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HISTORY'S CHALLENGE TO FEMINISM

Jeanne L. Schroeder*

LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE. By James A. Brundage. Chicago: University of Chicago Press. 1987. Pp. xxiv, 674. \$45.

In *Law, Sex, and Christian Society in Medieval Europe*, James Brundage¹ has written a book that is important for anyone interested in developing a feminist jurisprudence. This exhaustive study demonstrates that certain trends in contemporary feminist legal theories that seek to explain the feminine and masculine nature of and bases for contemporary law are both ahistorical and fundamentally conservative.²

The trends of feminist jurisprudence to which I refer are those which Robin West has identified as "cultural" and "radical" feminism.³ As described by West, both these viewpoints accept that the definition of human nature (which encompasses the contemporary American masculine stereotype) which underlies the dominant schools of American jurisprudence is in fact true of men. In other words, men actually are the autonomous individuals prior to the community iden-

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1. Hall Professor of History, University of Kansas.

2. I present this analysis more thoroughly in Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Jurisprudence*, 75 IOWA L. REV. (forthcoming).

3. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). Like all models, West's cultural-radical feminist dichotomy is in some ways simplistic and distorted in that she does not attempt to identify the divergence of views of feminists within these groups, nor does she discuss legal scholars who consider themselves feminists yet do not fall within these categories. I believe, however, that like any good model, this simplification serves a useful analytical function. Although I do not believe that West's attempt to link both of these schools of thought with her "connection thesis" is successful, I believe that her dichotomy enables us to examine common tendencies among different writers, even though no one writer conforms exactly with the theory supposedly promulgated by a particular school. Feminist jurisprudence is a new field of inquiry and is in an extremely fluid stage. It is wrong to conclude from the use of West's dichotomy that feminist legal scholars have solidified into competing schools of thought, or that there are not feminist legal scholars working outside of the two "schools" identified by West who are challenging the concept of feminine values. See, e.g., Cornell, *The Doubly Prized World*, 75 CORNELL L. REV. — (forthcoming); Cornell & Thurshwell, *Feminism, Negativity, Intersubjectivity*, 5 PRAXIS INTL. 484 (1986); Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989). There is even more variety among feminists in other disciplines. I do believe that West's characterizations, or perhaps caricaturizations, accurately describe certain tendencies in much feminist legal scholarship which I find disturbing.

tified in classical liberal political philosophy.⁴ Furthermore, both viewpoints accept that the contemporary American feminine stereotype is "true" of women: it is either natural, or the inevitable psychological result of the fact that women are the primary caregivers to children (the cultural feminist view), or it has been imposed upon women by men (the radical feminist view). Thus women are, or are forced to be, nurturing, connective, and relational, and have an ethic of care, as opposed to the masculine ethic of right.⁵ Cultural feminist jurisprudence embraces and privileges the feminine stereotype and seeks to reinterpret legal issues in light of these "feminine" values.⁶ Radical feminist jurisprudence rejects these values, arguing they are imposed by patriarchy to keep women weak and subordinate.⁷ Consequently, radical feminism, so defined, seems to privilege certain "masculine" virtues, such as individuation and empowerment.⁸

I believe that both views remain conservative even though they have taken the single gesture of reevaluating, and deciding whether to accept or reject, the feminine stereotype. They remain conservative because they have not yet taken the double gesture of reexamining the stereotype of masculinity and the concepts of gender difference formed by our patriarchal society. Patriarchy's stereotype of femininity is defined as the mirror image or negative of masculinity — the construct of "woman" exists purely to define "man."⁹ By not concentrating first on men's definition of themselves, which is the basis of the concept of femininity, these feminists are left with a choice of embracing or rejecting an externally generated definition of the feminine self. We will only successfully discover or create a truly feminist definition of the feminine self on which to base a jurisprudence of gendered justice if we

4. West, *supra* note 3, at 14.

5. West, *supra* note 3, at 18, 27-30, 36-38, 49-50. West notes, but ultimately finds inadequate, the Gilligan-Chodorow explanation of gender difference resulting from the fact that women raise children. *Id.* at 17-18, 20-21. MacKinnon's criticism of the "feminine" stereotype seems to be largely that it is socially imposed and not freely chosen. See, e.g., C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 124 (1989).

6. See, for example, Leslie Bender's analysis of the lack of a duty to save in tort law, in which she suggests that a jurisprudence based on an "ethic of care" might generate a different result. Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988).

7. C. MACKINNON, *supra* note 5, at 109-10. See also MacKinnon's discussion of the "feminine voice" allegedly identified by Carol Gilligan as the voice of the victim. MacKinnon, *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 BUFFALO L. REV. 11, 73-74 (1985). I fear that both Gilligan and MacKinnon accept the masculine characterization of the moral differences between American girls and boys which Gilligan believes she has identified.

8. West, *supra* note 3, at 29-30, 42.

9. Joan Williams expresses a criticism similar to mine as to the cultural feminists' (specifically, Carol Gilligan's) unquestioning acceptance of the stereotype of men "as empty vessels of capitalist virtues — competitive and individualistic and espousing liberal ideology to justify this approach to life." Williams, *supra* note 3, at 841. Even though I generally agree with West's description of MacKinnon's work, which I believe relies too heavily on accepting the masculine view of masculinity, MacKinnon at her best is passionately committed to the problem of how women can define and create themselves rather than accepting the reality imposed upon them.

simultaneously deconstruct the masculinist definition of the masculine self.

By saying current feminist legal history is "ahistorical," I mean two things. First, both cultural and radical feminist theories are based largely on the personal experiences of professional-class individuals in the late twentieth century and do not take into account the very different experiences — and I would say *selves* — of people living in other cultures and in other historical periods. Consequently, these theories are blind to the extent to which the self is culturally determined.¹⁰

Second, because they accept modern cultural descriptions of personality as universal, modern "feminist" jurisprudences do not recognize and analyze the historical roots of the prejudices on which they are based. The distinction between the historical and the universal is very hard to grasp if all we have to go by is our own experience. Our experience is historically produced, and to develop a jurisprudence based upon experience without examining the culture and thought of our intellectual grandparents is poor methodology.

A study of history indicates that in different cultures and in different times people held stereotypes of masculinity, and therefore of femininity, radically different from the dominant modern American stereotypes which I fear so many feminists erroneously accept. Medieval society conceived of the masculine self in many of the ways which feminists now see as uniquely female or as defined by men as feminine. Brundage's study of medieval sex law enables us to analyze how these gender stereotypes were played out in the development of legal theory. Medieval men saw themselves not as autonomous individuals, 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 to the other men who comprised their community.¹¹

In patriarchal societies, men as subjects define women as objects as a means of self-definition.¹² In order for men in any given society to

10. That is not to say that many other feminists have not been keenly aware of the culturally-determined nature of their perspective and criticism. One insight shared by most feminists is the importance of the role of society in forming gender. This idea was expressed first, and still most succinctly, by Simone de Beauvoir: "One is not born, but rather becomes, a woman." S. DE BEAUVOIR, *THE SECOND SEX* 267 (H. Parshley trans. 1968). Indeed, Catharine MacKinnon defends her method precisely because it is culturally (and individually) specific. See, e.g., C. MACKINNON, *supra* note 5, at 106-25. My criticism is that these feminists have not yet gone far enough in that certain of their unexamined assumptions serve to reinstate the very gender categories they wish to deconstruct.

11. Schroeder, *supra* note 2.

12. Feminists of many different theoretical approaches have described this process by which men use women as mirrors. For example, Luce Irigaray develops this thesis in the context of psychological theory in *Speculum of the Other Woman*. L. IRAGARAY, *SPECULUM OF THE OTHER WOMAN* (1985). Catharine MacKinnon makes a similar point in a political context. C. MACKINNON, *supra* note 5, at 122.

ascribe the characteristics which their society privileges to masculinity, they must define the negatives of these "virtues" as feminine. Consequently, the medieval male view of the feminine self which underlies early medieval law had many characteristics of the modern male view of the masculine self. Medieval women were considered selfish, individualistic, and outside the order of society. This vision coincides, in the High Middle Ages, with the apogee of economic power and status for women.¹³ Meanwhile, the "feminine" values of autonomy and sexual equality were adopted by canon jurists as the bases for revolutionizing medieval marriage law.¹⁴

Brundage's study enables us to follow and analyze how this process influenced the remarkable developments during the High Middle Ages in the law most obviously related to gender — the law of marriage, rape, and other issues of sexual regulation. This process had previously been presented in other contexts by historians such as David Herlihy in economic history¹⁵ and Georges Duby in cultural history.¹⁶ Very briefly, in the early Middle Ages, sex law was considered largely a secular matter. It reflected the dominant, and I would argue masculine, value of privileging the community over the individual. Marriage, divorce, and even rape were collective decisions of a social group, the extended noble family, overlords, and retainers, which could be imposed upon the individual.¹⁷

In the High Middle Ages, the Church sought to impose an alternate theory of the law of sexuality based on concepts of individuality including the rights of individual women. The canon lawyers studied by Brundage eventually concluded that marriage was a decision of individual conscience, not of the community. Specifically, a family could not force a woman into a legally binding marriage. Rape was

13. David Herlihy's economic research indicates that women's economic status was at its highest in the eleventh century, with some decrease in the twelfth century (and, of course, substantial regional variations). Women's power and status fell as the patrilinear family became the dominant structure by the thirteenth century. Herlihy identifies the rise of the patrilinear family as a response to the changes in marriage law imposed by the Church in the late eleventh and twelfth centuries, which made obsolete the old ways families preserved inheritance. Herlihy, *Land, Family, and Women in Continental Europe: 701-1200*, in *WOMEN IN MEDIEVAL SOCIETY* 10 (S. Stuard ed. 1976) [hereinafter Herlihy, *Land, Family, and Women*]; Herlihy, *The Making of the Medieval Family: Symmetry, Structure, and Sentiment*, *J. FAM. HIST.*, Summer 1983, at 116, 124-26 (1983) [hereinafter Herlihy, *The Making of the Medieval Family*]. Stuard agrees that the eleventh and twelfth centuries were the "watershed" of women's economic status. Stuard, Introduction to *WOMEN IN MEDIEVAL SOCIETY* 10 (S. Stuard ed. 1976). Georges Duby believes this process may have started for French women as early as the mid-eleventh century. G. DUBY, *THE KNIGHT, THE PRIEST, AND THE LADY* 99-104 (1983); see also *infra* note 49.

14. Schroeder, *supra* note 2.

15. See D. HERLIHY, *MEDIEVAL HOUSEHOLDS* (1985); Herlihy, *Land, Family and Women*, *supra* note 13; Herlihy, *The Making of the Medieval Family*, *supra* note 13.

16. G. DUBY, *supra* note 13.

17. Schroeder, *supra* note 2. This is not to suggest that in this earlier time the Church was not concerned with the moral regulation of sexual behavior or that Church courts and theologians never concerned themselves with sex-related legal issues.

recognized as a crime committed against an individual woman rather than merely against her family. Woman, although inferior to man in almost all ways, was created in the image of God and shared a common spiritual destiny with man. Consequently, canon jurisprudential theory determined that women should have equal rights with men in a variety of sexual issues. By the end of this period, the Church was successful in imposing these new theories of sex law upon the laity, at least in the case of marriage law.¹⁸ Other scholars have argued that as secular society internalized the new teachings on marriage and sex, the structure of the family and inheritance rights changed to women's disadvantage, so that by the late Middle Ages, women's economic status was much lower than it was during the High Middle Ages.¹⁹

Another movement, which I believe was related, happened simultaneously. The twelfth century is frequently identified with the "discovery of the individual." About this time, the concepts of privacy and individuality began to be seen as attractive values.²⁰ This trend continued until the end of the Renaissance where something resembling our modern concept of individuality as a positive (that is, masculine) value was recognized.²¹ As a consequence, society by that time divided the world into public and private spheres. Women, now identified with the stereotype of the nurturing mother, were relegated to the private world. As Joan Kelly-Gadol has noted, the Renaissance, usually cited as a high point in the history of the concept of freedom, was for women a low point.²²

Thus, a feminist analysis of the gender politics implicit in the development of legal structures presented in Brundage's study suggests that the errors of the current cultural and radical feminist agendas are twofold. First, these trends in modern feminist jurisprudences fail to

18. Pp. 194, 278-79; see also G. DUBY, *supra* note 13, at 282-84. The Church was not as successful in establishing exclusive jurisdiction over certain areas of sexual law, such as the law of rape. Pp. 578-79.

19. See *supra* note 13.

20. Volume II of *A History of Private Life* traces this development specifically in the area of household organization. 2 A HISTORY OF PRIVATE LIFE: REVELATIONS OF THE MEDIEVAL WORLD (G. Duby ed., A. Goldhammer trans. 1988) [hereinafter A HISTORY OF PRIVATE LIFE]. See also Charles Homer Haskins' classic intellectual history, *The Renaissance of the Twelfth Century*. C.H. HASKINS, THE RENAISSANCE OF THE TWELFTH CENTURY (1927).

21. Although his extreme views seem almost a caricature today, the classic study identifying the birth of the ideal of individuality with the Italian Renaissance is Jacob Burckhardt's *The Civilization of the Renaissance in Italy*. J. BURKHARDT, THE CIVILIZATION OF THE RENAISSANCE IN ITALY (1878). As discussed above, modern medieval historians see the development of this ideal as a process that began around the twelfth century. See *supra* note 20 and accompanying text. Caroline Walker Bynum, however, argues that although the seeds of individuality as a positive virtue may be identifiable in the twelfth century, twelfth-century society remained fundamentally communitarian. Bynum, *Did the Twelfth Century Discover the Individual?*, reprinted in C.W. BYNUM, JESUS AS MOTHER 82 (1982). It would take until the Renaissance for society to emphasize individualism instead of communitarianism.

22. Kelly-Gadol, *The Social Relations of the Sexes: Methodological Implications of Women's History*, in FEMINISM AND METHODOLOGY 15, 17 (S. Harding ed. 1987).

recognize fully the cultural basis for their theories of masculinity and femininity. Second, they implicitly or explicitly assume that adoption of a feminine jurisprudence which takes into account (either by unquestioning acceptance or by rejection) certain values because they have been labeled as "feminine," will lead to a less patriarchal and more free feminine world. In fact, history has shown that what we now regard as "feminine" values have been adopted in the past as "masculine" values and what some feminist legal theorists have seized upon as the most likely tools of establishing gender justice were at one time used as tools of patriarchy and oppression. This is the central insight which may be gained from a feminist analysis of the material Brundage has gathered in his book.

I am afraid I might be giving my readers the misimpression that Brundage's book is either a feminist or an anti-feminist tract, or that it is even primarily a discussion of the sociology of the Middle Ages as viewed from a twentieth-century perspective. Brundage does not engage in an express analysis of gender politics. On the contrary, Brundage tries to present the theories of medieval jurists, with particular attention given to the late eleventh through early thirteenth centuries, as closely as possible *in their own terms*, with explanation as needed for the understanding of a modern audience. Although Brundage definitely has a point of view on many of the issues he explores, such as his belief that the concept of ritual pollution or impurity underlies much of medieval sex law²³ and his virtual silence on economic arguments favored by certain other medievalists, he generally tries to present the material as it was written.²⁴

This is significant because, as Brundage points out in his preface, most of the materials from this central period have not been published in modern times and are not generally available (p. xx). In addition, although Brundage feels a need to apologize for his use of secondary materials in the portions of the book dealing with the earlier and later Middle Ages (p. xx), he has done an invaluable service to those of us who are interested in studying this era but whose foreign language skills are poor. Medieval historiography has been dominated by Euro-

23. P. 150. Brundage discusses the concept of ritual impurity and pollution throughout the book. *See, e.g.*, pp. 214-16 (discussing perceived pollution of intercourse as an important rationale for the imposition of mandatory clerical celibacy).

24. For example, the Church reform of marriage and sex law in the High Middle Ages is related to other church "reforms" often referred to as "Gregorian," after the late eleventh-century reformist pope, Pope Gregory VII. These reforms included the struggle for dominance in many affairs between the Pope and the Holy Roman Emperor. Brundage notes this connection throughout and occasionally refers to theories which suggest that the change in marriage law was a cynical attempt of the Church to wrest economic power from the nobility. Brundage concludes, however, that although the changes in marriage law may have had the *effect* of shifting wealth from the nobility to the clergy, this was probably not the clergy's conscious intention. Pp. 586-87. This is consistent with the way medieval scholars debated issues concerning marriage law.

pean scholars and the amount of material which has been written in, or translated into, English is frustratingly limited, although in recent years there seems to be a welcome publishing trend toward translating the works of many French medievalists such as Georges Duby and Fernand Braudel. Because Brundage has slogged through materials that have never been published (at least in modern times), has gathered together a tremendous amount of other material that has not previously been available in one place, and has presented material that has not generally been available in English, his book is a necessary addition to English language medieval scholarship, and I expect it will become required reading for anyone studying this field.²⁵

Moreover, Brundage's style is admirably clear and readable, characteristics often sadly lacking in legal scholarship, but more common in historical writing. A historical survey of the development of a particular legal theory runs the risk of being tediously repetitive, a risk for which Brundage needlessly apologizes (p. xx). Brundage has met this challenge and has produced a book that is consistently fascinating. He has also, almost as successfully, met the greater challenge of writing a book on sexual issues while avoiding prurience or, maybe worse, coyness or genteelness.²⁶

Nevertheless, certain limitations in the book's approach may be

25. Consequently, the scope of Brundage's book, and thus this review, is limited in several ways. First, it is limited to Western Europe. By this Brundage seems to mean primarily the area included in the modern Common Market countries other than Greece and Spain, with special emphasis on the areas included in modern France, Italy, and Germany. Second, it is limited to the law applicable to Catholic Europeans and, after the Reformation, a brief discussion of Protestants; it excludes Jews, heretics, and pagans (except to the extent they influenced Catholic thought), Eastern Orthodox Christians, and Moslems. Finally, it is limited almost entirely to discussion of the noble and clerical orders of society, with little discussion of the various free and servile classes of the peasantry or the merchant and skilled trade (guild) classes of the cities.

Although the laws discussed by Brundage were applicable to all classes in society, these laws were concerned primarily with the concerns of the two ruling orders. Very little remains of the other classes written in their own words, and the upper orders did not consider them a sufficiently important subject about which to write. Presumably, substantial property, demographic and court records, as well as personal correspondence and diaries, survive from this period which could serve as sources for a greater understanding of the legal life of the mass of the population. Several scholars, including Barbara Hanawalt, David Herlihy, and Georges Duby, have tried to organize some of this material to enable a better understanding of the economic reality of the medieval ages. But the life of the commoner in this period still remains largely unknown to us. Consequently, Brundage does not discuss in detail certain aspects of medieval marriage which would have concerned the lower classes more than the upper orders, such as the permissibility of marriage between the various classes. For example, could a *colona* (a half-free woman) marry a *servus* (an unfree man) or a *villein* (a free peasant)? What about marriages between *ministeriales* (people who were technically of an unfree class but who served as chamberlains, ministers, castellans, and in other positions of wealth and power) and *vavossars* (lower nobility)? Nor does Brundage discuss whether a serf, or indeed any person bound by feudal obligation, could legally marry without the consent of her feudal lord. Even if a servile marriage contracted without a lord's consent was legally binding, was the serf still subject to punishment and taxes for this infraction?

26. I did find some of his efforts to avoid repetition, such as finding a different term to describe what was considered a deviant heterosexual sexual position each time the subject is discussed, rather cloying. But this is a minor cavil.

initially disturbing to legal scholars. These are Brundage's insufficient discussion of the nature of his project and his limited definition of what constitutes "law."

By failure to discuss his project, I mean that Brundage does not expressly disclose his underlying presumptions and prejudices, does not define his terms, does not explain his choice of subject matter, and, as I will discuss more thoroughly below, might be criticized for perhaps giving a misleading description of the scope of his book. The reader is forced to try to draw inferences as to what Brundage is doing, often leading to frustration, if not misunderstanding. Perhaps legal education gives one a heightened awareness of the importance of precisely delineating one's terms and communicating one's parameters. Brundage is not completely successful in this respect.

To me, and I expect to most women, the most glaring example of Brundage's failure to explain his project is his total silence on the subject of abortion.²⁷ Not only are the issues of sex and abortion inextricably linked,²⁸ but abortion is one of the most hotly contested issues of sex law today. This omission is so remarkable that it cries out for an explanation. The decision was not necessarily wrong, but the various reasons for omitting the discussion have modern political and theoretical overtones, and are based on assumptions which should have been explained. I found myself constantly wondering what Brundage's reasoning was, and what this implied about his thesis of law, his attitude toward women, and the reliability of his analysis.

I can imagine at least three possible reasons for Brundage's omission of any substantive discussion of abortion, one of which I consider legitimate, one of which I consider illegitimate, and one of which I consider neutral. First, I am sympathetic with a decision to omit a discussion of abortion because of its very complexity and the need to circumscribe the scope of the book. Brundage could not cover *all* legal issues relating to the law of sexuality over so broad a historical period in one book — the book is close to 700 pages as it is. Because a discussion of abortion involves not merely legislation concerning sexuality, but various moral, philosophical, and theological debates as to the nature of human life, autonomy, bodily integrity, women's nature, and sexuality, to name a few, it might best be left for a second book which can explore these issues more thoroughly. In addition, the debate on abortion has produced much historical research in recent years and Brundage may have justifiably felt that another book on this sub-

27. Brundage uses the word "abortion" only once in the entire 674-page book, in a footnote which discusses the reasons behind the Church's condemnation of "deviant" coital positions. The footnote discusses whether "deviant" positions were condemned because they were too pleasurable, because they were considered bestial, or because they hampered procreation as did contraceptives and abortion. P. 163 n.160. I found this reference only because of the book's excellent index.

28. This would have been even more of a truism in the Middle Ages than today.

ject was not as urgently needed, especially when there were other areas of medieval sex law which had not been adequately explored and which might be relevant to the current debate. In other words, this decision may have resulted from a sensitivity to the importance and complexity of the abortion issue and the practical need to limit the scope of his work.

A second reason for omitting a discussion of the law of abortion is one I would reject: that abortion policy is not fundamentally a policy of sex law. It is not news that attitudes toward abortion, although often framed in terms of "right to life" are, in fact, reflective of underlying views of sexuality and the role of women. On a more prosaic level, even today, the leading cause of pregnancy is heterosexual intercourse — indeed, as Brundage presents in exhaustive length throughout the book, most medieval theorists believed procreation to be the only, or at least the primary, moral justification for sexual activity.²⁹ To discuss procreation as the justification for the legality of marriage without discussing one of the primary means of thwarting procreation, *i.e.*, abortion, is strange. Indeed, in this context Brundage does discuss the law of contraception, albeit briefly.³⁰ Thus, Brundage's decision might have been based on an insensitivity to the nature of the issue, a decision which would make me question Brundage's judgment and other decisions throughout the book.

A third possible reason for this omission, which I will develop presently, may stem from Brundage's decision to allow the canon scholars he is studying to define the field for themselves. Thus, Brundage's medieval clients, and not Brundage himself, have set the agenda. If this is the reason for omitting any discussion of abortion, then the omission itself is part of the text, and, therefore, worth analyzing explicitly.³¹

29. *See, e.g.*, pp. 197, 279-81.

30. *See, e.g.*, p. 358.

31. Other omissions which could have been explained are the absence of any extended discussion of the property law of marriage (except for passing references to the issue of whether or not dowries or bride prices were considered necessary components of a binding marriage, *see* pp. 275, 344-45) and the law of legitimization of children and inheritance. Medieval marriages (at least marriages of the noble class) were to a very large extent property matters — and property matters of extended families, not individuals. How property was distributed and who was permitted to inherit were, and would have been considered at the time, fundamental to any marriage law issue.

This is especially true if one accepts a commonly offered economic theory of the reasons underlying certain changes in marriage law propounded by canon lawyers in the eleventh through thirteenth centuries. According to this theory, the Church was intentionally attempting to diminish the economic power of the great medieval noble families as compared to the Church. *See supra* note 24. This goal was served by interfering with the nobility's ability to use marriage as a way of cementing alliances. This was done by forbidding families from contracting marriages for their members without the individual consent of the married couple, adopting very broad definitions of incest which prohibited marriages between closely affiliated families, and prohibiting divorce which enabled political marriages to be dissolved to reflect shifts in dynastic politics. Once again, even if these subjects were omitted purely out of the practical necessity of

The canon legal theorists themselves may not have viewed abortion as an important issue of the law of sexuality, in contrast to what many moderns think. Or, abortion might not have been considered a burning issue of *any* branch of law by the decretists. If this were true, it would be anachronistic to include a discussion of abortion in a book which tries to present the legal theories of the Middle Ages as they were understood in their own time.

Georges Duby has suggested that medieval penitentialists writing a generation before the first decretists did not include a discussion of contraception in their works involving marriage and other sexual relations.³² Rather, this subject was included in the same works as those which covered abortion — that is, in discussions of murder and violence.³³ If Duby is correct, then is Brundage being internally inconsistent by discussing, albeit briefly, the law of contraception in a work that purports to study medieval sex law on its own terms? The avoidance-of-anachronism argument would seem, then, to support exclusion of any discussion of both abortion and contraception but not one without the other. More importantly, however, there *is* some historical justification for including a discussion of abortion even in a study that seeks to take medieval sex law in its own terms. Gratian, for example, *did* include a hypothetical about abortion in his *Decretum*, in a section which was occasionally published separately as the *Treatise of Marriage*;³⁴ and Innocent III, one of the popes whom Brundage believes to have been particularly important in the development of canon sex law, also issued at least one opinion condemning abortion.³⁵ Were these two the exceptions in the canon sex law literature? In any event, even if I have guessed correctly as to why Brundage excluded abortion from his book, a brief discussion of Brundage's methodology in his foreword, or at least in a footnote would have been useful.³⁶

If this is Brundage's reason for omitting a discussion of abortion, it reflects the most serious limitation of the book's scope from a jurisprudential perspective — the author's limited definition as to what is law. As is fairly typical among nonlawyers (and unfortunately all too common among lawyers), Brundage uses the term "law" to mean legislation and the semi-official pronouncements of legal scholars in the

limiting the scope of the book, rather than out of insensitivity to the interrelationships between these issues, it would have been helpful for Brundage to have explained this more clearly.

32. G. DUBY, *supra* note 13, at 62.

33. *Id.*

34. See Noonan, *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION* 20 (J. Noonan ed. 1970).

35. *Id.*

36. Brundage does make clear that the issues of marital property rights, legitimacy, and inheritance always remained within the jurisdiction of secular courts throughout the Middle Ages, even after the Church imposed its jurisdiction over other aspects of family law. Pp. 319, 409, 482-84, 578-79. This was, therefore, not a subject explicated by the canonists Brundage is studying and is logically excluded from the book.

canons, papal decisions, and other works which Brundage discusses in loving, and fascinating, detail. He does not include in his concept of law the actual legal structure of society — that is, law as it is actually lived, perceived, and enforced in the community through litigation and custom.³⁷ This decision not to examine anything but “black-letter law” is particularly true for the period Brundage covers in greatest detail — the late eleventh through thirteenth centuries, the period about which Brundage makes his greatest contribution.

This period, often referred to by various flattering titles such as the “High Middle Ages” or the “twelfth-century renaissance,”³⁸ was a period of great intellectual activity and changes in social structure, the status of women, and the jurisdiction and power of the Catholic Church. As discussed above, during this period, the Church, in large part through the efforts of the canon lawyers studied by Brundage, reexamined its position of the early Middle Ages that sex and marriage were primarily secular and private, to be governed by families and the secular government, with the Church’s religious pronouncements on sexual behavior being moral, but not legal, exhortations relevant to the state of man’s soul. By the end of this period, medieval society had adopted the Church’s new view under which the Church achieved exclusive legal jurisdiction (both as to what we would call forum and subject matter jurisdiction) over certain fundamental issues of marriage and sex law (pp. 223-25). During this transition period, both the secular and ecclesiastical courts competed for jurisdiction, enforcing radically different concepts of marriage law.³⁹

Brundage’s entire analysis of this period, however, is limited to the consideration of the doctrines of the canon lawyers, *i.e.*, the law professors he refers to as the “decretists” or “decretalists” (because they edited and analyzed collections of papal decisions known as decretals), and of the reformist popes, whose textbooks, treatises, and legal opinions developed the theories which, by the beginning of the

37. A rejection of a definition of “law” as limited to statutes, cases, and so on, is implicit in the feminist critique of the public-private right distinction in American law and the suspicion of the use of a “right to privacy” as the basis for a right to abortion. For example, I interpret one of Catharine MacKinnon’s central theses in *Toward a Feminist Theory of the State* as the identification of a “private” realm (family, home, sex, and so on) which is separate and distinguishable from the “public” or “political” realm, and the recognition that the relegation of women to this private realm is itself a fundamentally political act. Consequently, that which is deemed most private is, in fact, that which is most political. C. MACKINNON, *supra* note 5, at 34-36.

Similarly, I suggest that the identification of a realm of the “private” which is beyond legal regulation is itself fundamentally a legal regulation. If the ideal of the classical liberal state is that the public realm with which men are identified should be the government of laws, and not of men, then the creation of a private realm with which women are identified means that the “traditional” ideal for women is, literally, that we live under a government of men, and not of laws.

38. *See, e.g.*, C. HASKINS, *THE RENAISSANCE OF THE TWELFTH CENTURY* vii-ix (1927).

39. This process is the subject of the central portion of Brundage’s book, in particular his discussions at pp. 223-28 and 319-24. By the late fourteenth century, after the Church’s marriage theories had been accepted by secular society, the secular government was successful in reasserting jurisdiction over some sexual issues. Pp. 578-79.

thirteenth century, became the definitive canon and secular law of marriage, law which held sway until the Council of Trent in 1563. He does not describe in any detail either the process by which this jurisdictional change came about, or what law was enforced and how, during this transitional period. It is probably true that the secular arm did not produce jurists who codified or systematized the old law or who wrote legal treatises describing secular law (lawyers, like virtually all highly educated men, being almost exclusively clerics). Nevertheless, Brundage could have examined other sources.⁴⁰

A variety of contemporary sources could have contributed to a fuller definition of medieval law. The secular arm operated courts and produced court records; court historians wrote chronicles which included descriptions of major marital litigation between great families; and individuals wrote personal correspondence describing the important events in their lives, including marriages and divorces. Brundage's extensive footnotes supporting his conclusions indicate that he was, in fact, aware of these materials. His failure to discuss these other sources, particularly case law, in the analysis which forms the heart of his book (instead of stating his conclusions partially drawn from this material) may seem even more surprising in light of the fact that he does discuss these sources to some extent in the portions of the book dealing with the early and late Middle Ages. Moreover, in his other writings, Brundage has both examined a wide variety of sources and adopted a case-based approach in analyzing the practice of reproductive law in the Middle Ages.⁴¹

The period Brundage examines was also one of increased literary activity, and a wealth of the then-new genre of romances and other works are available. Although fictional, these works tend to concern sexual and marital matters and could serve as a mirror of the actual workings of medieval society. Once again, although it is apparent from references in the book that Brundage is familiar with these works, he makes only conclusory statements regarding the changing legal theories of marriage and how they reflect, and were influenced by, the changing secular perceptions of marriage and sexuality implicit in chivalrous romances and the ideal of courtly love.⁴² These comments only make the reader want to know more and to question whether Brundage's conclusions are correct.

40. Michael Sheehan, for example, has examined parochial (*i.e.*, local ecclesiastic) court records as well as sermon books and other handbooks for parish priests to study how these new theories were taught to, and when they were adopted by, local clergy. Sheehan, *Choice of Marriage Partner in the Middle Ages: Development and Mode of a Theory of Marriage*, in 1 *STUDIES IN MEDIEVAL AND RENAISSANCE HISTORY* 9-15 (J. Evans ed. 1979).

41. See, for example, Brundage's contributions to *SEXUAL PRACTICES & THE MEDIEVAL CHURCH* (V. Bullough & J. Brundage eds. 1982).

42. The longest passage in the book concerning this interrelationship is one paragraph in a conclusion at the end of a chapter. Pp. 227-28.

Brundage discusses neither the operation of secular law in the secular courts during this transition period nor the actual application of canon law in the ecclesiastical courts. Although he discusses the decretals of the various reformist popes,⁴³ who were consciously active in the development of canon marriage law and the expansion of Church jurisdiction, Brundage's discussion is limited to giving the final rule of law which he believes was developed in each case. His omission of a description of the facts of the individual cases presents the "law" as only that which is written in the statutes, judicial dicta, treatises of learned professors, and so on, and ignores its actual application in individual cases.

Thus, Brundage uses what is probably a more restricted definition of law than most contemporary American legal scholars would adopt. Only in the application of stated rules of law to individual cases are we able to see the development of the law.⁴⁴ Brundage "reconciles the

43. These decretals were papal decisions in specific disputes, which were gathered together in case books used by the law faculties in the medieval universities. They would be roughly analogous to Supreme Court decisions today. Brundage indicates that during the twelfth century, a significant percentage of these decretals involved marital issues. Pp. 325-37.

44. Indeed, other writers have analyzed the facts of the cases underlying certain decretals and the hypotheticals used to illustrate different rules in the case books in order to explain the societal assumptions and the changes (or lack of changes) that the case represents. In *The Knight, the Lady and the Priest*, Georges Duby used a variety of sources to examine the facts underlying several notorious divorce cases (including the sensational divorce of Eleanor of Aquitaine from King Louis VI of France) which resulted in important decretals on marriage and divorce, and further used this examination to explore society and the status of women in the twelfth century. G. DUBY, *supra* note 13. The works of John Noonan, Jr., and Michael Sheehan are enriched by their examination of the specific hypotheticals and supporting cases used by Gratian, one of the earliest and most influential medieval law professors, to develop his version of the canon law of marital consent. Noonan, *Power to Choose*, 4 *VIATOR* 419 (1973); Sheehan, *supra* note 40, at 8-13.

For example, Sheehan shows the originality of Gratian's theories by presenting in detail the facts and holdings of the precedents on which Gratian relied in his interpretation of a certain *causa* or hypothetical relating to the minimum elements constituting a legally enforceable marriage — often considered the basis of later canon law. Sheehan demonstrates that Gratian could have read the available precedents as only requiring true familial, as opposed to paternal, consent to a marriage or as requiring that paternal consent be free and uncoerced. In one case, the findings of fact indicated that the mother and certain other relatives had declared their opposition to the marriage and that the father may have agreed to the marriage out of fear of a superior lord. Sheehan, *supra* note 40, at 10. Similarly, the case could have been interpreted only as prohibiting child marriages, because the daughter, who did not give consent, was described as an *infantula*, a little girl. Instead, Gratian adopted the revolutionary theory that a marriage is not legally binding unless the bride consents. *Id.* at 8-13.

On the other hand, Sheehan's analysis of Gratian's hypotheticals indicates that Gratian may not have held, as is frequently claimed, that *only* individual consent was required for marriage, because the hypotheticals and language of the holding are consistent with the rule that *both* individual and familial consent are required for marriage. This analysis helps one understand the development of the legal theory by showing in what ways Gratian's theories were similar to and different from secular marriage as actually practiced and from Church doctrine as actually preached. Finally, the specific factual analysis shows that Gratian in each case was concerned with the woman's rights in marriage; he mentioned only in passing that the rule would probably also apply to men. *Id.* at 11-12. Brundage, in contrast, comes to the same conclusions, but does not give the background so that the reader can follow his analysis and decide whether she agrees with Brundage's characterization of the legal rule. *See* pp. 235-42.

cases" for us and presents his own conclusions as to their proper interpretation, but does not present the information necessary for us to make our own analysis. Some lawyers may be dissatisfied with this aspect of the book, and underestimate the contribution which Brundage has, nonetheless, made.

A greater discussion in the book of the decisions of the lower courts, both secular and ecclesiastic, during this period would also be appropriate. Despite official pronouncements as to the indissolubility of marriage, how many divorces were, in fact, granted? Despite ecclesiastical prohibition of marriages within seven degrees of relationship without dispensations, how many "incestuous" marriages were actually permitted? Despite the fact that the canon law of adultery was theoretically the same for husbands and wives, how was it actually applied in the case law?⁴⁵ Were these cases rare exceptions to the rules? Or were the "exceptions" in fact the norm, and the stated rule the exception? As I stated, Brundage does engage in this analysis in his discussion of the earlier and later Middle Ages, but not of the period which is the focus of his book.

Disappointingly, because of Brundage's restricted definition of law, he does not discuss in any detail the other revolutionary societal change in attitudes toward sexuality and marriage which occurred contemporaneously with the development of canon law — the development of courtly love and the romantic ideal.⁴⁶ Brundage does mention in passing that several aspects of courtly love, particularly the emphasis on individual choice of sexual and marital partners, the increased recognition of the individual worth of women, and the concept that sexuality might not be all that bad after all, were consistent with the new canon law and probably influenced its development. He does not, however, attempt to reconcile those equally important aspects of courtly love which seem to oppose some of the most basic concepts of canon law: for example, the idealization of physical, adulterous love between young knights and the wives of their liege lords.⁴⁷ If this was an ideal propounded by the noble laity, an ideal diametrically opposed to the chastity and marital fidelity demanded by canon law, then what was the "law" of adultery which affected these people's lives on a day-to-day basis?

45. Brundage notes that despite the theory that the same sexual standards were supposed to apply to both sexes, many canon legal theorists were inconsistent in this regard, especially in their discussions of the law of adultery. *See, e.g.*, pp. 284, 306-07. He discusses some disparities in the late Middle Ages in the frequency with which men and women were prosecuted for adultery (surprisingly, men were prosecuted more than women, but that may be because society tacitly permitted men to use "self-help" against their adulterous wives, while women were required to bring their claims in court), and the relative harshness with which male and female adulterers were punished. P. 519.

46. *See, e.g.*, G. DUBY, *supra* note 13, at 216-26.

47. *See* G. DUBY, *supra* note 13, at 216-26; A HISTORY OF PRIVATE LIFE, *supra* note 20, at 76, 82, 145; *see also* pp. 184-85, 204-05, 227-28, 300-01.

Brundage also does not discuss the effect of changes in marital law on marriage and sexual customs and the peculiar social institutions governing feudal marriage. In particular, he fails to discuss the practice of preserving a family's wealth by forbidding younger sons, who did not share in the eldest brother's inheritance, to marry unless they were independently able to provide for a household (for example, by marrying a rich wife).⁴⁸ Since not all of these sons were destined for the clergy, those "youths" (as they were called regardless of their age)⁴⁹ were not always willing or able to abide by the canonists' exhortation to chastity and were not satisfied with the pleasures afforded by prostitution (an institution which, Brundage points out, was frequently tolerated by the medieval Church both in theory and practice as a necessary evil, less damaging to the fabric of society than adultery) (pp. 310, 342, 389-96, 445, 463, 521-30). These youths sought an outlet for their sexual energies, youthful enthusiasm, and yearnings for the security and companionship of a permanent household. If the literature and chronicles of the time are to be believed, they turned to

48. David Herlihy, by contrast, suggests that the Gregorian Reform of marriage led directly (although probably unintentionally) to this custom of agnatic inheritance and lineage, conjugal marriage, and the impoverishment of women. D. HERLIHY, *supra* note 15, at 86. Herlihy argues that prior to the Gregorian Reform, inheritance was "cognatic" (*i.e.*, reckoned through the mother as well as the father), rather than "agnatic" (*i.e.*, reckoned through the father), precisely because marriages were negotiated by families and were easily terminable. Family alliances frequently shifted so the same individual might "belong" to different families at different times in his or her life. One's distaff (or maternal, the distaff being the symbol of femininity) bloodline could therefore be as important as one's spear (or paternal) bloodline. Mothers had an independent social importance and families more freely gave inheritances to daughters and younger sons as part of marriage strategies. Families maintained their wealth *not* through primogeniture or other limitations on inheritance rights, but by controlling monasteries and other church properties. *Id.* at 22.

The Gregorian Reformists wrested control of Church property from the nobility who then had to find a way of maintaining their wealth — they did this by limiting the number of heirs through primogeniture (or, sometimes ultimogeniture) whereby younger (or older) sons did not share in an inheritance and daughters' rights were limited to dowries. *Id.* at 87. The Church's insistence on the indissolubility of marriage, coupled with primogeniture, permitted the tracing of family roots to one male heir. Thus, families became agnatic (or, as Duby would characterize it, agnatic lineage was superimposed upon cognatic lineage, which survived to some extent). As a result, women's importance in the family line diminished. The number of marriageable noblemen declined, as fewer men were wealthy enough to marry, and as the marriage market for women tightened, dowries became larger. At the same time, women lost control of their dowries in marriage. *See id.* at 82-103. Dante gives a similar account of the development of his own family from a cognatic structure (using a matronymic) to an agnatic structure (using a patronymic) and the simultaneous loss of economic power of Florentine daughters. DANTE, *THE DIVINE COMEDY: PARADISO*, Canto XV, lines 103-05 (G. Bickersteth trans. 1932).

49. Duby gives several examples of men described as "youths" (*juvenes*) in contemporary chronicles and literature who were actually in their mid-forties, a fairly advanced age in medieval times. Those unfortunate younger sons who were neither attractive, skillful, nor lucky enough to woo an heiress or otherwise acquire sufficient wealth to maintain a household lived out their days in perpetual adolescence traveling from castle to castle (they were generally not welcome at their parents' and siblings' homes) to enter tournaments and, at best, play the traditional role of *avunculus* (maternal uncle), educating their more fortunate nephews in "youth" culture. One of the reasons for the crusades propounded at the time (not a modern interpretation) is that they got rid of the excess "youths." G. DUBY, *THE CHIVALROUS SOCIETY* 112-22 (C. Postan trans. 1977).

means absolutely unacceptable to canon lawyers: adultery, abduction, and concubinage.⁵⁰ Was canon law, which protected a woman's right to choose her own husband and which made it easier for younger sons to seduce and marry heiresses, partially a response to this social problem? Or, as David Herlihy suggests, were the impoverishment of women and other social problems of the later Middle Ages the result of the change in marriage law?⁵¹ Or did the strict rules of canon law lead to the gradual abandonment of these restrictions on younger sons in the later Middle Age?

Brundage's decision not to discuss in detail these societal influences in the High Middle Ages should not undermine the importance of his original contribution to the study of this period by reliance entirely on original legal texts. Indeed, there are many intriguing studies of the social influences of the High Middle Ages and Brundage may have intentionally decided to supplement this work by concentrating his efforts on making available materials which were inaccessible for centuries. Brundage's use of original documents for this core part of the book is one of his most valuable contributions. Indeed, I cannot overemphasize the Herculean labor Brundage has accomplished, poring over innumerable ancient — in most cases handwritten — Latin manuscripts containing probably some of the most turgid material ever written, in order to give as complete as possible a presentation of the legal scholarship of the time. I fear, however, that Brundage's insistence on using *only* original materials for this section may have actually weakened it through his failure to put the materials in the context of the time.

A final caution about the book is that a casual reader might be initially discouraged by what seems at first blush to be a lack of consistency in approach throughout. For the earlier and later time periods covered in the book, Brundage does in fact discuss secular law and custom and, to a certain extent, discusses individual cases and even refers occasionally to literary materials. However, for the period of Brundage's greatest expertise, Brundage limits his discussion to these original texts. Brundage warns his audience in his foreword that, in a way, the book is really three separate books: "a monograph (Chapters 6-9) wrapped in a survey (Chapters 1-5, 10-11) with a final segment (Chapter 12) that summarizes the whole thing and draws conclusions

50. *Id.* at 119-22; see also G. DUBY, *supra* note 13, at 216; A HISTORY OF PRIVATE LIFE, *supra* note 20, at 76.

51. See D. HERLIHY, *supra* note 15, at 81. By the thirteenth century, society was perceived to have an excess of unmarried women caused by the changes in family structure, changes which many historians link to the rise of new religious groupings for women, such as the Beguines. This "problem" was known as the *Frauenfrage* ("the woman question"). Bolton, *Mulieres Sanctae*, in WOMEN IN MEDIEVAL SOCIETY, *supra* note 13, at 147-48; Stuard, *supra* note 13, at 8-11. Caroline Walker Bynum gives a feminist twist to the *Frauenfrage*: "If daughters were increasingly a problem for families, it stands to reason that family was increasingly a problem to daughters." C.W. BYNUM, HOLY FEAST AND HOLY FAST 225 (1987).

from it" (p. xx). One cannot, therefore, use this book to compare different periods of the Middle Ages to each other.

Brundage may be justified in objecting that my criticism merely reflects my desire to read a different book than the one he chose to write, and that I am not analyzing on its own merits the book that he in fact wrote. This is partially correct, but to a large extent when reading the book I had the impression that Brundage, or at least his editor, appears not to have understood what the book really was about. The title of the book, its foreword, and the breadth of its discussion throughout indicate that the book is a discussion of both the law of sexuality, in its broader meaning of constituting actual practice in addition to legislation, and the culture of marriage throughout the Middle Ages. However, Brundage's book is really something much narrower: it is an intellectual history of the ideas of a handful of canon jurists who Brundage believes (correctly, in my view) have profoundly influenced our modern laws and superstitions concerning marriage, sex, and gender. This perspective explains not only the structure of the book, but also the choice of subject matter and the definition of terms used.

In the first section of the book, Brundage discusses in great detail the antecedents of the decretists of this period. He discusses in great length not only the secular sex law and customs of the Romans and the Germanic tribes of Europe, and of the Frankish and other early medieval kingdoms, but also the writings of the early Church fathers and the penitentials and other religious writings of earlier periods. When Brundage reaches the period in which these theorists were working, he switches to a discussion of their theories as they presented them in their own writing. How these theories were applied in practice, what other competing secular theories existed at the same time, and the actual jurisdiction of these theories as laws at this time are not relevant to this discussion. In other words, for the eleventh through thirteenth centuries Brundage discusses only one branch of legal theory and makes no attempt to discuss the law of sexuality as a general matter, let alone sex or Christian society. Brundage then returns to a broader discussion of the law and society of later periods in order to explore the influence that these theorists had on later European law — now conceived in the broader sense of actual practice — and, most importantly to Brundage, on modern American law. Thus, Brundage tries to present the legal theories of a certain group of men, and he gives the historical, legal, and social antecedents, and the legal and social consequences.

Brundage's definition of law may also be seen as a result of historical integrity. The High Middle Ages were the dawn of the development of organized legal faculties and the study of law as a separate branch of inquiry. By restricting himself to that which medieval legal

scholars perceived as legal discourse, he correctly avoids the error of "doing history backwards" — that is, imposing modern sensibilities on an imaginary past and interpreting historical societies not in their own terms, but only as though they were inevitable evolutionary precursors of our society.⁵² In fact, it is only extremely recently, and thanks in large, but by no means exclusive, part to the work of feminist legal scholars, that American legal scholars have begun to take a broad interdisciplinary approach to law, ceasing to study law as consisting entirely of statutes and appellate opinions.

Because of the limitations on the scope of the material covered by Brundage, readers who are not already familiar with the available literature on medieval scholarship may need to read this book in conjunction with a book that describes the culture of this period in greater detail in order to place canon law theory in context. For example, Georges Duby's *The Knight, The Lady and The Priest*,⁵³ through its examination of several notorious divorce cases, discusses the struggle of the Church to gain jurisdiction over marriage and divorce litigation and to influence secular attitudes toward marriage in the twelfth century. The second volume of *A History of Private Life*, entitled *Revelations of the Medieval World*,⁵⁴ once again edited by Duby, examines the development of marriage and the status of women in the broader context of what is sometimes referred to as the "discovery of the self," the development of the concept of the autonomous individual through the Middle Ages.

In sum, Brundage's book is vital for those who would develop a jurisprudence of feminism. I give much credit to the book for inspiring what I call my "historicist" perspective toward a body of recent feminist work. Although the story of the development of medieval sex law is extremely complicated, and lends itself to many interpretations, I believe it leads to an account of gender stereotypes which should give pause to modern feminist writers. The account suggests that a variation of today's feminine virtues, such as relational thinking, interconnectedness, and, indeed, an ethic of care,⁵⁵ were touted in the Middle Ages as *masculine* virtues. Further, patriarchy was capable of expropriating medieval feminine values, such as individualism, and transforming them into legitimating virtues that served patriarchy. This accentuates the need to develop a jurisprudence that is not dependent

52. In her excellent study of medieval English peasant life, Barbara Hanawalt cites anthropologist Jack Goody as the originator of this wonderfully apt description of the "ethnocentrism of modernism" which can be found in many histories of family life. B. HANAWALT, *THE TIES THAT BOUND* 10 (1986).

53. G. DUBY, *supra* note 13.

54. 2 *A HISTORY OF PRIVATE LIFE: REVELATIONS OF THE MEDIEVAL WORLD*, *supra* note 20.

55. See *supra* note 5; see also C. GILLIGAN, *IN A DIFFERENT VOICE* (1982); N. NODDINGS, *CARING* (1984).

upon definitions of a female-male dichotomy, which is itself a patriarchal account, but which develops a theory capable of accommodating difference without defining ourselves and our virtue exclusively through difference.

Those of us who are dedicated to the feminist critique of contemporary American jurisprudence should not see historicism as a dispiriting attack on the work of feminist legal theoreticians to date. Rather, it should be seen as a verification of the most important insights of feminism to date: the inadequacy of conventional jurisprudence to understand and explain women, the failure of jurisprudence to question its own assumptions and its own perspective, and the failure of jurisprudence even to see, let alone explain, the suffering and oppression of women and their domination by men. Historicism exposes the lie that conventional jurisprudence is sex-neutral, scientific, and value-free.

Still, more important for the future, historicism should be seen as a challenge not to fall into the same errors as the jurists whom we criticize: failure to recognize the cultural perspective from which we view ourselves, unquestioning acceptance that our unmediated experiences have a universal or essentialist application, and acceptance of a static and mutually exclusive theory of gender which can only be restrictive on an individual level and lead to continued patterns of dominance and submission on a societal level. Brundage's book is a valuable advance toward that aim.