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THE VALUE OF A WOMAN: A COMPARISON OF THE LAWS AND THE TRADITIONS OF DIVORCE IN MEDIEVAL EUROPE AND MODERN AMERICA

Maria Funk Miles¹

I. INTRODUCTION

“If history repeats itself, and the unexpected always happens, how incapable must Man be of learning from experience.”² This thought by the great writer George Bernard Shaw raises two valuable questions: (1) does history repeat itself, and (2) if it does, what can women and men learn from the past? By comparing the divorce laws and customs in medieval Europe to the divorce laws and customs of modern America, one discovers that in some ways history indeed repeats itself.³ In particular, this

1. J.D. expected 2006, J. Reuben Clark Law School, Brigham Young University.

2. *Irish Studies Online*, http://www.irishabroad.com/Culture/FamousQuotes/george_bernard_shaw.asp (quoting George Bernard Shaw) (last visited Mar. 10, 2006).

3. It is valuable to note that in order to make such comparisons some generalizations are necessary. While specific laws during certain time frames will be noted, the author will also make generalizations as to the conditions in general during the entire medieval or modern time period. In addition, when the author refers to “medieval” or “Middle Ages” this refers to the time period of 500 A.D. to 1500 A.D. Discussion of medieval law will focus on medieval Europe, with a strong emphasis on Germanic laws and customs. Again, while certain places within Europe will be referenced specifically, in order to make comparisons, the author will also generalize as to conditions in medieval Europe as a whole. References to “modern America” refer more specifically to the United States from a time period beginning in the twentieth century until the present. In addition, the author notes that while her focus is on the value of women, it is conceivable that similar arguments may be made with regards to the value of men. This is beyond the scope of this paper, but would also be a valuable subject to study.

comparison reveals the cyclical nature of divorce and its correlation with the value society places on women. By examining this cycle, it becomes apparent that how society and the law regard divorce is a reflection of the value placed on women by law and society. Specifically, when divorce is seen as natural and normal, women are not as respected as when divorce is viewed as a moral wrong and something that should be avoided in most situations.

Medieval law comes from two sources: first, the secular, pagan culture created a dominant body of law throughout Europe. Second, the secular law was later overridden by the influence of the medieval Christian church. Modern American law likewise has two dominant influences, but in the reverse order of medieval times. First, American law began with religious influences but these later gave way to more secular legal concerns.

In comparing these two eras of law, medieval and modern, this paper will first address medieval and modern views of marriage and the purpose of the family in Section II. Section III considers domestic violence within medieval and modern marriage and its affect on women. Section IV examines how common divorce was in medieval Europe compared to how common divorce is in the United States today. Section V addresses medieval and modern views of divorce. Next, Section VI explores in more depth the particular divorce law of each time period. Child custody issues and the economic impact of divorce on women are discussed in Section VII. Finally, Section VIII provides a brief conclusion.

II. MARRIAGE AND THE PURPOSE OF FAMILY

To understand how divorce is a reflection of the value of women in society, one must first understand society's views of marriage because before a divorce can occur, a marriage must first be established. Voltaire, in explaining the early connection between marriage and divorce, said, "[d]ivorce probably dates from the same time as marriage. I think, that marriage is a few weeks older, that is to say that a man fought with his wife after a fortnight, beat her after a month, and that they separated after living together for six weeks."⁴ This section will provide an overview of medieval and modern views on marriage and the family in preparation for examining divorce.

4. RODERICK PHILLIPS, UNTYING THE KNOT 252 (1991).

A. *Medieval Views of Marriage and the Family*

Two major concerns of men living in medieval Europe were how to protect their land and how to improve their social, political, and/or economic status. One way of accomplishing both of these goals was through a “proper” marriage. Marriage was viewed as a legal arrangement that was not usually accompanied with emotions or celebration.⁵ The purpose of marriage was to create a “multi-purpose contract aimed at creating a social union, a reproductive unit, and a production and property-holding unit.”⁶ It is obvious that women were a necessary part of a marriage in order to achieve the purpose of procreation; however, a specific woman was not necessary to accomplish the goal of procreation and so one wife could justifiably be put away for another if the second wife was more useful in terms of achieving a higher social, political, or economic status.

The medieval Christian church, on the other hand, viewed the purpose of marriage to procreate, and not simply to achieve political or economic goals.⁷ This focus on procreation, rather than status, gave more value to the woman in her own right because she was needed as a mother, wife, and caregiver—and not simply as a tool to advance the man’s own social, political, or economic goals. In addition, this church doctrine contrasted the secular belief that marriage was an emotionless arrangement. Under secular tradition, because marriage was not believed to be based on love, it appeared to be a simple exchange that could be easily undone, without emotion or harm. Medieval church doctrine, on the other hand, encouraged couples to create a loving, unbreakable tie.

While women’s rights in choosing or consenting to a marriage were often limited in earlier civilizations (such as in early Roman law), the medieval Anglo-Saxons actually provided women more protection in this area.⁸ Consent was required by both parties to validate an Anglo-Saxon marriage. Under the secular

5. ARTHUR FREDERICK IDE, *SPECIAL SISTERS: WOMEN IN THE EUROPEAN MIDDLE AGES* 33 (1983). *See also* JENNIFER WARD, *WOMEN IN MEDIEVAL EUROPE, 1200-1500*, at 47 (2002) (“Romantic love was frowned on as the basis for marriage, but for some couples love already featured at the time of the wedding, while for others it developed after the marriage had taken place.”).

6. LISA M. BITEL, *WOMEN IN EARLY MEDIEVAL EUROPE 400-1100*, at 167 (2002).

7. *See* WARD, *supra* note 5, at 50.

8. ANGELA M. LUCAS, *WOMEN IN THE MIDDLE AGES: RELIGION, MARRIAGE AND LETTERS* 67 (1983). Under Roman Law, “a daughter could only protest [her

law of the Danish ruler, King Canute, who ruled from 1016-1035, "no woman or maiden shall ever be forced to marry a man whom she dislikes, nor shall she be given for money."⁹ This is not to say, however, that this law was always followed. There are records of a woman being told that if she refused to marry the man of her father's choosing, the father would "break her neck."¹⁰ Similarly, a man who sought to make a woman his bride threatened to strangle her with a towel unless she agreed to marry him.¹¹ Without a doubt, this abuse violated the law requiring the woman's consent to marriage, and if a woman could show she was forced by threat or fear into a marriage, the marriage was legally dissolved.¹²

This issue of consent may appear to demonstrate that medieval women and their opinions regarding their own marriages were valued. However, while a woman would not be legally forced into a marriage, this does not mean that women regularly chose their own husbands. It is likely that most marriages were arranged, usually to the economic or social benefit of both families.¹³ Notice that the concern throughout the secular arrangement of a marriage was the benefit of the families—not the happiness or security of the woman or even necessarily the man. Men and women were not completely free to choose a marriage partner until they reached the legally predetermined age of majority.¹⁴ This age, however, differed greatly between the sexes. Men had to be only twelve to fifteen to make such a decision on their own, while women had to wait until they were twenty to twenty-five. In a world that had an average life span of only forty-five years, this difference was much greater than it would be today.¹⁵

father's choice of her future husband] if the man selected was base or unworthy." *Id.*

9. *Id.* at 68.

10. R.H. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND 90 (1974).

11. *Id.*

12. *Id.*

13. See LUCAS, *supra* note 8, at 66. The parents of the bride and groom usually arranged the marriage and then the bride was consulted for her consent shortly before the marriage ceremony. *Id.*

14. See FRANCES GIES & JOSEPH GIES, MARRIAGE AND THE FAMILY IN THE MIDDLE AGES 54 (1987).

15. See FRANCES GIES & JOSEPH GIES, LIFE IN A MEDIEVAL VILLAGE 121 (1990) ("Life [in the Middle Ages] was short. Even if a peasant survived infancy and childhood to reach the age of twenty, he could not expect to live much beyond forty-five."). To put this in perspective, today the average lifespan is about eighty years.

In early medieval Europe, relationships were not exclusively between one man and one woman. Records indicate that before the influence of the Christian church took hold, the practices of polygamy, incest, and homosexuality were prevalent.¹⁶ For example, a sixth century Frankish monarch, Lothar, was recorded as having seven wives and multiple concubines.¹⁷ Indeed, “polygamy was common among most of the Germanic tribes. Wives were bought and sold; rape was treated as theft; and husband could repudiate wives with little ceremony.”¹⁸ With such practices it is easy to see that as divorce was common and marriage given little regard, women did not carry much worth or value. It was only with the eventual conversion to Christianity, beginning with rulers such as the Frankish King Clovis,¹⁹ that such practices dwindled and eventually disappeared.

B. *Modern Views of Marriage and the Family*

While many people in the United States agree that the family is the basic unit of society, not all Americans agree about what constitutes a family.²⁰ One notion that is common to almost every American’s view of marriage is that it is a union entered into because of love.²¹ Unlike the medieval notion that marriage was a legal arrangement for the benefit of the respective families, today most people regard marriage as a joyful union for the benefit of the happiness of the two entering the relationship.

If this law were in place today, women would not reach majority and be allowed to choose their own husbands until they were at least forty.

16. GIES & GIES, *supra* note 14, at 64 (noting that acts such as homosexuality and incest were later condemned and harshly punished by the church); FRANCES GIES & JOSEPH GIES, *WOMEN IN THE MIDDLE AGES* 17 (1978) [hereinafter *WOMEN IN THE MIDDLE AGES*] (describing the prevalence of polygamy).

17. *WOMEN IN THE MIDDLE AGES*, *supra* note 16, at 17.

18. *Id.*

19. *Id.*

20. An interesting example of the debate over what constitutes a family is the differing definitions of “family” provided in a dictionary. Family is defined as “[a] fundamental social group in society typically consisting of one or two parents and their children.” The same dictionary also provides a second definition as “[t]wo or more people who share goals and values, have long-term commitments to one another, and reside usually in the same dwelling place.” *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE*, 4th Ed. (2000), available at <http://dictionary.reference.com/search?q=family>.

21. However, there are modern exceptions to this thought. One website allows people to post a profile and name a price for marrying someone. *Marry for Money*, <http://www.marryformoney.com/index.cfm> (last visited 3/10/2005).

Another difference between the modern view of marriage and the medieval view is that in medieval times there appeared to be one predominant view of family and marriage. Today, as with many issues, there is a wide variety of thought regarding what should constitute a family. Some groups firmly believe that marriage is reserved for a man and a woman.²² On the other hand, some people argue that because marriage is based on love any two people who love one another, with few restrictions, should be able to wed legally.²³ As divorce has become more acceptable in modern society, ideas of what constitutes a family have become more diverse—homosexuality and even polygamy are argued to be acceptable family arrangements.²⁴ As in early medieval Europe, when homosexuality (practiced almost exclusively by men) and polygamy were secularly acceptable, such practices reduce the value placed on women. In polygamy, each woman is merely one of many disposable wives or concubines and in male homosexuality, the role of the woman is completely eliminated.

Another interesting comparison between women in medieval and modern marriages is the issue of age and consent. Today, in every state both men and women must be of legal age, usually eighteen or twenty-one, in order to enter into marriage.²⁵ This is interesting not because the age of consent has risen from medieval age limits—this would be expected because of the increase in lifespan in modern times. Instead it is interesting because a single age is required for *both* males and females. A person today must meet the statutorily required age of consent for marriage, regardless of sex. This is one modern development that may be

22. One example of this is the American Family Association whose main goal is to preserve the idea that marriage should be reserved for a man and a woman. This group claims to have nearly 2.5 million members. *AFA Online Home Page*, <http://www.afa.net/mission.asp> (last visited Mar. 1, 2006).

23. Million for Marriage, for example, supports the “right of every American to marry, including gay, lesbian, bisexual and transgender couples.” *The Human Rights Campaign Home Page* <http://www.hrc.org/millionformarriage/index.shtml> (last visited March 10, 2005).

24. One of the most outspoken groups on these issues is the American Civil Liberties Union (ACLU). In 1999, the group joined the fight to overturn a Utah law that made polygamy a felony. The ACLU stated that those practicing polygamy have a “privacy expectation [that] is something the ACLU is committed to protecting”. Press Release, ACLU, ACLU of Utah to Join Polygamists in Bigamy Fight (July 16, 1999), <http://www.aclu.org/ReligiousLiberty/ReligiousLiberty.cfm?ID=8318&c=142>.

25. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 89-90 (2d ed. 1988).

interpreted as an increase in the value of women. Women and men are placed on the same level and both are equally protected from making important life decisions before they are ready.

C. *Medieval and Modern Women's Value Outside the Home*

Marriage was necessary to women in medieval society in a similar way that marriage is useful to modern women. Women's rights in the Middle Ages were restricted such that women absolutely *needed* men—they “needed men to represent them in legal affairs, to vouch for them in public, and to support them economically.”²⁶ Likewise, modern women also find that they often must rely upon men. Although today women can legally represent themselves in court and support themselves financially, it is often the case that women still depend on men. For example, as recently as 1993, more than seventy percent of lawyers were male.²⁷ This indicates that for many years women had little choice but to be represented in court by a male attorney. Similarly, in 1993 only twenty percent of medical doctors were female, leaving most women no choice but to receive medical services from men.²⁸ The tide, however, may be changing in the way women must rely on men for specialized services such as legal or medical aid. Today, women outnumber men in colleges—women constitute fifty-six percent of college undergraduates.²⁹ As more women earn college degrees, all women (and men) will at least have the option of receiving specialized services from either a male or a female.

Many of these changes have occurred since divorce has become increasingly accepted in modern America. At first glance this may seem to indicate that as divorce becomes more acceptable, women earn a higher place in society. But this is not entirely accurate. In regard to education, while women outnumber men in undergraduate courses, women still “earn fewer doctorate degrees than men. There are also fewer women in many careers, including math, engineering, science and computers.”³⁰ With regard to finances, even when women do work outside the

26. BITEL, *supra* note 6, at 161.

27. Joe G. Baker, *The Influx of Women into Legal Professions: An Economic Analysis*, MONTHLY LABOR REV. 14, 16 (August 2002), available at www.bls.gov/opub/mlr/2002/08/art2full.pdf.

28. *Id.*

29. Raven Tyler, *Gender Gap 101*, PBS NewsHour Extra (Oct. 10, 2002), available at <http://www.pbs.org/newshour/extra/features/july-dec02/college.html>.

30. *Id.*

home, they still receive less pay than their male counterparts. In 2004, women made only seventy-six percent of what men were paid.³¹ Thus, even as women become increasingly independent—legally, educationally, financially—they still lag behind men in regards to the value³² placed on their education and work.

More importantly for this analysis, the *value* placed on women—not only the freedom women have obtained—must be evaluated. As women move farther into fields previously occupied by men, they lose the value that was once placed on them in the home, but they do not make up for this lost value as they increase their presence elsewhere. This is not to say that women cannot or should not get an education or become financially independent. On the contrary, this is very important. This merely indicates that as the idea of family becomes more diverse and divorce becomes more acceptable, women's value decreases in the home and does not likewise increase elsewhere—the woman becomes lost in the middle with society placing little value on her contribution in either place.³³

III. DOMESTIC VIOLENCE WITHIN MARRIAGE

A. *Violence in Medieval Marriage*

Within a medieval household, a wife was expected to be completely obedient to her husband.³⁴ Medieval wives were regarded as belonging to their husbands, and if a wife misbehaved or was disobedient to her husband this reflected on the husband. Thus, wife beating was socially acceptable as a method of creat-

31. Joel Wendland, *Reversing the "Gender Gap"*, Political Affairs (March 2004), <http://politicalaffairs.net/article/articleview/106/1/28/>.

32. Here, "value" refers to financial value although generally when the term is used in this paper it refers to the level of regard, respect, or reverence placed on women.

33. Specifically, now when a woman stays at home rather than enter the workforce, she is viewed as not contributing to society at-large. When a woman enters the workforce, she is seen as a poor mother, wife, and caregiver. The woman is not given full value no matter where she chooses to put her efforts. I have seen this first-hand as a law student. Female students who choose to have children during or after law school, rather than become a practicing attorney, are thought by many to be "throwing their education away." On the other hand, female students that choose to work and "put off" having children are thought by many others to be shirking their primary duties. It seems women are often "damned if they do, damned if they don't."

34. WARD, *supra* note 5, at 49.

ing order in the home.³⁵ Secular courts usually allowed separation only “when the violence was deemed excessive.”³⁶ Violence against wives was not restricted to a single class—women in every class, from the poor to the aristocracy were affected.³⁷ All women, even the aristocrats, in the Middle Ages were very dependent on their family and husbands for everyday sustenance—therefore, even in cases of great abuse, most women would be forced to remain with the abuser.³⁸

B. *Violence in Modern Marriage*

Some trends of the Middle Ages continue today, as seen in the staggering domestic violence statistics. Estimates of the number of women that experience non-fatal violence by an ‘intimate’ partner each year range from one million to four million.³⁹ Unlike the Middle Ages, however, domestic violence does not appear to equally affect women in all social levels. While there are no specific numbers available, it is believed that immigrant women in the United States experience much higher levels of abuse than American citizens.⁴⁰ In addition, statistics indicate that economically disadvantaged women are more likely to experience domestic violence.⁴¹

Though violence still effects women today, just as it did in the Middle Ages, the source of the problem is likely not the same. In the Middle Ages, women were legally non-existent once married. Though this trend continued for a short time in

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Bureau of Justice Statistics, *Special Report: Violence Against Women: Estimates from the Redesigned Survey* 3 (August 1995), <http://www.abanet.org/domviol/stats.html> (reporting one million episodes per year); American Psychological Association, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* 10 (1996), <http://www.abanet.org/domviol/stats.html> (reporting four million episodes per year).

40. Michelle J. Anderson, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 *YALE L. J.* 1401, 1403 (April 1993). Perhaps this may be attributed to the culture of the country that the immigrants came from, which may be more accepting of violence.

41. See JODY RAPHAEL & RICHARD M. TOLMAN, TRAPPED BY POVERTY, TRAPPED BY ABUSE: NEW EVIDENCE DOCUMENTING THE RELATIONSHIP BETWEEN DOMESTIC VIOLENCE AND WELFARE 20 (1997) (noting that most women on welfare have experienced domestic violence). This, however, could be a chicken / egg issue. For example, do women who are abused go on welfare because they are forced to leave the abuser / financial provider? Or do women on welfare more often enter into abusive relationships in order to gain financial support from a male?

modern day with the law of coverture, such laws have since been rejected.⁴² One possible explanation for the continuing trend of violence toward women is that as the value of women in the home is decreased, husbands' respect for their wives diminishes and husbands feel abuse is warranted and acceptable.

Sadly, even with a legal system in place that is meant to protect women, abused women are often harmed further after utilizing legal remedies. For example, "at least [thirty percent] of all battered women who pursue legal action are re-assaulted during the process of prosecution."⁴³ Further, some women are unable to take advantage of the laws created to protect them because "[m]any batterers have kidnapped their victims and seriously injured or even killed them to prevent them from testifying in court—a graphic reminder that the justice system often is unable to protect victims from harm."⁴⁴ Further studies of divorce and abuse are warranted in order to establish whether there is a causal link or even a simple association between the rate of divorce and the rate of abuse. Such a study would also add much insight into the value society places on the protection of women.

IV. COMMONNESS OF DIVORCE

Before shifting to discussion of society's views of divorce and laws regarding divorce, it is useful to understand how often divorce occurred in the Middle Ages in Europe and how often it occurs today in modern America. By examining the commonness of divorce, the cyclical nature of divorce rates emerges. This cycle's affect on the value of women can then be better understood by evaluating a society's views and laws of divorce.

42. See e.g., *United States v. Yazell*, 382 U.S. 341, 361 (1966) (Black, J. dissenting).

The Texas law of "coverture," which was adopted by its judges and which the State's legislature has now largely abandoned, rests on the old common-law fiction that the husband and wife are one. This rule has worked out in reality to mean that though the husband and wife are one, the one is the husband. This fiction rested on what I had supposed is today a completely discredited notion that a married woman, being a female, is without capacity to make her own contracts and do her own business.

Id.

43. Deborah Epstein, Margret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 476 (2003).

44. *Id.*

A. *How Common Was Divorce in Medieval Europe?*

One indication of how prevalent divorce or dissolution of marriage may have been in medieval Europe is how many cases dealing with such matters were heard before courts of the time. Of the 256 cases heard in York during the twelfth century, 88 dealt with marriage in some respect.⁴⁵ When these cases are further divided by outcome, over one half (45 cases) “deal[t] with the dissolution of marriage,” and the rest dealt with enforcement of promises to marry, alimony, and restitution of marital rights.⁴⁶ Although these numbers are interesting, they may not be an accurate depiction of how many people sought divorce, because the records of many other cases are lost.⁴⁷ In addition, there is a great likelihood that many who desired divorce never appeared before a formal court.

Records of the cases at Canterbury from 1372–1375 show that only ten out of every ninety-eight cases related to divorce.⁴⁸ Similarly, “[o]f the twenty-three marriage cases heard from April 1437 through April 1440 in the Rochester Consistory court, only five were for divorce.”⁴⁹ Once again, however, there are many other factors that can explain such a low number of divorce cases. The most simple and more likely explanation is that most “couples spli[t] up without reference to the court.”⁵⁰

Though many today believe that divorce is a modern phenomenon, these figures are still “surprising at first sight; particularly so because historians have told us that marriages were easily and frequently dissolved in the Middle Ages.”⁵¹ There are a few explanations for this discrepancy. First, it is likely that a majority of those who sought divorce in medieval times did not take their case before a court—they simply separated on their own.⁵² Consequently, it is not clear how many couples actually sought divorce during this time. Second, if a couple wished to dissolve a marriage, the simplest method was to find a reason why the mar-

45. FREDERIK PEDERSEN, *MARRIAGE DISPUTES IN MEDIEVAL ENGLAND* 19 (2000). These cases were heard before the Diocese of York from 1301 to 1400. *Id.* at 18.

46. *Id.* at 21.

47. *Id.* “Without a doubt the entire cause paper E series [of the twelfth century] represents a very small sample of the cases that the court heard.” *Id.*

48. WARD, *supra* note 5, at 50.

49. HELMHOLZ, *supra* note 10, at 74.

50. WARD, *supra* note 5, at 50.

51. HELMHOLZ, *supra* note 10, at 75.

52. *Id.* (“Men and women invalidly married simply divorced themselves.”).

riage was not valid when first entered into. For example, many laws throughout the Middle Ages forbid the marriage of relatives; thus, if a couple was closely related (referred to as consanguinity), their marriage would be void and divorce would not be necessary for the couple to separate.⁵³

A final explanation for the scarceness of medieval divorces "lies in the attitudes and habits of the people."⁵⁴ While records are lacking for the early Middle Ages, divorce may have been common but most couples probably never took such cases before a court.⁵⁵ In the later Middle Ages, however, records of divorce are more likely scarce because canon law dominated the legal system. Canon law courts were much stricter in their application of divorce law. For example, canon law courts did not allow a couple simply to claim consanguinity to make a marriage invalid. Instead, the couple was required to prove with reliable witnesses that the couple was related prior to marriage.⁵⁶ The canon law courts of the time were strict in their determination of divorce because of the "belief that it was better to risk allowing consanguineous unions than to risk separating couples God had legitimately joined together."⁵⁷ Hence, before the Church policies took hold, most marriages were likely ended by the couple, without ever appearing before a court. After conversion to Christianity, fewer couples divorced because they were required to take all cases to court and canon law courts were very strict in allowing divorce.

B. *How Common is Divorce in Modern America?*

Like in medieval Europe, modern America has experienced the rise and fall of divorce rates. In seventeenth century

53. *Id.* at 78. ("[E]veryone descended from the same great-great-grandfather was barred from marrying anyone similarly descended."). A similar law of affinity also barred marriages— in cases where a man slept with a woman he could not then marry that woman's sister. Likewise, "a man might not marry the widow who had previously stood godmother to a child by his first wife." *Id.* These restrictions allowed many couples to find a reason to invalidate their marriage without going before a court. *Id.* at 79. However, Church court records do not reflect that this was used as a method for divorce very often. This may be because "men seldom married women if they were aware that the marriage was open to objection on grounds of consanguinity." *Id.*

54. *Id.* at 81.

55. *Id.*, at 75.

56. *Id.* at 81 ("The aim was to ensure that no sentences of divorce were to be based on mere rumour.").

57. *Id.* at 82.

America, although divorce was allowed on limited grounds, divorces were rare. In New England during this time, only Massachusetts and Connecticut had “significant numbers of divorces.”⁵⁸ In Massachusetts, forty-four divorces were granted between 1636 and 1698, and in Connecticut only forty were granted during roughly the same time period.⁵⁹ It is interesting that these colonies also had the most liberal divorce laws of all the early colonies. However, it must also be noted that “formal divorce was a rarity” and couples may have separated without seeking a courts approval, as in early medieval Europe.⁶⁰

Today, few couples separate without seeking formal divorce and, in contrast to the little information available for the Middle Ages, through the work of the United States Census Bureau the number of divorces in the United States is closely tracked. Unlike the rough estimates that must be made regarding divorce in the Middle Ages, exact numbers of such statistics are readily available to illustrate modern trends.⁶¹ As most people are aware, divorce in the mid-twentieth century in America was very low. In the 1950’s there were only 2.6 divorces for every 1,000 people in the United States.⁶² By 1960, this had dropped to only 2.2 divorces per 1,000.⁶³ After this year, however, there was a steady climb, with no drops, in the divorce rate until 1976 when divorces were at an all time high with 5 divorces per 1,000. The rate then hovered around this amount until 1985, when an interesting shift occurred—the rate actually began to drop. The divorce rate has since continued to drop, with a few small and

58. PHILLIPS, *supra* note 4, at 140.

59. *Id.* While it would be useful to know the total number of marriages during this time in order to understand what proportion of marriages ended in divorce, records are scarce and an accurate count of marriages is unavailable.

60. *Id.*

61. It is important to note that prior to 1995 the statistics account for all states. After 1995, however, these statistics do not include data for California, Colorado, Indiana, and Louisiana because these states either no longer tracked or no longer reported divorces. Further, annulments are also counted as part of the divorce rate. U.S. Census Bureau, *Statistical Abstract of the United States: 2003*, 72 table 83 (2004), available at <http://www.census.gov/prod/2004pubs/03statab/vitstat.pdf>. In examining these statistics, note that the divorce rate is calculated out of every 1,000 people in the United States, not out of every 1,000 marriages.

62. *Id.*

63. *Id.*

temporary rises.⁶⁴ In 2001, the rate had fallen to only 4 divorces for every 1,000 people in the U.S.⁶⁵

Some contribute the recent drop in the rate of divorce to the increasing influence of religion in the United States. For example, in 1996, only thirty-seven percent of adults polled from across the United States had attended church in the past seven days.⁶⁶ In 2005, the number of adults who attended church in the past week had risen to forty-five percent.⁶⁷ Whether the increase in religiosity is the cause of the falling divorce rate, or if it is merely a correlation is debatable. Either way, it is something that is worth further study in order to predict future trends in the cycle of divorce rates.

V. SOCIETAL VIEWS OF DIVORCE

With an understanding of the basic cycle of divorce through medieval Europe and modern America, the foundation is laid to examine each society's view of divorce. This is important to understand because it illuminates the correlation between value given to women by society and society's level of acceptance of divorce.

A. *Views of Divorce During the Middle Ages*

1. Medieval Europe's Secular Views of Divorce

Many people today believe that divorce is a relatively new phenomenon—one that may have been used in the past but only has become a major development in society in the last century. Surprisingly to many then, divorce or dissolution of marriage has existed for centuries. Indeed, not only did it exist, but the “early Anglo-Saxons displayed a casual attitude toward divorce by men.”⁶⁸ This is similar to the belief of the Romans that dissolution of marriage was natural and not something that should be

64. See also, Ira Ellman, *Why Making Family Law is Hard*, 35 ARIZ. ST. L.J. 699, 703 (2003) (“That decline [in Arizona’s divorce rate] has accelerated since 1995, and Arizona’s divorce rate today is barely half the rate during the peak years of the 1970s. It has not been this low since the early 1960s.”).

65. U.S. Census Bureau, *Statistical Abstract of the United States: 2003*, 72 table 83 (2004), available at <http://www.census.gov/prod/2004pubs/03statab/vitstat.pdf>.

66. The Barna Research Group, *Church Attendance*, <http://www.barna.org/FlexPage.aspx?Page=Topic&TopicID=10>. (last visited Mar. 10, 2006) Church attendance refers to weekly services and does not include a special event such as a wedding or a funeral.

67. *Id.*

68. GIES & GIES, *supra* note 14, at 108.

prevented.⁶⁹ However, the Anglo-Saxons not only allowed men to dissolve a marriage, as the Romans, but they also allowed divorce by women.⁷⁰ Compared to the Christian culture during the same time, which will be discussed in the next section, this was an extremely liberal view. These early medieval “lax rules about divorce” continued into as far as the eleventh century.⁷¹

One explanation for the lax attitude toward divorce is found in the feelings surrounding marriage itself. As discussed previously, in the Middle Ages, “[m]arriage was a legal entity and experience. It was nothing to celebrate.”⁷² Marriage was not viewed as an act of love and commitment as it is today. Like any other business or legal contract, marriage was a necessity that was entered into with few emotions. In the end, when a marriage was unsuccessful, for whatever reason, dissolution did not necessarily carry a negative connotation—at least secularly.

2. Medieval Christian Church’s Views of Divorce

In order to determine the influence the Christian church had on medieval thought, it is valuable to understand how the church gained influence throughout Europe in the Middle Ages. The move to the Christian faith from paganism⁷³ did not occur overnight—the process of conversion took over one thousand years.⁷⁴ Because the world was a much larger place in the Middle Ages than it is today,⁷⁵ the shift to Christianity happened as one individual at a time was converted. Starting in the 500-600’s, monks began to serve as missionaries as they spread throughout Europe converting individuals and creating local monasteries.⁷⁶

Interestingly, conversion first took place with nobility. In the early Middle Ages, only nobility had complete “political freedom, so all attempts at conversion had to be directed at this class.”⁷⁷ Once the highest nobility of an area was converted to

69. *Id.*

70. *Id.*

71. LUCAS, *supra* note 8, at 77.

72. IDE, *supra* note 5, at 33.

73. Many Germanic peoples were pagan before converting to Christianity. See F. DONALD LOGAN, A HISTORY OF THE CHURCH IN THE MIDDLE AGES 20 (2002).

74. ISNARD WILHELM FRANK, A HISTORY OF THE MEDIAEVAL CHURCH 2 (John Bowden, trans. 1995)(1990).

75. Many refer to the world today as shrinking or getting smaller because communication and access to information is so greatly increased it is very easy to know what is happening in every corner of the world, regardless of one’s own location.

76. FRANK, *supra* note 74, at 4.

77. *Id.* at 12.

Christianity, it was not long before lower nobility and then peasants were also converted. Perhaps surprisingly, this change from paganism was not a complete culture shock for many in medieval society. Paganism required "customs and usages," which medieval people were accustomed to observing.⁷⁸ However, Christianity required a more "precise observance of divine commandments and the careful performance of cultic regulations."⁷⁹ Regulation of marriage and divorce is one example of how Christianity added more restrictions and strict regulation to medieval European society.

The church's ability to regulate matters such as divorce, however, did not fully mature until the later Middle Ages. In the early Middle Ages, when local monasteries were still run by monks, the church was not very centralized. With the new reforms of the thirteenth century, the church finally took measures to centralize, and the papacy was declared to have secular authority.⁸⁰ With a declaration of intertwined "papal authority and royal power," the church gained greater influence in the secular realm. Many papal reforms focused specifically on marriage.

Canon law, developed under Pope Innocent III, outlined precise requirements for marriage. For example, rather than the common medieval practice of marriages being arranged in private and without celebration, the church required wedding ceremonies to be performed in a church and forbid private ceremonies.⁸¹ Symbolic of the increased reverence towards marriage, the church regarded marriage as "one of the seven sacraments, as the nature of marriage [came to be regarded] as an indissoluble bond."⁸² Also, while the secular medieval society had lax views toward divorce, the church unequivocally condemned divorce on moral grounds. While divorce was condemned by the church, the church still allowed divorce on limited grounds, though a high standard of proof was required to meet any of the limited grounds.⁸³ Still, because divorce was so rooted in medieval culture, it took many years before the idea of the indissolubility of marriage really spread through Europe.⁸⁴

78. *Id.*

79. *Id.* at 13.

80. *Id.* at 86.

81. LOGAN, *supra* note 73, at 197.

82. WARD, *supra* note 5, at 30.

83. *Id.* at 49-50.

84. CONOR MCCARTHY, MARRIAGE IN MEDIEVAL ENGLAND: LAW, LITERATURE AND PRACTICE 139 (2004).

B. *Modern American Views of Divorce*

1. *Early Religious Influences on Divorce in America*

Many early American colonies were settled by groups with religious backgrounds who sought religious freedom from the Church of England. Most of these groups allowed divorce in the seventeenth century, but on very limited grounds. In the Plymouth colony, as with most others, divorce was only allowed for adultery or desertion.⁸⁵ Some colonies, however, were even stricter as divorce law developed. Rhode Island only allowed divorce in the case of adultery.⁸⁶ Connecticut, on the other hand, was more liberal and allowed divorce on the grounds of adultery, desertion, as well as evasion of punishment, and failure of conjugal duties.⁸⁷

Overall, the majority's religious belief that marriage should be safeguarded had the greatest influence on the development of divorce law in the early American colonies. Grounds for divorce were limited, as discussed above, because of the belief that law should "not permit men and women who were 'frustrated or oppressed' to 'escape their family.'"⁸⁸ Although divorce was granted if a man or woman deserted the family or committed adultery, the guilty spouse was then "forbidden the opportunity of gaining 'a second chance' at marriage" because that spouse had already shown a lack of respect for marriage.⁸⁹ Forbidding the guilty party from remarriage was also seen as a punishment because the person was banned from again entering "that forum that God had provided for the sanctification of men and women. . . . [Such] risks to the soul, implied by exclusion from marriage . . . were the real punishment that divorce inflicted on the matrimonial offender."⁹⁰ Therefore, divorce was viewed as necessary in order to free the innocent party, but it was also seen as a punishment for the guilty party, who was then forbidden from remarriage.

85. RODERICK PHILLIPS, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* 136 (1988).

86. *Id.* at 139.

87. *Id.* at 140.

88. *Id.* at 144.

89. *Id.* at 147.

90. *Id.* at 147.

2. Modern American Secular Views of Divorce

A clear shift from the seventeenth century American view of divorce has occurred. Religion within America has become much more heterogeneous, and religious influence on the workings of government has become not only scarce, but also taboo. Today it is difficult to summarize modern American views on any subject because people subscribe to such a wide variety of ideals, religious and otherwise. It is possible, however, to group the general feelings towards divorce into two opposing categories. First, some Americans believe that divorce is a natural phenomenon and is a basic freedom that should not be restricted. William Pinsof, president of The Family Institute at Northwestern University, argues that divorce is a "normal social event[] in the life course of modern families."⁹¹ This view is based on the belief that divorce is a natural event that has replaced death as an end to marriage. In the Middle Ages, the average lifespan was only forty-five years. Now with people living twice as long, many couples divorce at this age as a way to end a relationship that would have ended naturally, with death, in the Middle Ages.

Second, some Americans believe divorce is harmful to the family unit and should be avoided wherever possible and that law should encourage stable, traditional families. Americans who hold this view are appalled by the thought of divorce as a natural occurrence. The founder of the Coalition for Marriage, Family and Couples Education, Diane Solle, in response to the claim that divorce is a natural phenomenon states that, "[s]aying divorce is normal is like saying polio is normal, and let's focus on building a better iron lung."⁹²

VI. LAWS REGARDING DIVORCE

In order to understand the value a society places on a woman, the laws of the society must be examined. The law may indicate the place a certain type of person is assigned within a community. It may indicate advancement for certain people or it may show the status a certain type of person is given. For example, in the laws of Wihtraed of Kent, written circa 695, only five

91. Karen S. Peterson, *Study: Divorce, Living Together New Norms*, USA Today, Jul. 28, 2002, available at http://www.usatoday.com/news/health/2002-07-28-pro-divorce_x.htm.

92. *Id.*

of twenty-eight chapters of law name women in some form.⁹³ Similarly, “in the laws of Hlothar and Eadric of Kent (673-85), women are named in but one of nineteen sections.”⁹⁴ Women were not mentioned a single time in the laws of Andover (955-63) or in the laws of Wehtbordeston (962-63).⁹⁵ Medieval laws that did address women usually did so only in the context of their relationships to men or family. Today’s laws, by contrast, apply equally to both men and women in most cases. Courts and legal writers generally now recognize that laws that refer to “men,” use the term as a signal referring to all people.⁹⁶ Such trends indicate the legal status of women in each society and by more closely examining the laws and traditions surrounding divorce, both in medieval and modern times, we may reach a better understanding of the how divorce is reflective of the value a society places on women.

A. *Medieval Laws Pertaining to Divorce*

In order to understand divorce through medieval times, it is important to understand the laws regulating the practice. Laws are often reflective of either the common attitude during a certain period, or of the aspirations of a certain society. Laws regarding when divorce was allowed and who was permitted to seek a divorce are also indicative of how relationships and women specifically are viewed by society. Such laws were quite similar throughout medieval Europe, but there were deviations so the laws of several areas will be explored.

Divorce in our modern sense did not exist, at least semantically, in medieval society.⁹⁷ The term “divorce” as used in medieval writing often referred to what today is called annulment.⁹⁸ Couples had two options to end a marriage. First, the couple could simply separate without remarrying another person.⁹⁹ This was referred to as divorce *a mensa et thoro*.¹⁰⁰ In such a case, the

93. MEDIEVAL WOMEN AND THE SOURCES OF MEDIEVAL HISTORY 261 (Joel T. Rosenthal, ed., 1990).

94. *Id.*

95. *Id.*

96. Debora Schweikart, *The Gender Neutral Pronoun Redefined*, 20 WOMEN’S RTS. L. REP. 1, 1-2 (1998) (“Although the legal profession has promoted gender neutral language in recent years, many legal communications still maintain “he” as a referent to both sexes.”).

97. HELMHOLZ, *supra* note 10, at 74.

98. *Id.*

99. WOMEN IN THE MIDDLE AGES, *supra* note 16, at 33.

100. HELMHOLZ, *supra* note 10, at 74.

couple lived apart legally, "but did not break the bond between them."¹⁰¹ Second, a couple could petition either the church or the local secular leader to declare their marriage invalid.¹⁰² If couples elected this second option, they were then able to remarry.

Similar to the lax attitude of the early Anglo-Saxons regarding divorce, Germanic custom recognized divorce when both the husband and the wife consented.¹⁰³ However, not all medieval laws were so permissive of divorce. Frankish law at the time "did not allow a woman to initiate divorce."¹⁰⁴ Even stricter, Burgundian law not only prohibited women from attempting to divorce, but also provided that a woman who made such an attempt would be "smothered in mire."¹⁰⁵ This law illustrates a strong hostility toward woman obtaining divorce. Obviously then, at least in Burgundian law, the lax attitude of the Anglo-Saxons toward divorce by both men and women was absent. Visigothic law, on the other hand, permitted women to divorce their husbands on limited grounds, such as homosexuality, murder, sorcery, or violation of graves.¹⁰⁶

Throughout medieval Europe divorce was not restricted to a single class. The seventh century laws of Aethelbert seem to allow persons to divorce without restriction to class.¹⁰⁷ It is also known that in the eighth century many Anglo-Saxon kings obtained divorces from their wives.¹⁰⁸ Some believe that divorce was primarily used among aristocracy¹⁰⁹ as a way to ensure a proper heir was borne or to move forward politically or economically. It may have been that divorce was rarer among the peasant population,¹¹⁰ perhaps because concerns over heirs and eco-

101. *Id.*

102. *WOMEN IN THE MIDDLE AGES*, *supra* note 16, at 33.

103. *LUCAS*, *supra* note 8, at 70.

104. *Id.* at 69.

105. *Id.*

106. *Id.* at 70. It is important to note, however, that not all historians are in agreement about the general facts surrounding medieval divorce law. *See e.g.*, *IDE*, *supra* note 5, at 98 ([A wife] could not sue her husband for divorce, nor could she obtain any protection from his brutality. If a divorce was to be sought and obtained it was because the husband wished it, petitioned for it, and won it from his wife on the grounds that it was she who erred.).

107. *GIES & GIES*, *supra* note 14, at 108-09.

108. *Id.* at 109.

109. *GIES & GIES*, *supra* note 15, at 117.

110. *Id.* ("Divorce . . . was a recurring problem for the Church among the aristocracy, who searched for ways to dissolve a barren or disappointing marriage, but among the peasants it was a rarity. When it did occur among villagers, the common-

conomic status were less pressing. Overall, throughout the early Middle Ages, divorce was viewed with little, if any, animosity as illustrated by the ability for people to dissolve a marriage for a variety of reasons.

Medieval husbands often used divorce law to their advantage in order to gain a higher status. This was possible because Germanic tradition permitted the easy dissolution of “[m]arriages made for economic or political reasons.”¹¹¹ Likely the view in such cases was that a contract was dissipating, rather than a divorce occurring. One example of this easy dissolution is seen in the many marriages of Uhtred of Northumbria. He first married Ecgfrida who was the daughter of a bishop. Not long after the marriage, he “set her aside” for Sigen. This marriage was a step up in Uhtred’s career—Sigen was the daughter of a wealthy man, Styr—and was arranged on the condition that Uhtred kill Styr’s enemy. Later, Uhtred received a third wife as a reward for his military services.¹¹² In this type of scenario, each wife was put away as the husband picked a new wife. The woman likely suffered the most in such situations because she would not always be permitted to remarry after her husband put her away in order to better his own situation.¹¹³ Thus, the individual woman in such cases was not given a high level of respect or value as she was used simply as a tool to better the man’s own situation.

A husband could also use the divorce system to put away his wife when he simply wanted a new wife. Annulment, or a declaration that a marriage was invalid, was allowed by Italian law “in cases of impotence, bigamy, consanguinity.”¹¹⁴ In such cases, the parties were required to show evidence that because of some fact, the marriage was invalid when it was entered into. For example, “the existence of a prior marriage invalidated a present one and provided grounds for divorce.”¹¹⁵ Men used this as a

est ground was bigamy. Couples sometimes separated, however, either informally or under terms arranged by a Church court, though the latter expedient was expensive and therefore not normally undertaken by villagers.”).

111. LUCAS, *supra* note 8, at 77.

112. *Id.* at 78.

113. In this case, Uhtred’s first wife, Ecgfrida, is known to have remarried. Not all women would be afforded such an opportunity either because the law prohibited remarriage or because the man would reject a woman who could not prove she was a virgin upon marriage.

114. WARD, *supra* note 5, at 50.

115. *Id.*

tactic to marry one woman, leave her for another woman, and then leave the second woman and use the first marriage as a means to have his second marriage declared invalid.¹¹⁶ Neither the first nor the second wife had any recourse against such actions.

With the increasing influence of the Christian church, the laws through the Middle Ages generally became stricter with regards to divorce. There were, however, exceptions to this. For example, in 826, the Church, led by Pope Eugenius II, proved to be even more flexible than some current secular codes by allowing the "innocent" party in a case of divorce caused by adultery to remarry.¹¹⁷ This was counter to a prior ruling in 789 by Charlemagne, a secular leader, that adultery was sufficient cause for separation, but that neither the husband nor the wife could remarry afterwards.¹¹⁸ One may speculate that men were more often the guilty party in such cases, and so women were often harmed twice by the act—first by divorce and then by being prohibited from remarrying. In cases of adultery, a woman was often punished more harshly than a man.¹¹⁹ Throughout the medieval divorce process—in granting divorce, determining if remarriage was possible, and assessing any punishment—the woman was given little respect. The woman was harmed more often by the process, whether innocent or guilty.

The influence of the church was also seen in the Middle Ages as the divorce process became increasingly difficult as marriage was encouraged and divorce shunned. A thirteenth century English law allowed a woman to dissolve a marriage upon proof that her husband was incapable of meeting her desire to become a mother.¹²⁰ Because this type of law allowed for the possibility of a married couple conspiring together to obtain a divorce, several forms of proof were allowed. Under early canon law, a couple was forced to remain married for three years in order to prove conception was not possible.¹²¹ Another form of proof was a "seven-handed compurgation of the parties' oaths that no intercourse was possible."¹²² Finally, some courts, such as in

116. *Id.*

117. LUCAS, *supra* note 8, at 70.

118. *Id.*

119. WARD, *supra* note 5, at 49.

120. HELMHOLZ, *supra* note 10, at 88.

121. *Id.*

122. *Id.* Compurgation required the parties to find seven witnesses to swear to their belief of the truthfulness of the parties' oath. See THE AMERICAN HERITAGE

York and Canterbury in the early 1400's, required an intrusive physical examination of the wife, husband, or both by a qualified expert to determine whether the parties were physically able to procreate.¹²³

In addition, as divorce became less acceptable and Christianity gained greater influence, the safety and protection of women was of greater priority—an indication that women were given greater value within the society. For instance, later Italian law, around the twelfth century, allowed separation “on the grounds of adultery, apostasy, heresy, or violence, or when both parties wished to live the religious life.”¹²⁴ It is interesting to note that this law allowed for separation on grounds of violence. This shows that the law was beginning to recognize the abuse that many women endured and was creating a way for women to escape this abuse. Most laws and traditions until this point expected women to obey their husbands, often requiring that women endure violence.¹²⁵

Under canon law, women were also given increased protection from being betrothed or married to a man before she was of age. Under medieval canon law, “a marriage contracted by a child below the age of seven was automatically void.”¹²⁶ Though the average lifespan of the time was much shorter than in modern times, this was still a very young age for marriage considering puberty was fixed, by law, at twelve for females and fourteen for males.¹²⁷ A marriage contract created when the child was between the ages of seven and puberty was not automatically invalid, but rather could be either ratified or rejected when the child reached puberty.¹²⁸ Despite this law, records again indicate that many child marriages were contracted for during medieval times. Few cases are recorded in which a marriage contract is chal-

DICTIONARY, *Compurgation*, <http://dictionary.reference.com/search?q=compurgation>.

123. *Id.* at 89. While this paper will not go into the details of such procedures, there are records of such inspections that indicate this exercise was equally invasive for both males and females.

124. WARD, *supra* note 5, at 49.

125. Violence was prevalent in medieval life and it is safe to assume that women were most often on the receiving end of the violence. See HELMHOLZ, *supra* note 10, at 90 (referring to the violence of medieval life). See also IDE, *supra* note 5, at 16 (“[In the Middle Ages] [m]en applauded other men who would mercilessly beat their wives, and women expected to be beaten regularly.”).

126. HELMHOLZ, *supra* note 10, at 98.

127. *Id.*

128. *Id.*

lenged on grounds of age—but the cases that are available also challenge the marriage on grounds of “force and fear.”¹²⁹ This may suggest that many times children were forced into marriage contracts without consent, despite the law forbidding such action.

Overall, as the medieval church gained influence divorce became more difficult to obtain and was seen as an evil to be avoided, rather than a natural or normal process to be used whenever convenient. Women were afforded more protection under canon law—they were protected from abuse, early marriage, and in general wives were protected from being easily put away to further their husband’s own social or political goals.

B. *Modern American Divorce Law*

The United States has two eras in divorce law. From the first state divorce laws in the nineteenth century to the mid-twentieth century, most states used a fault system. Starting with California in 1969, most states have now moved to a no-fault divorce system.¹³⁰ To understand how the law today influences women’s position in society, both systems will be examined.

1. Fault-Based Divorce Law

As divorce law developed in the United States, it was similar to the laws in the Middle Ages, in that one party was required to show some ‘fault’ by the other party. Also similar to medieval law were some of the grounds for divorce: adultery, abandonment, impotence, consanguinity were all legal grounds for divorce in modern America. During the twentieth century, each state developed its own laws regarding divorce. As a general rule, the western states were more liberal than eastern and southern states—divorce rates were also higher in the west than in other states.¹³¹ This, however, may be mere correlation, rather than causation.

Although some believe the fault system injured couples because the focus was on fault, under this system divorce was more difficult to obtain but women were still afforded protection. Similar to the system in later medieval law created under the influence of the medieval church, divorce in the American fault

129. *Id.* at 99.

130. Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 *CIN. L. REV.* 1, 1-2 (1987).

131. Shaakirrah R. Sanders, *The Cyclical Nature of Divorce in the Western Legal Tradition*, 50 *LOY. L. REV.* 407, 422 (Summer 2004).

system was discouraged by stricter laws. Still, women were protected by laws that allowed her to divorce on grounds of abuse. For instance, “[d]uring the first half of the twentieth century, existing grounds were expanded and additional grounds were implemented into the fault based regime.”¹³² The old law of cruelty, for example, was expanded to include mental cruelty or abuse. In addition, new grounds such as “nonsupport, insanity, voluntary separation, and incompatibility” were added.¹³³ While divorce was not encouraged through extremely lax laws and attitudes, the laws still protected women—a sign that this system gave value to women.

A relatively new phenomenon that developed during the early twentieth century as a result of differing state laws regarding divorce is what is called ‘migratory divorce.’ Under the Full Faith and Credit Clause of the United States Constitution, each state recognizes and holds valid public acts and judicial proceedings of every other state.¹³⁴ Thus, if one state decrees that a couple is legally divorced, every other state will also recognize the couple as divorced.¹³⁵ In order to avoid “burdensome divorce laws” of one state, a spouse would take advantage of this principle of full faith and credit by seeking a divorce in a jurisdiction (other than the domicile of the couple) that had more flexible divorce law.¹³⁶ For example, if state X had very restrictive laws that only allowed a couple to divorce for a singular reason, such as adultery, a couple may not qualify for divorce in state X. In order to obtain a decree of divorce then, one spouse may move to state Y and then use the more lenient laws of that state to file for and obtain the divorce.

With this change, the value modern American society afforded women began to decline. As in early medieval Europe, men were able to manipulate the system and use women to better their own situation. When a marriage no longer suited the tastes of the husband, he was able to move to another state and

132. *Id.*

133. *Id.*

134. U.S. CONST. art. IV, §1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”).

135. *See e.g.*, *Atherton v. Atherton*, 181 U.S. 155 (1901) (holding that where a Kentucky court decreed the Athertons to be divorced, the state of New York must recognize the decree).

136. Sanders, *supra* note 131, at 423 n.102.

use a more lenient law to obtain divorce.¹³⁷ The wife had no recourse from such actions, other than attempting to obtain a favorable divorce settlement.

2. Shift to No-Fault Divorce Law

By 1987, all fifty states¹³⁸ followed California's lead and passed no-fault divorce laws. Many of the debates over these laws occurred around the same time as the debates over the ratification of the Equal Rights Act, which granted specific rights to women. Equality of the sexes, however, was not at the center of the debate over no-fault divorce.¹³⁹ Instead, the focus of the shift to no-fault was the belief that this would reduce the conflict associated with divorce¹⁴⁰—something that would benefit the men, women, and children involved in divorce. Under no-fault law, spouses are not required to show proof of some misbehavior on the part of the other spouse in order to obtain a divorce.

There has recently been a backlash against the no-fault system. Some critics believe that women suffer the most under no-fault law because "it eliminates the leverage that women had under the fault system in negotiating property and alimony settlements."¹⁴¹ Critics also argue that because the actions of the spouses are not examined, issues such as domestic violence go undiscovered by the court, leaving women with no redress for the

137. Since, as noted previously in Section II C, most men have higher income than women, it could be inferred that men have more resources to move to another state to seek divorce, though clearly it is possible for women to use such laws to their advantage as well.

138. Not all states, however, exactly followed California's model for no-fault. There are several variations on the no-fault system.

Only fifteen states have "pure no-fault" divorce laws in that strict sense. In twenty-one states, a no-fault provision based . . . supplements, but does not replace, fault grounds. Ohio, counted as one of these twenty-one states, is unique in having both a divorce law based on fault and a procedure for dissolution of marriage based on an agreement of the spouses without any statutory specification of a breakdown standard. Fourteen states and the District of Columbia use a separation or an incompatibility standard as their no-fault ground.

Kay, *supra* note 130, at 5-6.

139. *Id.* at 2.

140. The purpose of the California no-fault law was to "(1) to alleviate the pain, expense, and humiliation inherent in the fault system; (2) to restore the parties' dignity; (3) to change the grounds for divorce; and (4) to remove the requirement of showing and proving fault from the divorce procedure." Nicole D. Lindsey, Note, *Marriage and Divorce: Degrees of "I Do," An Analysis of the Ever-Changing Paradigm of Divorce*, 9 U. FLA. J.L. & PUB. POL'Y 265, 268 (1998).

141. *Id.* at 269.

abuse.¹⁴² Some believe that the increase in the rate of divorce is directly related to the passing of no-fault law, because couples are able to escape marriage with little effort.¹⁴³ In an effort to reverse the effect of no-fault divorce, Louisiana passed the Covenant Marriage Act in 1997, which “makes divorce more difficult”¹⁴⁴ and aims to encourage stronger commitment to marriage.¹⁴⁵

Although many argue that the current no-fault system harms women more than the fault system did, it may be possible that some of the changes in the system actually help women. Like many couples in the Middle Ages, under the old fault system in the United States, many unhappy couples sought divorce by finding a type of fault that they could most easily prove in court. In the Middle Ages, if a spouse wanted a divorce, the easiest method was to prove consanguinity. In the modern United States, under the fault system, it was easiest to blame the other partner for the dissolution of the marriage on grounds such as emotional abuse. Perhaps it is an improvement within the current no-fault system in modern America that couples may focus on amicably ending the relationship, rather than finding fault in the relationship. Perhaps, as a result, during a divorce the wife can still be valued because the husband is not forced to convince the court of the wife’s fault in the situation.

142. Martha Heller, Note, *Should Breaking-Up be Harder to Do?: The Ramifications a Return to Fault-Based Divorce Would Have Upon Domestic Violence*, 4 VA. J. SOC. POL’Y & L. 263, 266 (1996).

143. One religious and legal scholar argued, “First, I am concerned about the current overemphasis on rights and underemphasis on responsibilities. Where will this lead in our public life? No society is so strong that it can support continued increases in citizen rights while neglecting to foster comparable increases in citizen responsibilities or obligations. Yet our legal system continues to recognize new rights even as we increasingly ignore old responsibilities. For example, so-called no-fault divorces—which give either spouse the right to dissolve a marriage at will—have obscured the vital importance of responsibilities in marriage.” Dallin H. Oaks, *Where Will It Lead?*, BYU MAGAZINE 34 (Summer 2005) (emphasis added).

144. Jeanne Louise Carriere, “*It’s Déjà vu All Over Again: The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*,” 72 TUL. L. REV. 1701, 1701, (1998).

145. *Id.* at 1703. The Act requires pre-marriage counseling and counseling during marriage. Grounds for divorce are restricted to adultery, commission by one spouse of a felony, abandonment, and physical or sexual abuse of the spouse or a child. *Id.* at 1718.

VII. WOMAN'S POSITION AFTER DIVORCE

A. *Medieval Child Custody and Economics After Divorce*

1. Child Custody Issues in the Middle Ages

Children, like women, in the Middle Ages were not afforded the same rights as a man. In general, there was little legal concern for child. Still, there is record of a few laws regarding the placement of children after the dissolution of a marriage. King Aethelbert of Kent decreed in 597 that "If [a wife] wishes to go away with the children, she is to have half the goods. If the husband wishes to keep [the children], [she is to have the same share] as a child."¹⁴⁶ In this regard, it appears that the woman's role as a mother was still valued by society and the law as her role as mother was preserved, if she wished. However, while her role as a mother may have been valued, if the woman did not choose to continue in this role, she was afforded only a child's share of the marital goods. Thus, after divorce, her value was diminished as demonstrated by the fact that if she was not a mother and not a wife, then she was provided with little to care for herself.

2. Economics

Because medieval law allowed different types of separation or divorce, funding for the wife also differed. In cases of divorce *a menso et thoro*, where the couple was separated but could not remarry other people, the wife received a maintenance from the husband.¹⁴⁷ This is a logical result because for legal purposes the bond of marriage was not broken¹⁴⁸—this would be similar to a formal separation of a modern couple.

Medieval laws regarding the disbursement of property after divorce differed over time. Under Frankish laws, a woman was forced to give her former husband's family part of her property as a sort of reimbursement.¹⁴⁹ On the other hand, later medieval Welsh law allowed a woman to receive a set percentage of property that she brought into the marriage.¹⁵⁰ The amount the woman received increased in accordance with the length of the

146. WOMEN IN THE MIDDLE AGES, *supra* note 16, at 19.

147. WARD, *supra* note 5, at 49.

148. *Id.*

149. BITEL, *supra* note 6, at 169.

150. *Id.*

marriage.¹⁵¹ The women that fared the best for themselves post-divorce were those of late medieval Ireland. They were not only able to receive a portion of their own property that they brought into marriage, they were also able to receive a portion of the family profits, depending on the amount of work the woman contributed. For instance, if a woman “kept sheep and made cloth from the wool, and kept cows to make milk products, [she] deserved a percentage of the couple’s lambs and calves.”¹⁵²

This progression shows that as divorce became less acceptable, the woman fared better after divorce. In the earliest laws, the woman was forced to pay her husband after divorce and by the end of the Middle Ages, the woman received funding depending on what she added to the marriage. This is another example that shows as divorce became less acceptable in medieval Europe, women were valued more and given more protection.

B. *Modern American Child Custody and Economics After Divorce*

1. Child Custody

Although the shift to no-fault law affected the division of property, it “did not change the legal standards governing the custody of children in any significant way.”¹⁵³ “In 1990 the wife was awarded custody of the children 72 percent of the time in divorces in which custody was awarded. Joint custody was the second most common arrangement (16 percent), while husbands were awarded custody in 9 percent of divorces in 1990.”¹⁵⁴ This is very similar to the trends of the medieval times, that generally if a woman wished to keep her children after marriage, she was permitted to do so. As seen in the next section, however, this does not mean that the woman and her children are adequately provided for—while the woman is still valued as a mother after divorce, she is not valued enough to be given sufficient financial protection.

151. *Id.*

152. *Id.*

153. Kay, *supra* note 130, at 12.

154. National Center for Health Statistics, *Advance Report of Final Divorce Statistics*, http://www.cdc.gov/nchs/products/pubs/pubd/mvsvr/supp/44-43/mvs43_9s.htm (last visited Mar. 3, 2006).

2. Economics

If one ever doubted the disparate effects of divorce on males and females in modern America, one must only look to the economic effects of divorce to discover how the results are truly unequal. First, women are disproportionately harmed economically by divorce because of the division of labor during marriage. Even in today's society where many women work full-time, the wife often makes much less than her husband and often contributes much more to the household work. After divorce, however, this work is consistently undervalued and women are left with much less than men.¹⁵⁵ In fact, "[s]tudies confirm that the economic consequences of divorce are far more devastating for women and children than for men."¹⁵⁶

Specifically, while women usually live off of only one third of the marital income after divorce, men's income usually increases by nearly fifty percent.¹⁵⁷ This trend continues no matter how long a couple is married prior to divorce. For marriages that last less than ten years, after divorce women's income is only 80% of that during the marriage, while men's income increases to 171%.¹⁵⁸ For couples that divorce after eighteen years, women live on 70.5% of the marital income and men live on 149%.¹⁵⁹ Hence, despite any contribution a woman may have made to the marriage, her standard of living decreases after divorce, while her former husband's standard of living increases.

VIII. CONCLUSION

Through the study of divorce laws and customs in both medieval Europe and modern America, it is discovered that women are afforded less value when divorce is acceptable, easy to obtain, and prevalent in a society. As divorce laws become more lax, women are not valued for their work as a wife and mother, nor are they as valued as much as men for their work outside the home. In addition, when divorce laws are lax, generally less di-

155. Kaylah Campos Zelig, Comment, *Putting Responsibility back into Marriage: Making a Case for Mandatory Prenuptials*, 64 U. COLO. L. REV. 1223, 1227 (1993) ("[C]ourts today frequently undervalue, or completely dismiss, the dependent spouse's contributions, consequently providing inadequate economic packages for both the dependent spouse and the children.").

156. Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1121 (1989).

157. Zelig, *supra* note 155, at 1227.

158. *Id.*

159. *Id.*

rect protection from abuse is provided for women. Also, the financial situation of a woman after divorce leaves her with little to provide for herself and her children, while her former husband's financial status increases.

It is not enough, however, simply to acknowledge that women are undervalued when attitudes and laws regarding divorce are lax. With this understanding, society in general and women specifically should work to enhance the value of women. This can be done through stricter divorce laws that, while still protecting women, place a higher value on protecting marriage, rather than allowing men and women to escape the commitment made when entering marriage. In addition, laws should be created that give women greater protection after marriage so that women have adequate means to provide for themselves and to act in the role that is preserved even after divorce—that of a mother.

Finally, this study is also an indication of what is to come in the future of divorce laws and customs in the United States. As the past cycles of divorce law are explored and lessons are learned from the effects of the cycle, society can make changes as it moves into the next cycle. Currently there is a surge in religiosity in America and it is likely that, just as an increase in religion in the Middle Ages changed divorce law, this shift in religious influence will change current divorce law. As such changes are made, hopefully a key priority during the process of making new law will be to give proper value to each person involved—particularly, society must reexamine the law to discover the value of a woman.

