted by the Church.

As I discussed above, the ideal of earlier medieval society was one of interconnectedness, community, and hierarchy. Marriage and sex were matters to be determined by entire communities—primarily families and feudal lords—and not by individuals. In contrast, as I shall argue, the ideology eventually adopted by the elite of the religious community, at least as reflected in the Church of the Gregorian Reform, recognized interconnectedness as the existing order. However, like the radical feminists of today, Church thinkers longed for independence and separateness; they feared violation, which was conceived primarily as a result of sexuality. In this vein, theologians and lawyers recognized the spiritual equality of all men and, even more surprisingly, of men and women. What is more, although I have stated that hierarchy was perceived as natural, they did not believe that the existing earthly hierarchy was "natural," in the sense of being part of the original creation. Rather, it was the divine and just punishment of men and women for original sin—it was "natural" only in

80. J. Brundage, supra note 70, at 137. The Church, of course, could always excommunicate or impose other sacramental penalties on those who violated religious sanctions. Consequently, if sexual law disputes were brought in Church courts, the canon judges might have imposed the dominant secular law, even though it might have been inconsistent with the Church's moral teaching.
81. See generally id. at 124-49; Sheehan, supra note 79, at 5-7.
82. J. Brundage, supra note 70, at 149. Brundage believes that such restraint was uncommon.
83. For example, during the early Middle Ages, Frankish men practiced polygyny and concubinage, and Frankish women practiced serial monogamy and were concubines, despite the fact that this contradicted Church teachings. Although moralists occasionally spoke out against these practices, and as society became more and more Christianized, secular society rejected them also, most of the clergy seems to have accepted these customs as perfectly respectable. Gregory of Tours, in his history of the early Frankish kings written in the sixth century, speaks matter of factly about the polygyny of the Frankish nobility and kings. See, Gregory of Tours, The History of the Franks 222 (L. Thorpe trans. 1974). Charlemagne, who was later canonized, had at least four wives in Muntehe, several concubines, and perhaps a few Friedelfraus, although later in life he bowed to ecclesiastical pressure and maintained only one wife in Muntehe at a time (in addition to his concubines and inferior wives). McNamara & Wemple, Marriage and Divorce in the Frankish Kingdom, in S. Stuart, Women in Medieval Society, supra note 71, at 95, 103-05; G. Duby, The Knight, the Lady and the Priest, supra note 11, at 42; see infra note 91 for a discussion of the various forms of Frankish marriages.
the sense of the debased state of creation immediately after the Fall. 84

The Reformist lawyers of the eleventh century moved the trend in theories of marriage and sexuality toward the autonomy of women. These views contained the seeds of medieval feminism, even though they were supported by explicitly misogynistic canon lawyers. The Reformist lawyers recognized the rights of individual women to contract marriage and developed a theory of sexual law that was theoretically symmetrical between the sexes. They also recognized equality in sexual matters despite the fact that the Church taught, as a matter of divine law, that women were inferior and subject to men in all other legal and social matters. 85

It is beside the point whether or not these changes in sex law were in fact intended to be more advantageous to men than women. 86 The point is that these changes were debated in terms of the rights of women and characteristics that were initially associated with women. Indeed what better

84. That is, even though as I argue supra in the text accompanying notes 42-47 that the hierarchical order of society was divinely decreed, the precise terrestrial sexual hierarchy which existed was a result of the Fall. According to Duby:

Sin was the source of inequality; the carnal mechanisms of generation created the 'genera,' according to which laymen were hereditarily assigned to one of several social conditions . . . . Class division and seigniorial oppression were thus justified by a natural inequality residing in impurity . . . . This was the order God wanted. And so it was the order that existed.

G. Duby, The Three Orders, supra note 41, at 165-66; see infra text accompanying notes 263-64 for a discussion of the debased state of the current sexual hierarchy, as compared to the proper original hierarchy of the Garden.

The medieval theory that sexual subordination was divinely ordained by God has recently been rejected by the Catholic Church. The Biblical curse of Eve is now interpreted as God's prediction of the debased nature of human life in the state of sin—not a holy state. We should, therefore, struggle against sexual subordination just like we struggle to free ourselves from the other punishments predicted by God to Adam and Eve (including backbreaking labor and snakebite). See John Paul II, On the Dignity of Women, supra note 32.

85. I find it telling that Pope Innocent III, who was one of the most influential Popes in instituting and enforcing the Gregorian Reformist theory of marriage, was also a very ardent supporter of women elsewhere, namely in the religious orders. As I will discuss later, in the late twelfth through thirteenth centuries there was a great increase in women who wished to follow a religious vocation. They were met with great hostility and suspicion from a large segment of the monastic community. Innocent III encouraged these women by recognizing new orders of nuns in defiance of the specific prohibition of the Fourth Lateran Council. Bolton, Mulieres Sanctae, in S. Stuard, Women in Medieval Society, supra note 71, at 141, 149.

86. Have not many of our recent well-intended efforts to improve the status of women and enrich professional women been some of the factors which have led to the feminization of poverty in this country? Indeed, some changes which, at first blush, may have seemed advantageous to women in fact seem not to have benefited women. For example, the Gregorian Reformists did away with legal concubinage and made most continuing concubinage relationships into marriage. Rather than dignifying the role of women, this change probably degraded and impoverished many women. J. Brundage, supra note 70, at 183. Concubinage was not merely sexual slavery, but was a form of informal or second-class marriage. Concubines, although on average probably not as financially well off or enjoying as high a status as wives, were nevertheless respectable women with legally enforceable rights and privileges. Concubinage gave an alternative family arrangement, particularly for couples of differing social classes. When legal concubinage was eventually abolished, the women who in previous times would have been concubines did not necessarily have the alternative of marriage to their upper-class lovers; rather, they were now considered at best mistresses with no legal rights or, at worst, prostitutes with legal liabilities.
way of breaking the power of a secular social structure, which many believe
was a Gregorian Reformist goal, than to support an increase in women’s
rights against the existing patriarchy? Perhaps one reason secular society
eventually adopted most aspects of the Gregorian Reform of marriage was
because men began to privilege the autonomous values implicit in it. It
would hardly be surprising, then, that eventual adoption of the Reform
agenda would prove disadvantageous to women.

Medieval canon lawyers considered two primary issues as related to the
legislation of sexual behavior. These issues were the definition of marriage
and the permissibility of clerical marriage or concubinage, which had been
frowned upon but tolerated by the Church in the early Middle Ages. The
first of these revolved around the concept of individual consent in personal
decisions and the second, the medieval concept of sexuality and the status
of women. 87

C. Secular Theory of Marriage and Rape

1. Marriage

As I have said, marriage law as actually practiced in the early Middle
Ages was largely a secular matter. It was based primarily on early Germanic
law, as eventually modified by Christian teaching. 88 Germanic law envi-
sioned marriage almost entirely in terms of sexual relations and families. 89
Marriages made with the consent of both families were preferred, both
socially and legally. Marriages by such consent were considered permanent
(subject to divorce on limited grounds), and the children of such marriages
had greater inheritance rights. However, other regular sexual relationships
were recognized as marriages even though entered into without familial
consent. In the earlier period even marriage by rape was permitted,
although because of the relative unimportance of the consent of individuals
this category may have included what we would consider elopement. 90
These latter forms of marriage may have been considered legally and
socially inferior to marriages negotiated between the respective families,
and were frequently not considered permanent. They were, however,
considered marriages in the sense that they were the regularized sexual
unions recognized by society. 91

87. These are, of course, not the only gender issues which concerned medieval jurists and
which might be fruitful areas for further feminist study. I especially hope that some feminists
will study the medieval institution of prostitution, which was not only frequently tolerated as
a necessary evil by the Church throughout most of the Middle Ages but, in the late-fourteenth
and early-fifteenth centuries, was run by the government as a public utility in much of
continental Europe. J. Brundage, supra note 70, at 521-23.
88. J. Brundage, supra note 70, at 124-35.
89. Id. at 135.
90. Id. at 129.
91. Duby describes the various forms of Frankish marriages quite differently than
Brundage. Brundage describes Kaufehe, the highest class of marriage, as marriage with familial
consent, where the bride’s family handed over the bride’s Munt, her wealth and dominion, to
her husband’s family. The second class of marriage, Friedelehe, he describes as marriage
without familial consent, but only the individual couple’s consent. Consequently, the bride’s
Munt is never transferred in a Friedelehe. Id. at 128-29.
2. The Formal Prerequisites

In the early and high Middle Ages, nobles still preferred marriages contracted by the entire families of the couple. (Of course to some extent this still remains true today.) The earliest attempts to legislate a Christian theory of marriage under Justinian in the mid-sixth century required a formal negotiated property settlement agreement between the two families as the minimum necessary for marriage.\(^2\) Marriage ceremonies varied considerably throughout the Middle Ages, but usually concentrated on the mingling of the families who gave consent. For example, one common ceremony involved a _traditio_—the transfer of the bride from her birth family and formal incorporation into her marriage family—typically consisting of the bride’s family accompanying her in a joyous parade through town to the house of the groom’s family who would then entertain the in-laws.\(^3\) This ceremony seems similar to the modern custom of the father giving away the bride. The transfer of the bride price or dowry from one family to the other might also have been a part of the ceremony.\(^4\)

In many places in Europe, the sexual aspect of the marriage was overtly acknowledged by the custom of representatives of both families accompanying the couple into the marital bedroom in order to witness the couple entering the marriage bed.\(^5\) Some medieval chronicles and stories refer to couples as being married, having sexual relationships, and even maintaining a household and conceiving children during what we would call the betrothal prior to the public ceremony. This was so because the

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Duby also describes _Friedelehe_ as being a sort of temporary and inferior form of marriage. The significant distinction Duby sees between _Friedelehe_ and _Muntehe_ (the term he uses for the highest form of marriage) was not that the former was entered into without familial consent (indeed, Charlemagne would not give his daughters in _Muntehe_ so as to not divide his kingdom among too many heirs, but approved of his daughters’ _Friedelehen_). Rather, the _Friedelehen_ were temporary because the woman’s _Munt_ was not handed over to her husband but remained with her or her father. The _Friedelehe_ was like rental of a wife—marriage for a term of years—rather than fee simple absolute ownership. The _Friedelfrau_ in a _Friedelehe_ marriage kept her _Munt_ and her freedom. However, in Germanic society the fact that the _Friedelfrau_ retained control over herself and her property and was not properly governed by a man, was considered a dangerous proposition and, therefore, inferior. Because she did not give her _Munt_ to her husband but retained it for her own use, she was not entitled to receive support from her husband and her children inherited from the father only if he did not produce heirs from a subsequent _Muntehe_. G. Duby, _The Knight, the Lady and the Priest_, supra note 11, at 41-42.

92. This was later abandoned almost immediately for the lower classes because it meant that the family relationships of the majority of the illiterate populace would not be considered marriage. J. Brundage, supra note 70, at 114. Reformist decrees were loathe to abandon the requirement of property settlements because they protected the women’s property interests. They, therefore, encouraged dowries but stopped short of making marriages without formal dowry arrangements illegal or unenforceable. Id. at 189-90, 275.

93. Id. at 262, 266-68; de la Roncière, _Tuscan Notables_, supra note 55, at 247-49, 297.

94. Id. at 293; Aristocratic French Households, supra note 69, at 130-31; G. Duby, _The Knight, the Lady and the Priest_, supra note 11, at 152.

95. The family probably did not stay to witness the union, but this is not clear. G. Duby, _The Knight, the Lady and the Priest_, supra note 11, at 132-33. Brundage believes that this custom seems to have been initially suppressed to some extent by the Reformers in response to the Church’s insistence on the consensual, as opposed to the sensual, nature of marriage. It once again became popular in the mid-twelfth century when the canon lawyers eventually accepted a theory of a positive role of sexuality in marriage. J. Brundage, supra note 70, at 415.
sexual relationship had been the secular definition of what we might call marriage so long as the families agreed.96 There seems to have been distinction between a marriage, which was a family affair, and a wedding, which was a public celebration which might occur before or after a public marriage (or, although this was frowned upon, not occur at all) without affecting the validity of the marriage.

During the early Middle Ages the Church did not have legal jurisdiction over marriage. The priest was the one party conspicuously not legally required to attend the marriage ceremony. Throughout the Middle Ages, even after the Gregorian Reform, priests were frequently present at marriages and were asked to perform services at marriages, but were not legally necessary. Neither secular law nor Church proscriptions required a priest or any other authority to officiate at or even attend a wedding, although as the Middle Ages progressed the Church strongly recommended a priestly blessing.97 At least by the high Middle Ages, the families for good luck frequently asked a priest to bless the couple either at the exchange of vows or after they entered into the marriage bed, either because of sophisticated religious conviction or as ritual magic or exorcisms.98 Frequently, however, the families dispensed with the priest and the bride's father bestowed the nuptial blessing.99 A priest, as one of the most highly educated people in town was often asked to act as witness to the marriage contract, much like a notary.100 To publicize the marriage, at least part of the ceremony often took place outside the front door of the local church and not within the building.101 Priests, as influential members of the community and frequently as members of the families, were often invited as guests to the wedding feast.102

3. Divorce

The primary secular purpose of the noble marriage was to assure the wealth and continuity of families. Marriage was a matter of concern for the community, the family, and the couple's respective liege lords, but not of

96. G. Duby, The Knight, the Lady and the Priest, supra note 11, at 124-28.
98. Probably to ensure fertility and to protect the couple from evil. Aristocratic French Households, supra note 69, at 132-33. The priest might also bless the rings and say other blessings during the ceremony or subsequent festivities. All these marital blessings might have been requested by the family as exorcisms or ritual magic in the same way that they might ask for the priests to bless their fields or their swords. Duby could not find Church manuals prescribing specific procedures for such blessings until the twelfth century. G. Duby, The Knight, the Lady and the Priest, supra note 11, at 151-53.
99. Aristocratic French Households, supra note 69, at 133.
100. Sheehan, supra note 79, at 31-32; see also J. Brundage, supra note 70, at 190, 439-43 (discussing public regulation of marriage contract).
101. Sheehan, supra note 79, at 27-28. Occasionally, however, a mass would follow the exchange of vows. G. Duby, The Knight, the Lady and the Priest, supra note 11, at 151-53.
102. On the one hand, most decretists encouraged priests to attend weddings to make sure that consent had been freely given by the parties. On the other hand, many moralists thought that priests should not attend weddings because then, as now, they were frequently the occasion for behavior unbecoming the clergy: overeating, excessive drinking, and lewd humor. Brundage describes this admonition as "no more than a pious hope, not a seriously enforced policy." J. Brundage, supra note 70, at 191.
individual concern for the couple itself. Noble marriages tended, therefore, to be dissolved for various reasons related primarily to assuring communal goals, such as sterility and sexual incapacity—which prevented the birth of heirs—and adultery by the wife—which confused the issue of legitimacy of the heirs. 103 Theoretically, the wife could invoke the communal obligation of the marriage to produce heirs as grounds for divorce. In most cases, however, the obligation was exercised against the individual woman for the sake of the family. 104 Because male sterility was not generally recognized or admitted, a childless marriage would result in divorce from the woman, so that the husband could remarry. 105 Women over a certain age were presumptively less fertile (and less attractive, although this was not considered a legitimate reason for divorce) and were frequently divorced so that more heirs could be produced. 106 Female adultery was so potentially disruptive to the community that the husband theoretically could be punished as a pimp if he did not divorce his philandering wife. 107 In noble families, marriages often were dissolved for trumped-up reasons, or for no reason at all, if an alliance became no longer politically or financially

103. G. Duby, The Knight, the Lady and the Priest, supra note 11, at 47-48. Duby indicates that female adultery may have been quite common and was often accepted by the husband, so long as it remained discreet, or until the husband wanted a divorce for any other reason. Id. at 219-24; Duby, Communal Living, in II A History of Private Life, supra note 41, at 35, 82.

104. For a general presentation of the history of the imposition of canonic views of marital indissolubility over noble views of dissolubility in the eleventh through twelfth century, see G. Duby, The Knight, the Lady and the Priest, supra note 11, at xix, 202-24. Brundage recognizes Duby's models of marriage: the secular ideal was endogamous marriage (i.e., intermarriage within extended families or traditionally allied clans to promote continued close relations), dissoluble at will, and controlled by families; the clerical ideal was exogamous marriage, indissoluble, and a matter of free choice by individuals (although he notes that it, like most models, is an oversimplification). J. Brundage, supra note 70, at 194-97; see also supra note 91.

105. G. Duby, The Knight, the Lady and the Priest, supra note 11, at 91-92; Bullough, Medieval Medicine, supra note 11, at 497. Women did, however, bring actions for divorce based on their husband's impotence, but this may have been because the marriage could not be constituted (in the case where marriage was to be formed by future consent plus coitus) or perhaps because the husband could not pay the "conjugal debt." See infra note 233 (discussing the theoretical symmetry or the conjugal debt).

106. "The main preoccupation of the aristocracy ... made it essential for a man to be able to dismiss a wife who was slow to produce sons, and sometimes to change wives, when the chance of a more distinguished marriage presented itself." G. Duby, The Knight, the Lady and the Priest, supra note 11, at 48. Duby points out that King Philip I of France was justified by the standards of the nobility in divorcing Queen Berthe on the grounds that she had passed her years of maximum fertility and, in an era of high child mortality, more heirs were needed. The divorce became a scandal, however, because of the public impression, actively encouraged by the Church, that he was putting aside a perfectly respectable and faithful wife merely because she had become fat with age and the king had met a more attractive woman. The scandalous nature of this divorce, which was opposed by and litigated in front of the Pope, was used by the Reformists to publicize and gain public acceptance of the Church's revolutionary marriage laws. Id. at 7-14.

107. See supra note 70. Duby suggests that as a matter of honor it was essential to dismiss or otherwise publicly punish an adulterous wife if the matter became too public. See G. Duby, The Knight, the Lady and The Priest, supra note 11, at 219-20 (although this may not have been grounds for divorce under canon law as it eventually developed). Some canon lawyers believed that it was stupid and impious for a husband not to turn out his adulterous wife. J. Brundage, supra note 70, at 306-07; see also Aristocratic French Households, supra note 69, at 82.
4. The Role of Individual Consent

The nobility did not emphasize the validity of individual consent to marriage, probably because it was potentially disruptive to dynastic strategies. To prevent splitting of the patrimony, by custom younger sons were not permitted to marry unless they could obtain a sufficient estate from another source (either winning wealth or lands in battle or somehow contracting an arrangement with the family of an heiress). Although it was accepted that a young man would not remain celibate, it was extremely convenient if liaisons entered into without his family's consent legally could be dismissed as concubinage, dissoluble at will and not producing heirs to the paternal estate, rather than a binding marriage.

Marriage of daughters was a strategy for obtaining military and financial aid. Medieval noble marriages were typically hypergynic: the wife was of higher rank than her husband. The wife's family would bargain for fealty and financial support from lower noble families by offering their socially superior daughters in marriage to the sons of the lower families, whose social standing would be improved by the alliance. Medieval chronicles also contain instances of families marrying daughters into enemy families in order to act as spies. For the sake of family tranquility, successful breeding, and parental affection, it was considered preferable if the daughter personally consented to the marriage arranged by her parents. However, this was not essential. There were innumerable instances of marriages against the will of adult daughters and, maybe even more frequently, marriages of young children and infants.

108. The most frequently asserted grounds for divorce seemed to have been incest. Although it is beyond the scope of this article, one of the great conflicts of canon marriage law was the inconsistency of the goals of exogamy and indissolubility. The Church adopted the position that marriages could not be contracted between persons related within seven degrees. Relationships could be by blood, affinity, sponsorship (i.e., acting as godparents to a person), or sexual relations (i.e., if the groom had intercourse with a relative of the bride, they were considered related). These rules were so broad and complicated that virtually anyone could find an impermissible relationship to bring up if they decided they wanted a divorce. The origins of and reasons for these incest rules are controversial, but the Church finally modified them at the Fourth Lateran Counsel in favor of indissolubility. This attempt was not altogether successful, as shown by Brundage's assertion that in some places as late as the fourteenth century "trial" marriages seemed to have been practiced, whereby the bride and groom would call it off after a period of time by standing as godparents for the same child, thereby becoming close relatives. J. Brundage, supra note 70, at 456-37.

109. G. Duby, The Chivalrous Society 112-22 (C. Postan trans. 1977) [hereinafter G. Duby, The Chivalrous Society]. Duby states that attitudes started changing in the last third of the twelfth century and noble families began to allow their younger sons to marry. He speculates that this may have been a reaction against a trend toward female emancipation. G. Duby, The Knight, the Lady and the Priest, supra note 11, at 216.

110. Sometimes their financial and military standing could be improved as well, if the daughter was an heiress or obtained a life estate in an income or a castle as a dowry. Aristocratic French Households, supra note 69, at 141; G. Duby, The Knight, the Lady and the Priest, supra note 11, at 221.

111. Aristocratic French Households, supra note 69, at 137.

112. Id. at 127-28. The frequent papal decretals, and the analyses and glosses of decretists, about the degree of coercion which rendered consent unfree (and therefore the marriage void)
5. Rape

The concept of marriage as a communal or family decision also underlies the early medieval secular law of rape. Following Roman law, the crime of *raptus* (rape) included not only what would be called rape under modern American legal principles—sexual intercourse against the victim's will—but also what we would call elopement.\(^{113}\) Rape was abduction, usually with sexual relations, without the proper consent. However, since sexual matters were of primarily communal and not individual interest, proper consent could only be granted by the family.\(^{114}\) If a woman was forced to have sexual relations with a man chosen by her and her husband's family as a marriage partner, she was not raped. However, if she chose to marry her lover secretly or attempted to run away from home, she was raped. The woman's body was a valuable commodity to be used in the family business and the woman could not defeat the family's plans by trying to enter into a secret marriage. Frequently, rape also included abduction for the purpose of persuading the daughter's family to agree to a marriage, even if accompanied with consensual coitus or with the woman's consent to marriage.\(^{115}\) The interference of abduction with the proper modes of

attest to the continued prevalence of forced marriages throughout the Middle Ages. Eventually, the test accepted by the Church was whether the force was such that would sway a "constant man," the medieval jurisprudential grandfather of the "reasonable person" of modern law. J. Brundage, supra note 70, at 345. Similarly, the frequency of decretals and legislation considering whether a father could disinherit a daughter who refused to marry the father's choice and forcing a father to pay a dowry upon his daughter's clandestine marriage, indicate the persistence of parental control over marriages. Id. at 397, 431. Despite these pressures by the Church, court records show that the nobility took quite amazing steps in trying to enforce forced infant marriages in light of canon law. For example, nobles would try to argue that there was sufficient evidence that a daughter freely consented to her marriage if she smiled during the vows, especially if she was too young to have learned to talk! G. Duby, The Knight, the Lady and the Priest, supra note 11, at 257. Sheehan points out that for a considerable period after the Church's adoption of the new marriage theories, local priests tended only to pay lip service to the concept of consent, and generally allowed forced marriages of daughters if they served the common good. Sheehan, supra note 79, at 17; see also Haskell, The Paston Women on Marriage in Fifteenth-Century England, 4 Viator 459 (1973) for a discussion of the pressure placed on daughters who attempted to refuse arranged marriages long after individual consent in marriage was instituted as a legal requirement.

113. J. Brundage, supra note 70, at 148, 209-10 (examples of the type of economic and psychological pressures applied by families on their daughters who resisted the family's marriage arrangements as late as the fifteenth century); id. at 249.

114. Duby points out that Hincmar, archbishop of Reims in the second half of the ninth century and one of the earliest medieval prelates to try to formulate a consistent law of marriage, in his treatise *On the Stamping Out of Abduction* saw rape as a breach of public order (i.e., leading to feuds), rather than a sexual offense. His treatise was, in fact, a discourse on peace. G. Duby, The Knight, the Lady and the Priest, supra note 11, at 32-83.

115. Abduction remained common until the twelfth century. But was it merely an act of barbarism and oppression directed against women? Many women instigated their own abductions or at any rate aided their abductor. When lovers faced opposition from their clans, abduction was a means of asserting individual freedom; if the clans later recognized the *fait accompli*, it ended happily. A girl imprisoned in her own home or a wife abused by her husband might look upon her abductor as a liberator. Women gave themselves in order to attract a champion. Thus, the meaning of abduction is ambivalent. Proof of the oppression of women forced to resort to such measures to free themselves, it was one of their most effective weapons. Abductions were often rather theatrical affairs; in a more profound sense they were a kind of ritual.
negotiation in the marriage market was frowned upon.

This definition (or we would say conflation) of rape, kidnapping, and elopement may explain some of the oddities of medieval rape law which may seem to us extremely misogynist. They are misogynist, but not for the reason apparent at first blush. For example, one of the primary areas of debate among the Gregorian Reformers over rape law was whether a rapist could remedy his crime by marrying the victim or whether he was permitted to marry his victim.\(^{116}\) Similarly the facts that the victim also was on occasion subject to punishment and that the rapist faced a great variance of penalties—from paying fines to the victim's parents to mutilation and execution\(^{117}\)—reflect both the wide variety of misbehavior which came under the rubric of rape and the fact that the primary social purpose for including elopement in the definition of *raptus* was to preserve the financial value of the woman for her family.

6. **The Role of Community**

The medieval secular law of marriage, like most levels of medieval life, was anti-individualistic and communal in its very nature, at least at the level of the extended family and the feudal bond. The concepts of familial and feudal consent do not seem to have been, either on the theoretical level or in practice, merely euphemisms for individualistic consent by the father and lord. Medieval cases and chronicles seem generally to refer to familial consent, although there is often a recognition that this consent may have been expressed by the father or leading male in the family.\(^{118}\) Medieval chronicles, literature, and letters reflect that these decisions were made and negotiations conducted not only among the family generally, but also with the family's and lord's retainers and counselors.\(^{119}\) The writings, both factual and fictional, condemn as unwise and disruptive fathers and lords who made such decisions without counsel. Counsel also seems to have

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Aristocratic French Households, supra note 69, at 139. For an example of such a consensual abduction see G. Duby, The Knight, the Lady and the Priest, supra note 11, at 246.

116. J. Brundage, supra note 70, at 209-10, 311-12 (marriage of prostitutes was encouraged to combat prostitution, but for non-prostitutes the aim was to prevent marriage of the rapist and the woman in order to discourage rape as a means of elopement). The modern reader's horror at the suggestion that a rape victim might be forced to marry her attacker should subside somewhat when one contemplates that these cases were intended to deal with the treatment of elopement.

117. This disparity continues throughout the medieval period. Id. at 165, 209-10, 313, 398, 471-72, 550-52. Brundage also suggests that the disparity of punishment may also be a reflection of class differences. "... The swineherd who ravished a duchess, if by some miracle he escaped mutilation or death, would be enslaved; the duke who ravished a shepherdess, if punished at all, would make compensation by providing her with a purse full of coins as a dowry." Id. at 313.

118. See G. Duby, The Knight, the Lady and the Priest, supra note 11, at 235, 240, 246 (examples of the persons involved in noble marriage decisions in the high Middle Ages). An example of marriage negotiations in Italy as late as the fourteenth century is given by de la Roncière, Tuscan Notables, supra note 55, at 292-93.

119. Both Sheehan and Noonan, in their discussion of the precedents on which Gratian relied—ecclesiastical, of course, but prior to the development of the Gregorian theory of marriage—discuss the fact that in the earlier cases the defect in the marriage may have been the father's failure to obtain the consent of the rest of the family, not the daughter's. Noonan, The Power to Choose, 4 Viator 419, 420 (1979); Sheehan, supra note 79, at 10-15.
included the women of the household, especially the father's wife and mother and, to some extent, the daughter. The lady of the manor was recognized as in charge of all feminine matters in the household, including the raising of female and young male children, as well as matters of marriage and childbirth.\footnote{120} Although the lord was officially in charge of the lady, his control of women's matters was indirect through the lady.\footnote{121} It was to be expected, therefore, that the lady would and should have had much to say as to the marriages of the women under her control, including those of her daughters. It is also to be remembered that in the typical hypergynic marriage the lady outranked her lord and she—as well as her birth family—would have been a well respected authority in the area of dynastic politics, perhaps more knowledgeable than the lord.\footnote{122} Medieval correspondence also indicates that the lady was frequently an advisor or negotiator in marriage discussion, especially when the lord was away from home on crusade, in battle, or, in the higher-ranking families, at another one of the family residences.\footnote{123}

120. Aristocratic French Households, supra note 69, at 70-85. One chilling example was Gertrude, who maintained a strict gynaeceum organized as a private convent, that was a virtual prison for her women. Her biographer admiringly describes the marriages she arranged for the women in her control, the strict punishments she imposed on girls who tried to enter clandestine marriages and, indeed, her excellent husbandry in maintaining her farms by seeing that her women serfs were “covered” by appropriate serf husbands when they reached puberty, in the same way the prudent farmer’s wife makes sure that all her ewes are mated in season. G. Duby, The Knight, the Lady and the Priest, supra note 11, at 260-61.

121. Aristocratic French Households, supra note 69, at 70-71, 78-79. Herlihy emphasizes that the role of women seems to have varied by country. For example, in Southern France the specialization of the noblemen’s role as fighter restricted the man’s economic role in the household with the wife being in charge of the “solicitude” of the household. This was less true in Italy which was not as feudalized. Germany and Northern France were closer to the Southern French mode. Herlihy, Land, Family, and Women in Continental Europe, 701-1200, supra note 71, at 24-25, 30.

122. G. Duby, The Knight, the Lady and the Priest, supra, note 11, at 221. It may seem inconsistent with my thesis that women were perceived to be individualistic and men communitarian in medieval society to see women actively involved in such marriage negotiations. I don’t think it is. First, I do not have an opinion as to whether medieval women were in fact more individualistic than medieval men, but I am merely arguing that such a tendency was perceived by the people at the time. Second, it is not inconsistent that women would have internalized the masculine value structure of the proper way for society to be organized just as a large number of modern women, whether or not “naturally” or socially communitarian, tend to adopt the contemporary (masculine) values of individuality and aggressiveness (either for themselves or their husbands) as the way to get ahead. In addition, it is hardly news that people who value individualism also frequently believe they have the right to exploit other individuals. I would also direct the reader to Ann Haskell’s study of the women of the late medieval Paston family, supra note 119, in which she concludes that noblewomen were extremely strong and independent personalities in marriages which, despite clerical misogyny and oppressive statutes, seemed to be an institution in which each partner contributed equally. However, their correspondence reveals that, as late as the fifteenth century, the older women, who handled all marriage negotiations of women, used extremely oppressive tactics against the younger women.

Haskell at first wonders how medieval girls raised in such condition of subordination developed into such strong-willed adults. She concludes, however, that late medieval English women believed in the modern (masculine) military aphorism “he who would command must first learn to obey . . .” Younger women were to learn discipline through subjection, in order to earn the right to command later. Haskell, supra note 112, at 170.

123. Aristocratic French Households, supra note 69, at 136-43. Although it is outside the
D. Church Theory of Marriage and Rape

1. Development of a Theory of Marriage

We have seen that the Church initially had little, if any, legislative role in enforcing the law of marriage. Eventually, the Gregorian Reformists realized that clerical supervision of marriage was an opportunity to increase the power of the Church against the power of secular lords. By approximately the beginning of the eleventh century, despite the initially strong opposition of the nobility and kings, the Church courts had gained exclusive jurisdiction on all issues relating to marriage and divorce.\textsuperscript{124} The Church, however, still lacked a coherent body of law and enforcement mechanisms to implement its theories. By approximately the end of the twelfth century, the Church had developed a comprehensive canon law of marriage, which, as the forerunner to modern western marriage, became the secular theory of marriage as well.\textsuperscript{125}

The Reformers ultimately adopted a theory that had its origins in ancient Roman law and, to some extent, the Jewish law concepts reflected in the Bible. The Reformers interpreted Roman and Jewish law in light of the theories of sexuality developed by the early Church Fathers, such as Augustine, Jerome, and Isidore. In addition, Reformist canon marriage law was greatly influenced by the contradictory status of women in theological theories: women were considered inferior to and subordinated to men, on the one hand, while men’s spiritual equals, on the other. In Reformist Church theory, I can see elements of the argument that women are

scope of this article, not only did families control the marriage of their members, but under secular law, lords controlled the marriage of their vassals. This was also, finally, abolished by the canon lawyers as a constituent of valid marriages, but the custom continued of having to pay a tax or fine to marry without the consent of one’s lord. B. Hanawalt, supra note 56, at 200-03. Other records seem to show that although lords may have been intimately involved in arranging the marriages of their powerful vassals, and of heiresses and widows who controlled powerful fortresses, the marriages of the peasants and servile vassals were arranged by the ladies. Aristocratic French Households, supra note 69, at 71.

\textsuperscript{124} Except property right issues, which remained within the jurisdiction of local secular law.

\textsuperscript{125} J. Brundage, supra note 70, at 223. Duby describes this process as a merger. G. Duby, The Knight, the Lady and the Priest, supra note 11, at 282-83. Sheehan points out, however, that it was not until the thirteenth century that these theories reached the \textit{hoi polloi} and began to be implemented in local parochial courts. Sheehan, supra note 79, at 17-18:

The highly controversial divorce and remarriage of King Phillip I of France at the turn of the eleventh and twelfth centuries discussed by Duby is a good illustration of the difficulty of the struggle of the Gregorian Reformist party to institute their new ecclesiastic model of marriage, even among the clergy. Even though the King had accepted the idea that the Church had the authority to hear divorce cases (what we might call subject matter jurisdiction) he challenged the legitimacy of the rule imposed by the Church (what we might call the choice of law). G. Duby, The Knight, the Lady and the Priest, supra note 11, at 4-18. Every French bishop, save one, Yves of Chartes, initially supported the King's refusal to obey the Pope's ruling (and attended the “bigamous marriage”) and Yves (an early developer of the canon theory) was forced to leave the country. Id. at 8-10. The Papal Reformist party of the Church (which controlled the bishops of southern France—the northern bishops tended to be royalists) subsequently excommunicated the King. Id. at 13. The King eventually submitted officially to the Pope’s ruling although, unofficially, he continued to live with his second wife (or concubine). Id.
separate and stand against the dominant communal patriarchy. This argument manifests itself particularly in the idea that marriage can and must be created by the consent of individual women.

Classical Roman law saw marriage purely as a matter of consent. Consent may have been familial, or solely by the individual. 126 Because the purpose of marriage was to raise a family, sexual intercourse was an anticipated and inevitable result of marriage. Intercourse was not, however, a necessary condition of marriage: there was no concept that a marriage had to be consummated. 127

As the Church developed its theories throughout the Middle Ages, two of the consequences of this consensual theory of marriage proved disturbing. First, if a couple could have created a marriage by consent, it should also have been able to dissolve a marriage by consent. Second, marriage was a purely private matter between families which did not require any outward ritual, or governmental or Church permission. 128 During the high Middle Ages, the Church would eventually reject the first of these principals, but accept the second.

Throughout the high Middle Ages, Church theorists wrestled with the definition of marriage. They recognized the importance of sexuality in marriage. Indeed, most theologians maintained that the only reason marriage was permitted was procreation. Many added a secondary reason, to give humans a single permitted outlet for their sexual urges. However, very few theologians during the early Middle Ages could conceptualize of marital sex as encouraging and reinforcing the virtues of marital love and fidelity. It would have been unthinkable to suggest that sexual pleasure itself could have been other than sinful, let alone beneficial. 129

Not only was the concept of sexuality morally repugnant to the theologian, but linking sex and marriage would also have caused a grave problem in mariology. Catholic doctrine simultaneously held that Mary had been legally married to Joseph and that Mary remained a virgin. 130 Thus, Catholic doctrine categorically separated the concepts of sex and marriage.

It had not been the custom or practice under either Roman, ancient Germanic, or medieval secular law to require any form of licensing, registration, or public ceremony to legally recognize a marriage, as we do today. Therefore, it did not occur to medieval thinkers to require such formalities as a necessary constituent of a valid marriage. For various reasons, however, the Church encouraged that public marriages be at-

126. This was especially true in the case of the bride whose consent, at least as to her betrothal, was often given on her behalf by her father or guardian. J. Brundage, supra note 70, at 32-38.
127. Id. at 36.
128. Id. at 32-33, 36, 38-39. This is not to suggest that there were no customs or laws restricting marriages, but that there was no requirement of licensing, registration, or public ceremony.
129. For a discussion generally of patristic theories of sexuality in the context of how they affected early Church theories of marriage, see id. at 80-93.
130. Id. at 274, 354; G. Duby, The Knight, the Lady and The Priest, supra note 11, at 182; Gold, The Marriage of Mary and Joseph in the Twelfth-Century Ideology of Marriage, in Sexual Practices and the Medieval Church 102 (V. Bullough & J. Brundage eds. 1982).
tended by priests. The requiring of certain ceremonies like *traditio*, as some canonists briefly suggested, lacked universality because of the wide variety of customs throughout Europe and between social classes. Consequently, theologians, ecclesiastical courts, and canon lawyers concentrated primarily on the element of consent as the determining factor in marriage.

Around the beginning of the high Middle Ages, canon lawyers became dissatisfied with what I have called the secular theory of communal or family consent. Early papal decisions and earlier theologians had questioned the sufficiency of familial consent absent individual consent in marriage. However, it was only with the development of canon law as a separate field of study—beginning in the eleventh century and flowering with the establishment of the first universities and law faculties in the twelfth century—that individual consent was found to be sufficient for marriage, even in the absence of familial consent.

One of the most influential early canon lawyers was Gratian, who was probably a professor at the newly formed University of Bologna. Gratian wrote his *Concordance of Discordant Canons* (customarily referred to as Gratian's *Decretum*) around 1140, during the middle of the era of marriage law reform. In the *Decretum*, Gratian attempted to reconcile existing precedents and theories into a coherent body of law. Ten out of the thirty-six hypotheticals which constituted the middle portion of this enormously successful textbook concerned issues relating to marriage and sex. These were published separately as *The Treatise on Marriage*. Gratian determined that freely given individual consent, followed by coitus, was necessary for marriage. He left open the possibility that familial consent might have been an additional requirement. Gratian based his argument on the precedent of two early papal decisions, certain passages of Paul's epistles, and writings of various Church Fathers. His conclusions, however, were by no means dictated by these precedents. Gratian's proposed resolution of the competing theories of marriage was immediately recognized as a revolutionary insight and sparked spirited legal debate for the next 150 years. Most significantly, Gratian's hypotheticals on the subject of consent in marriage, as well as most of the precedents on which he relies, all revolve around the issue of whether a woman can defy her family. Only in passing does Gratian mention that the holdings probably also apply to men.\(^{131}\)

Gratian's theory was criticized and modified by later decretists throughout Europe. It was also implemented and modified in actual cases by Reformist popes with legal training. Unanimous agreement among ecclesiastical legal scholars was finally reached by the thirteenth century, when it was eventually agreed that neither familial consent, feudal consent, priestly blessing, nor any formal ceremony was required for a valid and enforceable marriage. A marriage could be formed either by present individual consent, with or without coitus, or future individual consent (i.e., betrothal) followed by coitus. Although public ceremonies and priestly blessings were strongly urged (and it might have been sinful to forego them) in order to ensure the regularity of the marriage and to protect the

\(^{131}\) Schroeder, supra note 2, at 1901 n.44.
spouses (especially the wife) from later denial of consent given secretly, they were not required to make the marriage legally binding or an effective Sacrament. 132

During the counter-Reformation, priestly blessings became required as a matter of canon law to establish the validity of marriage. This canon law became binding in many Catholic jurisdictions only very recently. 133 Throughout the high Middle Ages until the counter-Reformation, despite the strong opposition of the nobility, the Church recognized the validity of secret marriages contracted without parental approval or approval of one's feudal lord.

Once again, the debate may be understood as concentrating primarily on the rights and privileges of the woman, not the man, in marriage. James Brundage's examples of cases appealed to the pope are predominantly cases where women wanted either to dissolve coerced marriages, or to recognize marriages that were contracted secretly. Most importantly, clandestine marriages were not merely recognized against the wishes of the wife's family who disapproved of the marriage, but many of the cases enforced the wife's rights against her husband who later wished to divorce her. Recognition of individual consent in marriage was not merely a method which allowed husbands to enforce the property rights of the wife that they had secretly married against the will of the wife's family. It also legitimized the wife's rights against all the men in her life.

In addition, the papal decisions and decretists' theories repeatedly forced the fathers of girls who wished to choose their own husbands to pay the customary dowry. They also sometimes forbade families from disinheriting women who either refused to marry their fathers' choices, or married someone of whom their family disapproved. 134 A threat to disinherit a daughter might be enough to render consent, and a family-chosen marriage, invalid. Whether or not some of the popes or lawyers did this also out of a cynical desire to break up the estates of powerful noble families, these decisions and laws were intended to protect—and seem to have protected—women's immediate individual economic rights at the cost of their fathers' rights.

132. Brundage discusses this process extensively throughout the central portion of Law, Sex, and Christian Society in Medieval Europe, which he describes as a monograph on this subject. J. Brundage, supra note 70, at 229-416.

133. Id. at 563-65. The new teachings on marriage adopted at the Council of Trent, known as the Tametsi, prohibited clandestine marriages for the first time. The Tametsi was not, however, binding in a country until it had been officially promulgated and explained to the laity. Consequently, it took a long time for it to become the law throughout Catholicism. For example, the Tametsi was not officially received by English Catholics until the nineteenth century.

134. This was the case so long as the husband was of the same social class; marriage between a free woman and a servile man was another question. J. Brundage, supra note 70, at 397, 438-39. Feudal lords could, however, impose fines on women who wished to marry against the lord's will or refused the lord's candidate. Both Brundage and Hanawalt agree that, although most marriages continued to be arranged by families, by the thirteenth century fewer women were forced into marriage and women frequently chose to pay fines or taxes imposed by feudal lords for the right to choose their own husband. Id. at 439; B. Hanawalt, supra note 56, at 200-01. Although one can argue that the power to tax free choice in marriage is the power to destroy that right, the fact that the tax was paid indicates that the choice was frequently made.
The canon lawyers were also concerned with the implications for women of one logical development of the concept of consensual marriage: the conditional marriage. If marriage is a matter of consent like a contract, and if contracts can contain conditions, then marriages can also contain conditions. From the cases decided and the hypotheticals discussed by the decretists, these conditional marriages seemed to have been a ruse for families and husbands to retain control over women, and women's money, through coercion. Typical conditional marriage contracts were: "I consent to be married to you so long as your father pays a big enough dowry"; "or your inheritance comes through"; "or you deed your dowry to me"; "or you have a male heir within two years."\(^{135}\) Brundage's examples seem to indicate conditions imposed by a husband upon his wife, not the other way around. The canonists wrestled with this problem because it seemed both to flow from their contractarian theory and to allow for easy "divorce." Eventually it was decided that if a man had intercourse with his wife, he could not afterwards try to throw her out on the grounds that some condition was not fulfilled. Coitus was waiver of conditions.\(^{136}\)

### 2. Rape

The decretists also seem to have been the first to conceptualize rape as a crime of violence. This was not because the male lawmakers could not understand the concept of sex as violation.\(^{137}\) I believe that they did. Contrary to Catherine MacKinnon's conclusion that by defining rape as violence, and only violence, men have sought to legitimate a whole range of other "rape experiences" which are not physically violent,\(^{138}\) the decretists—who also defined rape as violence—recognized that rape had something to do with violating individual women.\(^{139}\) The introduction of violence into the definition of rape came from (the then new and radical) ideas that women have some degree of sovereignty over their own bodies and that rape was primarily a crime against the individual woman, as opposed to a crime against her family.

As I have said, the canon lawyers insisted that marriage was constituted by the free and uncoerced consent of the individual couple and wished to free it from familial control. In order to protect the legitimacy of elopements and clandestine marriages, the canon lawyers rejected the

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135. J. Brundage, supra note 70, at 277-78. Although these changes in marriage law may have had the long-run effect of reducing the economic status of women generally.
136. Id. at 338-39.
137. West, supra note 1, at 59-61.
138. C. MacKinnon, Feminism Unmodified, supra note 6, at 85-92. By emphasizing the violent side of rape, society de-emphasizes the sexual side, thereby preserving the "sex is good" norm. C. MacKinnon, Theory of the State, supra note 6, at 135. I am using the term "physical violence" in the masculinist sense, extreme physical acts likely to cause severe bodily harm or death. I do not wish to suggest, nor do I think that MacKinnon suggests, that all rape is not violative and violent. I agree with MacKinnon that this does seem to be a function of the equation of rape and physical violence in our society. I am suggesting, however, that this may not be its origin and that it may also serve positive feminist goals as well. That is why many feminists have supported the concept that rape is a crime of violence, not sex.
139. Some earlier canonists such as Yves of Chartres (late eleventh century) began to equate abduction with sexual violation. J. Brundage, supra note 70, at 209.
concept that rape was abduction without family consent. Because marriage was a matter of the individual woman's consent, rape also became a matter of the woman's consent. Abduction or intercourse with a woman's consent might be fornication or adultery, but it was not rape and would not have been an impediment to a subsequent valid marriage. The test as to whether consent was freely given to support a finding that a specific act of intercourse was not rape paralleled the analysis of whether or not consent to marriage was freely given. The test was not whether or not a woman consented, but the degree of force, which could be purely psychological. The canon lawyers adopted the same test as for determining whether or not consent was freely given for marriage: an objective "constant man" test. Perhaps, because this test was applied to men (in marriage disputes) as well as women, the canon lawyers did not have a problem understanding that a wide range of psychological factors could be considered force. Blackmail, threats against family members, or the threat of imminent bodily harm—let alone grave bodily harm or death—were sufficient to cause "consensual" sex to be rape. Some decretists thought that "importunate pleading" might constitute sufficient force. To these theorists, the degree of violence was relevant to the severity with which a specific act of rape was punished, rather than to a finding of whether or not the act was rape. Some decretists recognized that intercourse with "moderate coercion" and no violence was rape nevertheless, but was not to be punished as stringently as violent rape. Even where the force was not so great as to nullify consent, so that an act could not be considered rape, the decretists recognized that coercion might have constituted a crime against the woman. Consequently, they developed a new crime of "seduction" to cover a wide variety of rape-like experiences that were not as violent as rape. As late as the sixteenth century, canon lawyers argued that physical violence was not an element in rape, because they recognized that words and emotional pressure were forms of violence. The decretists did require that a woman resist her rapist, but this did not mean that a woman had to fight back. Tears might be resistance enough.

In modern times, the concept of rape has become limited to physical violence—rather than a constant man standard which emphasizes more complex psychological factors—and a sophisticated law of "seduction" or some other crime to cover rape experiences which are not as violent as "rape" has not developed. This may have more to do with the fact that the

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140. Gratian, as well as some decretists, thought that rape may also be a crime against the woman's family or father, but the lack of consent required, was the woman's, not the family. J. Brundage, supra note 70, at 249, 596.
142. Id.; see also supra note 112 (discussing consent to and parental control over marriage).
143. J. Brundage, supra note 70, at 249-50, 511; Brundage, supra note 141, at 144.
144. Brundage, supra note 141, at 144.
145. Id.
146. J. Brundage, supra note 70, at 311.
147. Brundage, supra note 141, at 146-47.
148. J. Brundage, supra note 70, at 570.
149. Brundage, supra note 141, at 144.
Church was not as successful in establishing jurisdiction over rape as it had been over marriage (there were occasional ecclesiastical attempts to assert jurisdiction, but the canon courts could not order physical punishment, resulting in many criminal cases being returned to the secular arm) and the medieval stereotypes of women as being lying, lustful, and generally unreliable witnesses. Perhaps as a result, canon law theories on rape may not have had as great an influence on secular law as the theories on marriage. In addition, there is some evidence that by the mid-thirteenth century the Church courts, if not the canon jurisprudes, started to restrict their definitions of coercion, and began to require a showing of physical violence or fear of imminent death in cases in which husbands tried to break marriages on the grounds of coercion.

In the twelfth century, the jurisprudence of evidence was also in a very early stage. Evidentiary rules in medieval litigation typically required demonstrable evidence of resistance in addition to testimony. Ordeals and the swearing of oaths by family members and friends were still the primary means of proving cases, although these methods started to disappear by the end of the century. The decretists and the papal lawyers were unsatisfied with these methods and encouraged the use of testimony by witnesses. While men generally considered women to be less truthful by nature than men, women were allowed to testify in sexual misconduct cases. The use of testimony was still experimental. The reliability and probity of testimony generally, and by women specifically, was still questioned, and the use of cross-examination had not developed. Canon lawyers, therefore, also encouraged the use of direct "objective" evidence, such as evidence of physical harm, and screams and protestations heard by third parties. That is, medieval concepts of consent, coercion, and violence in both marriage and rape were in an early state of development and ranged from the psychologically sophisticated to the crude.

151. Noonan, supra note 119, at 433.
152. J. Brundage, supra note 70, at 224-25, 319-22, 416.
153. Id. at 253, 411. Although some lawyers realized that under their definition of rape it was possible for a woman to rape a man, they also noted that this was an extremely rare occurrence. Id. at 396. It would have been assumed, therefore, that virtually all rape victims giving testimony would have been women.
154. Id. at 311. Even as late as the thirteenth century, notoriety, rather than testimony, was still a permissible form of proof for a wide range of sexual offenses (although rape may not have been one of them). Id. at 411-12. I do not want to place too much reliance on this point, because we know so little about such matters, but many historians have pointed out that despite the increase in privacy at this time, sexual activity during the twelfth century was, by our standards, amazingly public. Although sharing beds was frowned upon for moral and hygienic reasons, people, including the highest nobility, throughout the Middle Ages continued to have their servants, and sometimes retainers, sleep in the same rooms. Diaries, correspondence, chronicles, and fiction indicate that sexual intercourse, including rape, frequently, or even usually, took place while other people were in the room. Medieval noblewomen would have rarely, if ever, had the opportunity to be alone for the opportunity for unwitnessed rape. The requirement of evidence of coercion may not have been as outrageous as it has become in the modern rape law of our society, where rape usually occurs in isolation. See, Duby & Braunstein, Solitude, supra note 53, at 518-19 (relating the confession of a noblewoman who was raped on three separate occasions, each time in front of numerous witnesses).
No matter how unsophisticated or oppressive modern rape law concepts of consent and violence might be, the concept of consent and violence as evidence of rape was a strikingly sophisticated improvement over prior law when it was first proposed. The notion that consent and violence were evidence of rape resulted from the recognition that rape was a violation of a specific individual.

E. Rationales for Canon Marriage Law

1. Personal Sin

The decretists, who were clergymen in addition to lawyers, rejected the theory of familial consent as an element of marriage for several reasons. One reason was the development of the concept of the individual's responsibility for her own soul and the concept of individual, rather than communal, sin. In many ways the Church became more powerful and intrusive as the Middle Ages progressed. The primacy of the Church and its newly developed Sacraments as the necessary intermediary between people and God always remained at the heart of Catholic doctrine. However, in contrast to the earlier Middle Ages, individuals no longer believed that the clergy and the king alone were solely responsible for the health of their souls. Individual confession replaced communal penance. The “secular” clergy who brought the word of God to the laity in the cities—especially the new preaching orders of the twelfth century, the Franciscans and the Dominicans—began to eclipse the importance of the “regular” clergy, who were cloistered monks seeking individual perfection and praying for mankind generally from behind the protection of their monastery walls.

From the high Middle Ages through the late Middle Ages and into the Reformation, the laity increasingly sought individual religious experiences. This can be seen by the establishment of the various lay religious orders, the growth of “heretical” groups, and the development of spiritual literature aimed at the laity.

This “discovery” of the individual in spiritual matters is often described as part of a broader “discovery” of the self and privacy in all facets of life. Most interestingly, this discovery of individuality and privacy

156. Monks in the orders founded in the early Middle Ages used to live in common sleeping dormitories and pray chanting in unison, and were never permitted to be alone, except as punishment. In the orders founded in the high Middle Ages, monks lived in separate cells within the monastery and engaged in individual prayer and meditation. Contamine, Peasant Hearth to Papal Palace: The Fourteenth and Fifteenth Centuries, in II A History of Private Life, supra note 41, at 425, 482-89; Duby & Braunstein, Solitude, supra, note 53, at 515-16.
157. For a discussion of the early-thirteenth century movement of large numbers of women seeking to obtain spiritual perfection through the rejection of marriage and entering either regular religious orders (such as the newly founded Poor Clarics) or the lay orders of the cities known as the Beguines, see Bolton, supra note 85.
158. Charting the “discovery” of the idea of privacy in medieval Europe is the theme of Volume II of The History of Private Life, supra note 41. The concept of the discovery of the individual in the high Middle Ages has become so much of a cliché that Bynum felt compelled to argue that the new twelfth-century concepts of individuality and self still retained strong communitarian elements and should not be confused with the full-blown modern or even
through the high Middle Ages began at what may have been the apogee of the status and economic power of women. The economic history of medieval women is a field still in its infancy, but David Herlihy and others who have studied it conclude that women's economic and political power and their social status as compared to men increased in the early Middle Ages. Women's power and status peaked and started its downward trend somewhere before 1200 (during the period in which changes in marriage law were being made), in the second half of what I call the high Middle Ages. Around this time, secular society finally adopted the changes in marriage law, and, I would suggest, masculine society internalized the individualistic assumptions of the laws. Selfishness, previously ascribed to femininity, was “discovered” as “individuality” as it began to be reconceptualized as a spiritual ideal and legal right, and eventually re-ascribed to masculinity. As this occurred, women's power and status fell dramatically.

2. Privacy

The development of privacy was another factor in the rejection of familial consent in marriage law. Most life in the earlier Middle Ages, including life of the highest nobility, was led in public—in the large common halls of the castles dominated by the lord and his knights who slept in common dormitory style. In the high Middle Ages, manor houses were divided for the first time into rooms with the outer public spaces—the

Renaissance concepts of individuality and self, which took considerable time to develop from these primitive beginnings. See Did the Twelfth Century Discover the Individual, reprinted in C. Bynum, supra note 53, at 82.

It is difficult to posit which, if either, is the cause or effect of the other, or whether these were both effects of other factors.

See D. Herlihy, Medieval Households, supra note 74, at 131-59; S. Stuard, Women in Medieval Society, supra note 71, at 1-10; Herlihy, Land, Family, and Women in Continental Europe, 701-1200, supra note 71, at 13-32; Herlihy, Medieval Family, supra note 71, at 122-24, 126. Duby believes that women began to lose control over their property in the mid-eleventh century when the noble families tried to consolidate their wealth and to impose stricter control on their children's marital options (by forbidding the youths to marry, and forcing the daughters into arranged marriages). G. Duby, The Knight, the Lady and the Priest, supra note 11, at 94, 99-100. Joan Kelly-Gadol notes the particularly low status of women in the Renaissance resulting from the "domestication of the bourgeois wife and escalation of witchcraft persecution." She states that "if we apply Fourier's famous dictum—that the emancipation of women is an index of the general emancipation of an age—our notions of so-called progressive developments, such as . . . the Renaissance . . . undergo a startling re-evaluation." Kelly-Gadol, The Social Relations of the Sexes, in Feminism and Methodology 15, 17 (S. Harding ed. 1987). She further contrasts the relatively high status of the feudal lady, as compared to the Renaissance counterpart, which she ascribes to the development of the public/private distinction and the privatization of women. Id. at 24. This would suggest that part of the Church's strategy (although perhaps not consciously adopted for this reason) was to weaken the power of the male nobility by helping noblewomen retain their economic status against recent inroads by noblemen. Of course, an alternative explanation which does not support my theory is that the change in marriage laws by the Church was part of the movement to impoverish and privatize women, rather than impoverishment and privatization being the unintentional result.

In the high Middle Ages, manor houses were divided for the first time into rooms with the outer public spaces—the

Barthélemy, Civilizing the Fortress: Eleventh to Thirteenth Century, in II A History of Private Life, supra note 41, at 597. These public spaces may have been divided into areas by screens or tapestries. Id. at 407.
aulae or halls—being the province of the lord and his knights, and the inner spaces—the camerae or chambers—being the province of the lady and her chamberlain, although under the titular control of the lord. 162 Included in the functions of the chambers under the lady's control were the feudal treasury and most economic matters of the manor, sometimes including the collection of taxes. 163 As European society became more sophisticated and the manor became more an economic and governmental body and less of an armed garrison, the strictly non-military (in the sense of engaging in physical combat) functions in which women were expected to participate became more important. In fact, Georges Duby believes that noblewomen of the high Middle Ages had particular power even in matters involving war. According to him, "Feudal warfare, in many respects a 'private' affair, was a concern of women, who exercised undeniable, though not total, power over the private domain." 164 During the Crusades the lord would be away from the manor for months or years at a time, during which the lady was expected to run not only the economics of the estate, but its military and politics as well. This encouraged the growth of feminine power and prestige. 165

It is interesting to note that the chivalrous ideal, which required the "youths" (the younger sons of the nobility who were not permitted by custom to marry) to serve and pledge fealty to their lord's wife, also developed at this time. Sometimes described as a cynical attempt by the upper nobility to control the lower nobility by using their wives as sexual lures, 166 chivalry also in its initial period served to increase both the prestige of women and the political power of noblewomen. The fact that this "romantic" ideal may have eventually served to trivialize women should not obscure its initial stages, which occurred at the watershed of medieval women's economic power. 167

162. Aristocratic French Households, supra note 69, at 70-71, 78-80; de la Roncière, Tuscan Notables, supra note 55, at 209-11. Barthélémy cautions that although the distinction between hall and chamber is a convenient dichotomy, in fact, there was much overlap in function and terminology. Barthélémy, supra note 161, at 418-21.

163. Aristocratic French Households, supra note 69, at 71. Herlihy also notes that the state treasury was under the control of the Frankish queens, at least at the end of the ninth century. Herlihy, Land, Family, and Women in Continental Europe, 701-1200, supra note 71, at 24-25.

164. Aristocratic French Households, supra note 69, at 138-39. Barthélémy also thinks that the fact that ladies, like our modern generals, rarely engaged in physical fighting, and were, therefore, at less risk of being killed than knights, which gave them a recognized and respected advantage over men in controlling military strategy. Id.

165. D. Herlihy, Medieval Households, supra note 74; S. Stuard, Women in Medieval Society, supra note 71, at 10-12; Herlihy, Land, Family, and Women in Continental Europe, 701-1200, supra note 71. Haskell makes a similar point in connection with the Paston wives. Although women had become largely privatized in southern Europe by the fifteenth century, English noble family structure and economy required the husbands to be away from the family home for long periods (in the city, at other residences, etc.). This gave the wife almost total control of all economic affairs of the family. Haskell, supra note 112.

166. Aristocratic French Households, supra note 69, at 75-76.

167. This characterization is found in Herlihy, Land, Family, and Women in Continental Europe, 701-1200, supra note 71, at 30-32. Some feminist historians have suggested that privatization served to disenfranchise and impoverish women. See S. Stuard, Women in Medieval Society, supra note 71, at 4-5. I suggest that this was a later result from the initial movement towards autonomy. Individuality and autonomy were, in this initial period,
3. Sacramentalization

Individual consent as a constituent of marriage also was related to the gradual sacramentalization of marriage in the twelfth century. The word *sacramentum* had been used in connection with marriage in earlier centuries, but this use was in the broader sense of "holy sign."\(^{168}\) The seven Sacraments of the Catholic Church had not yet been fully developed and the word *sacramentum* was used to describe a wide variety of solemn rites, such as the dubbing of a new knight and/or the coronation of a king or queen.

The sacramentalization of marriage was finally agreed to by the Church, in significant part as a reaction to Catharism, the dualist heresy so widespread in Southern Europe. Catharism held that the material world, and therefore the Creator God of the Old Testament, was evil. The Cathars, therefore, rejected not only sexuality as evil, but marriage and procreation as well (although only the *catheri*, the "perfects," were expected to abstain). While the Catholic Church was suspicious of sexuality, it could not reject procreation and marriage entirely without, like the Cathars, rejecting the holiness of creation. The Church, therefore, was forced to insist on the holiness of marriage and, to some extent, the propriety of sex in marriage to counter the Cathar challenge.\(^{169}\)

As a Sacrament, marriage, the union between a woman and a man, symbolized the union of the Church and Christ and the individual and God.\(^{170}\) That is, marriage symbolized the mysteries of the Incarnation and salvation. The fact that marriage had both an intellectual (i.e., consensual) and physical (i.e., sensual) side was explained by the dogma that, unlike the other Sacraments which were instituted once by Christ, marriage was instituted by God twice: first by God in the Garden for the purpose of procreation, and again after the Fall as a remedy for lust (Christ merely recognized the pre-existing Sacrament at the wedding at Cana).\(^{171}\) As salvation became more and more recognized as an individual responsibility and the Sacraments were conceptualized as ways in which Grace could be conferred on individuals, marriage was also recognized as the act of specific instruments of feminine power. That is to say, initial development of the concepts of individualism and privacy which occurred in the eleventh and twelfth centuries were ideas which served to protect the political and economic power and prestige of women vis-a-vis men. Political power was considered personal property of the nobility, and was initially relegated largely to the "private" realm, which included women. As I have stated, demographic and economic studies indicate that the economic power and prestige of women increased perhaps as late as the early twelfth century, although it fell off afterwards. It was only in the later Middle Ages, when individuality became more and more the dominant ideology, as it is today, that it became increasingly a male ideology and instrument of patriarchy. As the distinction between public and private life became stronger, all governmental and most economic functions of the manor eventually moved out of the private sphere and out of the female sphere. The noblewoman increasingly was excluded from government as government became more a matter of public affairs and not the personal property of the nobility. By the Renaissance, women were largely excluded from politics and lost much of their former control over finances.

\(^{168}\) G. Duby, The Knight, the Lady and the Priest, supra note 11, at 178-79.
\(^{169}\) J. Brundage, supra note 70, at 431-33.
\(^{170}\) G. Duby, The Knight, the Lady and the Priest, supra note 11, at 180-81.
\(^{171}\) J. Brundage, supra note 70, at 271-72.
individuals. If marriage were a Grace-conferring Sacrament, it could not depend for its validity on the consent of anyone but the persons who conferred, and upon whom was conferred, Grace.\footnote{172} Neither could the Grace of the Sacrament be foisted on an unwilling recipient by a family.

4. Corruption

Another reason for the canonists' increased emphasis on individual consent was the developing medieval theological concept—inheritied from Augustine, Jerome, Isidore, and the other early doctors of the Church—that sex was inherently sinful, violative, and corrupting.\footnote{173} Catholic doctrine held that procreation was necessary (although no longer mandated) to populate the Church Militant and that marriage was recognized by Christ at the wedding at Cana as the only way to legitimize sexuality if used for the proper purpose of procreation.\footnote{174} Theologians, and the early decretists, generally accepted Augustine's characterization that sex within marriage for the purpose of procreation was permitted as "a good use of a bad thing," although always spiritually and physically inferior to chastity, which was "a good use of a good thing."\footnote{175} Virtually no one doubted that the married could not obtain the spiritual perfection of the virgin.\footnote{176} Celibacy or chastity was theoretically possible within marriage, but required the consent of both parties.\footnote{177} As I will discuss below, medieval law required each spouse to pay the conjugal debt owed to the other and engage in sexual activity when and where the other spouse demanded it. Theologians debated whether sexual intercourse could ever not be sinful—even if performed in marriage, at the order of the other spouse, in the only permitted position, with as little pleasure as possible, for the express and sole purpose of procreation, and not on a Wednesday, Friday, Sunday, any holy day, during Lent, Advent, or the season after Pentecost.\footnote{178} Even if not expressly sinful if engaged in under these limited circumstances, it was always pollutive. Marriage was permissible, but it was spiritually dangerous because one's purity and even ability to pray was at the mercy of one's spouse.

As the decretists concentrated more and more on the importance of freely given consent in marriage, they also emphasized the importance of

\begin{footnotes}
\footnote{172. For some reason, the Church did not adopt for infant marriage the theory adopted for infant Baptism: that the consent to the Sacrament could be given by a person's sponsors, at least when the person was below the age of reason (usually considered to be seven).

\footnote{173. J. Brundage, supra note 70, at 80-86, 279-81, 348-51, 424-26; see also Ruether, Misogynism and Virginal Feminism in the Fathers of the Church, in R. Ruether, Religion and Sexism, supra note 43, at 150; Atkinson, supra note 65; McLaughlin, supra note 43.

\footnote{174. One can find occasional non-condemnatory references to non-procreative sex among the canonists, but these seem to have been the exceptions. J. Brundage, supra note 70, at 80-86, 279-81, 348-51, 424-26.

\footnote{175. Id. at 280.

\footnote{176. For example, the patristic formulation of the three conditions of a woman's life was that a virtuous wife could reap thirtyfold; a widow, sixtyfold; but the virgin reaped hundredfold. R. Ruether, Sexism and God-Talk: Toward a Feminist Theology 143 (1985) [hereinafter R. Ruether, Sexism and God-Talk].

\footnote{177. McLaughlin, supra note 43, at 226; J. Brundage, supra note 70, at 242, 503-04, 507-08.

\footnote{178. J. Brundage, supra note 70, at 198-99.}
the emotional experience of the individuals in marriage and revived the Roman law concept of “marital affection” as a constituent of the consent that distinguished marriage from concubinage and other informal consensual relationships. Accordingly, some decretists suggested that marital sexuality tended to increase marital affection and fidelity and, therefore, might have had a spiritual value in addition to procreation and a remedy for lust.

Because individuals were considered increasingly responsible for their own souls, and because marriage was a decision that directly affected the state of one’s soul, it became important that the individual was able to make decisions concerning marriage. Even though the paradigm of sexual danger recognized by the theologian—the timid male longing for spiritual purity and time for prayer but constantly polluted and exhausted by the insatiable demands of his lusty wife—seemed to threaten the state of the masculine soul, medieval theologians always insisted on theoretically equal rights for women in sexual matters. Despite the hysterical misogyny (to use an etymological oxymoron) of medieval theologians, they also adored the concept of the female virgin. While the worship of virginity and the theories that virgins literally inhabited a higher sphere in heaven than married women and widows—no matter how chaste and holy—in many ways had been so debilitating for women and had unfairly stigmatized and trivialized the medieval matron, it also served to protect a women’s right to control her body, at least at the level of refusing marriage.

F. Church versus Nobility

The Church’s attempt to establish jurisdiction over marriage issues was an important part of the Gregorian Reformist movement, during which the pope and the Church wrested considerable political, economic, and spiritual control from the Holy Roman Emperor and the nobles. The Church’s emphasis on individual consent (which legitimized secret marriages and elopements), the novel theory that marriages were indissoluble (which hindered nobles from shifting marital alliances for political expediency), along with the strict rules on incest adopted by the Church (which forbade

179. Id. at 299, 297-98, 300.
180. Id. at 278.
181. See infra notes 235-40 and accompanying text.
182. Of course “hysteria,” recognized in the Middle Ages as a disease of the womb (hystera in Greek), was a uniquely female complaint. Medieval medical doctors and theologians spent a great amount of effort describing the troubles this mischievous organ caused. They debated whether Plato was right in describing the womb as a creature which lived inside women with a semi-independent existence. Whether independent or not, many doctors thought that it had a disturbing tendency to wander around the body. In the words of one anatomist, it was “altogether erratic.” Some thought that it was these migrations that caused hysteria (especially when it lodged in the throat). Others, following Galen, vainly tried to point out that it could never get further than the diaphragm. It was particularly embarrassing to the theologians, who encouraged virginity as generally being the most perfect state, that the sure-fire cure prescribed by secular doctors for hysteria was proper exercise of the uterus through orgasm and pregnancy. Galen suggested the obvious medical treatment for virgins—masturbation—but for some reason most medieval theologians did not accept this approach. See Bullough, Medieval Medicine, supra note 11, at 185 (describing hysteria and other amazing theories of medieval gynecology).
marriages within seven degrees of relationship, whether by blood, marriage, sponsorship as godparents, or sexual intimacy), had the effect of hindering the ability of the great noble families to contract political marriages to increase their wealth and power compared to the Church, where marriage (at least among the highest orders) and, consequently, inheritance of ecclesiastic offices, were theoretically not permitted. Others have suggested the even more sinister motive of the Church to render many traditional noble marriages illegitimate as a way of escheating the property left to children which the Church now declared to be bastards or to limit the number of potential heirs who could challenge bequests to the Church. 183

In any event, one of the primary goals of the ecclesiastic marriage reform of the eleventh and twelfth century was to wrest marriage from the control of the nobility. The reason the Church did this was in significant part due to the desire of the clergy to decrease the wealth and power of the married nobility vis-a-vis the Church. 184

I would suggest that one of the implicit reasons (albeit, probably not a conscious one) that the Church may have used women's rights in marriage as one of the weapons to limit the power of the noble elite was precisely because there is nothing so subversive to an existing patriarchal society than to increase the power of women in that society. By giving women more control over their destiny, the Reformists were very consciously trying to undermine the fundamental basis of their rival's institutions.

G. Conclusions

Regardless of the motive of the individual decretists or the economic structures which may have underlaid the development of theories, the canonic theory of autonomy of the soul and spiritual equality between men and women—as contrasted with the noble ideal of communal responsibility
and hierarchy—served to increase certain rights of the noblewoman. A woman could not legally be forced to have intercourse with a man she did not choose, and her relationship with a man she did choose was legitimate.

Consequently, the study of medieval cultural and legal history strongly suggests that in the early and high Middle Ages, the concepts of communality, intimacy, and inequality were masculine values supporting the patriarchal status quo. The ideals of individuation, rights, and equality increased the political and economic status of women in the eleventh and twelfth centuries and were in a sense largely women's issues, although they were expounded primarily by male canon lawyers and were part of a wide range of movements in the high Middle Ages. By the late Middle Ages these individualistic values became the dominant societal values. Consequently, they became masculine values and were used to support a new patriarchal status quo, which led to the decreased status of women.

I do not mean to argue that this shows the cultural feminists are necessarily wrong in their analysis of male and female nature and as to what is masculine or feminine jurisprudence. Instead, I mean to show that in other cultures people have had radically different understandings of masculine and feminine nature. Concepts that modern feminists hope are feminine and liberating have been perceived in other cultures as masculine and the opposite of liberating. Values that are initially challenges to the patriarchal status quo may, if successful, be coopted by patriarchy to form a new form of oppression.

What I urge is for feminists, especially cultural feminists, to adopt a more sophisticated and historically informed mode of analysis and not to assume, as they now do, that people have always been modern American yuppies. Rather, in different cultures not only are people's concepts of self different, but I believe the actual self is different. We must be very careful, therefore, not to pose universal metaphysical conclusions about the essential nature of people after only examining our own society or engaging in crude biological determinism.

In addition, I urge feminists, especially those whom West has dubbed radical feminists, to consider the antecedents of current "masculine" jurisprudence and the historical parallels to modern radical feminist theories in order to consider the extent one's views are influenced and prejudiced by our intellectual legacy. I think that medieval theories of the nature of sexuality and women, as reflected both in canon law and medieval theology, offer some evocative parallels to consider.

IV. CONTEMPORARY RADICAL FEMINISM AND MEDIEVAL VIRGINAL FEMINISM

A. West's Radical Feminism

As described by West, radical feminists posit that women, in contrast to men, are by their nature uniquely connected with others. In contrast to cultural feminists who celebrate intimacy, especially in the "joy" possible in pregnancy, motherhood and, I suppose, heterosexual relations, radical feminists insist "on the invasive, oppressive, destructive implications of
women's material and existential connection to the other." West believes that radical feminists view "women's physical connection with nature and with the other as in some sense the 'cause' of patriarchy." Specifically, she characterizes radical feminists of the 1960s as concentrating on the invasive nature of pregnancy, and feminists of the 1980s as concentrating on the violation of intercourse.

West's characterization of this line of thought is typified in the writing of Shulamith Firestone:

Pregnancy is indeed the paradigmatic experience of physical connection, and it is indeed the core of women's difference, but . . . it is for that reason alone the cause of women's oppression . . . . Pregnancy itself, independent of male contempt, is invasive, dangerous and oppressive; it is an assault on the physical integrity and privacy of the body.

According to West, more recent feminists, such as Andrea Dworkin, have theorized that:

[Like pregnancy, . . . intercourse is invasive, intrusive and violative, and like pregnancy it is therefore the cause of women's oppressed, invaded, intruded, violated, and debased lives . . . .]

[Consequently,] according to Radical Feminists, women's longings for individuation, physical privacy, and independence go well beyond the desire to avoid the dangers of rape or unwanted pregnancy. Women also long for liberation from the oppression of intimacy (and its attendant values) which both cultural feminism and most women officially, and wrongly, overvalue. Intimacy, in short, is intrusive, even when it isn't life threatening (perhaps especially when it isn't life threatening). West characterizes jurisprudence, which she refers to as the "Rule of Law," as masculine jurisprudence reflecting the masculine existential dilemma but not recognizing the feminine existential dilemma. Because patriarchy cannot experience the uniquely feminine dread of intrusion and longing for individuation, "[n]either sexual nor fetal invasion of the self by
the other is recognized as a harm worth bothering with.”191 The two areas of law she uses as examples are rape and abortion. Criminal rape is defined in terms of fear a man can share: that is, violence (fear of annihilation) or theft of property. Rape not involving these fears, but involving women’s fears—such as marital rape and date rape192—are not punished.193 Similarly, because the woman’s fear of unwanted pregnancy is the danger of invasion by the other—a fear a man cannot understand—abortion rights have been framed within the concept of protecting the right of privacy—fostering autonomy, a masculine desire.194

A study of medieval theology and jurisprudence suggests that, whether or not radical feminists are correct in characterizing intercourse and pregnancy as invasive and violative by their very nature, and whether or not contemporary masculine discourse is incapable of expressing the reality of contemporary feminine violation, they are incorrect if they postulate this understanding as being uniquely and essentially feminine and foreign to male thought. Rather, the violative and pollutive nature of intercourse and pregnancy was not merely a widely held masculine experience, it was a major tenet underlying the canon law of sex and marriage. In addition, the degrading and oppressive effect on women of heterosexual intercourse and pregnancy was expressly recognized by male theologians. It was considered justification for both the low position of most women in medieval secular society and the limited role of female religious in the Church hierarchy. It resulted in patristic virginal feminism,195 which, despite startling similarities to West’s characterization of radical feminism, was a patriarchal institution. As I will argue, medieval theologians would have agreed with MacKinnon that women are defined as sexual beings, that femininity is sexual, and that “heterosexuality is the structure of the oppression of women.”196 Theologians, however, would have thought that this was divinely inspired.

191. Id. at 59.
193. West, supra note 1, at 59.
194. Id. at 59-60; see also C. MacKinnon, Feminism Unmodified, supra note 6, at 93-102. I agree with West’s recognition that such invasions cannot be expressed in contemporary phallogocentric legal vocabulary. I am questioning West’s suggestion that men are essentially incapable of comprehending these concepts. MacKinnon also supports abortion on the grounds of autonomy—or more accurately, as a necessary remedy given women’s lack of choice in sexual intercourse. C. MacKinnon, Theory of the State, supra note 6, at 246.
196. C. MacKinnon, Feminism Unmodified, supra note 6, at 60. I will not speculate whether MacKinnon and other radical feminists might find that at least superficially similar views of female personhood were expressed by male medieval theologians, and reinforce their theories. I do think, however, that it would greatly enhance the radical feminist argument if it were able to show that many of our current social institutions and assumptions on sexuality were initially supported by the power structure precisely because they were intentionally degrading of women, while the apologias for the institutions (e.g. the nurturing nature of women, etc.) came later. See infra note 268 and accompanying text.
B. Medieval Theories of Sex and Woman

1. Sex as Violation and Pollution

Canon lawyers—all male following Catholic theology—saw sex as inherently violative, as ritual pollution. This fear of violation became the basis of many of the Church’s rules concerning consent in marriage, clerical celibacy, and other sexual issues. It was also the justification for segregating women and prohibiting women from entering the clergy and engaging in public life. The clergy longed for purity, which meant independence of their souls and bodies from sex.

The sexual theories of Augustine, Jerome, and the other “Fathers” of the early Christian Church not only influenced later Catholic dogma but also the development of canon law. It is beyond the scope of this article to describe these theories in detail or the various differences among the Fathers.197 There was general agreement, however, that sex was an inherently shameful, dirty, and polluting business. It was also generally agreed that sex in its current form, involving lust and pleasure, resulted from sin. Although Adam and Eve may not have actually had intercourse in Eden (because they ate the forbidden fruit on the day they were created and may never have gotten around to intercourse), the fact that God commanded them to reproduce indicated that they were capable of doing so.198 Prelapsarian intercourse could have been accomplished rationally, however, for the specific purpose of procreation without undue pleasure and without the disturbing involuntary reactions of postlapsarian sex organs or the impairment of Eve’s hymen.199

Although it may have been heretical to believe, as did the Manichean heretics in the early Christian era and the Catharic heretics of the high Middle Ages, that sex was always sinful (because it was part of creation, which was holy), the concept of non-sinful sex was extremely limited.200 Non-sinful sex was limited to heterosexual intercourse within marriage. It probably was also limited to intercourse engaged in for the express purpose

197. In addition to Brundage’s descriptions of the sexual theories of various Church Fathers and the influence of these theories on the development of canon law, many secondary sources serve as good introduction for the non-expert. See P. Brown, supra note 60; McLaughlin, supra note 43.
198. Some of the early Fathers thought that Adam and Eve may have been androgynes in the Garden or that sexuality caused the Fall. Later theologians, including Augustine, rejected this idea. Adam and Eve were fully sexed before the Fall, although sexuality was very different from its present state. P. Brown, supra 60, at 92-96, 175, 268, 294-96, 398-401.
199. Augustine was one of the earliest, and best known, theologians who adopted this view. This seems to have been the dominant theory accepted by medieval theologians. E.g., Thomas Aquinas, Summa Theologica, Ques. 94, art. 1, in 1 Basic Writings of Saint Thomas Aquinas, part I, ch. VII (Pegis 1945) [hereinafter cited Thomas, Summa Theologica]; J. Brundage, supra note 70, at 82-85.
200. Interestingly, in his youth Augustine was a Manichean. Manicheism was a “heresy,” which like the later Catharism, held that all sexuality, including marriage, was evil. As with the Cathars, celibacy was only expected from the most holy, the “elect,” but not from the rank and file of the “auditors.” P. Brown, supra note 60, at 391-92. It was as a politically ambitious young auditor, hoping to one day aspire to the elect, that Augustine uttered his famous prayer (which he later recounted in his Confessions), “Lord, give me chastity . . . but not now.” Id. at 392.
of procreation or to pay the conjugal debt, although some theologians thought that it might be permissible to engage in marital intercourse as a remedy for lust which would otherwise lead to adultery. Pleasure in sex was sinful and, insofar as sex was assumed to be always to some extent pleasurable to at least one party, even marital sex for the correct reasons was perhaps to some extent sinful (although marriage might have the effect of negating the sin), or at a minimum polluting.\textsuperscript{201}

Based on their loathing of sex and Paul’s injunction that, although marriage was permissible, it was better to remain unmarried, the Fathers glorified virginity and celibacy and accepted marriage reluctantly. Marriage was good in that procreation increased the Church Militant worshiping God.\textsuperscript{202} It is doubtful, however, that any theologian believed a married person could attain the spiritual perfection of the celibate. To repeat, in Augustine’s formulation, which was incessantly echoed throughout the Middle Ages, marriage was permitted as a good use of a bad thing, but celibacy was preferred as a good use of a good thing.\textsuperscript{203} Or to paraphrase Jerome, the only good thing about marriage is that it produces virgins.\textsuperscript{204} And a man who loves his wife too much is an adulterer.\textsuperscript{205}

2. The Equivalence of Woman and Sex

The Fathers and medieval theologians, like the feminists described by West, did not identify sexuality as merely the difference between men and women. Rather, they saw sexuality, and the resulting pregnancy, as the defining factors of woman’s nature.\textsuperscript{206} As expressed by Augustine and adopted by Christian theologians throughout the medieval period,\textsuperscript{207} the sole reason that Eve was created was procreation, and this was her sole function. This is clear because if God had intended to give Adam a companion for friendship, love, or to help him work, He clearly would have

\begin{itemize}
\item \textsuperscript{201} J. Brundage, supra note 70, at 89-93, 139-40, 154-64, 197-99, 235, 240, 279-88, 364-69, 448-51; McLaughlin, supra note 43, at 222.
\item \textsuperscript{202} It was generally agreed that the Biblical injunction “to be fruitful and multiply” was no longer in effect. The purpose of this injunction was to have ensured the growth of the Jewish nation from which Christ was to be born. This purpose was accomplished and the earth had become well populated so celibacy was permitted. McLaughlin, supra note 43, at 232; Ruether, supra note 173, at 164.
\item \textsuperscript{203} J. Brundage, supra note 70, at 89. This slogan was parroted by those decretists who had a negative view of sexuality. Id. at 580.
\item \textsuperscript{204} Atkinson, supra note 65, at 134.
\item \textsuperscript{205} “Nothing is filthier than to have sex with your wife as you do with another woman.” J. Brundage, supra note 70, at 90-91 (quoting Jerome, \textit{Adversus Jovinianum}, 1.49, in 23 \textit{Patrologiae cursus completus . . . series Latina} 281 (J.P. Migne 1844-1864)). These admonitions against excessive marital sex were frequently repeated by the high medieval decretists. J. Brundage, supra note 70, at 366-67.
\item \textsuperscript{206} This is how I interpret West’s connectedness thesis, which she believes underlies both cultural and radical feminism. To be fair, however, I believe that both MacKinnon and Gilligan have more subtle theories. I believe MacKinnon is saying that men have made “women” into sex (and baby machines—MacKinnon speaks remarkably little about maternity, except in her discussions of abortion) in patriarchal society. In a society freed of patriarchal domination, this may not be true of biologically female persons. Gilligan is saying that girls experience a different developmental process than boys because women raise children and girls have a different relationship with their mothers than boys.
\item \textsuperscript{207} See, McLaughlin, supra note 43, at 215-21.
\end{itemize}
created another man. Eve was created from Adam's body and "symbolized" the body. Although woman was created in the image of God and is a rational creature, woman standing alone, representing body, is not the image of God, "but only when taken together with the male, who is her 'head.'" In Augustine's terminology, the body—sexuality and procreation—was woman's "nature," just as the head—rationality and spirituality—was man's nature. The mind/body duality was redefined as the man/woman duality. This view has modern echoes in West's acceptance of the concept that the fact of pregnancy defines woman's nature and the fact that men do not become pregnant defines man's.

Rosemary Ruether interprets the conclusions of Augustine and Jerome, which resulted from their equation of women and sexuality, into contemporary parlance as follows:

The very soul-body dualism of the Fathers . . . made the relationship of man to woman essentially a subject-object relationship, in which the woman as 'sex object' was to be either wrongly abused for carnal pleasure or 'rightly used' in a dispassionate and objective . . . way as a material means . . . for the achievement of a further goal, that is, the building up of the implanted male seed into a child.

Because this equates women with sex, and makes women literally into objects, defined by men who, as subjects, use women, this is very similar to MacKinnon's theory of pornography and patriarchy. MacKinnon, however, presents this as a radical critique of patriarchy (i.e., this is the goal which men won't admit), whereas the Church Fathers were candid about this goal. Despite this candor, the Church Fathers, like modern patriarchy, as MacKinnon has argued, denied the political nature of this goal, in that they presented it as external or "objective" truth, i.e., divinely inspired, not a product of man.

208. J. Brundage, supra note 70, at 84-85. But see P. Brown, supra note 60, at 402 (even though Augustine did not believe that a woman's company could be as stimulating as a man's, he did emphasize the importance of "friendship" in marriage).

209. The medieval understanding of "symbol" was not limited to signification or metaphor. Reflecting the "realist" school of thought (which we might call "neoplatonic idealism") which dominated much of medieval thought, the symbol was not a mere metaphor, but participated in the reality which it reflected. Although concerned primarily with the late Middle Ages, and to some extent superseded by later research, I recommend Huizinga's study of the fifteenth century for an introduction to medieval symbolism. See J. Huizinga, The Waning of the Middle Ages (1949).


211. Id. at 163. As discussed supra in note 32, the Catholic Church has rejected its former teaching of the inequality of women, but still teaches that women are restricted to different vocations than men, which vocations are defined in terms of our anatomical sexuality.

212. I would also point out in passing that medieval theologians and physicians thought their views of the difference between men and women were supported by "obvious" biological and medical analogies. See J. Brundage, supra note 70, at 426-27; Bullough, Medieval Medicine, supra note 11. Modern cultural feminists should take these views to heart before they try to make broad metaphysical conclusions on human nature based on anatomical metaphors.

213. See infra notes 259-60.

214. Ruether, supra note 173, at 163.

215. See infra notes 259-60.
Women, symbolizing sex, are therefore by their essence sexually voracious, demonstrably capable of greater sexual pleasure and endurance than men. Women have an inherent tendency to be more sexually aggressive and promiscuous than men. What is more, because sex is sinful and women symbolize sex, women are morally, as well as physically, weaker and more prone to sin than men. This is shown by the fact that it was Eve, not Adam, who was seduced by the serpent. Men, whose nature was the opposite of sex, feared the violation and pollution caused by sex. Because woman's nature was sex, she was not so much "violated" by sexual intercourse or pregnancy as that she symbolized that violation. Violation was her reality.

Thus, the Church Fathers, like West, started their analysis by identifying the lowest common denominator of all women which was not also shared by men—their sexual and reproductive potential. They then equated this common factor with the prime (or sole) defining factor of woman. From this they developed a theory of woman's self through metaphor. That is, they tried to identify defining psychological traits which were most nearly analogous to the identifying physiological trait. To the early Christian and medieval mind, the psychic norms which seemed most analogous to sex and pregnancy included selfishness and violation, not, as West argues, connectedness and intimacy.

Medieval theology, custom, and law believed that women, if not controlled by strict laws and preferably confined in a gynaeceum, would violate men and disturb the order of society through seduction and, in the case of married men, enforce their legally recognized and enforced lien over their husbands' sexuality. In large part, canon sex law was designed both to protect man from sexual violation by woman and to enable the female virgin saint adored by the "virginal feminists" to achieve masculine spirituality.

3. Ritual Pollution

The belief in the pollutive and violative nature of sexuality was one of the key elements underlying the development of medieval sex law. Only during the later part of the high Middle Ages or beginning of the late Middle Ages does one begin to see any significant body of opinion suggesting that marital sexuality might have a positive value. This, however, is near the completion of development of the Catholic theory of marriage and the development of the ideal of the patrilineal conjugal family, which replaced the earlier extended cognatic family and which is the forerunner of our modern concept of the family.

216. See McLaughlin, supra note 43, at 225.
217. Id. at 218-19. Some theologians even held that because of Eve's moral weakness, her sin of eating the fruit was not all that heinous and mankind would not have been expelled from the Garden if Adam had not joined her in sin. Id. at 219-20; see also supra note 60.
218. Cf. C. MacKinnon, Theory of the State, supra note 6, at 191 (“Women's sexuality is not only violable, it is—hence women are—seen in and as their violation.”).
219. As I will discuss below, it was also believed that only if woman renounced her sexuality and became a man could she achieve true virtue. See infra text accompanying notes 280-88.
An analysis of the development in the early Middle Ages of the Church doctrines on sex and marriage, which were later to be the basis of canon law, must concentrate on penitentials. Penitentials, which became influential between the end of the sixth through the beginning of the twelfth centuries, were handbooks of penances to be used by confessors.\textsuperscript{220} By prescribing specific penances for specific sins, penitentials are widely recognized as a reliable barometer of what theologians thought were sins, and of the relative seriousness of different sins.\textsuperscript{221} The single largest category of behavior treated by the penitentials were sexual offenses.\textsuperscript{222}

The penitentials placed great emphasis on the ritually pollutive nature of sexual intercourse. Intercourse was permitted or prohibited not only depending on the wife's physical condition (forbidden during menstruation, pregnancy, and nursing), but depending on the Church calendar.\textsuperscript{223} For example, intercourse was prohibited during Lent and on Sundays. Abstinence was required for a prescribed period before receiving the Holy Eucharist.\textsuperscript{224} Despite the fact that priests regularly blessed newly married couples in their wedding bed with the hope that the specific act of intercourse engaged in \textit{immediately} after the blessing would result in pregnancy, it was sinful to have intercourse for three days after the Sacrament of marriage.\textsuperscript{225} Similar ideas were reflected in the writings of the decretists of the high Middle Ages, although with less emphasis on the elaborate distinction between permissible and impermissible times.

Because of the pollution caused by sex, women were not generally permitted to approach the altar, and if they did they were required to cover their hands if they touched the chalice or other instruments of the religious service.\textsuperscript{226} Most significantly, women were not permitted to enter a church for a little over one month after childbirth, when they would be cleansed in a ceremony called "churching the woman," because of the pollution she would cause others.\textsuperscript{227} Women who died in childbirth and were not "churched" frequently were forbidden to be buried in consecrated ground.\textsuperscript{228}

Brundage argues that one of the primary reasons underlying the movement towards clerical celibacy during the high Middle Ages was the fear of the pollutive nature of sex.\textsuperscript{229} He acknowledges that there are

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\textsuperscript{220} J. Brundage, supra note 70, at 152.
\textsuperscript{221} See id. at 152-54.
\textsuperscript{222} Id. at 155.
\textsuperscript{223} Id. at 155-60.
\textsuperscript{224} McLaughlin, supra note 43, at 229.
\textsuperscript{225} As to continence immediately following the marriage, see J. Brundage, supra note 70, at 159. \textit{See also} G. Duby, The Knight, the Lady and The Priest, supra note 11, at 28-29. As to the apparent conflict between the nuptial blessing and the exhortation to continence, see id. at 258-59. As discussed supra at note 98, Brundage believes that the Church began reinstituting the practice of the blessing of bed in the mid-twelfth century, as attitudes toward sexuality became less hostile.
\textsuperscript{226} C. Erickson, supra note 58, at 195-96.
\textsuperscript{227} McLaughlin, supra note 43, at 229-30. The period of cleansing was, typically, a few days longer if the baby was a girl. Id.
\textsuperscript{228} C. Erickson, supra note 58, at 196-97.
\textsuperscript{229} J. Brundage, supra note 70, at 214-17. Clerical marriage and concubinage, at least at
various economic and political theories suggested by other historians for the imposition of clerical celibacy by the Reformists. However, he also gives credence to the reasons given by the Reformists themselves who insisted on celibacy, because only the chaste could be holy and it would impugn the Sacraments if they were performed immediately after the (ritually pollutive) act of sexual intercourse.

4. The Conjugal Debt

An additional aspect underlying the theories of clerical celibacy and individual consent in marriage was the medieval legal concept of the conjugal debt. The conjugal debt made the possible violation and pollution of the husband in marriage a real fear to the canon lawyer.

The conjugal debt, which may be seen as a legally enforceable property interest in the other partner's sexuality, was the obligation of a spouse to engage in sexual intercourse upon the demand of the other spouse. Remnants of this concept remain in modern laws which have made legally recognizable rape of a wife by her husband impossible. In the Middle Ages, however, this debt was considered mutual, was recognized in theory and, to a large extent, enforced in practice in a symmetrical way. The Church's theory of conjugal debt was probably not, however,
the origin of the legal impossibility of marital rape. If Roman law did admit the possibility that a husband could rape his wife, marital rape would have been an impossibility under the Germanic legal principles of the nobility of the early Middle Ages. The canon law theory of conjugal debt may have been in large part a post hoc justification of the existing legal norm.

The reason that the conjugal debt was considered mutual was because of the aporia that, despite the fact that Church doctrine held women to be fundamentally inferior and subject to men in almost all ways, women were men's equals in spirituality and sexual rights since women were rational creatures created in the image of God. Consequently, one of the striking aspects of canon sex law was its insistence—as a theoretical and, to a large extent, a practical matter—in absolutely equal and symmetrical laws governing men and women. This was so despite the fact that the secular law of sexuality treated men and women very differently.

It is true that the concept of the conjugal debt was used to legitimate what we would call rape within marriage. It did, however, give women a

Brundage is careful to note, however, that despite decretists' insistence on theoretical equality, many individual decretists were influenced by conventional notions of inequality and adopted asymmetrical applications of sex laws in a wide variety of situations. Id. at 284.

234. J. Brundage, supra note 70, at 449.

235. See McLaughlin, supra note 43; Ruether, supra note 173, at 153-56; supra text accompanying notes 10-13.

236. This is perhaps most clearly seen in the law of adultery. Secular law generally did not criminalize adulterous men, but demanded harsh treatment of adulterous women. Even though secular law frequently prohibited a cuckold from killing or otherwise abusing his unfaithful wife, such murders were often tolerated. J. Brundage, supra note 70, at 132, 462-63, 519-20; Aristocratic French Households, supra note 69, at 82; G. Duby, The Knight, the Lady and the Priest, supra note 11, at 220-21.

Canon law theoretically treated adultery by men and women the same and absolutely prohibited the murder of unfaithful spouses. J. Brundage, supra note 70, at 198, 208, 247-48, 388. As I mentioned supra at note 233, despite this theoretical equality, individual decretists were often influenced by societal prejudices and were not consistent in their treatment of the sexes. See id. at 284, 306-07. Even Thomas Aquinas, who generally thought that men and women were subject to the same sexual standards, concluded that society could justifiably punish adultery by a wife more severely. This is because it was more disruptive for the stability of the family (which was necessary for raising children) than adultery by the husband, even though adultery by a husband might be the graver sin because men have greater moral strength than women. McLaughlin, supra note 43, at 227-28. Some decretists insisted that a husband who discovered his wife in adultery should turn her out because to act otherwise was "stupid and impious," but a wife could not dismiss her adulterous husband, although she could, thereafter, refuse to pay the conjugal debt. J. Brundage, supra note 70, at 306-07. Although canon law generally gave men greater rights in prosecuting adultery cases than women, the decretists tried to limit prosecution of women on suspicion and required proof. Id. at 320-22. Women were allowed to bring adultery actions in canon courts, even though they frequently did not have this right in the secular courts. Id. at 411. On the other hand, there is some evidence that in the late Middle Ages adulterous women were treated by secular law less harshly than adulterous men. Id. at 519. This might, however, be because the law implicitly condoned a cuckolded husband's use of "self-help" in punishing his adulterous wife, but required him to prosecute her lover in the courts and also required a betrayed wife to prosecute her adulterous husband (if she even had jurisdiction, which she often lacked in the secular courts).

237. The decretists determined that rape was technically impossible in marriage because the conjugal debt constituted consent to intercourse. However, they did agree that if a
cause of action against their husbands which, although framed in terms of requiring the husband to have sexual intercourse, seems to have been used as an effective tool to punish desertion and force support. 238 Medieval court records show that such actions were brought, and won, by women. 239

The penitentials and the writings of the canon lawyers of the high Middle Ages are filled with elaborate discussions of the seriousness and enforceability of the conjugal debt. Some decretists held that the conjugal debt was the highest duty a man had, outweighing the duty of vassal to lord. Most experts agreed that a spouse was absolutely required to perform when and where demanded no matter how inappropriate, even at times (e.g., on holy days, during pregnancy, etc.) or places (e.g., churches) otherwise proscribed and no matter how repugnant (even if the spouse had contracted leprosy). 240 The sin of the complying spouse was probably excused, in whole or in part, by the fact that the spouse was under a duty.

Perhaps because canonists and the writers of penitentials were clerics, and of course men, and because women were considered more sexual than men, canon lawyers particularly concentrated on the dangerous duty of the husband to satisfy his wife's sexual demands. Because of woman's sexuality, it was often assumed that an unsatisfied woman would inevitably be driven to commit adultery. This was seen as disastrously disruptive to the order of society. Consequently, it was a man's duty to society, as well as to his wife, to keep her sexually satisfied. 241 Medieval medicine indicated that frequent performance of the conjugal debt was necessary for the wife's health because the womb had to be kept sufficiently exercised by orgasm and pregnancy to avoid hysteria. 242 Consequently, secular legislation sometimes contained provisions making a husband responsible for a wife's adultery.
(although this may have been merely a theoretical liability, it seemed to reflect the popular prejudice). Penitentials and books of sermons distributed to parish priests exhorted men that, no matter how odious and polluting, they were bound to obey a wife's spoken demands. They were also required to try to anticipate their unstated wants by gentle questioning, since women often were paradoxically reticent to speak of sex and were physically unable to force sex, although they were more naturally sexually aggressive than men.\textsuperscript{243} Indeed the existence of the conjugal debt, along with the impossibility of a man to be able to pay the debt to two women simultaneously, was identified by at least one glossator as a justification for making polygamy illegal.\textsuperscript{244}

The existence of the conjugal debt also gave wives a certain degree of control over their husbands' professions because a husband could not absent himself from his wife's bed for any length of time without her permission. Medieval historians reported that the wives of William the Conqueror's soldiers petitioned William to send his soldiers back home to Normandy because by keeping them in England, he was robbing them of their sexual lien. William's bishops (using an argument which should sound plausible to American commercial lawyers) informed him that the wives' right was enforceable and had a higher priority than the husbands' loyalty to their king because the men did not own their bodies and could not pledge them without the wives' consent. The king, in compliance with God's law, sent the men back home long enough to sleep with their wives, and then return to camp.\textsuperscript{245} Similarly, canon lawyers debated whether a man could join the Crusades without his wife's formal waiver of her sexual lien over his body (although, for practical reasons, the Church eventually granted a general dispensation in this case).\textsuperscript{246}

The absolute nature of the conjugal debt may have been one of the reasons the canonists debated whether a woman could divorce her husband because of impotence. Throughout the Middle Ages, impotence (including what we would call female frigidity in the rare cases in which intercourse was physically impossible) remained one of the few reasons for which divorce, separation, or annulment was permitted, either as a matter of doctrine or practice.\textsuperscript{247}

\textsuperscript{243} J. Brundage, supra note 70, at 358; McLaughlin, supra note 43, at 226.

\textsuperscript{244} Brundage, supra note 70, at 359.

\textsuperscript{245} Id. at 198. Other writers have suggested that this story is merely another misogynist calumny about the lustiness of women. See Aristocratic French Households, supra note 69, at 140. Regardless of its literal truth, the fact that the story was considered plausible enough to be repeated indicates the seriousness with which medievals viewed the wife's claim over her husband's body.

\textsuperscript{246} The final papal decision to allow husbands to go on Crusade without a wife's consent was considered a major embarrassment by the decretists because it could not be reconciled with the law of conjugal debt. Brundage, supra note 70, at 359.

\textsuperscript{247} Makowski, supra note 233, at 108-09. On the other hand, most canonists seem to hold that although impotence which prevented consummation of the marriage might be grounds for divorce, once the marriage was consummated by one act of intercourse, subsequent impotence might not be. J. Brundage, supra note 70, at 236, 243, 290-92, 339, 415, 456-57, 512; Brundage, The Problem of Impotence, in Sexual Practices and the Medieval Church 135 (V. Bullough & J. Brundage eds. 1982).
The existence of the conjugal debt, combined with the masculine fear of violation and pollution of sex, was one of the primary reasons for requiring clerical celibacy. It would have been inappropriate for a priest to say mass immediately after being polluted by sexual intercourse.\textsuperscript{248} Perhaps more importantly, it was agreed that only the celibate could achieve the height of spiritual perfection, which was the goal of the clergy. The canonists were unanimous, however, that because of the conjugal debt, a man could not refuse his wife's demands and could not take a vow of chastity without his wife's consent—in which case the vow would be binding on her as well.\textsuperscript{249} Marriage and the priestly life were, therefore, incompatible.

An example of this reasoning can be seen in the correspondence of Heloise and Abelard.\textsuperscript{250} After she had borne his child,\textsuperscript{251} Heloise tried to persuade Abelard not to marry her and to continue to live in concubinage on the ground that sex was polluting and would hinder Abelard's ability to be a great theologian. Abelard, at this time, had only taken minor clerical orders for which marriage was not yet forbidden. If she married Abelard, Heloise would not be able to help save Abelard from himself since she could no longer refuse to pay the marital debt. Abelard recognized the strength of this argument, even though he would become one of the few medieval theologians to suggest that marital sex might be beneficial in that it increased marital love, which was a good thing, and might be more than just a means of procreation or a cure for adultery.\textsuperscript{252} Abelard insisted on a secret marriage in order to cure their sin. Happily, Abelard was excused from this unpleasant predicament when Heloise's uncle had him castrated.

5. Changing Perceptions

A gradual change in the concept of sexuality as violation and pollution at the end of the high Middle Ages paralleled, and was part of, the development of canon law of marriage and the apogee of the status of women in the high Middle Ages. As the decretists concentrated on the importance of individual consent and the nature of freely given consent, they were forced to consider the emotions and relationship of the married couple. Simultaneously, in secular life the nobility developed the ideal of

\textsuperscript{248} Accordingly, one of the first and most important aspects of the Gregorian Reform was the imposition of celibacy on the priesthood. G. Duby, The Three Orders, supra note 41, at 210, 255-56.

\textsuperscript{249} Atkinson, supra note 65, at 140; Makowski, supra note 233, at 101, 109-11.

\textsuperscript{250} É. Gilson, Heloise and Abelard 49-53 (1963); see also J. Brundage, supra note 70, at 222.

\textsuperscript{251} To whom they gave the curious name "Astrolabe," after the newly invented astronomical instrument.

\textsuperscript{252} J. Brundage, supra note 70, at 187, 203; C. Erickson, supra note 58, at 205-07. Abelard was, of course, considered in his time to be on the brink of heresy on a number of issues, and was forbidden from teaching.
chivalry with its concentration on individual experience and the cult of courtly love. Both this religious-legal analysis and this secular movement began to recognize (reluctantly in the case of the cleric-lawyer, avidly in the case of the troubadour) the positive aspects of sexuality in an accepted relationship and the importance of love in marriage—whether in the form of caritas or amitas to the theologian; marital affection to the lawyer; or erotic romantic love to the noble and the poet.

Once again, the acceptance of a view of intercourse as good, pleasurable, and promoting intimacy—as opposed to subordination—was a woman's issue when it first developed. That is, woman was equated with sex, and the status of sexuality in society was expressly identified with the status of women. The acceptance of a more positive view of sexuality initially seems to have coincided approximately with the acme in feminine status. Once again, when the concepts of romantic love became the dominant ideology of society by the late Middle Ages, they were adopted by the patriarchy and used to trivialize women in the late Middle Ages. The original idea of courtly love was based on the subordination of the vassal (the lover) to his lord (the lady). The courtly ideal of romantic love soon changed to emphasize woman as a sexual plaything. The literature presented women who were admirable only for their beauty and fidelity, rather than noble warlike or spiritual viragos. Women were advised to concentrate on their appearance and manners to win a lover. The earlier strategy of harnessing the energies and loyalties of unmarried youths by having them swear fealty to a noble lady became a trivial court game.

6. Modern Parallels

Once again, my point is not that this shows the conclusions of certain feminists—that heterosexual sex is violative of women—to be wrong, or that sex is liberating of women and violative of men. Nor am I trying to argue that the "violation" or "pollution" that medieval intellectuals recognized in sex is identical to the violation which Dworkin believes women experience in intercourse, or the domination and institutionalized terrorization of women by rape and pornography recognized by MacKinnon (and West, in the case of rape). Nor do I disagree with West's powerful critique of the inability of contemporary masculine legal discourse to recognize, let alone express adequately, the oppression of contemporary women. What I would like to emphasize is that the most intellectually significant portion of the population—the clergy (which was also drawn primarily from the noble class), the young men who were educated in the great universities, the female religious in their convents, and the noblewomen who read inspirational and moral treatises written for their edification—did recognize and believe in a concept of sexual violation suggestively similar to that investigated by radical feminists. Further, that concept was viewed as primarily an issue of male, not female, metaphysics. It also suggests a contradiction with what West suggests: that men are incapable of understanding a concept of

253. Indeed, Bloch points out that the lady was often addressed by the lover in the masculine gender, showing her dominant status. M. Bloch, supra note 41, at 233.
254. Id.; Aristocratic French Households, supra note 69, at 76.
violation of nonviolent and even consensual rape and unwelcome sexual contact (and presumably must just take our word for granted).  

Men in modern American society are not accustomed to this concept and our phallologocentric legal vocabulary can not express it. Men, however, might be capable of understanding how these and other similar concepts underlie much of modern sexual legislation, which was derived from ideas first developed in the Middle Ages. This suggests that there may be hope of translation, for women to communicate with men and to persuade contemporary male jurists of their insights by reference to now unstated but underlying concepts imbedded in traditional law.

I also will now suggest that the implications for women which medieval theologians drew from the theories of sex as violation and sex as woman are eerily similar to radical feminist theory. While theologians believed that these conclusions show that the domination of women by men was divinely ordained, the radical feminists see them as an indictment of patriarchal society.

C. Virginal Feminism

The dialectic between the two contradictory medieval beliefs about women—that woman is sexuality and that woman is a rational creature in the image of God—led to the ideal of the heroically virtuous woman, which has been described as virginal feminism. The fact that this oppressively patriarchal medieval ideal is closely analogous to the contemporary radical feminist ideal seems startling at first blush. When one reflects, however, that the radical feminist, as well as the cultural feminist, has accepted without questioning contemporary Western stereotypes of masculine nature (which necessitates the acceptance of the corresponding stereotype of feminine nature) and that certain of these stereotypes are legacies of our

255. West, Women's Hedonic Lives, supra note 6, at 144; West, supra note 1, at 59.

256. MacKinnon recognizes that her feminism can be compared to masculine theory:

If this analysis is correct, to be realistic about sexuality socially is to see it from the male point of view, and to be feminist is to do so with a critical awareness that that is what one is doing. Because male power creates the reality of the world to which feminist insights, when accurate, refer, feminist theory will simply capture that reality but expose it as specifically male for the first time.

C. MacKinnon, Theory of the State, supra note 6, at 124-25. And further: "This is why feminist insights are often criticized for replicating male ideology, why feminists are called 'condescending to women,' when what we are doing is expressing and exposing how women are condescending to." C. MacKinnon, Feminism Unmodified, supra note 6, at 59.

Insofar as MacKinnon is exposing the implicit concepts behind our particular form of patriarchy, she is performing a valuable task. As I am trying to show parallels between the theology upon which many of the institutions of our legal system are based (particularly the law of marriage and rape) and radical feminist theory, I wish to support MacKinnon's analysis insofar as she has correctly intuited patristic sexual politics. What I do question is her assertion that she successfully examines the male point of view with a critical awareness. I believe the implication of MacKinnon's theories is that women would be better off if they shunned heterosexuality, abandoned weak (feminine) ways and adopted (what our society labels as) masculine values of autonomy and power—are in fact the same conclusions which the Church Fathers adopted. As such MacKinnon's feminism may be consistent with, not a challenge to, our patriarchal system.
medieval heritage, this analogy becomes more inevitable than surprising.\textsuperscript{257}

To reiterate, the medieval theologian and canonist, like West and MacKinnon, defined the nature of women by her sexuality.\textsuperscript{258} The medieval man would agree with the radical feminist that the woman's role in sexual intercourse and pregnancy was debasing to women by its very nature in society, and not, as West suggests, because of the compulsory nature of the institutions of intercourse or pregnancy.\textsuperscript{259} The medieval theologians saw woman's role in society as the instrument of procreation: a wife, submissive to her husband who, because of his rational impregnable nature,

\section*{Notes}

\textsuperscript{257} In this regard I agree with McLaughlin, who believes that many modern people (including modern feminists) have unwittingly, by failing to analyze their historical antecedents, accepted as truths prejudices developed in the Middle Ages. McLaughlin suggests what she thinks the historical approach can add, specifically in theological investigation:

The first task is to make explicit the assumptions received from this tradition about male/female difference and hierarchy, and to expose with the help of historical understanding the now patently invalid intellectual foundations of these typologies . . . . Behind the recently popular discussion of male and female complementarity lies some very traditional symbolism and feelings about the "eternal feminine" which need to be brought into the open. The woman and the man must be demythologized.

McLaughlin, supra note 43, at 257 (footnote omitted).

\textsuperscript{258} As to West, see supra notes 19, 28-35, 185-91 and accompanying text.

MacKinnon has written extensively as to the reduction of woman to sex in our culture. See C. MacKinnon, Theory of the State, supra note 6, at 125 ("Men define women as sexual beings; feminism comprehends that femininity is sexual."); C. MacKinnon, Feminism Unmodified, supra note 6, at 107 ("But the social meaning attributed to women as a class, in which women are defined as gender female by sexual accessibility to men, is not what courts have considered before when they have determined whether a given incident occurred because of sex."); id. at 161 ("Deeper than the personhood question or the violence question is the question of the mechanism of social causation by which pornography constructs women and sex, defines what 'woman' means and what sexuality is, in terms of each other.").

\textsuperscript{259} As West correctly points out, MacKinnon does not concentrate on the experience of pregnancy. She does, however, identify heterosexual intercourse in patriarchy with rape. See C. MacKinnon, Theory of the State, supra note 6, at 125 ("Men see rape as intercourse; feminism observes that men make much intercourse rape."); id. at 141 ("The assumption that in matters sexual women really want what men want from women, makes male force against women in sex invisible. It makes rape sex."); id. at 146 ("Combine this with the similarity between the patterns, rhythms, roles and emotions, not to mention acts, which make up rape (and battery) on the one hand and intercourse on the other. All this makes it difficult to sustain the customary distinctions between pathology and normalcy, paraphilia and normophilia, violence and sex.").

West correctly notes that MacKinnon frequently implies that it is the compulsory aspect of sexuality, the lack of free choice, which makes heterosexuality the structure of oppression. West, supra note 1, at 43. See C. MacKinnon, Feminism Unmodified, supra note 6, at 60-61 ("Most people see sexuality as individual and biological and voluntary; that is, they see it in terms of the politically and formally liberal myth structure . . . . Those who think that one chooses heterosexuality under conditions that make it compulsory should either explain why it is not compulsory or explain why the word choice can be meaningful here."). Further, as MacKinnon purports to limit her analysis to our society, this leaves open the possibility that heterosexuality could be non-oppressive in some other society in which sexuality is freely chosen.

My qualm with West's interpretation of MacKinnon and Dworkin is that it may be misleadingly mild, because it can be read to imply that heterosexuality in our society may not be oppressive to an individual if she is able to confront and choose it with critical awareness. I believe that the radical analysis has a much greater emphasis on the fundamental structures of society which make such a "choice" illusory.
was her head. The Church Fathers, such as Augustine and Jerome, agreed with the radical feminist that men do not have intercourse with women out of affection. Few theologians from the early Christian era until the latter part of the high Middle Ages (with the possible exception of Abelard) even mentioned, let alone thought possible, the concept of marital affection expressed through intercourse. For men, sex could only be purely instrumental. In sex men only "used" woman for the permitted purposes of procreation and domination, or "abused" women for the sinful purpose of masturbation. The wife was required to submit to her husband for the sake of procreation and because she symbolized the body, was thus subject to her husband, who symbolized the head. Although the theologians often spoke of "friendship" between husband and wife in marriage as a virtue, this was conceived as a "friendship" between unequals; a husband might be his wife's "friend" in the same way a just lord might be the "friend" of his serf. At the same time, it was doubted whether a woman was morally capable of a true friendship with her husband or anyone else.

Most importantly, the role of a woman as a dutiful wife was not recognized by society as a noble profession, but was found degrading. Like hierarchy, subjugation of mothers was not exactly part of the natural order if this meant being part of God's original creation. It is true that theologians interpreted Genesis to mean that Eve's nature was subordinate to Adam's and that Eve was created for procreation, but in the Garden there was no lust. As a rational creature, Eve enjoyed the natural dignity and excellence of her body. She was subordinate to Adam in the same way that the lower orders of angels are subordinate to the higher orders of angels, although all angels are excellent. Genesis expressly states that the punishment of Eve's sin was the twofold curse of bearing children in sorrow and being subject to Adam. She was no longer merely subordinate to Adam; she was now dominated by Adam, forced to obey him even against her will, no matter how poorly treated. In other words, a woman's role of wife and mother in the postlapsarian world was a cursed and debased form of her created nature.

260. Ruether, supra note 173, at 162. Cf. C. MacKinnon, Theory of the State, supra note 6, at 111:

(What women learn in order to 'have sex,' in order to 'become women'—woman as gender—comes through the experience of, and is a condition for, 'having sex'—woman as sexual object for man, the use of women's sexuality by men. Indeed, to the extent sexuality is social, women's sexuality is its use, just as femaleness is its alterity.)


262. "It was a received opinion that a woman was incapable of true friendship, for she lacked the stability and the requisite moral and intellectual capacity." Id. at 229. Augustine thought it self-evident that women were not created as emotional or intellectual companions for men, essentially because men make such better companions. See infra note 284.

263. "Yet at the same time the role of mother and nurturor of children was by no means accorded the honor given it in the post-Reformation world. Here again Aristotelian biology assured a passive, auxiliary, and subordinate status, . . . ." McLaughlin, supra note 43, at 230. Once again, this is in contradistinction to modern Catholic theory, which emphasizes the nobility of the maternal role. See infra note 276.

The role of women in motherhood was seen as passive, subordinate, and dominated by men. It was considered the primary duty of the father, not the mother, to raise and educate the children. Thomas Aquinas and many other educated medieval men accepted the Aristotelian biological theory that, even in conception, a woman was passive and female children were an imperfection of the naturally male sperm caused by some accident in the womb. Accordingly, although it was recognized that the mother might have more actual influence over children than the father, it was propounded that the child should have greater love for the father. Theoretically, the father should have custody of the child after the age of three (the theoretical age for weaning male children). It was not until the late Middle Ages that one sees the development of the concept of the ennobled nurturing mother having the primary duty of education propounded by the Protestant Reformers who did not believe that marriage was a debased state.

The nobility’s ideal mother in the early Middle Ages centered entirely around her reproductive function, not her nurturing function. The
preferred practice was to turn children over to wet nurses and other professionals quickly after birth with the express purpose of regaining fertility to make the next birth possible.\textsuperscript{270} It was the noble ideal, and to a large extent custom, to exchange their children with other noble families at a young age. Vassals sent their young sons to be raised by their lord's family and lords sent their young sons to be raised by their vassals as a means of cementing friendship and bonds of fealty (and, perhaps, to serve as hostages).\textsuperscript{271} Infant girls were frequently turned over to be raised by the families of their intended bridegrooms.\textsuperscript{272} Everywhere in medieval society the importance of a woman being responsible to raise her own children was de-emphasized.\textsuperscript{273}

The development of the cult of the Virgin Mary in the high Middle Ages may have increased (or reflected an increase in) the status of woman in medieval society, but not her status as wife and mother.\textsuperscript{274} Rather, the emphasis of the cult was on how Mary was different from other women. Mary was a virgin, and remained a virgin even after giving birth to Christ. Most theologians believed that she was free from the imperfection of ages, and into the Renaissance was replaced by the familiar nativity depicting Mary as a nurturing mother, fondling or adoring the Child.


\textsuperscript{271} Among the French nobility, young noble boys were customarily turned over to their maternal uncle, their avunculus (which is, of course, the root of our English words "uncle" and "avuncular"). In the typical hypergynic noble family, the avunculus would have been of higher rank than the boy's father and, therefore, a fitting educator. Herlihy points out that by the mid-thirteenth century, this custom of the avunculate was becoming rarer and was resented. D. Herlihy, Medieval Households, supra note 74, at 97. Many historians, particularly those with a Marxist viewpoint, such as Phillipe Aries, have speculated that peasants similarly sent their children out at a tender age to serve an apprenticeship as servants. This view of the development of the family and the notion of childhood is reflected in The Dialectic of Sex. S. Firestone, supra note 21, at 86-97. Hanawalt's research indicates that, at least in thirteenth- and fourteenth-century England, peasant children almost always stayed home with their families. B. Hanawalt, supra note 56, at 170-86. Bynum also challenges the Ariesian thesis and thinks that nuclear families with tight affective bonds existed at least in urban areas by the thirteenth century. She contrasts this to the raising of noble children but, as I have noted, Herlihy believes the customs among the nobility may have already started changing by this period. C. Bynum, supra note 53, at 225. Hanawalt's analysis does not necessarily disprove Aries' theory vis-a-vis the earlier period.

\textsuperscript{272} Widow & Ward, supra note 270, at 161-63. Occasionally the infant groom entered his infant wife's nursery.

\textsuperscript{273} It is true that the Cistercian monks of the twelfth and thirteenth centuries developed a positive stereotype of the gentle, nurturing, nursing mother, but this image seemed to be used almost entirely as a metaphor for the love and community which the male monks felt or as an image of the mystical union of the soul of the male monk and God. See supra note 67.

\textsuperscript{274} It was also a reflection of the Church's attempt to increase its dignity. In medieval symbolic imagery, the Church, as the Bride of Christ and the interceder, was a type of Mary as Queen of Heaven, mother of Christ and Mediatrix. The images of the Coronation of the Virgin which grace the tympana of so many Gothic cathedrals from the twelfth century on and which show Mary sitting next to Christ, rather than kneeling in front of him as a real queen would at her coronation, were intended to be, and would have been so read by the laity as, representations of the sovereignty of the Church being co-equal to the sovereignty of the king. See R. Ruether, Sexism and God-Talk, supra note 176, at 149-58 (discussion of the medieval identification of Mary with the Church as the Bride of Christ and the corresponding distancing of Mary from ordinary women).
original sin from the moment of her conception (although this doctrine, the 
Immaculate Conception, was not proclaimed mandatory Catholic doctrine 
until the late nineteenth century) and, therefore, did not experience lust or 
temptation. Many writers, although careful to avoid the heresy that would 
suggest that Mary did not physically carry Christ in her uterus, insisted that 
she did not bear the pain and indignity of physical childbirth, but rather 
experienced a miraculous childbirth. 275 In other words, the concept of 
Mary as the Blessed Mother was a reproach to, and rejection of, actual wives 
and mothers. 276

Sexual intercourse also was seen as inherently degrading to women, or 
more accurately, the embodiment and stigma of Eve's curse of degradation. 
The fact that intercourse destroyed the hymen was interpreted as the

275. This idea was also popular with the laity as reflected in the literature of the time, such as *The Golden Legend* and other hagiographies. A common depiction is that when her time 
came, a blinding light surrounded Mary, and the Child was miraculously removed from her 
body without labor or childbirth. This miracle also caused the secondary miracle of restoring 
the hands of the helpless or palsied (depending on the version of the story) woman whom 
Joseph had stupidly hired to act as a midwife. See E. Male, supra note 269, at 209-12. Despite 
the efforts of the Church to develop a cult of a dignified St. Joseph, the laity continued 
throughout the Middle Ages to depict Joseph as a dithering, senile buffoon—a stock comic 
character in medieval drama. Who else could the priests have convinced to marry a woman 
who had pledged herself to eternal virginity and was pregnant by someone else?

276. Although as the Middle Ages progressed, a competing image of a more human Mary 
developed. McLaughlin, supra note 43, at 246-47. Bynum explains that recent historians agree 
that Mary was not very important to women's spirituality, and it was male, not female, writers 
who preached the imitation of Mary as a religious precept. C. Bynum, supra note 7, at 260.

At the risk of pushing the analogy too far, I would suggest that the theologian's glorification 
of Mary's virginal motherhood is reminiscent of the recent suggestions of some feminists that 
pregnancy and motherhood might be rewarding experiences if they can be freely chosen and 
separated from the compulsive patriarchal institution. See West, supra note 1, at 53-55. 
Similarly, medieval hagiographies of the high Middle Ages started to emphasize the mysteries 
of other virginal mothers. In the thirteenth century, virgin saints were increasingly reported 
to have visions of the infant Christ Child who they nurtured in their ecstasies, other virgins' 
breasts miraculously filled with milk to save abandoned children, and Satan began tempting 
virgins in the guise of helpless children, as opposed to handsome men or dragons. D. Herlihy, 
Medieval Households, supra note 74, at 120. In each case, the sweet virginal maternity of the 
saint is a reproach to the lusty reality of actual matrons.

The one area in which Mary was upheld as an approachable model to real mothers was as 
Mediatrix between sinful men and a just God. Duby and Herlihy have written extensively 
about the generational conflict in noble households of the twelfth and thirteenth centuries 
between younger sons (who could not marry and had limited inheritance rights) and their 
fathers. The mother, who during this period tended to be a generation younger than her 
husband—and obviously a generation older than her sons—frequently played the role of 
peacemaker. Similarly Mary, as our Divine Mother, tried to temper the justice of God with her 
feminine mercy. See id. at 120-21; Herlihy, Medieval Family, supra note 71, at 125-26.

This presents interesting parallels to Gilligan's work on moral development, which contrasts 
the girl's ethic of care and mercy with the boy's ethic of rights and justice. See supra note 12. 
McLaughlin suggests, however, that in popular imagery, Mary's mediating mercy was 
frequently depicted as being capricious, illogical, and vengeful—the negative, rather than 
positive, stereotype of the soft female heart. McLaughlin, supra note 43, at 254-56.

Once again, contemporary Catholic teaching has rejected its medieval tradition. Mary is now 
considered a model for women to emulate. John Paul II, On the Dignity of Women, supra note 
32; see also Excerpts from Draft Pastoral Letter on Women by Catholic Bishops in the U.S., 
N.Y. Times, Apr. 12, 1988, §1, at 30. The bishops particularly note, and reject, the 
presentation of Mary as so exalted as to be beyond emulation. Id.
indignity of castration—the vagina was thought of as literally the wound to which Sigmund Freud referred. The woman who had sexual intercourse lost forever her bodily integrity and the dignity in the excellence of her created body.\textsuperscript{277}

Once again, the medieval theologians agreed with the radical feminists that experiences of heterosexual intercourse and pregnancy, even in the permissible state of marriage, were by their very nature (and not by virtue of the oppressive institutions surrounding them) intrusive, violative, and oppressive of women.\textsuperscript{278} They were the Biblical twofold curse of Eve.

How did medieval theologians reconcile this view of the degradation of the state of women with the seemingly contradictory belief in the spiritual equality of woman as a rational creature in the image of God? Like radical feminists, medieval theologians agreed that women seek independence, individuation, physical privacy, and physical integrity, but that these are not possible in pregnancy and intercourse. To reach the spiritual perfection of which they are capable, women must reject the intimacy which the nature of their bodies imposes. This is not the search for what West characterizes as the "autonomy" praised by liberalism ...[,] one's right to pursue one's own ends." Rather, it is what West identifies as the " 'Individuation,' as understood by radical feminism, ... the right to be the sort of creature who might have and then pursue one's 'own' ends."\textsuperscript{279}

\textsuperscript{277} McLaughlin, supra note 43, at 223.

\textsuperscript{278} West notes that, to her knowledge, no radical feminist has yet suggested that heterosexual intercourse, like pregnancy, might be joyful and liberating if it could be separated from the compulsory patriarchal institutions in which it exists. West, supra note 1, at 53-54. However, as stated, supra note 59, West overstates this somewhat in that MacKinnon seems to leave this possibility in a future society as an open question. I do not know of any medieval theologians who consciously developed a theory of virginal sexuality similar to the paradox of virginal motherhood. However, a similar idea is apparent in many areas of medieval Catholicism. Was not the erotic poetry of the Song of Solomon as an elaborate allegory of the relationship of the Church as Bride to Christ and to the soul to God? Moreover, nuns were considered the brides of Christ in a literal and legally binding manner. Medieval mystics, both men and women, both nuns and laywomen, like mystics in many cultures, did, in fact, describe their mystic experiences in explicit and intentionally sexual imagery. This was not limited to the famous "Freudian" imagery of St. Theresa of Avila, the well-known counter-Reformation saint who experienced ecstasy while penetrated by the arrow of a beautiful angel, but descriptions by strictly orthodox and admired holy women of the ecstatic joy they experienced in their visions of Christ's marriage bed. C. Bynum, supra note 7, at 246-50; D. Herlihy, Medieval Households, supra note 74, at 118-19.

\textsuperscript{279} West, supra note 1, at 42. I interpret West's definition of an individual as a person who makes choices, whereas individuation is the process whereby a person becomes an individual who is able to identify her goals and choices, and then choose. In West's dichotomous world, men, who are already separate, can be individuals. Women, who are connected, must first become individuated.
Unfortunately, the conclusion reached by the medieval theologians was not liberating of women—as radical feminism hopes to be—but fundamentally oppressive and patriarchal. The ideal is the virgin virago—the individuated creature who has and pursues her own ends, the woman who becomes a man.\textsuperscript{280} And this ideal was used both to incarcerate and limit (albeit adoringly) the virago and to justify the degradation and humiliation of the vast majority of women who could not become viragos.

The most rabidly misogynist theologians, including Augustine and Jerome in the early Christian era and Thomas Aquinas, among others, at the end of the high Middle Ages, who taught the sexual nature of women and insisted on their meek submission to the degrading duties of marriage, recognized that in order for women to reach spiritual equality with men, they must reject the mandatory motherhood and subjugation of patriarchal society. If a woman rejected sexuality and motherhood, preferably by perpetual virginity, but was forced to marry, by celibacy after widowhood she could become, like a man, spiritual.\textsuperscript{281} She could become a virago, not in the classical sense of a woman who accepts the masculine duties of leading troops in battle, but in the sense of a surrogate man.\textsuperscript{282}

\textsuperscript{280} Because MacKinnon purports to describe women in the structure of a particular society rather than developing a theory of “natural” femininity, she does not expressly call for “individuation.” As others have pointed out, however, the concept of individuation seems implicit in her identification of oppression and lack of autonomy or choice. See supra note 6; see also C. MacKinnon, Theory of the State, supra note 6, at 124 (“women’s complicity in their condition does not contradict its fundamental unacceptability if women have little choice but to become persons who then freely choose women’s roles. For this reason, the reality of women’s oppression is, finally, neither demonstrable nor refutable empirically.”).

The concept of “free choice” as a goal is inconsistent with MacKinnon’s other statements that suggest she is only theorizing about our society and that we are totally socially constructed. “Free choice” unlimited by the compulsion of society seems to require a theory of a pre-social individual. Schroeder, Abduction From the Seraglio, supra note 10, at 122.

\textsuperscript{281} The literalness with which this masculine identification was sometimes considered can be seen in the many medieval hagiographies of transvestite women saints, who hid their sex (and sometimes miraculously grew beards) and lived as men. These saints ranged from the clearly imaginary, to the legendary Pope Joan (whose historicity is controversial at best, but who has her supporters), to real women whose stories have been embroidered to include fantastic details, to, of course, Joan of Arc. Except for Jeanne d’Arc (who was a real person living in the fourteenth century and, consequently, a real risk to the order of society) these women were not criticized for their assumption of male dress, which followed from their search for spiritual perfection. Even Pope Joan fell not because of her transvestism but because of her weak female nature which could not meet the dignity of her masculine dress—she took a lover and became pregnant. Transvestite male saints are unknown. Bullough, supra note 57, at 44-52. Bynum has pointed out that in patristic times, holy women had visions of themselves before God as males, and their masculinity indicated that they had been saved. C. Bynum, supra note 53, 158-59. Bynum in her more recent work has emphasized that the concept of holy female to male transvestitism may have been a male misogynist fantasy. Medieval women occasionally dressed as men for practical reasons (such as avoiding rape while travelling) but rarely, if ever, for religious reasons. C. Bynum, supra note 7, at 291. Even St. Catherine of Siena, one of the few female saints who occasionally exhorted women to be virile, rejected holy transvestitism. As an adolescent she entertained a fantasy of entering a male monastery as a transvestite. Christ appeared to her in a vision and told her that cross-dressing was not necessary—he preferred her as a woman. Id. at 256-91.

\textsuperscript{282} In his translation of the Bible into Latin known as the Vulgate (which was, of course, the official Catholic Bible) Jerome used the word “virago” as the name which Adam gave the woman in paradise. After the Fall she is referred to as \textit{Eva}, \textit{femina}, or \textit{mulier}. Thus, Jerome
Catholic theologians expressly recognized that the virgin who rejected sexual subjugation not only became similar and equal to a man, she might even surpass him. This idealization of the virgin was not merely theoretical or conventional. Despite the fact that medieval misogyny was typically conventional—condemning women generally and repeating stereotypes, rather than referring to specific women—theologians' praise of virgins was not limited to symbols such as Mary and the saints, but rather contained vivid descriptions of real individuals whom they personally knew and admired. Jerome, whose writings contain some of the most extraordinarily virulent statements on women, is full of praise for Paula, Eustochium, and the other holy women whom he knew and worked with as friends and colleagues. His vicious stereotypes of and hatred for Woman contrast sharply with his love and admiration for individual women. Jacques de Vitry's thirteenth-century descriptions of Andrea of Foligno, St. Clare, the Beguines and other specific holy women whom he knew personally contain the ring of authentic personal friendship and admiration of real individuals, not conventional ideals. These writings are not patronizing in tone or attitude; the writers recognize the spiritual equality or superiority of these individuals. Indeed, Jacques de Vitry dedicated his life to lobbying for changing the etymological speculation in Genesis that the Hebrew word for woman was derived from the word for man, because the first woman was created from the first man, into a comment on the contrast between Eve's manlike prelapsarian excellence and her feminine postlapsarian degradation.

Bynum insists that medieval female theologians apparently did not accept the male=soul/female=body dichotomy adopted by male theologians, and (with the exception of St. Catherine) did not urge women to become virile. C. Bynum, supra note 7, at 277-96.

At least as a practical matter, Jerome thought that many of the women he knew were more spiritual than he or the other men he knew. Ruether, supra note 173, at 172-75, 175; see also Brown's discussion of Jerome's writings on sexuality and relations with his female friends. P. Brown, supra note 60, at 366-86.

Even though Jerome generally excoriated the very thought of women preaching, when he was required to leave his congregation for a while to attend Church business in Africa, he appointed one of his female friends, Marcella, whom he considered the foremost scholar on Biblical interpretation in Rome, to take his place in settling theological disputes—although he forbade women from teaching publicly. Id. at 175.

Peter Brown places Jerome's misogynist works in the context of the Roman satirical tradition, which was characterized by a profound pessimism of human nature, and fashionable misogyny. Peter Brown discusses Jerome's theory of sexuality and describes in detail Jerome's close relationship with and admiration for the holy women with whom he actually lived and worked. Id. at 367-86.

In contrast, Augustine, whose misogyny is not characterized with the lurid descriptions of Jerome, seems never to have developed any close relationship with any woman, except his mother, and did not seem to think such a relationship was possible between the sexes. His Confessions do not reveal any affection for either of his two concubines, which he kept in his youth for purely sexual purposes or any concern for, or even curiosity about, their welfare after he dismissed them. Ruether, supra note 173, at 175. "Compared with Jerome . . . Augustine moved in a monochrome, all male world . . . . He would never visit a woman unchaperoned, and did not allow his own female relatives to enter the bishop's palace. He expelled a young clergyman who he had found speaking with a nun 'at an inappropriate time of the day.' " P. Brown, supra note 60, at 396.

Bolton, supra note 85, at 144-47.

I believe that it is significant that Catharism, Catholicism's heretical twin, which was the semi-official religion with its own alternate clergy in parts of Provence, Northern Spain, and Northern Italy in the twelfth and thirteenth centuries, accepted the concept of broad-based
recognition by the Church of the seriousness of women's religious vocation and was instrumental in obtaining papal approval of Clare's work in founding a religious order, but died before achieving his goal of obtaining official recognition of the Beguines (i.e., religious lay women who banded together in communities in the cities, rather than behind cloistered walls, to live lives of poverty, chastity, and charity). 287

To become spiritual, a woman had to reject her female nature and become manlike. 288 Despite the fact that theologians mouthed the conven-

feminine equality both in their Church and society, with female clerics and preachers, in addition to cloistered nuns. The Cathars rejected all creation, including sexuality, as evil. By rejecting sexuality as a concept, they also rejected the legitimacy of sex roles and hierarchal marriage. After all, it was the evil creator-God of the Old Testament, not the good spiritual redeemer-God of the New Testament, who cursed Eve and instituted marriage. In other words, they also accepted the fact that intercourse and reproduction were debasing of women (and men) and that women could achieve self-individuation by rejecting them. The difference is that Catharism took Catholicism an additional step and rejected the status quo as evil for all women, rather than suggesting that only a privileged few cloistered nuns would be able to reject this role. See G. Duby, The Knight, the Lady and the Priest, supra note 11, at 107-22.

287. Bolton, supra note 85, at 144-47.

288. MacKinnon skates very close to the virago ideal. She denigrates traditional feminine personality traits and heterosexuality, and privileges values which our society labels as masculine.

MacKinnon both agrees that women in our society have those values which our society labels as feminine and denigrates these values as imposed upon women, and keeping women weak and powerless:

The discovery that the female archetype is the feminine stereotype exposed ‘woman’ as a social construction. Contemporary industrial society’s version of her is docile, soft, passive, nurturant, vulnerable, weak, narcissistic, childlike, incompetent, masochistic, and domestic, made for child care, home care, and husband care.

C. MacKinnon, Theory of the State, supra note 6, at 109. And:

The work of Carol Gilligan on gender differences in moral reasoning gives it a lot of dignity, more than it has ever had, more, frankly, than I thought it ever could have. But she achieves for moral reasoning what the special protection rule achieves in law: the affirmative rather than the negative valuation of that which has accurately distinguished women from men, by making it seem as though those attributes, with their consequences, really are somehow ours, rather than what male supremacy has attributed to us for its own use. For women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness.

C. MacKinnon, Feminism Unmodified, supra note 6, at 39. “Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men.” Id.

She particularly notes the oppression of women who erroneously believe they “choose” heterosexuality. See infra notes 6, 13; supra note 280; see also C. MacKinnon, Feminism Unmodified, supra note 6, at 59 (“Feminists say women are not individuals. To retort that we ‘are’ will not make it so; it will obscure the need to make change so that it can be so.”). Her criticisms of heterosexuality often come close to the rejection of sexuality in our society as a necessary process for individuation. See C. MacKinnon, Theory of the State, supra note 6, at 141 (“Women’s sexual ‘reluctance, dislike, and frigidity,’ women’s puritanism and prudery in the face of this sex, is ‘the silent rebellion of women against the force of the penis . . . an ineffective rebellion, but a rebellion nonetheless.’”) (footnote omitted); id. at 145 (“To put it another way, perhaps gender must be maintained as a social hierarchy so that men will be able to get erections; or, part of the male interest in keeping women down lies in the fact that it gets men up. Maybe feminists are considered castrating because equality is not sexy.”).
tional wisdom that consecrated virgins had to adopt the feminine virtues of humility, meekness, and submission, in order to become a virgin virago, women needed to adopt the conventional masculine virtues of strength and boldness. These were needed in order to reject the domination of masculine society, particularly the control of her father and male relatives who would otherwise force her to marry. These virtues were not permitted in the wife, who because of her sexual nature had to be meek and submit always to her husband.

This "virginal feminism" of orthodox Catholic dogma may be seen as one of the primary rationales for establishing the primacy of individual consent in marriage. It is not the case, as one might expect, that the canonists debated whether or not sons could dispute their parents' marital compulsion, and this was generalized to women. Rather, the decretists all discussed expressly the issue of whether the daughter could disobey her family and then mentioned in passing that the ruling would also apply to a son. This probably reflects in part the custom (which started breaking down when marriage laws were "reformed") that families discouraged all but their eldest son from marrying but sought to marry off their daughters for dynastic political reasons. Daughters were probably, therefore, more frequently forced into unwelcome marriages than sons. As I have mentioned before, Innocent III—one of the Reformist popes most concerned with changing the law of consent in marriage—was also a great admirer of virgin viragos and actively supported women religious in opposition of both the Fourth Lateran Council and the leaders of the male religious orders who wished to suppress the formation of new female convents.

The other, darker side of so-called "virginal feminism" is that it was the rationale for the legal and customary oppression of women. I have already discussed how the paradigm of the heroic and spiritual virgin served as a degradation of her opposite, the matron. But it was also used to severely curtail the opportunity of women to enter religion and the role of religious women.

Because it was woman's sexuality that was degraded, during the high Middle Ages there developed a morbid and literal concept of virginity as necessary for feminine spirituality. Not only were women who married...
or who lost their physical virginity accidentally or by rape were forbidden from either adopting a religious vocation or entering the highest level as consecrated virgins, but the fear of loss of virginity became a justification for extreme strictures of the lives of female religious. Because women were so much more sexually fragile than men—both psychologically, metaphysically, and physically—at the end of the high Middle Ages and in the late Middle Ages it became the rule that nuns had to be strictly cloistered. Although monks were also cloistered, they were given much more freedom to leave their monasteries. In order to remove both monks and nuns from sexual temptation, the common practice in the early Middle Ages of joint male/female monasteries became increasingly rare. The old established orders which had traditionally had sister nunneries, such as the Cistercians, increasingly tried to avoid this duty. The new preaching orders of the Franciscans and Dominicans, although forced by the Pope to adopt female branches, subjected the related female convents to different rules: the sisters were rigidly cloistered unlike their wandering, preaching brethren. They were not even permitted to adopt the strict poverty which was the basis for the Franciscan reform of the clergy because of their delicate natures, and were forced to accept gifts. The exclusion of the majority of women, even virgins, from the religious life of the high Middle Ages coincided with both the so-called “discovery of the self,” which encouraged individuals to seek individual spiritual perfection, and an excess of unmarried noblewomen resulting from the custom of prohibiting the younger noblemen to marry. These conditions led to what was known in the thirteenth century as the Frauenfrage (i.e., the woman question) and the development in the later part of the high Middle Ages and the late Middle

291. Even Innocent III, as a condition of the recognition of her order, insisted that Clare agree that, thereafter, her Poor Clares be strictly cloistered. Clare, who after all founded her order in imitation of the wandering Franciscans and who cared for the sick in the town, reluctantly agreed. Innocent did, however, grant her nuns the unique franchise of living in strict poverty and of being autonomous of male orders. After his death, these great privileges were also wrested from the valiant Clare. Bolton, supra note 85, at 148-52; see also C. Bynum, supra note 53, at 15-16.

292. With some rare and notable exceptions such as the famous joint convent of Fontevraud, founded in the twelfth century, where, surprisingly, the monks were made subject to the nuns and the mother abbess. As McLaughlin has pointed out, however, the stated rationale of the founder was based on conventional medieval views of the subordinate role of women. The monks were made subject to women because their ideals were service and humility. They debased themselves by serving women. Female dominance in this one case was justified on the basis that it would further the spirituality of the men, not the that of the women. McLaughlin, supra note 43, at 239-41.

293. This is especially shocking when one reflects that both Francis and Dominic, founders of their eponymous orders, were initially strong supporters of the female branches. St. Clare was converted by, and was a close friend of, Francis, who encouraged her vocation. Indeed, the churches of Francis and Clare remain down the street from each other in Assisi. In his later life Francis resisted not just the official affiliation of the Poor Clares and the Franciscans but any obligation of Franciscan priests to provide pastoral services to the nuns. He was particularly upset that these women called themselves "sisters" in imitation of his "brothers." Dominic founded his order specifically to preach against Catharism. He recognized that women were drawn to the Cathars in disproportionate numbers because Catharism recognized female religious vocations. He, therefore, concentrated his early preaching toward women and worked to establish female convents even before he founded male convents. Bolton, supra note 85, at 150-52.
Ages of lay religious groups outside of the official recognition of the Church, such as the Beguines. They also have been identified as one of the reasons why women were represented so heavily in the heretical movements of the late Middle Ages.294

D. Lessons?

This suggests to me that on one level, the radical feminists have correctly identified one of the “hidden agendas” behind many of the institutions of our modern patriarchal society. In fact, at the time this agenda was originally adopted, it wasn’t hidden, but was acknowledged openly. I am concerned, however, that radical feminists have accepted the misogynist view of women and sexuality. Although it is surely not their intent, by disparaging heterosexuality and pregnancy in patriarchal society without the development of a positive alternative, they run the risk of elevating the rare radical (dare I say, virginal) feminist at the expense of further belittling the vast majority of women who will engage in marriage and motherhood.

My concern comes from personal experience. Until a couple of years ago I was a professional virago and am now an academic virago. Like so many other women on Wall Street, I achieved considerable professional and economic success, and great personal satisfaction, by adopting the masculine values of the legal community and rejecting the feminine values of motherhood. However, I have been horrified to see myself and other women like me held up as a standard that is virtually impossible for mothers in the profession to achieve and used as a justification for putting women in a lower “mommy track” or forcing them out of practice altogether. We are presented as justification that the legal profession is open to women, and as evidence that those who didn’t make it either didn’t want to or weren’t good enough. The few, very few, of us who have made partner at law firms or otherwise have achieved professional success, and the tiny percentage of us who are mothers, are testimony not to the fact that it is possible, but to the fact that it is virtually impossible. I also have been horrified when I have seen praise of women like me—and I suspect, if you, my reader, are a woman, like you—as role models, used not to encourage women, but as a reproach to those women who can’t, or don’t want to, reject values they consider to be feminine. I am most saddened because this reproach all too often comes from the mouths of other professional viragos who need to justify both their success and the sacrifices that they have been forced to make to achieve that success.295

294. Id. As I have discussed, Dominic expressly recognized that the failure of the Church to address women’s religious desires was one of the primary reasons for the popularity of heretical movements. See supra note 47.

295. Many others, including MacKinnon, have noted this phenomenon. See C. MacKinnon, Feminism Unmodified, supra note 6, at 76 (“When a few of us, the exceptions, overcome all this, we are told we prove that there are no barriers there and are used as examples to put others down. She made it, why can’t you?”); id. at 37 (“The women that gender neutrality benefits, and there are some, show the suppositions of this approach in highest relief. They are mostly women who have been able to construct a biography that somewhat approximates the male norm, at least on paper.”). Of course, by this definition, MacKinnon is herself a virago
V. CONCLUSION

I realize as I reread this essay that my theories contain a strong "hooey" factor, that they run the risk of incredible oversimplification. Indeed, I justly might be criticized for "doing history backwards." I am able to tell one story after reviewing certain historical trends, but I realize that others may conclude that alternative stories might be told which they believe fit these "facts" more accurately. Many medieval stereotypes of women which I did not discuss in this article are very similar to certain modern stereotypes—especially those relating to women's supposedly weaker and more emotional character. Cultural feminists might find that medieval history shows that even if certain stereotypes as articulated by medieval writers were different from the cultural feminist vision of femininity, other aspects of the culture and lives of medieval people might support their female = relational/male = autonomous dichotomy. Cultural feminists may also argue that if women's status fell in the late Middle Ages when individuality was on the ascent, this would support a theory that communitarianism is, in fact, feminine, or at least beneficial to women. I believe that radical feminists would find more than ample support for their theories of the history of sexual use and abuse of women.

Indeed, I could critique my own historical analysis as coming close to committing the same error which I attribute to West. Arguably, I am basing my analysis of medieval culture by comparing it to unexamined presumptions about modern culture. I am, therefore, predestined to conclude that medieval society and men are the negatives of modern society and men. That is, if I accept that modern American society values individuality and labels it masculine and I find that medieval values are different, the vocabulary leads me to characterize medieval society as valuing community (i.e., anti-individualism) and labeling it as masculine. But this inability of one culture's (or gender's) vocabulary adequately to describe the reality of another's is precisely my point.

I am not trying to structure a universal theory of history or of female nature. I am, however, concerned that certain moderns, such as the radical feminists, who may have "happened" on to one of the trends which underlie our culture through deduction, have failed to examine the intellectual history of these ideas and are overemphasizing this one trend at the expense of all others. I am also concerned that cultural feminists are accepting contemporary stereotypes of femininity without questioning whether they are culturally contingent despite lip service to the contrary. My greatest concern is that both schools of feminism are unconsciously accepting masculine analysis and a masculine vocabulary of sexuality. In order for us to develop a true feminist jurisprudence—which I believe is absolutely critical for furtherance of feminine freedom and the development of a truly just jurisprudence for both sexes—we, as women, must define ourselves, not merely accept men's definitions of ourselves. Al-

296. The evocative term for the ethnocentrism of modernity was coined by Jack Goody. See B. Hanawalt, supra note 56, at 10.
though it may be a truism that femininity and masculinity can be defined only in reference to each other, we must stop defining ourselves in terms of how we differ from men, or in terms that our gender difference outweighs our human similarity, as the baseline for analysis. The recognition that Woman is different from Man does not mean she is his opposite or complement. Many feminists pay lip service to these propositions. It is now time to put content into them.

The most valuable insight that a historical analysis can give us is not merely an explanation of the origins of our modern legal concepts, but an understanding that the cultures and people who developed these initial concepts were in many ways fundamentally different from us—not merely in the physical and political aspects of their lives, but in their very understanding of their selves, their bodies, and their relationship to others. On the other hand, in certain ways these cultures and people, in many ways abhorrent to our sensibilities, are amazingly similar to us: This may be so, at least in part, because their concepts underlie many of our modern social institutions and assumptions. Historical study should enable us better to analyze our own jurisprudence in two ways: on a simple level, to rethink whether legal constructs and social institutions which were developed originally to serve a different set of societal and individual values "work" for our modern society and values; and on a more metaphysical level, to question to what extent modern theories of self and society are culturally determined and based on assumptions of human nature and morality that we do not share.

To most modern readers, medieval theory seems unsophisticated, crude, cruel, and demonstrably wrong. Even more, to the modern reader medieval social institutions seem unjust. We should remember, however, that these theories were, just as ours are, the result of the most intelligent and sophisticated men (I'm afraid that is the correct word) trying as hard as they could in good faith to understand themselves and the world around them, but always in the context of their own society from which they could not escape. It is, therefore, not enough to consider that these people were "wrong" in not recognizing, as we sophisticated moderns do, the fundamental equality of people, the importance of individual rights, and other ideas which modern Americans regardless of the philosophical school to which they belong (including most radicals, although they would probably reject this terminology) tend to accept.

It is not correct, for example, to label the cultural changes of the twelfth century and later of the Italian Renaissance as the "discovery" of the self as though the concept of individuality was always there, but earlier generations were just too stupid or oppressed to see it. Rather, by reading the writings of the people of the time, one comes to the understanding that these people in this culture experienced themselves differently than we do today. Men did not prize equality, individuality, and autonomy not necessarily because they didn't think of it, but because in their society these ideas

297. For example, Gilligan's critique of the dominant theories of child development starts from her observation that in these theories the "child" who is studied and on whom the theories are based is always presumptively the boy. See supra note 12.
were absurd and potentially culturally destructive. They, therefore, identified these characteristics with women. Throughout and after the Middle Ages both the society and the ideas changed until we finally arrived at modern Western society and ideas. We have a tendency to view this as evolution—society getting better over time, mankind discovering the truth. Perhaps it is just change.

I am not trying to say that one must not make moral decisions, that society cannot improve, or that we do not learn over time. I do not believe that the study of history teaches us to have respect for tradition or nostalgia for the past. I do believe the Middle Ages produced to my taste some of the most beautiful and evocative art ever produced by Western civilization (I am profoundly incompetent to speak of other cultures) and that despite the unrelenting cruelty and oppression of the period, there are many sublime and seductive aspects of medieval society. I have absolutely no illusions, however, that life in twelfth-century Europe was as "good" as life in twentieth-century America is for most people. At least the knowledge of history can serve as a critique to our intellectual hubris. We should always remain aware that many things we perceive as self-evident may be cultural assumptions that may seem as naive and wrong to our grandchildren as our grandparents’ theories seem to us now. I do not believe the old saw that those who do not study history are doomed to repeat its mistakes. Rather, I believe that those who do not study history will probably make new and different mistakes.

It was a commonly believed medieval cliché that although medieval people were intellectual and cultural dwarves compared to the giants of ancient Greece, Rome, and Israel, they could still see further than those giants by standing on their shoulders. Similarly, whether or not we believe that we are intellectual giants compared to our medieval grandparents, we can still see further if we allow ourselves to climb onto their shoulders.

Feminist theory can act as a critique of dominant cultural assumptions. My criticism of West’s and MacKinnon’s work to date is that instead of being critical, it is in fact extremely conservative, accepting the basic assumptions of what it perceives as the dominant masculine theories, but finding exceptions for the female case. Attempts to date at articulating a “feminist” jurisprudence, based on essentialist views of masculinity and femininity, reduce the choice of jurisprudential theories to gender loyalty. I believe that both historical and feminist criticism are capable of developing and supporting more than a necessarily restrictive feminine jurisprudence. In order to challenge the basic underlying assumptions of the dominant jurisprudence, feminists must develop a more human and “feminist” jurisprudence, which need not be gender-neutral.

I would also caution feminists not to make the mistake that Martin Luther, who rejected many Catholic teachings on marriage, thought female scholars might make. In rejecting Catholic misogynist writings on women as

298. This cliché is memorialized in the stained glass at Chartres Cathedral, which depicts the four dwarfish New Testament Evangelists riding piggyback on the broad shoulders of four giant Old Testament Prophets.
disparaging the wisdom of the Creator, he shrugged his shoulders and said, “But I suppose, that if women were to write books, they would say much the same sort of things about men.” Or, as Chaucer put in the mouth of the Wife of Bath, whose latest husband, Iankyns, loved to read misogynist stories in a *Book of Wikked Wives*:

By God, if wommen hadde writen stories,
As clerkes han with-inne hir oratories,
They wolde han written of men more wikkednesse
Than all the mark of Adam may redresse . . . .

299. J. Brundage, supra note 70, at 560.
300. G. Chaucer, The Canterbury Tales, supra note 232, at The Wife of Bath’s Prologue, lines 94-96. Iankyns’s *Book of Wikked Wives* was a collection of misogynist writings through the ages, from Jerome and the other Church Fathers to contemporary literature. Iankyns loved to try to edify his wife Alisoun by quoting from this book until she was driven to tearing it apart. This led to a “humorous” bout of fisticuffs resulting in Alisoun’s victory, the burning of the book and a promise from the chastened Iankyns that the Wife would have complete sovereignty over him and everything he owned. From that day on they “hadden never debaat.” Id. at line 822. The wife who beats her husband, usually with her distaff which was the symbol of femininity, was a stock comic character in medieval art and literature. Did medievals find this so hilarious for the same reason that monks filled the borders of their manuscripts with humorous “baboons,” or animals dressed in human clothes engaging in human activity—because it was an absurd reversal of the actual state of nature?