

9-1-2007

The Adulterous Wife: A Cross-Historical and Interdisciplinary Approach

Meghan E.B. Norton
Sonnenschein Nath & Rosenthal LLP

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/bwlj>



Part of the [Criminal Law Commons](#), [Family Law Commons](#), and the [Legal History Commons](#)

Recommended Citation

Norton, Meghan E.B. (2007) "The Adulterous Wife: A Cross-Historical and Interdisciplinary Approach," *Buffalo Women's Law Journal*: Vol. 16 , Article 5.

Available at: <https://digitalcommons.law.buffalo.edu/bwlj/vol16/iss1/5>

This Featured Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Women's Law Journal by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

THE ADULTEROUS WIFE: A CROSS-HISTORICAL AND INTERDISCIPLINARY APPROACH

BY MEGHAN E.B. NORTON*

INTRODUCTION

The law has yet to find a truly effective way of addressing adultery. This lack of success has stemmed in part from differing philosophical attitudes about the reaches of individual freedom within the confines of society. Because adultery has always been difficult to evaluate on moral and legal grounds, authors, legal scholars and readers have long been fascinated by the topic. Within the realm of fiction, authors often depict a wife's adultery because the consequences for female adultery have historically gone much deeper than the ramifications for an unfaithful husband.

In this article, I will briefly describe three quintessential adultery novels—*The Scarlet Letter*, *Madame Bovary*, and *Anna Karenina*—that will provide a framework for examining adultery in the United States, France, and Russia within a cross-historical context. From this inquiry, I will assert that the legal consequences for unfaithful women were historically far worse than they were for unfaithful men. The discrepancies involving the treatment of adulterous women stemmed from three sources that co-existed with the law, dictated the law, and were beyond the reach of the law to a certain extent. Within the context of the United States, France, and Russia, I will first show how the church was a strong force promoting a double standard for men and women engaging in adulterous relationships. The rules of the church often dictated harsher penalties for women, and these rules consequently influenced the societal and moral values that defined societies, even when the role of the church became less powerful in later centuries. Second, I will demonstrate how a man's physical

* Associate, Sonnenschein Nath & Rosenthal LLP; B.A., University of Pennsylvania, 2001; J.D., Northwestern University School of Law, 2005. I would like to thank Professor Cynthia Grant Bowman for her helpful comments, encouragement and insight.

and political power over women was an additional source of inequality. The general acceptance that men could discipline their wives if they so desired provided men with the ability to punish adulterous wives in private without needing to turn to the law. Finally, I will show how unequal repercussions for infidelity also stemmed from women's economic dependence in patriarchal societies. Women's economic dependence itself provided punishment for an act of adultery, because if a husband discovered an infidelity, he could simply leave his wife, thus condemning her to a life of poverty.

In Part I, I begin with a brief synopsis and analysis of *The Scarlet Letter*, which is followed by a discussion of the historical development of U.S. adultery laws. Part II examines *Madame Bovary* and then moves to an analysis of French adultery laws over the past several centuries. In Part III, I introduce *Anna Karenina* and follow the novel's introduction with an examination of the progression of Russia's relevant laws. Finally, Part IV concludes that religion, power and economics have all played a significant role in the treatment of wives who committed adultery. Furthermore, the declining religious and moral definitions of adultery have brought on a new development in modern attitudes about infidelity within a marriage, while economic inequities remain present today.

I. ADULTERY IN THE UNITED STATES

A. THE SCARLET LETTER

The Scarlet Letter was published by Nathaniel Hawthorne in 1850 as a work of historical fiction depicting seventeenth-century New England. Hawthorne's tale opens with Hester Prynne leaving the town jail with an infant in her arms. It is clear to the townspeople that Hester's husband is not the father of this child because he has been away — and presumed lost at sea — since Hester has arrived at the colony. Upon making the obvious deduction, women in the town complain amongst themselves that Hester has not received capital punishment for her sin: "This woman has brought shame upon us all, and ought to die. Is there

not law for it? Truly there is, both in the Scripture and the statute-book.”¹ Instead of being put to death, however, Hester receives a lifelong sentence to wear a scarlet “A” on her breast that will openly display her ignominious crime to the world.

Hester’s husband mysteriously surfaces in the town, but when he sees that she has been convicted of adultery, he abandons her and never reveals to anyone that she is his wife. Arthur Dimmsdale, the town minister and Hester’s accomplice and lover, eventually goes crazy with guilt, sears an “A” onto his chest, and ultimately dies because his nerves are not strong enough to support his shame. Hester, in turn, spends the remainder of her life in a solitary and isolated state, with the scarlet “A” ever present on her breast.

The dynamics of church, male, and economic power all contributed to Hester’s fate. As evinced by the townswoman’s comment, violating the scripture and violating the law were often viewed as one in the same. This convergence of religious and legal doctrine demonstrates the church’s power in dictating iron-clad societal expectations. Male power is illustrated by Hester’s husband, Roger Chillingworth. Chillingworth is betrayed by and ashamed of his wife; therefore he abandons her forever, regardless of her own wishes. Hester consequently endures economic suffering because she no longer has the support of her husband, and she struggles to make a living for herself and her daughter by employing her abilities as a seamstress. Hester’s scarlet “A” thus serves as a symbol of a patriarchal and repressive society’s legal and religious power to punish through exile.

B. ADULTERY LAWS IN COLONIAL AMERICA

Hawthorne’s depiction of colonial laws was very accurate; Hester truly could have been sentenced to death for her actions. In 1631, Bay Colony’s Court of Assistants passed a law making adultery a capital offense.² The Massachusetts Bay, New Haven, Plymouth and Connecticut colonies all prescribed a sentence of

¹ Nathaniel Hawthorne, *The Scarlet Letter* (1850), *reprinted in* 1 *The Norton Anthology of American Literature* 1330, 1333 (Nina Baym ed., 1998).

² Mary Beth Norton, *Founding Mothers & Fathers: Gendered Power and the Forming of American Society* 342 (1996).

death for the commission of adultery.³ The definition of adultery in seventeenth-century America was gender-specific and involved only intercourse with a married woman.⁴ Therefore, if a married woman and a single or married man engaged in intercourse, the crime was adultery. If, however, a married man slept with a single woman, the crime was only considered fornication.⁵

The colonial definition of adultery showed a manifestation of men's power over women because it reinforced the notion that wives were entitled to fewer rights than their husbands. This definition also upheld the idea that the wife was the property of her husband; adultery "violated a husband's exclusive sexual access to his wife and directly challenged his supremacy in the household."⁶ The thought process behind these laws is also revealed by the fact that rape was a capital offense only if it was committed against a married woman.⁷ Once again, the crime was more serious because of the injury it could potentially cause the husband.

The church was also a source for the law's power to condemn someone to death for committing adultery—Massachusetts Bay relied to some extent on the Old Testament in writing its criminal code, and this code was then copied by several other colonies.⁸ These laws further represented the paternalistic notion that the covenant between a husband and his obedient wife laid the foundation for an ordered society.⁹

The Court of Assistants issued two death sentences in an adultery case for the first and only time in 1643/44 for Mary Latham of Marshfield and James Britton of Weymouth.¹⁰ Mary was a young wife in an unhappy marriage to a much older man, and both Mary and James were hanged despite their remorse.¹¹ The Court of Assistants in Massachusetts never again condemned

³ *Id.* at 74.

⁴ *Id.* at 342.

⁵ *Id.* See also RODERICK PHILLIPS, UNTYING THE KNOT: A SHORT HISTORY OF DIVORCE 103 (1991) [hereinafter PHILLIPS, UNTYING].

⁶ NORTON, *supra* note 3, at 74-75.

⁷ *Id.* at 348.

⁸ *Id.* at 325.

⁹ See *id.* at 13.

¹⁰ *Id.* at 342.

¹¹ *Id.*

anyone to death for committing adultery.¹² Instead, the court began to convict the accused of lesser offenses, and the punishment would involve a fine, whipping, or wearing a badge on one's sleeve with the letters "AD".¹³ For example, Mary Mendam was convicted of adultery in 1639 in Plymouth Colony, and her punishment for this offense was to be publicly whipped and to wear a badge on her left sleeve containing the letters "AD" for the rest of her life or until she left the colony.¹⁴

It is not clear why the courts abandoned the death penalty in adultery cases after the 1630's, while the statutes remained in effect for several years.¹⁵ It does appear, however, that many high-ranking officials were very skeptical about the policy.¹⁶ There were also few instances when courts had the opportunity to hear accusations of adultery, primarily due to the fact that it was often in the best interests of both parties to keep quiet about it.¹⁷ As far as interests went, wives possessed no legal interest if their husbands committed adultery and no economic interest in leaving them because it was difficult for a woman to earn a living outside of the home. If it was the wife who committed adultery, husbands often chose to deal with the incident privately to avoid potential public humiliation. In one instance, when a certain Mary Taylor of Maryland admitted that a George Catchmey was the father of her child, her husband Robert sat down with George to discuss their options.¹⁸ During their conversation, George was quick to inform Robert that if he prosecuted them for adultery, "the Court would Record him Cuckold and Catchmey should keep the Child".¹⁹ Thus, the two men decided that if George would provide Robert with tobacco, Robert would take care of the child.²⁰ In the end,

¹² *Id.* at 342-43.

¹³ *Id.* at 343, 264.

¹⁴ *Id.* at 264.

¹⁵ *See id.* at 342.

¹⁶ *Id.* at 343.

¹⁷ *Id.*

¹⁸ *Id.* at 343-44.

¹⁹ *Id.* at 344.

²⁰ *Id.*

both men felt more at ease with taking the matter into their own hands and keeping the matter private.

Considering that she could have received a death sentence, it sounds as though matters turned out well for the adulterous Mary Taylor. However, the relatively positive resolution of this matter should not overshadow the awareness that Mary was at the mercy of her husband's and lover's decision; and although she did not receive physical punishment, the men wielded complete power over her fate.

C. SUBSEQUENT LEGAL DEVELOPMENTS DURING THE EIGHTEENTH AND NINETEENTH CENTURIES

Each of the colonies permitted divorce on adultery grounds as early as the seventeenth century.²¹ The laws were based on the idea that a court-ordered divorce was punishment for a spouse who committed crimes against marriage, "especially the arch sin of adultery."²² In the nineteenth century, all of the states except for South Carolina, which had not legalized divorce, allowed divorce on the grounds of adultery.²³ Almost 250,000 divorces were granted based on adultery between 1867 and 1906.²⁴ The double standard remained with regard to criminal adultery, but divorce laws based on adultery grounds were at least facially neutral, even if their practice greatly favored men.²⁵ Between 1692 and 1786,

²¹ ROBERT L. GRISWOLD, *ADULTERY AND DIVORCE IN VICTORIAN AMERICA 1800-1900* 3 (1986). Note also that even during the seventeenth century, courts did not legally distinguish between adultery committed by the husband or the wife, although the moral view held that a wife's adultery was more serious. MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* 34 (1972).

²² RHEINSTEIN, *supra* note 22, at 34.

²³ GRISWOLD, *supra* note 22, at 12.

²⁴ *Id.* at 1-2.

²⁵ *Id.* at 13. In his *Treatise on the Law of Divorce and Annulment of Marriage*, William T. Nelson defined adultery as "the voluntary sexual intercourse of a married person with one not the husband or wife." *Id.* at 12 (quoting WILLIAM T. NELSON, *A TREATISE ON THE LAW OF DIVORCE AND ANNULMENT OF MARRIAGE* 177 (1895)). Although almost every state possessed facially neutral divorce laws, there were three states that explicitly discriminated against women with regard to adultery: North Carolina, Texas and Kentucky. *Id.* at 4-5. These three states held that in order for wives to sue for divorce based on adultery, the

adultery was the sole grievance cited for half of the divorce suits brought by husbands, while no woman brought a divorce suit based on adultery until 1774.²⁶ In addition to the lack of female petitions, women were less successful in obtaining divorces based on adultery, evincing a strong double standard in the courts regarding gender and infidelity.²⁷

In the nineteenth century, husbands were still more likely than wives to seek divorce on the grounds of adultery.²⁸ One author argues that this discrepancy existed because husbands had more power to do so.²⁹ The difficulty for wives bringing divorce petitions based on adultery was in part due to “cultural values” that made women vulnerable to such accusations (i.e., “the Victorian emphasis on female chastity”) and instilling in them a fear that similar retaliation would result if they were to allege adultery on the part of their husband.³⁰ Also contributing to the discrepancy was women’s economic dependence on men, which virtually required wives to overlook their husbands’ infidelity: “a woman suspicious of her husband’s fidelity might find it wiser to swallow her pride than to risk the economic hardship that a successful divorce petition might bring.”³¹ Thus, the theme of female economic inferiority and political powerlessness continued to play a role, although the statutes themselves were more facially neutral than they were during the time of Hester Prynne.

Interestingly, it appears that the appellate court judges of the nineteenth century began to develop an awareness of these themes of power, social norms, and economics that were providing an unequal playing field with regard to wives and adultery petitions and would therefore often reverse lower court divorces based on a wife’s adultery.³² Thus, although Victorian culture

husband was required to be living with his mistress, whereas if the husband was suing for divorce based on adultery, the wife did not need to be living with her lover. *Id.* at 42.

²⁶ *Id.* at 3-4.

²⁷ *Id.* at 4.

²⁸ *Id.* at 2, 4.

²⁹ *Id.* at 5.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 16.

emphasized sexual repression, judges were aware of the catastrophic effects for a wife who was accused of violating the codes of sexual chastity and therefore were more sensitive about granting a divorce on the basis of a wife's adultery.³³ Judges were also often aware that if a wife was divorced for committing adultery, in addition to becoming a "moral pariah," she would be required to spend the rest of her life relying on the charity of her relatives or performing menial labor.³⁴ Elizabeth Cady Stanton called the laws unequal because, if the wife was guilty, she left the marriage utterly penniless, while if the husband was guilty, he still kept most of the property.³⁵ According to Robert L. Griswold, "[d]espite growing female influence within the nineteenth-century family, courts recognized that husbands often exercised great control over their more innocent, less worldly wives."³⁶

In sum, looking at subsequent legal developments in the eighteenth and nineteenth centuries, it becomes clear that the forces of social/religious, political and economic disparity continued to dominate adultery issues with regard to women. However, the nineteenth century marked a significant improvement for women accused of committing adultery because judges were beginning to develop a new awareness of the social and economic devastation that an adultery charge could bring on a wife.

D. ADULTERY LAWS IN THE UNITED STATES TODAY

The current divorce laws in the United States vary from state to state, but the "bottom line is that the couple who wants a

³³ *Id.* at 15-16.

³⁴ *Id.* at 16. As stated by Justice John Ryland of the Missouri Supreme Court, "I know of no situation . . . where general good character can be of more importance to her, than in a proceeding for a divorce, upon the charge of infidelity of her husband . . . [c]onvict the defendant of the charge, and the law deprives her of her property, of her children, of all that is dear to her, and turns her as an outcast upon the world, a miserable and degraded being." *Id.* at 31 (quoting *O'Bryan v. O'Bryan*, 13 Mo. 17 (1850)).

³⁵ RHEINSTEIN, *supra* note 21, at 39.

³⁶ GRISWOLD, *supra* note 21, at 34.

divorce in the United States can get it.”³⁷ States are now divided between pure no-fault states and mixed fault/no-fault states.³⁸ In the no-fault states, marriages are terminated on the grounds of irreconcilable differences and fault is not taken into account with regard to property division and maintenance.³⁹ Some scholars have argued that no-fault can actually have “catastrophic” effects for wives who have sacrificed their careers and are not justly compensated by a husband who has left them, for example, for another woman.⁴⁰ In states that maintain mixed grounds of fault and no-fault, the commission of adultery can be taken into account with regard to spousal maintenance and property division.⁴¹

Criminal penalties for adultery also exist in several states and charges are still sometimes brought against offending spouses.⁴² Criminal prosecutions for adultery are most frequently brought in military courts, which actively prosecute adultery as a crime.⁴³ Angered spouses can also bring alienation of affection suits against their spouse’s accomplice in a handful of states, which occurred as recently as November 16, 2004 in Illinois.⁴⁴

³⁷ Matthew Butler, *Getting Divorced: Grounds for Divorce: A Survey*, 11 J. CONTEMP. LEGAL ISSUES 164 (2000) [hereinafter Butler].

³⁸ *Id.*

³⁹ *Id.* at 166.

⁴⁰ *Id.* In support of this argument, note that James A. Hayes, a member of the Assembly Judiciary Committee, had a personal interest in the no-fault legislation. Hayes divorced his wife of 25 years and quoted part of the 1969 Report to support his argument that he had lesser obligations to her under the new system. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 566 (2d ed. 2002).

⁴¹ See Butler, *supra* note 38, at 166.

⁴² WEISBERG & APPLETON, *supra* note 41, at 543.

⁴³ Melissa Ash Haggard, *Note: Adultery: A Comparison of Military Law and State Law and the Controversy this causes under Our Constitution and Criminal Justice System*, 37 Brandeis L.J. 469 (1998). Adultery as a military crime includes the standard elements of being a married party and having intercourse with someone other than a spouse. *Id.* at 473. However, the statute also includes a third element: the adulterous conduct must bring “discredit upon the armed forces.” *Id.* Essentially, this “discredit” requirement serves as a prohibition on open and notorious adultery amongst military personnel. *Id.*

⁴⁴ *Man Sues Neighbor After Wife Dumps Him*, CHI. TRIB., RedEye Ed., Nov. 16, 2004, at 7.

The current laws of the United States no longer contain the sexual double standard promoted by religious institutions, nor do they place women at the mercy of their husbands' physical power. The laws do, however, still struggle with attempting to equalize the economic disparities that exist between men and women because of the uncompensated household labor that is typically performed by the wife, sometimes at the expense of her career. If Hester Prynne were around today, she would have been able to divorce Chillingworth without much hassle, but he may have been successful in leaving her with little or no support.

II. ADULTERY IN FRANCE

A. MADAME BOVARY

While the United States courts were developing an awareness of the discrepancies that wives faced with regard to adultery charges in the nineteenth century, Gustav Flaubert was writing *Madame Bovary* in France. *Madame Bovary* created quite a stir in 1857 because it focused on the scandalous subject of adultery. Flaubert and his publisher were even forced to defend a legal action for offending public morals, although they were eventually acquitted.⁴⁵

Flaubert's novel describes the life of young and beautiful Emma, who marries Charles, a country doctor, in hopes that becoming a wife will cure her life of boredom and meaninglessness. Once married, Emma's life does not meet her expectations and she quickly grows despondent and agitated with Charles. Emma dreams of living in Paris and associating with the aristocracy instead of living the life of a country wife: "[s]he wanted to die, but she also wanted to live in Paris".⁴⁶ Emma meets Leon, a law clerk, and begins a flirtation with him. When Leon leaves town, Emma then meets Rodolphe, who is a wealthy landowner enthralled with Emma's beauty and obvious boredom with her husband. Emma and Rodolphe begin a passionate love

⁴⁵ GUSTAV FLAUBERT, *MADAME BOVARY* ix (Paul De Man ed., W.W. Norton & Co. 1965) (1857).

⁴⁶ *Id.* at 43.

affair that continues until Rodolphe eventually abandons Emma after having grown tired of her. All the while, Emma's husband Charles remains blissfully ignorant of her infidelity and indiscretions. Emma becomes ill and almost dies as a result of being spurned by Rodolphe. When she recovers, Emma soon begins an affair with Leon, whom she meets again. Eventually, both Emma and Leon tire of their affair, but Emma has driven herself deeply into debt as a result of her reckless behavior. In an attempt to rid herself of her debts, Emma flirts with lawyers and creditors, eventually throwing herself at Rodolphe in an unsuccessful attempt to borrow three thousand francs. Realizing her desperate situation, Emma goes to the apothecary and secretly consumes a large amount of arsenic. Emma later dies a horrible death, miserable and in despair.

In *Madame Bovary*, Emma's husband is as powerless as the religious morality that Emma constantly rebuffs. However, Emma is caged by her role as a woman, unable to escape the economic constraints of a bourgeois female in nineteenth-century France. Thus, although Emma is not victimized by her husband, the law, or the church for committing adultery, she is simultaneously unable to escape the misery of an unhappy marriage because she has no capacity as a woman to travel alone to Paris and create a life for herself there, as follows: "she longed for lives of adventure, for masked balls, for shameless pleasures that were bound, she thought, to initiate her to ecstasies she had not yet experienced".⁴⁷ Emma desperately attempts to improve Charles's career since she cannot have a career of her own; she also realizes in her final hours that her only device for obtaining money is to offer her sexuality. When her final attempt to obtain money fails, she plunges into hopeless despair and ends her life. Emma thus serves to represent the position of a middle-class country wife trapped in an unhappy marriage with no escape other than death.

⁴⁷ *Id.* at 48.

B. ADULTERY LAWS BEFORE THE REVOLUTION

Although the church did not have a strong presence in Emma's life, it has always had a strong presence in France, therefore affecting the society against whose standards she was rebelling. French law was dominated by the presence of the Catholic Church, and a tension existed in France between those who believed that the Catholic Church should control matters of marriage and divorce, and those who believed that marriage should be a secular institution.⁴⁸ During the eighteenth century, marriage laws in France were governed by the Catholic Church, but the church did not allow divorce.⁴⁹ If a couple's marriage broke down, their only options were to try to annul the marriage or to obtain a separation.⁵⁰ Legal separation, however, prevented the parties from remarrying.⁵¹ Alleging adultery was one way that a husband or a wife could attempt to obtain a separation. In order for a husband to obtain a separation based on adultery, he only had to show that his wife had been unfaithful, whereas a wife had to show that the husband committed the adultery in the marital dwelling for her petition to be successful.⁵² The requirements were more stringent for a wife alleging adultery, thus revealing the church's double standard that a husband's adultery was somehow a lesser offense than the infidelity of a wife. Therefore, a husband could betray his wife as much as he wanted and his wife would have no legal recourse, so long as the infidelity occurred outside of the home. A discrepancy also existed between husbands and wives with regard to punishment for adultery. Ecclesiastical law provided that if a wife committed adultery, she could be forcefully

⁴⁸ RHEINSTEIN, *supra* note 22, at 194-195.

⁴⁹ ROBERT CHESTER, DIVORCE IN EUROPE 147 (1977) (individual chapter authored by Anne Boigeol, Jacques Commaille and Louis Roussel).

⁵⁰ *Id.*

⁵¹ *Id.* at 157.

⁵² RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 160-161 (1988) [hereinafter PHILLIPS, ASUNDER].

placed in a convent for up to two years, while no such punishment existed for men.⁵³

Husbands also possessed power over their wives that they could use to enforce their own punishments. For example, in eighteenth-century France, husbands were allowed and culturally expected to discipline their wives, using physical force if necessary (the term used was “moderate correction”).⁵⁴ *The Encyclopédie* of 1785 states that “[t]he wife who behaves badly towards her husband must not, for that reason, be released from his authority, but he may obtain an order for her to be confined in a convent.”⁵⁵ Furthermore, because of their social and economic inferiority, women would often simply accept their husband’s adultery and allow the mistress to move into their home.⁵⁶ In one instance, a woman in Rouen shared her house with her husband, children, and her husband’s mistress for five years.⁵⁷ Provisions even existed for husbands who wanted to separate from their wives but did not want to be involved in the embarrassing public proceedings: the husband could obtain a private warrant to have his wife imprisoned in a private facility.⁵⁸ The French Revolution abolished this practice, but it was reinstated by Napoleon several years later.⁵⁹

C. SUBSEQUENT LEGAL DEVELOPMENTS: THE FRENCH REVOLUTION AND NAPOLEON

After the Revolution, French ideology shifted to a more liberal and secular view. The French people wanted to remove the Catholic Church’s control over marriage and allow couples to

⁵³ PHILLIPS, UNTYING, *supra* note 6, at 103 PHILLIPS, ASUNDER, *supra* note 53, at 161.

⁵⁴ PHILLIPS, ASUNDER, *supra* note 53, at 160.

⁵⁵ *Id.* at 16 (quoting *Encyclopédie, ou dictionnaire raisonné des arts et des métiers* (17 vols., Paris, 1785), XV, 60).

⁵⁶ PHILLIPS, UNTYING, *supra* note 6, at 105.

⁵⁷ *Id.*

⁵⁸ PHILLIPS, ASUNDER, *supra* note 53, at 346.

⁵⁹ *Id.* According to the Code Napoleon, a wife divorced on the basis of adultery “shall be condemned . . . to confinement in a house of correction, for a determinate period, which shall not be less than three months, nor exceed two years.” *Id.* (quoting Code Napoleon, Book I, Title VI, Article 298).

divorce if they were unhappy.⁶⁰ The Act of 1792 made marriage simply a civil contract, allowing divorce based on mutual consent, incompatibility of temper, and two other grounds.⁶¹ Under the Act of 1792, adultery was not listed separately as a ground for divorce.⁶² According to one author, “a man’s simple adultery was not regarded as sufficiently serious, and that of a woman to be so delicate as to require it to be hidden behind the façade of a less scandalous ground.”⁶³

The divorce laws were modified in 1803/4, and Napoleon played a large role in drafting the new regulations.⁶⁴ The law maintained the availability of divorce, although it was made much less liberal.⁶⁵ The Civil Code transformed divorce into more of a punishment for misconduct than an outlet for unhappiness.⁶⁶ Under the Code, divorce was obtainable on the basis of four different grounds, two of which involved adultery: (1) a wife’s adultery (art. 229); (2) a husband’s “open and notorious” adultery with a mistress in the marital home (art. 230).⁶⁷ Thus, in addition to being successful in keeping divorce as a legal option, Napoleon was also successful in reinstating the double standard that had existed within the ecclesiastical laws.⁶⁸ In addition, an adulterous wife could once again be imprisoned for two years for her offenses and would never be permitted to marry her partner in crime.⁶⁹

⁶⁰ RHEINSTEIN, *supra* note 22, at 200.

⁶¹ *Id.* at 201.

⁶² *Id.* at 202.

⁶³ *Id.*

⁶⁴ *Id.* at 209-10.

⁶⁵ *Id.* Some say that Napoleon was a strong advocate for maintaining the freedom to divorce due to of his own desire to end his marriage to Josephine de Beauharnais because she could not produce a male heir. *Id.*

⁶⁶ *Id.* at 210.

⁶⁷ *Id.* at 211.

⁶⁸ Under the law of 1803, “[m]ost of the old Canonistic distinctions between the rights of husband and wife and the restrictions as to the re-marriage of one of the parties were restored. The wife was said to owe obedience to her husband while he owed her his protection.” S. B. KITCHIN, A HISTORY OF DIVORCE 160 (1912) (citing Code Civil, Arts. 213, 229 and foll., 234, 296, 298-302, 306-310).

⁶⁹ *Id.* (citing Code Civil, Arts. 213, 229 and foll., 234, 296, 298-302, 306-310). A husband convicted of aggravated adultery could, however, be fined between 100 and 2,000 francs. PHILLIPS, ASUNDER, *supra* note 53, at 352.

D. LEGAL DEVELOPMENTS IN 1816 AND 1884

Divorce was repealed in 1816 after Napoleon lost power and the church regained its control of marriage laws.⁷⁰ Once again, separation was the only remedy for a couple who wanted to split. According to one historian, during the nineteenth century “prostitution, the mistress system, and irregular unions flourished.”⁷¹ Moreover, the influences of Victorian England dictated that women “were supposed to suffer in silence.”⁷²

Divorce was reinstated in 1884 by the Naquet Act after having been unavailable for 68 years.⁷³ The Act recognized divorce on three separate grounds, one of which was adultery.⁷⁴ The new law also dictated that divorce on adultery grounds prevented the offending spouse from ever marrying his or her accomplice.⁷⁵ Emma, therefore, would have been unable to marry Leon or Rodolphe, had she and Charles divorced on the grounds of adultery. The 1884 law also removed the double standard for women, allowing them to divorce an adulterous husband whether or not he committed the adultery in the marital home.⁷⁶ Therefore, even though husbands may have remained more economically and socially powerful in the late nineteenth century, the French laws were at least leveling out with regard to gender biases.

E. CURRENT ADULTERY LAWS IN FRANCE

The law of 1884 was ultimately replaced by a bill that went into effect on January 1, 1976.⁷⁷ This new law removed adultery as a separate ground for divorce, although the offense remains within the ground of “divorce for misconduct.”⁷⁸ Thus, even though a spouse can sue for marital misconduct based on adultery,

⁷⁰ CHESTER, *supra* note 50, at 148.

⁷¹ RHEINSTEIN, *supra* note 22, at 214.

⁷² *Id.*

⁷³ ⁷³ CHESTER, *supra* note 50, at 148.

⁷⁴ *Id.*

⁷⁵ RHEINSTEIN, *supra* note 22, at 217.

⁷⁶ PHILLIPS, UNTYING, *supra* note 6, at 175.

⁷⁷ CHESTER, *supra* note 50, at 149.

⁷⁸ *Id.* at 149 and 221.

the commission of adultery no longer automatically resulted in divorce.⁷⁹ Interestingly, of the different kinds of fault cited (and fault-based divorces comprise about forty-five percent of all divorces), adultery is alleged the most frequently.⁸⁰ With the new French divorce regime and modern social developments, the three forces that placed women on unequal footing with regard to adultery have all but been erased: the church no longer dictates the laws, thus removing the sexual double standard, and women now have a greater ability to provide for themselves economically and therefore cannot be controlled by patriarchal social forces. Today, Emma Bovary would have been allowed to divorce her husband and she would have been able to move to Paris and find a job.

III. ADULTERY IN RUSSIA

A. ANNA KARENINA

Leo Tolstoy published *Anna Karenina* in final form in Russia in 1878, following closely behind *The Scarlet Letter* in the United States, and *Madame Bovary* in France.

Tolstoy's novel involves the three families of Oblonsky, Karenin, and Levin. Stiva Oblonsky cheats on his wife Dolly regularly: "I'm made that way. And really, one does so little harm to anyone, and gives oneself so much pleasure".⁸¹ Anna Karenina is a dutiful wife to the older Karenin until she meets the dashing bachelor named Vronsky, falls in love with him, and the two begin a passionate affair. As Anna and Vronsky's affair develops, Anna eventually confesses to her husband that she is having an affair with Vronsky and is in love with him. Anna initially asks Karenin for a divorce, but her husband refuses because of the social impropriety and his desire to maintain control over his wife. As time passes, Karenin changes his mind about the divorce, plans to

⁷⁹ MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 168 (1989).

⁸⁰ JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, *PRINCIPLES OF FRENCH LAW* 259-260 (1998).

⁸¹ LEO TOLSTOY, *ANNA KARENINA* 172 (Leonard J. Kent & Nina Berberova eds., Random House 1965) (1878).

use Vronsky's letters as evidence, and visits a divorce lawyer to learn about his options. The lawyer advises Karenin to obtain a divorce on the grounds of mutual consent, but Karenin wants to proceed on fault grounds and leaves the lawyer's office unsure of what to do. With the matter of divorce remaining unsettled, Anna leaves Russia to tour Europe with Vronsky, thus creating the ultimate scandal. When they return, Anna has become a virtual outcast, while Vronsky – and Stiva Oblonsky, who also openly cheats on his spouse – is able to maintain his lifestyle. For Vronsky, the affair initially improved his status: “[h]is affair with Madame Karenina, by creating so much sensation and attracting general attention, had given him a fresh distinction which soothed his gnawing worm of ambition for a while”.⁸² As Anna grows increasingly unhappy, tormented, and is unable to obtain a divorce, she ultimately throws herself under a train to escape her desperate situation.

Anna is not punished by the law for her behavior, but she is punished by a society that believes adultery is acceptable for husbands and not for wives. During a dinner conversation at Oblonsky's house, one of the guests notes that, “[t]he inequality in marriage . . . lay in the fact that the infidelity of the wife and the infidelity of the husband are punished unequally, both by the law and by public opinion”.⁸³ Oblonsky is able to cheat on his wife while maintaining his place in society, whereas Anna's adultery makes her a social outcast. Anna does not fear economic hardship or the wrath of her husband, but she is deeply affected by the social isolation she encounters as a result of her infidelity.

B. ADULTERY LAWS IN EIGHTEENTH-CENTURY RUSSIA

During the eighteenth century, the Russian Orthodox Church essentially governed marriage issues.⁸⁴ Cases were heard at the Consistories of the Church, which would rarely dissolve a

⁸² *Id.* at 324.

⁸³ *Id.* at 412.

⁸⁴ Robin Bisha, *Marriage, Church, and Community in 18th-Century St. Petersburg*, in *WOMEN AND GENDER IN 18TH-CENTURY RUSSIA* 228 (Wendy Rosslyn ed., 2003).

marriage, but would grant separations based on a wife's adultery.⁸⁵ In order to prove adultery, the Consistory required the deposition of witnesses to the adulterous act, although records indicate that marriages were dissolved without this evidence.⁸⁶ Despite the existence of these church courts, most people preferred to resolve their marital problems privately instead of turning to the church, for example, by disciplining their wives physically.⁸⁷ *The Domostroi*, or Book of Household Management, a popular book of rules for Russian households, encouraged husbands to use corporal punishment against their wives, thus giving husbands the discretion to punish their wives when they so desired.⁸⁸ For example, in 1720, Avdot'ia Ivanova doch' received a beating from her husband Ivan Sukhov after he learned that she had been involved in an affair with another man while he was out at sea.⁸⁹ In another example, one woman had a cruel husband who beat her and ultimately sent her away to fend for herself alone, practically destitute.⁹⁰ She eventually began living with another man but was found by the police, thus allowing her husband to divorce her, give her a beating, and forbid her from ever remarrying.⁹¹ In eighteenth-century Russia, the laws of the church and the economic inferiority of women contributed to their unequal treatment. However, women's physical and societal powerlessness may have been the strongest instrument of exploitation because it provided a husband with unlimited discretion to punish an adulterous wife in any way that he saw fit.

C. LEGAL DEVELOPMENTS PRIOR TO THE 1917 REVOLUTION

During the nineteenth and early twentieth centuries, the patriarchal ecclesiastical laws continued to determine almost all marriage and divorce matters, and these determinations were

⁸⁵ *Id.* at 229.

⁸⁶ *Id.*

⁸⁷ *Id.* at 228.

⁸⁸ *Id.* at 231.

⁸⁹ *Id.*

⁹⁰ *Id.* at 233.

⁹¹ *Id.*

sanctioned by the laws of the state, thus maintaining the typical double standard with regard to adultery.⁹² In 1850, the church authored new laws that were to govern divorce, although they maintained much of the old ideology.⁹³ Under these laws, adultery of one of the spouses was a ground for divorce, and the innocent spouse could choose to proceed in one of two ways.⁹⁴ The husband could initiate a secular suit, which would cause the guilty wife to be placed in a prison or monastery for four to eight months.⁹⁵ Proof of adultery, however, required the testimony of two witnesses who had seen the act.⁹⁶ The innocent party's other alternative was to simply sue for divorce.⁹⁷ Karenin was facing this decision when he was at the lawyer's office—he wanted to use Vronsky's letters to sue Anna for divorce based on her adultery, but his lawyer advised him that it would be too difficult and that the allegation would require more than letters for support.⁹⁸

The Revolution of 1917 changed the divorce laws, based in part on the notion that “[u]nder the double standard of bourgeois morality, the men were free to find satisfaction with mistresses or prostitutes—other victims of exploitation—while all extramarital ventures were strictly forbidden to women.”⁹⁹ The new political philosophy also included a more general notion that the hierarchical family structure needed to be recast so that wives were no longer dependent on their husbands and children were no longer dependent on their parents.¹⁰⁰ The Soviets quickly removed the church's power over marriage and issued a Decret stating that the Russian Republic only recognized civil marriage.¹⁰¹ In 1918, the Russian Soviet Federated Socialist Republic (RSFSR) enacted a

⁹² WILLIAM E. BUTLER, *RUSSIAN LAW* 419 (2003) [hereinafter WILLIAM E. BUTLER].

⁹³ Bruno Martuzāns, *Divorces, Roots'Saknes*: LatNet, at <http://www.roots-saknes.lv/Marriage/Divorce/Divorces.htm> (last visited Aug. 3, 2005).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ TOLSTOY, *supra* note 82, at 387-389.

⁹⁹ RHEINSTEIN, *supra* note 22, at 223.

¹⁰⁰ WILLIAM E. BUTLER, *supra* note 93, at 419.

¹⁰¹ *Id.* at 420.

more permanent law that again made it clear that a religious marriage had no legal identity unless it was also registered civilly.¹⁰² The RSFSR allowed divorce on demand at the request of either the husband or wife "without any statement of reasons," thus removing any necessary grounds such as adultery and any double standard in the law.¹⁰³

D. CURRENT DIVORCE AND ADULTERY LAWS IN RUSSIA

Under Stalin in the 1930s, divorce became a more restricted practice again, and substantial fees had to be incurred in order to obtain one.¹⁰⁴ In 1944, an Edict further restricted divorce by requiring the courts to make an attempt at reconciling the parties.¹⁰⁵ Divorce was liberalized again during the 1950s, and a new liberal Family Code was created in 1965.¹⁰⁶

¹⁰² *Id.*

¹⁰³ *Id.* at 421. In 1920, The Russian Soviet Government bureau wrote that "[t]he code is a superb rebuke to those psychopathically afflicted persons who spread the sickly tattle about "nationalization of women." The laws are perhaps distinguished above all else by their recognition of the rightful social function and economic status of women. They may be searched from beginning to end without disclosing any trace of the old economic, political and legal discriminations between the sexes. The slate is wiped clean. Nothing remains of the ancient slavery or the old taboos . . ." THE RUSSIAN SOVIET GOVERNMENT BUREAU, THE MARRIAGE LAWS OF SOVIET RUSSIA: COMPLETE TEXT OF FIRST CODE OF LAWS OF THE RUSSIAN SOCIALIST FEDERAL SOVIET REPUBLIC DEALING WITH CIVIL STATUS AND DOMESTIC RELATIONS, MARRIAGE, FAMILY AND GUARDIANSHIP 11 (1921).

¹⁰⁴ WILLIAM E. BUTLER, *supra* note 93, at 422 and RHEINSTEIN, *supra* note 22, at 228. Despite the desire of Soviet authorities to make the laws more beneficial to women, many women argued that the new laws were harmful: "[i]t was alleged that peasant men, needing help during the harvest, would marry before the harvest and divorce after it, using their temporary wives as unpaid labor. Women criticized the law, arguing that it was women who suffered most when men married, divorced, and remarried in rapid succession. By the mid-1930s the government responded to these concerns and introduced restrictions on divorce, including financial sanctions that cut deeply into the divorce rate." PHILLIPS, UNTYING, *supra* note 6, at 199.

¹⁰⁵ WILLIAM E. BUTLER, *supra* note 93, at 422. Once again, although the laws remained facially neutral, one author notes that, "[i]n 1944, there were 50 percent more women of child-bearing age than men of a comparable age. This surplus should not be wasted by the state. But if marriage and the family were

The Family Code was then changed into the Family Code of the Russian Federation in December of 1995, and this, as amended in 1997 and 1998, is the current law.¹⁰⁷ Under this law, a marriage may be terminated by application for divorce by one or both spouses without the stipulation of any grounds.¹⁰⁸ Thus, adultery no longer exists in Russia as a ground for divorce, and all of the Russian marriage and divorce laws remain facially neutral with regard to women. Additionally, the church no longer possesses the same amount of power that it had before the revolution, thus removing the patriarchal ideology about adultery. Therefore, in today's Russia, Anna could have applied for a divorce and remarried Vronsky with or without her husband's consent.

IV. CONCLUSION

Throughout the seventeenth, eighteenth, nineteenth, and part of the twentieth centuries, the adultery laws of the United States, France, and Russia have evolved to reflect the political and religious ideologies of the eras. All three societies at one point used religion to promote a double standard with regard to women and adultery. All three societies also relied at certain times on the physical and political power of men to deal with adulterous wives on the terms that they saw fit. And finally, all three societies failed to account for the devastating economic ramifications facing wives who either sued for adultery or committed adultery themselves. During the mid-nineteenth century, when political expression had well begun to permeate the novels of its time, three different

both to be strengthened, the men had to be encouraged not only to marry but also to produce offspring with the unmarried women. If their marriages were not to be threatened by jealousy and scandal, they would have to be protected against their extramarital ventures becoming known to their wives . . . so there was also in the Soviet Union the prohibition of 'recherche de la paternite' [paternity actions] and, in the USSR, the assumption by the state of the financial care of illegitimate children." RHEINSTEIN, *supra* note 22, at 231.

¹⁰⁶ WILLIAM E. BUTLER, *supra* note 93, at 422.

¹⁰⁷ *Id.*

¹⁰⁸ Family Code of the Russian Federation, Chapter 4, Article 16 (1998). WILLIAM H. BUTLER, *supra* note 93, at 425-26.

authors noticed the gender discrepancies surrounding adultery in their respective countries and created tragic heroines who lived out the consequences of those double standards. The anguished outcome of the lives of Hester, Emma and Anna showed how the forces of religion, physical power and economics served to essentially destroy an unfaithful wife.

As the role of the church has diminished over time, the sexual double standards have all but disappeared for wives. Similarly, the notion of a wife as her husband's obedient property has disintegrated, thus removing the power of husbands to take matters into their own hands. Economic disparities still exist, as shown by the opponents to no-fault divorce, and this disparity may exist well into the future until society finds a way to compensate spouses for unpaid household labor. In an interesting twist, as the religious and social punishments for adultery have faded, they have also given rise to a new phenomenon that can be seen in the current suits filed by both sexes against spouses for criminal adultery and alienation of affection in the United States. Because adulterous spouses will no longer become impoverished social lepers or religious outcasts, and because no-fault divorce does not even address the incidence of adultery, injured spouses are now struggling to look for new ways to define and receive compensation for the harms that they have suffered. It remains yet to be determined how the law will address this issue now that men and women are on more equal footing with regard to the social consequences of their marital indiscretions.