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# **Divorce in the Movies: From the Hays Code to Kramer vs. Kramer**

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## **Abstract**

Movies often provide a window through which we can observe human behavior and legal institutions as they existed when the film was made. However, this is not true of the subjects of marital disintegration and divorce. Hollywood's rigid system of self-censorship, embodied in the Hays Code and the Production Code Administration, nearly blotted divorce themes right off the screen. What little was said of the subject during the middle third of the twentieth century was wildly wrong. The Code was written by and administered by staunch Catholics, largely to stave off boycott threats by the Catholic Legion of Decency. As a result, it reflected Catholic moral teachings, particularly the prohibition of divorce.

This article surveys films about divorce from the pre-Code era (1930-34), the Code era (1934-68), and the immediate post-Code era (1968-1980s). It discovers that divorce themes were candidly portrayed during the pre-Code era but were thoroughly suppressed during the Code era. In the post-Code era, the subject crept back to the screen in a series of memorable films about divorce in the late 1970's and early 1980's. The article then analyzes *Kramer vs. Kramer* (1979) in detail, finding it to be one of the few classic treatments in film of divorce and family law.

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DIVORCE IN THE MOVIES: FROM THE HAYS CODE TO *KRAMER vs. KRAMER*

Michael Asimow\*

Movies and other media of popular culture serve as windows to the social history of the time when they were produced.<sup>1</sup> By watching old films, we transport ourselves back to the bygone days when the film was made. We learn what filmmakers were concerned about as well as what they thought ordinary people were concerned about. Even though filmmakers must refract institutions, events and character in order to compress, simplify, and entertain, what remains is still a valuable artifact. Film history helps us understand what earlier generations thought about business, politics, law, marriage and the family, gender relationships, sexuality; it furnishes insight into the attitudes, hopes, fears, and dreams of ordinary people. It allows us to observe the institutions of society in action. Studying the content of films as social history is important for a second reason: people learned

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<sup>1</sup> For discussion of the study of film as social history, see Douglas Kellner, *MEDIA CULTURE* 5 (1995) (study of popular culture illuminates social environment and provides insight into what is going on in contemporary society); Chandra Mukerji & Michael Schudson, *RETHINKING POPULAR CULTURE* 26 (1991) (popular culture should be viewed as a society thinking about itself); Molly Haskell, *FROM REVERENCE TO RAPE: THE TREATMENT OF WOMEN IN THE MOVIES* xii (1973) (movies as looking glass into the past); Lawrence Friedman, *Law, Lawyers, and Popular Culture*, 98 *YALE L.J.* 1579 (1989) (study of films necessary to study social history of law); Louise Everett Graham & Geraldine Maschio, *A False Public Sentiment: Narrative and Visual Images of Women Lawyers in Film*, 84 *KY. L. REV.* 1027, 1028-34 (1995-96) (film narrative and imagery is window into cultural notions of women's status).

about all these things by going to the movies. Films have always had a profound impact on people's opinions and beliefs (more so, of course, before the advent of television). To some undefined extent, the films of a time actually made history as well as reflected it.<sup>2</sup>

These claims--that films are worth studying because they both reflect and make history--fail miserably when applied to American films about marital breakdown and divorce during the middle third of the twentieth century. By studying films made between the mid-thirties and the mid-sixties, we can learn nothing about the pathologies of marriage, popular attitudes toward divorce, or the institutions of family law. What little those films tell us now, and what they told film audiences then, was wildly wrong.

This article explores the reasons for this striking anomaly. It examines the divorce phenomenon in real life and in movies before, during, and after the system of movie self-censorship embodied in the Hays Code. The article culminates in an analysis of the films relating to divorce in the late 1970's and early 1980's, concentrating on *Kramer vs. Kramer* (1979),<sup>3</sup> an outstanding and definitive film that treats all the elements of the divorce process seriously and which pointed the way for divorce-related films of the present.

#### I. MARITAL BREAKDOWN AND DIVORCE IN FILM

Marital trouble and divorce are unpleasant but ever-present realities of modern life. These days, approximately one of every two first-time marriages in America ends in divorce and the prospects for later marriages are even worse. Similar patterns apply throughout the

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<sup>2</sup> See Michael Asimow, *Bad Lawyers in the Movies*, 24 Nova L. Rev. -- (2000) (films about bad lawyers influence public attitude toward lawyers).

<sup>3</sup> For other treatments of divorce in film, see Ira Lurvey & Selise E. Eiseman, *Divorce Goes to the Movies*, 30 U.S.F.L. REV. 1209 (1996); David

first world. But this is nothing new. During the twentieth century, divorce has been a social and economic phenomenon of epic proportions. The divorce rate has advanced steadily, particularly after World War I and throughout the 1920's. It fell during the Depression but spiked after World War II, stabilized (though at a much higher rate than before the War) during the 1950's, and shot upwards throughout the 1960's, '70's and '80's.<sup>4</sup> Divorce law reform was a subject of constant controversy during most of the century.<sup>5</sup>

The reasons for the relentless advance in the divorce rate are not difficult to discover.<sup>6</sup> The social stigma attached to divorce diminished steadily; the more people that got divorced and survived the experience, the more others wanted to follow in their footsteps. Divorce laws were liberalized.<sup>7</sup> Perhaps most important, in the early part of the century and especially between the Wars, a new paradigm for marriage took hold.<sup>8</sup> In the old days, most people viewed marriage as a matter of social status and a lifetime commitment to furnish mutual financial and homemaking support. Long-term love and happiness might be an unexpected and welcome byproduct, but few people thought such things were essential.<sup>9</sup> Under the new paradigm, people came to believe that marriage should bring happiness and personal fulfillment. Since

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Ray Papke, *Peace Between the Sexes: Law and Gender in Kramer vs. Kramer*, 30 U.S.F.L. REV. 1199 (1996).

<sup>4</sup> See Roderick Phillips, UNTYING THE KNOT 186-190, 209-13, 225 (1991); U. S. Dep't of Commerce, MONTHLY VITAL STATISTICS REP. (March 22, 1995).

<sup>5</sup> Phillips, note 4, ch. 7-9; Glenda Riley, DIVORCE: AN AMERICAN TRADITION (1991).

<sup>6</sup> Phillips, note 4, ch. 9; Riley, note 5, 144-46 (1991).

<sup>7</sup> Undoubtedly, the widespread adoption of no-fault divorce in the 1960's and 1970's made divorce easier and cheaper and thus contributed to the increase in the divorce rate. However, that is not the whole story; no-fault was adopted in part because the legal system couldn't cope with the flood of divorces under the then-prevailing fault system. The big rise in the divorce rate preceded the adoption of no-fault. Phillips, note 4 at 243; J. Herbie DiFonzo, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA (1997).

<sup>8</sup> See Phillips, note 4, ch. 8, 9; DiFonzo, note 7, ch. 1

marriage frequently fails to provide happiness and fulfillment to one or both partners, a great many marriages fail to meet expectations. Such marriages are doomed to disintegrate and divorce generally follows.

At the same time, women reevaluated their roles and came to believe that they were socially and economically equal to men; they rejected the idea that men and women each inhabited their own spheres, the woman at home and the man in the world. Women's economic opportunities improved, making divorce a realistic option for many more women. Women renounced the sexual double standard. They believed they were entitled to escape from dreary, loveless, or abusive marriages, and they thought they could manage economically without male support. As more and more women internalized these feminist sentiments, more of them decided to leave their marriages.<sup>10</sup>

The eternal process of marital breakdown and divorce is full of dramatic possibilities. During the pre-divorce phase, the parties become increasingly incompatible and unhappy in their lives together. Frequently, there are complex and clandestine love affairs outside of marriage; deception, jealousy, and betrayal; emotional upheaval; disruption of the lives of children; and economic warfare. The routine of everyday life is shattered. During the post-divorce phase, one or both parties may find themselves physically and emotional isolated; others turn to promiscuity. Forced out of the shelter of the household, many women find satisfying new careers; others find that the world of work holds nothing for them. Often one ex-spouse's standard

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<sup>9</sup> Phillips, note 4, ch. 5.

<sup>10</sup> DiFonzo, note 7, ch 1.

of living rises while the other's plummets.<sup>11</sup> One partner's true personality blooms when freed from the stifling constraints of marriage; another's joy of life is snuffed out. A high divorce rate insures that there are plenty of complex blended families with multitudes of step-children and ex-spouses.

This sort of highly dramatic material should be the subject of countless film scenarios, right along with such staples as romance, love, marriage, and childbirth. After all, a pretty high percentage of adults have been divorced at least once; everyone else has friends or relatives that have been divorced. A substantial percentage of young people have experienced their parents' divorce. All of these people can empathize with the travails of fictional characters whose marriages disintegrate. And they should, therefore, be willing to buy tickets to dramatic or comedic movies that center on divorce.

These days, movies routinely dwell on the emotional and financial prequels and sequels to divorce. Divorce is the obvious and natural platform for numerous modern film stories. Name your favorite: *Living Out Loud* (1998) focuses on the loneliness of a divorced woman; *Husbands and Wives* (1992) explores the struggles of two newly divorced couples; *As Good As It Gets* (1997) deals with the difficulties of single parenthood; *Music of the Heart* (1999) features a divorced woman who, by necessity, starts a fulfilling new career; *Mrs. Doubtfire* (1993) centers on a father's unusual tactics to live with his kids; *Stepmom* (1998) deals with the travails of two moms, the kids, and the dad; *The First Wives Club* (1996) features a group of embittered ex-wives out for a little revenge; a black woman is abandoned by her husband for a

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<sup>11</sup> Weitzman claims that following divorce, wives' standards of living decreased by 73% and husbands' increased by 43%. Leonore J. Weitzman, *THE DIVORCE REVOLUTION* 337-56 (1985).

younger white woman in *Waiting to Exhale* (1995). And there are countless others.

## II. THE HAYS CODE, THE PRODUCTION CODE ADMINISTRATION, AND THE TREATMENT OF DIVORCE

But it was not always such. The remarkable fact is that for more than thirty years divorce was nearly blotted off the screen. From 1934 to 1968, Hollywood worked under a system of rigid self-censorship. Even though countless "women's movies" were made during those years,<sup>12</sup> the realistic treatment of divorce was mostly off-limits.

### *Early efforts at governmental and industry censorship*

American movie censorship has a long and painful history.<sup>13</sup> During the silent era, some cities (especially Chicago) engaged in governmental censorship of films.<sup>14</sup> During the 1920's, in the wake of some spectacular Hollywood scandals, numerous state and local governments maintained censorship schemes<sup>15</sup> and many others considered whether to adopt them. Governmental censorship was entirely legal during those years. The Supreme Court held in 1915 that prior censorship of films was constitutional since the movie business was not

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<sup>12</sup> Haskell, note 1 at 153-88.

<sup>13</sup> See generally Richard S. Randall, *CENSORSHIP OF THE MOVIES* (1968). Film censorship can be viewed as one important part of a much bigger story--a century-long struggle between producers and consumers of popular culture for control of its content. The struggle continues today with battles over television ratings or internet content. Many (but by no means all) of the private pressure groups trying to control cultural products are religiously based. See generally Francis G. Couvares, *Hollywood, Main St. and the Church: Trying to Censor the Movies before the Production Code*, 44 *Amer. Quar.* 584 (1992).

<sup>14</sup> Robert Sklar, *MOVIE-MADE AMERICA* 30-32 (New York City), 126-32 (Chicago) (1994); Randall, note 13, 11-13.

<sup>15</sup> Censorship boards operated in eight states and about 90 cities, frequently affecting film distribution for large regions. Mark A. Vieira, *SIN IN SOFT FOCUS: PRE-CODE HOLLYWOOD* 8 (1999); Raymond Moley, *THE HAYS OFFICE* 27-28, 53-56 (1945).

entitled to freedom of speech or press.<sup>16</sup> This decision was not overruled until 1952.<sup>17</sup>

Around 1909, the movie industry engaged briefly in self-censorship.<sup>18</sup> In the early 1920's, Will H. Hays,<sup>19</sup> the director of the newly formed Motion Picture Producers and Distributors of America (MPPDA), lobbied hard against governmental censorship and tried to build bridges to various private groups interested in cleaning up the movies.<sup>20</sup> At first, Hays managed to co-opt these groups and to chill the drive toward government censorship. At the same time, he tried to head off problems for the industry by persuading studios to clean up films or not to adapt certain books or stage plays into film.<sup>21</sup>

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<sup>16</sup> *Mutual Film Corp. v. Ohio Industrial Commission*, 236 U.S. 230 (1915); *Block v. City of Chicago*, 239 Ill. 251, 87 N.E. 1011 (1909). See Randall, note 13 at 18-25; John Wertheimer, *Mutual Film Reviewed: The Movies, Censorship, and Free Speech in Progressive America*, 37 Am. J. Leg. Hist. 158 (1993) (pointing out that prior to *Mutual Film* nobody had even considered the possibility that movies might be entitled to freedom of speech). In *Mutual Film*, the Court considered whether Ohio's censorship statute violated the state constitution; at that time, the Bill of Rights of the U. S. Constitution did not apply to the states. The Court thought that movies were no different from circuses or other spectacles, conducted purely for profit. In the Court's view, they had nothing in common with the press.

<sup>17</sup> *Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495 (1952). The Court invalidated New York's censorship statute which banned exhibition of films that were indecent, immoral, inhuman, sacrilegious, or would tend to corrupt morals or incite to crime. Dictum in a 1948 case clearly foreshadowed that *Mutual Film* would be overruled. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). See Randall, note 13 at 25-32. Nevertheless, many state and local censorship boards remained in existence even after *Burstyn* to enforce obscenity laws. See *Freedman v. Maryland*, 380 U.S. 51 (1965) (setting forth procedural protections that licensing boards must provide).

<sup>18</sup> The National Board of Review of Motion Pictures consisted of a group of lay people who screened all new films looking for "obscenity," a term they considered self-defining. Sklar, note 14 at 31-32.

<sup>19</sup> See Moley, note 15 at 32-51 for an account of Hays' personality, the rationale for hiring him as the industry's leader in 1922, and the relationship of his organization to the film industry.

<sup>20</sup> For an account of Hays' struggles with Protestant and Catholic pressure groups, see Couvares, note 13.

<sup>21</sup> Vieira, note 15 at 8, 14; Sklar, note 14 at 133, 154; Randall, note 13 at 16; Moley, note 15 at 59; Richard Maltby, "To Prevent the Prevalent Type of Books:" *Censorship and Adaptation in Hollywood, 1924-1934*, 44 Amer. Quar. 554 (1992). Maltby recounts Hays' efforts to

Around 1927, pressure for government censorship began building again. Religious groups became more fundamentalist in their orientation and Hays' efforts to bring the industry's critics into the tent began to fail. This trend coincided with the emergence of sound films, which allowed filmmakers to produce much more shocking and offensive films than was possible with silent film technology. State and local censorship boards reacted accordingly, slicing films to ribbons. Theater owners protested about the content of the films (which exposed them to local censorship and boycotts).<sup>22</sup> Antitrust legislation or prosecution against the big studios became a credible threat.

Responding to these ominous developments, Hays promulgated a list of "Don't's and Be Carefuls." in 1927.<sup>23</sup> One provision called for exercising special care in the manner in which certain subjects were to be treated "to the end that vulgarity and suggestiveness may be eliminated and that good taste may be emphasized." One of the subjects that called for special treatment was "the institution of marriage." The newly formed "Studio Relations Committee" (SRC), headed by Colonel Jason Joy, was charged with enforcing the 1927 Code. Despite Joy's efforts, the 1927 Code was widely ignored and had little effect.<sup>24</sup> Once more, the industry was in trouble; government censorship was on the rise, Congress considered antitrust legislation aimed at the industry, and religious groups were out for blood.<sup>25</sup>

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prevent adaptation of inappropriate books or to sanitize thoroughly the books that were adapted.

<sup>22</sup> Couvares note 13 at 594-98.

<sup>23</sup> The 1927 Code is reprinted in Vieira, note 15 at 214; Gerald Gardner, THE CENSORSHIP PAPERS: MOVIE CENSORSHIP LETTERS FROM THE HAYS OFFICE 1934 TO 1968, 213-14 (1987).

<sup>24</sup> Vieira, note 15 at 12-13; Sklar, note 14 at 174; Moley, note 15 at 65-67; Jack Vizzard, SEE NO EVIL: LIFE INSIDE A HOLLYWOOD CENSOR 39 (1970).

<sup>25</sup> Leonard J. Leff & Jerold L. Simmons, THE DAME IN THE KIMONO: HOLLYWOOD, CENSORSHIP, AND THE PRODUCTION CODE FROM THE 1920'S TO THE 1960'S 8 (1990).

*The adoption of the Hays Code and the Production Code Administration*

In 1930, the "Hays Code" was born. It was drafted by Martin Quigley, a respected Catholic layman and longtime activist for decency in films, together with Daniel Lord, a Jesuit priest and dramatics professor. Legendary M-G-M producer Irving Thalberg also had a hand in drafting the Hays Code. Hays promptly embraced this document and the MPPDA adopted it in March, 1930.<sup>26</sup> Despite enforcement efforts by the SRC, the Hays Code was ineffective. Films remained sexy and violent because the SRC had little actual power to change the creative and financial decisions of producers.<sup>27</sup>

During the early 1930's, the Depression struck Hollywood like a freight train. A great many people no longer had any disposable income with which to buy tickets. At the same time, radio cut deeply into the audience for movies.<sup>28</sup> Ticket sales plunged.<sup>29</sup> The large theaters owned by the big studios became white elephants as audiences dwindled. Meanwhile, the studios (as well as theaters) had to make massive capital investments in converting to sound.<sup>30</sup> By 1933, several studios were bankrupt and the industry was in disarray. Informal enforcement of the 1930 Code was futile in such dire economic conditions, because the studios simply could not resist the temptation to produce ever more lurid films that might attract customers into empty theaters.

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<sup>26</sup> Vieira, note 15 at 13-18, and Leff & Simmons, note 25 at 9-12, have good accounts of the complex politics, as well as the colorful personalities, involved in the process of drafting and approving the 1930 Code. The Hays Code, and the official statement of reasons supporting it, are reproduced in Vieira, note 15 at 214-18; Thomas Doherty, *PRE-CODE HOLLYWOOD: SEX, IMMORALITY, AND INSURRECTION IN AMERICAN CINEMA 1930-1934*, 347-64 (1999).

<sup>27</sup> Leff & Simmons, note 25 at 13-54; Moley, note 15 at 68-76; Vieira, note 15 at 18; Doherty, note 26 at 8, 106-07. In 1933, a prominent screenwriter asserted that "the Hays moral code is not even a joke any more; it's just a memory." *Ibid.*

<sup>28</sup> Doherty, note 26 at 34-37.

<sup>29</sup> Ticket sales fell from the astounding level of 100 million tickets weekly to 40 million before levelling off at 60 million. *Id.* at 28.

Meanwhile, a variety of powerful pressures to clean up the movies converged simultaneously. Catholic clerics disillusioned with enforcement of the 1930 Code formed the National Legion of Decency.<sup>31</sup> The Legion credibly threatened nationwide boycotts of films it considered to be indecent or even of all films. A Catholic-led boycott of Philadelphia theaters virtually closed them down. In April, 1934, millions of people (by no means all Catholics) signed pledges to observe the Legion's boycotts.<sup>32</sup> The Motion Picture Research Council released its quasi-scientific study *Our Movie-Made Children*, asserting that films were ruining the morals of young people.<sup>33</sup> State and local censorship was becoming ever more intrusive and a federal censorship regime became a very real possibility.<sup>34</sup>

The industry caved. Hays announced formation of the Production Code Administration (hereinafter referred to as the "PCA") which was designed to enforce the 1930 Code through a rigid system of industry self-censorship. This new scheme went into effect on July 11, 1934.<sup>35</sup> The PCA had absolute power to approve, censor or reject movies made or

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<sup>30</sup> Id. 31-34.

<sup>31</sup> Couvares, note 13 at 599-610, details the long-term involvement of the Catholic church with attempts to control the content of films. Originally, Couvares notes, Hays found the Catholics more congenial than the Protestants because the Catholics opposed censorship legislation and because (unlike the Protestants) they usually spoke with a single voice. However, the relationship became more adversarial in the late 1920's and worsened in the 1930's when the Church decided the Hays Code was not being enforced. Particularly harmful was a tremendous controversy over the film *The Callahans and the Murphys* (1927) which was viewed as disparaging to the Irish as well as to the Church.

<sup>32</sup> Sklar, note 14 at 173; Moley, note 15 at 80-81; Doherty, note 26 at 320-22; Vieira, note 15 at 172.

<sup>33</sup> Doherty, note 26 at 322-23; Sklar, note 14 at 134-40.

<sup>34</sup> Doherty, note 26 at 323-24. In addition, a newly established federal agency, the National Recovery Administration (NRA), threatened to regulate the content of pictures along with all economic aspects of the industry. Id. 323. See text at note 47-49 for further discussion of the NRA.

<sup>35</sup> See Vieira, note 15 at 191-93 for a vivid description of the events surrounding the formation of the PCA.

distributed by the studios.<sup>36</sup> The PCA was headed by one of Hays' employees, a tough and able Catholic layman named Joseph Breen. Breen, who was well versed in all aspects of the motion picture business, ran the PCA from 1934 until 1954.<sup>37</sup> The 1934 announcement launched a system of industry self-censorship that lasted 34 years. During much of that period, producers could do little but accept the PCA's decisions, since it was impossible to get financing for an unapproved project or to release a picture that lacked the PCA seal of approval.<sup>38</sup>

The PCA exercised power over all phases of the film production process. It reviewed the decision to acquire a particular book or stage play for adaptation; it often reviewed the basic story before the script was written; it would scrutinize every word of the script, often demanding deletion of lines, scenes or action. Double entendres or sexual references were ruthlessly pruned. There were further conferences during production so that any changes made in the script, as well as lyrics, costumes and sets, could be observed and passed on. Producers would often shoot "protection shots" of particular scenes in order to have a backup if the censors demanded deletion of the preferred version. The finished version was previewed by the same two staff members who worked on the script and a third member who came to it with a fresh mind. The censorship process often triggered arduous

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<sup>36</sup> The only appeal from the Office's rulings was to the full board of directors of the MPPDA in New York. This group consisted of financial rather than production people who were anxious to avoid offending public tastes. Appeals were rare and seldom successful. Doherty, note 26 at 325-27; Vizzard, note 24 at 54.

<sup>37</sup> Breen's background and personality are discussed in Vizzard, note 24 at 45-56; Moley, note 15 at 79-80, 89-90. Breen had worked for Quigley (co-author of the 1930 Hays Code) before Hays hired him and indeed was something of a double agent. Vizzard claims that Breen, while employed by Hays, played an important role in organizing the Legion of Decency whose boycott threats helped bring on the PCA.

<sup>38</sup> In addition, the studios agreed to pay liquidated damages of \$25,000 if they released a film without a seal. The liquidated damage

and heated negotiations over plot or dialogue or the amount of visible female anatomy.<sup>39</sup>

Breen and his staff reviewed each and every film with what seems to us today an incredible attention to detail. As Gerald Gardner writes:

The Code became the Bible of Joe Breen and his disciples at the Hays office. After reviewing a screenplay for a forthcoming film... Breen would cite the code as holy writ. In its name ministers would be turned into laymen, fade-outs would be turned to dissolves, lines of dialogue would disappear, scenes would be moved from bedrooms to patios, prostitutes would be turned into dancers--all in the name of adherence to the code.<sup>40</sup>

Despite initial resistance, the movie industry came to embrace the Code and the PCA.<sup>41</sup> While producers found it annoying and inconvenient to deal with the censors' demands, the status quo had its advantages. For one thing, if a film came armed with the PCA's seal of approval, state and local censorship boards were likely to leave it alone. The Catholic Legion of Decency, and other religious or secular pressure groups, were unlikely to condemn the film. At least some

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provision agreement was quietly dropped because of antitrust concerns. Moley, note 15 at 83; Vizzard, note 24 at 54.

<sup>39</sup> Moley, note 15 at 92-95.

<sup>40</sup> Gardner, note 23 at xx. Gardner's book consists entirely of correspondence and memoranda from the PCA's files concerning Hollywood's most beloved films. As Gardner puts it, "when one reads the letters from the Hays Office to men like Louis B. Mayer, Jack L. Warner, and Harry Cohn, one can picture these autocrats thrashing about like hooked marlin, as the censors gutted the most dramatic ingredients from their most prized and profitable pictures." Id. xvi. Leff and Simmons' chapter on *Gone with the Wind* (1939) is an amusing and enthralling account of the struggles between Breen and David O. Selznick over countless details in that classic film. Leff & Simmons, note 25 ch. 5.

<sup>41</sup> Odd as it seems to us today, there was relatively little complaint from film critics or the general public about movie censorship. Some speculate that censorship was palatable because people believed that

foreign censorship boards also deferred to the PCA.<sup>42</sup> In short, the Hays Code was great public relations for an industry that badly needed an image facelift. Even more important, the cleaned-up pictures, led by Shirley Temple movies and films based on great novels, also cleaned up at the box office; the studios started earning big profits despite Depression conditions for everyone else.<sup>43</sup> All this insured the stability of the censorship scheme for many years.

*The PCA as a self-regulatory administrative agency*

In many respects, the PCA functioned like a government regulatory agency. A number of important federal agencies, such as the Interstate Commerce Commission, the Federal Trade Commission and the Federal Communications Commission, were created prior to the 1930's. Congress intended these agencies to solve particular economic and social problems that could not be adequately dealt with through the market, the common law, or existing government departments.<sup>44</sup> Under prevailing administrative law theories of the time, the way to solve problems of this sort was by turning them over to experts, granting the experts broad discretion, and shielding the experts from political influence and judicial meddling.<sup>45</sup> The pre-New Deal agencies provided the model to which President Roosevelt and Congress turned to solve the problems of the Great Depression. Under the New Deal, such traditionally market-oriented functions as corporate finance, labor relations, agricultural pricing and production, banking, and many others fell under federal

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the libertinism and money-grubbing of the 1920's had precipitated the Depression. Doherty, note 26 at 47-50; Vizzard, note 24 at 38-39.

<sup>42</sup> Often, Breen's letters simply pointed out the idiosyncratic rules maintained by foreign censorship boards so that scripts could be rewritten before production began.

<sup>43</sup> Doherty, note 26 at 335-36.

<sup>44</sup> See James M. Landis, *THE ADMINISTRATIVE PROCESS* CH. 1 (1938).

<sup>45</sup> See generally Richard B. Stewart, *The Reformation of Administrative Law*, 88 Harv. L. Rev. 1667, 1676-88 (1975), discussing the failure of

government control. Congress launched Social Security and the WPA put millions of people to work.

Shortly before the creation of the PCA, the National Industrial Recovery Act of 1933 (NIRA)<sup>46</sup> placed all of American business (including the movie industry) under the control of a single administrative agency--the National Recovery Administration (NRA).<sup>47</sup> NRA functioned by adopting codes regulating the business practices and labor relations of entire industries. Usually these codes were first negotiated within particular industries and were then rubber-stamped by NRA. Thus the Hays Code and the PCA functioned in a manner similar to a regulatory agency, particularly one adopted under NIRA. While NIRA soon was invalidated by the Supreme Court,<sup>48</sup> the movie industry's production code remained in effect for 34 years.

The PCA that administered the Hays Code was, of course, an instance of private self-regulation rather than government regulation.<sup>49</sup> However, the public-private difference is less sharp than might appear at first glance. Although we imagine that industry always resists government regulation, this is often not the case. Many government

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the "expertise" model to legitimate broad delegations of legislative power to administrative agencies.

<sup>46</sup> 48 Stat. 195.

<sup>47</sup> Films of the time often display the NRA's blue eagle.

<sup>48</sup> *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (NIRA invalid both as an unlawful delegation of legislative power and because it exceed Congress' power under the commerce clause). By this time, NIRA was widely regarded as a cumbersome failure; it probably would have been repealed if the Supreme Court had not invalidated it. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *Stan. L. Rev.* 1189, 1254-57 (1986).

<sup>49</sup> Self-regulatory regimes have been very common in the communications industry. See Angela J. Campbell, *Self-Regulation and the Media*, 51 *Fed. Comm. L. J.* 711 (1999) (evaluating self-regulation of radio, television, comic books, and video games as well as movies); Nina C. Leibman, *LIVING ROOM LECTURES* 105-13 (1995) (self-regulation in television industry). For a discussion of self-regulatory administrative bodies and the role of professionalism in their formation, see generally Jody Freeman, *The Private Role in Public Governance* 79-83, forthcoming *N.Y.U. L. Rev.* (2000).

agencies are created with the enthusiastic support of a particular industry. The industry may seek regulation to bring order to disorderly markets or to limit competition. It may accept regulation to fend off private litigation or to head off an even more intrusive regulatory scheme than the one actually adopted. For example, the FCC was created in 1927 with the enthusiastic backing of the radio industry to bring order out of chaos on the airwaves and to protect the investment of established broadcasters from interlopers.<sup>50</sup>

The movie industry created the PCA for similar reasons.<sup>51</sup> It viewed self regulation as a lesser evil than state, local, and foreign government censorship or boycott threats by the Legion of Decency. In addition, the industry was impelled by more noble concerns of professionalism; many in the business felt a genuine impetus to start putting out better pictures and getting rid of some of the sex and violence typical of the early 1930's. Such pictures might improve the industry's image and bring people back into the theaters. The industry believed that a tightly administered regulatory scheme was the only way to achieve this goal, because unmitigated competition produced a "race to the bottom." In an unregulated environment, studios had an irresistible impulse to release ever more sleazy or violent pictures.<sup>52</sup> This is a perfect example of the sort of market failure that frequently led to the creation of new regulatory agencies.

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<sup>50</sup> Radio Act of 1927, 44 Stat. 1162 (1927); Thomas G. Krattenmacher, COMMUNICATIONS LAW AND POLICY 3-12 (1994).

<sup>51</sup> Obviously, a key element in formation of the PCA was that the industry was oligopolistic; it consisted of a relatively small number of studios, all of which subscribed to the idea. Since the studios also controlled most of the first run theaters, they were able to bring the independents on board as well. In the present environment of weak studios, independently owned theaters, and independent film production, it would be infinitely more difficult to initiate a self-regulatory censorship scheme.

<sup>52</sup> Doherty, note 26, ch. 5 discusses the competition between studios in the early '30's to produce ever more lurid pictures.

Like a government regulatory agency, the PCA was created by and drew its powers from a document of superior authority. The formal decision in 1934 by the MPPDA to launch the PCA delegated regulatory power to that body; the 1930 Hays Code established the policies it was to enforce. Like many administrative agencies, the PCA adopted interpretive rules to supply guidance in areas where the Code was unclear.<sup>53</sup> Like government licensing agencies, the PCA staff reviewed all scripts and negotiated changes with producers.<sup>54</sup> Like an administrative judge, Breen and his successors adjudicated disputes between the staff and producers that had not been resolved through such negotiations.<sup>55</sup> The PCA kept careful records of each of its decisions in order to maintain consistency; thus it used a sort of common-law precedent system in its informal adjudication.<sup>56</sup> An appellate mechanism existed whereby producers could appeal the PCA's rulings (although the right to appeal was seldom exercised and still less often successful).<sup>57</sup> And like government agencies with power to issue licenses, zoning approvals, or cease and desist orders, the PCA had the power of coercion; it enforced its decisions by denying a certificate to unapproved productions. Thus the PCA, a private self-regulatory body,

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<sup>53</sup> See Vieira, note 15 at 219 for a sample of Breen's interpretive rules. See also text at note 73 for treatment of Breen's interpretive rule about divorce.

<sup>54</sup> Indeed, the PCA's functions were much more bureaucratic and intrusive than those carried out by typical state and local government censorship boards. Government boards normally became involved in the censorship process only by viewing completed films and then granting or refusing to grant permits or demanding cuts. See Randall, note 13 at 81-111 for description of the operations of state and local censorship boards.

<sup>55</sup> Breen wrote: "We like to think that the decisions of the Production Code Administration are, in reality, the decisions of a private judicial tribunal, duly instituted and empowered to interpret a set of fundamental laws. These decisions, even as the decisions of public courts, have the force of law for the industry and are carefully considered in adjudicating subsequent cases." Leff & Simmons, note 25 at xiii-xiv.

<sup>56</sup> Vizzard, note 24 at 10.

<sup>57</sup> See note 36.

functioned with all the bureaucratic rigidity and coercive power of a government regulatory agency.

*The Decline and Fall of the Hays Code*

In the 1950's, the Code became steadily less effective. During that decade, the movie industry was losing the audience war to television; movies had to offer something that audiences couldn't see on the small screen. Moreover, foreign films dealing more explicitly with sex were freely exhibited at art theaters without the PCA's seal of approval. In 1952, the Supreme Court invalidated government censorship of movies,<sup>58</sup> thus removing one of the main reasons for the establishment and maintenance of the Code. In 1953, United Artists released Otto Preminger's *The Moon Is Blue* without the PCA's seal;<sup>59</sup> the film did well economically, which shattered the belief that a major production was doomed without the seal. Breen retired in 1954; the new PCA director, a long-time staffer named Geoffrey Shurlock, was less censorious and more flexible than his predecessor.<sup>60</sup> The Code was revamped and liberalized in 1956 and again in 1966,<sup>61</sup> by which time an increasing number of pictures produced by major studios were being

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<sup>58</sup> See note 17. The 1948 *Paramount* antitrust decision which opened up the industry to independent producers and theater owners also weakened the Code structure. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). *Paramount* created new players who might be willing to produce or exhibit films without the PCA seal. Randall, note 13 at 200; Roy Eugene Bates, Note, *Private Censorship of Movies*, 22 Stan. L. Rev. 618, 620 (1970).

<sup>59</sup> Vizzard, note 24 at 151-58; Randall, note 13 at 208-09; Leff & Simmons, note 25, ch. 9. Preminger also directed *The Man with the Golden Arm* (1956) which again was released without the seal and succeeded at the box office.

<sup>60</sup> Shurlock's relaxed attitude triggered a severe schism between the PCA and the Catholic Legion of Decency. Vizzard deals extensively with this conflict. Vizzard, note 24 at 190-264.

<sup>61</sup> Randall, note 13 at 201-04. The 1966 revised code did not contain the language about protecting the sanctity of marriage. Possibly, *Divorce American Style* (1968), discussed in text at notes 105-08, is an example of a film that could be made under the 1966 Code revisions but not under earlier versions.

released without the PCA's seal of approval.<sup>62</sup> The PCA's system of self-censorship lingered on until 1968 when recently appointed industry czar Jack Valenti finally ditched it in frustration.<sup>63</sup> Valenti put in place the ratings system, a descendant of which survives today.<sup>64</sup>

*Divorce and the Hays Code*

Today, the Hays Code, if remembered at all, is associated with the idea that movie crime (unlike the real thing) could never pay. We chuckle at the Code's restrictions on the explicit discussion or depiction of sex or of the absurd degree of pre-marital chastity that the PCA insisted on. Married couples appeared only in separate beds<sup>65</sup> and bathrooms seemed to lack toilets.<sup>66</sup> But the rules prohibiting explicit treatment of sex never prevented the movies from dealing with sex.<sup>67</sup> Things had to be suggested, not spelled out, but everyone understood what was happening. The censors required only that the

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<sup>62</sup> Randall, note 13 at 205 (39 films produced by major studios were released without the seal of approval during a three-year period in the 1960's). According to Randall, id. at 209, from 1960-64 only about 22% of the total number of films exhibited in New York had the PCA seal of approval; however, the PCA maintained that films with the seal accounted for close to 90% of total gross domestic receipts. Foreign films, independent productions, and nudie films were among the many that were never submitted for code approval during the 60's. Sometimes unapproved films were released through subsidiaries of the studios so that everyone could maintain the pretense that the studios still complied with the Code. Vizzard, note 24 at 342.

<sup>63</sup> Vizzard provides a humorous account of the last days of the Code, with particular reference to the treatment of oral sex. Vizzard note 24 at 329-48.

<sup>64</sup> See Richard M. Mosk, *Motion Picture Ratings in the United States*, 15 Cardozo Arts & Ent. L. J. 135 (1997); Sklar, note 14 at 294-97; Doherty, note 26 at 344. In fact various rating systems had long been in effect, some supported by the film industry. Randall, note 13 at 181-98.

<sup>65</sup> The separate bed rule was imposed by the English censors, and the PCA enforced it as an accommodation to its British counterpart. Vizzard note 24 at 114.

<sup>66</sup> For discussion of the toilet rule, see Leff & Simmons, note 25 at 150-51.

<sup>67</sup> The Code provided: "No film shall infer that casual or promiscuous sex relationships are the accepted or common thing. Adultery and illicit sex, sometimes necessary plot material, shall not be explicitly

subject be treated discreetly and that those who engaged in extra-marital sex somehow be punished for it. This was an example of the rule of "compensating values" which was a mainstay of Code enforcement. Under the "compensating values" approach, crime or illicit sex could occur but those who engaged in it had to receive retribution.<sup>68</sup>

Crime and sex, handled with discretion, remained permissible subjects for the movies--how could it be otherwise? But there was a group of subjects that were wholly ruled out as thematic material. As long-time PCA staff member Jack Vizzard put it, "The Code was an instrument designed to present reality on the screen not as it *was*, but as it *should be*. Its purpose was to protect audiences from the reality out of which they entered the theater, and into which they were going to return."<sup>69</sup> The forbidden subjects included abortion, miscegenation, contraception, or homosexuality,<sup>70</sup> as well as divorce. These forbidden themes clearly reflect Catholic teachings--hardly a surprising observation considering the identity of the authors of the Code and the reasons for its adoption.<sup>71</sup>

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treated, nor shall they be justified or made to seem right and permissible."

<sup>68</sup> See Vieira, note 15 at 219 (quoting the Office's annotations relating to compensating moral values); Gardner, note 23 at xviii; Sklar, note 14 at 174; Moley, note 15 at 101; Doherty, note 26 at 11.

<sup>69</sup> Vizzard, note 24 at 20.

<sup>70</sup> For example, the Code provided that "the subject of abortion shall be discouraged, shall never be more than suggested, and when referred to shall be condemned... a story must not indicate that an abortion has been performed. The word 'abortion' shall not be used." Under the 1956 Code revision, abortion could be referred to if clearly condemned. Leibman, note 49 at 98. On the subject of homosexuality in film, see William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy 1880-1946*, 82 Iowa L. Rev. 1007, 1078-80 (1997).

<sup>71</sup> Doherty, note 26 at 6-7; Randall, note 13 at 206-13. Daniel Lord, a Catholic priest and one of the authors of the Hays Code, wrote in a 1931 letter complaining about lax enforcement of the Hays Code: "The stories are now concerned with problems. They discuss morals, *divorce*, free love, unborn children, relationships outside of marriage, single and double standards, the relationship of sex to religion, marriage and its effects upon the freedom of women. *These subjects are*

If a normative position is needed in this article, here's mine: reasonable people can differ about the appropriateness of self-regulatory censorship that is intended to insure discreet, tasteful treatment of themes like sex and violence or to prevent unduly tasteless language. Obviously, the contemporary film rating system is a milder version of industry self-censorship; it is appropriately designed to grade pictures according to the degree of explicit sex, violence, and language. The rating system helps consumers make intelligent choices between films and helps keep children away from inappropriate pictures. But I object to censorship that rules out serious treatment of important issues because a particular religious group wants to keep those issues off the screen. During the years the Code was in effect, film was by far the most important instrumentality of popular culture. Divorce is a common and legal form of human behavior, one which filmmakers are entitled to treat imaginatively. Similarly, audiences are entitled to choose films dealing with this aspect of human relationships.

The ban on serious treatment of divorce themes was not explicit in the Hays Code. It was derived from this language: "the sanctity of the institution of marriage and home shall be upheld." The sanctity of marriage provision was interpreted by the PCA to mean that people normally didn't get divorced in the movies. If absolutely necessary, divorce could occur; under Breen's guideline, divorce was permitted "only for sound reasons, as a last resort, and never lightly or flippantly."<sup>72</sup> As an example of the PCA's attitude toward divorce, consider the comments made in reference to whether a film could be

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*fundamentally dangerous.*" Quoted in Vieira, note 15 at 55 (emphasis added).

adapted from a book called *The Divorce of Marcia Moore*. The PCA strongly disapproved of the project because the book "sets forth the proposition that divorce is the desirable solution for marital maladjustments... This basic concept, coupled with the light attitude toward marriage and its obligations and the acceptance of adultery, all add up to a flagrant violation of the provision of the Code which requires that the sanctity of the institution of marriage should be upheld."<sup>73</sup> Needless to say, the studio abandoned the idea of making a film from this book.

### III. DIVORCE IN THE PRE-PCA ERA

At least some of the unpleasant aspects of marital disintegration and divorce were shown semi- realistically in pre-1934 films. A large number of silent films dealt with issues of marital breakdown, sexual infidelity, and divorce.<sup>74</sup> Early films in the sound era were

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<sup>72</sup> Moley, note 15 at 107. For treatment of divorce on television, see Leibman, note 49 at 106 (under 1962 TV code revision, justified divorce was permissible thematic material).

<sup>73</sup> Letter from Stephen S. Jackson to Harold Melnikes, April 21, 1948. Similarly, in commenting on *The New Divorce*, another picture that was never made, Breen wrote that the "entire dialogue, in which discussion of divorce is treated for comedy, is objectionable, on the ground that it weakens respect for the institution of marriage." Letter from Breen to John Hammell, June 19, 1936. In commenting on *Gentleman's Agreement*, Breen wrote: "It is regrettable that the sympathetic lead in your story should be a divorced woman. We have steadfastly made a practice of urging that such characterizations be omitted whenever possible for the general good and welfare of the industry. Our feeling is based upon the fact that, by having your sympathetic lead a divorced woman, your story inevitably carries the flavor of acceptance and a tacit justification of divorce. We have, of course, steadfastly refused to approve stories which contained an outright justification of divorce, and have endeavored to approve divorce in motion pictures only when it was obtained against the wishes and generally over the objection of the sympathetic lead." Letter from Breen to Darryl Zanuck, March 21, 1947, quoted in Gardner, note 23 at 179. Somehow Zanuck prevailed on this point. Kathy Lacey's prior divorce is discussed freely throughout the film.

<sup>74</sup> Sklar, note 14 at 92-94; Charles Musser, *Divorce, DeMille and the Comedy of Remarriage*, in Kristine Brunovska-Karnick and Henry Jenkins, *CLASSICAL HOLLYWOOD COMEDY* 282-313 (1995). The subject index to the American Film Institute Catalog of Motion Pictures Produced in the United States lists 171 films dealing with divorce from 1911-20 and 182

exceptionally candid about issues relating to gender roles and sexuality whether made before or after adoption of the 1930 Hays Code. Women who engaged in premarital or extramarital sex, or who made use of their sexual powers to get ahead, were not always punished for their misdeeds.<sup>75</sup>

Marital breakdown and divorce appeared frequently in the sound films of the early 30's.<sup>76</sup> In the aptly named *The Divorcee* (1930), for which Norma Shearer won an Academy Award, Jerry and Ted have a love marriage. Ted ruins it with a casual infidelity that Jerry discovers. He assures Jerry that his infidelity meant nothing, but when she reciprocates and tells him it means nothing, he can't tolerate it and walks out--a powerful assault on the double standard. Jerry tells him that "from now on, *you're* the only man in the world my door is closed to."<sup>77</sup>

Ted's desertion is followed by a typical New York collusive divorce.<sup>78</sup> Jerry follows up her threat by becoming a promiscuous party

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films dealing with divorce from 1921-30. In many silent films, particularly those made by Cecil DeMille, divorce followed marital breakdown and was treated as an acceptable, even positive course of action. The spouses sometimes but not always got back together in the end. Ernst Lubitsch's *The Marriage Circle* (1924) is a good example of a divorce for keeps. A married couple, Josef and Mitzi Stock, despise each other. Mitzi carries on an affair with Franz, her best friend's husband. Josef gathers the evidence of her fling and divorces her. Franz goes back to his wife and Mitzi takes up with Franz's business partner. This story would become unthinkable after 1934.

<sup>75</sup> See generally Doherty, note 26; Vieira, note 15. Just a few titles from these refreshingly candid films: *Baby Face* (1933), *Red Headed Woman* (1932), *Blonde Venus* (1932), *A Free Soul* (1931), *Female* (1933), *The Single Standard* (1929).

<sup>76</sup> According to the subject index to the AFI catalogs, note 74, 98 films dealt with divorce from 1931-33 (an average of 33 per year) and 36 dealt with divorce in 1934, the year the PCA came into existence.

<sup>77</sup> The SRC objected to this particular line of dialogue but it stayed in the film. Letter from Jason Joy to Irving Thalberg, March 7, 1930. *The Divorcee* is discussed in Vieira, note 15 at 19. The film was released only a few weeks after adoption of the 1930 Code.

<sup>78</sup> During this era, New York law permitted divorce only upon proof of adultery. As a result, most people who wanted divorce did so through

girl (which doesn't seem to interfere much with her career as a businesswomen). Ted struggles as a journalist, finding little happiness and moving to Paris. Tiring of her glamorous flapper lifestyle, Jerry starts an affair with Paul, an old friend who is trapped in a loveless marriage to Dorothy. Jerry and Paul plan to marry after Paul's divorce. But the need for Hollywood happy endings<sup>79</sup> overtakes this quite realistic post-divorce scenario. Jerry feels it would be wrong to deprive Dorothy of her husband. Overcome by guilt, she breaks it off and travels to Paris to reconcile with Ted.<sup>80</sup>

Despite the happy ending, *The Divorcee* attacked with gusto a good many of the social concerns of the late-twenties, such as the sexual double standard, casual infidelity, and quickie (and fraudulent) divorce under the adultery-only standard followed in New York. The

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default decrees based on perjured testimony and fraudulent posed photographs. Phillips, note 4 at 218. If an adulterous spouse wished to resist another's petition for divorce, the defendant could prove "recrimination," meaning that the plaintiff had also committed adultery. The ironic result was that if both spouses had been unfaithful, they had to stay married to each other! Since Ted and Jerry's divorce was collusive, however, no recrimination defense was offered.

<sup>79</sup> Conceivably, the newly adopted Hays Code influenced the film's ending. Irving Thalberg, one of the drafters of the Code, produced the film. Because the divorced couple reunited, it can be argued that the film managed to navigate around the constraints of the Code.

Another pre-Code divorce/remarriage story is *What Price Hollywood* (1932), the hard-edge precursor for the soggy but better known *A Star is Born* (1937). In the 1932 version, the movie star marries and is divorced (while she's pregnant) by a rich polo player who can't stand her lifestyle. The divorce was interesting and realistic; the softball remarriage ending was not. In the 1937 version, in which the star marries her alcoholic mentor, there's no divorce.

<sup>80</sup> Other pre-Code movies dealing in a candid manner with issues relating to marital disintegration and divorce include *The Possessed* (1931) (lawyer's nasty divorce causes him to reject marriage in future relationships); *Red Headed Woman* 1932 (casual infidelities lead to divorce; bad girl sleeps her way to the top; but the nice people do remarry in the end); *Divorce in the Family* (1932) (harsh effect of mother's remarriage on small child); *Call Her Savage* (1932) (bad girl makes unwise marriage, gets divorced); *A Bill of Divorcement* (1932) (wife gets divorce and remarries after husband has been in mental institution for 15 years); *The Champ* (1931) (divorce leaves washed up

film frankly describes post-divorce promiscuity on the one hand and post-divorce alienation on the other, as well as the economic success of one partner and the economic troubles of the other. This story is especially pointed because of the gender inversion (the woman has an active social life and economic success; the man is alienated and loses his job). The issue of whether marriage should be a loveless lifelong commitment for mutual support (Paul and Dorothy) or a vehicle for happiness, love and fulfillment (Ted and Jerry) is an important subtext of the film--and it offers support for both views. Needless to say, the film doesn't deal with every divorce-related problem; it's convenient that Jerry has no money problems and isn't tied down with children. The Studio Relations Committee expressed little concern with the film in 1930,<sup>81</sup> but when the issue arose of remaking it in 1940, Breen vetoed the idea.<sup>82</sup> This differential treatment of *The Divorcee* clearly indicates the contrasting attitudes toward divorce-oriented themes of the pre- and post-1934 censorship regimes.

Similarly, in *Born To Love* (1931), Doris finds herself pregnant after a fling with Barry, a handsome soldier on leave in London during the War. Thinking Barry is dead, she agrees to marry the aristocratic Wilfred who gives the baby his name. Unexpectedly, Barry returns from the War. Doris allows Wilfred to think (wrongly) she committed adultery with Barry; he divorces her with catastrophic consequences. Wilfred gets exclusive custody of the baby<sup>83</sup> and Doris is thrown out on

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boxer with little kid); *Private Lives* (1931) (divorced couple remarry new spouses but ditch them and run off together).

<sup>81</sup> Letter from Jason Joy to Irving Thalberg, note 77.

<sup>82</sup> Letter from Joseph I. Breen to Val Lewton, March 23, 1940. Breen said that the film could never be approved because it condoned adultery. He also observed that the film had been cut to shreds by state and local censorship boards.

<sup>83</sup> By this time British courts had long abandoned the rule (followed well into the 19<sup>th</sup> century) that the child is the property of the

the street. While the plot of *Born to Love* is creaky and the movie is in no way memorable, the issues it dwells on are genuine. Is marriage for appearances, convenience, support of children, and stability (as Wilfred saw it)? Or is it for love, passion, and fulfillment? When the two visions of marriage conflict, and divorce follows, family law principles that decide property and custody issues according to fault can produce devastatingly unjust results.<sup>84</sup>

Before leaving the wonderful subject of pre-1934 films, we mustn't overlook the delicious Frank Capra comedy *Platinum Blonde* (1931) in which streetwise reporter Stew Smith finds himself married to the gorgeous and super-rich Ann Schuyler. How do the filmmakers deliver Stew out of this ill-starred marriage and into the arms of the equally gorgeous but far more appropriate Gallagher, his reporter buddy? With a divorce? Well, of course!<sup>85</sup>

#### IV. DIVORCE UNDER THE CODE

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father. The custody determination in the film was undoubtedly based on the mother's supposed fault.

<sup>84</sup> For discussion of fault divorce in the movies, see text at notes 145-49. SRC head Jason Joy objected to *Born to Love*. Joy suggested that Doris and Barry be secretly married so their child would be legitimate. However, these objections came after production was nearly completed and they were ignored. Letter from Jason Joy to Charles Rogers, Feb. 13, 1931.

<sup>85</sup> Herrick library files indicate that *Platinum Blonde* was never submitted to the SCA. See SCA memorandum of November 4, 1931. I encountered several other examples of serious pre-PCA films involving divorce. In *The Rich are Always With Us* (1932), Caroline is a wealthy woman betrayed by her husband Greg with a younger woman. After their divorce, Caroline continues to help Greg but she marries Julian who has always loved her. In *Chained* (1934), there are two divorces. Richard Field is a rich older man with a younger mistress, Diane Lovering. Originally Mrs. Field refuses to give Richard a divorce so he can marry Diane, but she finally relents and divorces him in Reno. Later, Richard agrees to a second divorce so Diane can marry her new true love, Mike Bradley. This film was released in August, 1934, but the Herrick library has no file for the film. In *Reno* (1930), Nevada divorces are treated as routine human behavior. The divorce of the virtuous Felicia and the contemptible Alex turns into a dirty fight over which of them committed adultery. If Felicia is at fault, she loses custody of her little boy. However, Alex is killed in a car crash before the divorce decree is entered.

Surprisingly, two very early films of the PCA era dealt candidly with divorce issues--*One More River* (1934) and *The Gay Divorcee* (1934); they were the first and virtually the last films to do so for three decades.

*One More River*, a film directed by James Whale and based on a contemporary book by John Galsworthy, proved to be one of the best divorce pictures of all time. In this film, set in England around 1930, Lady Claire Corven leaves her sadistic husband Sir Gerald in Ceylon because of physical abuse. She cannot divorce him because she cannot prove he committed adultery.<sup>86</sup> She returns to London and lives a celibate existence although she spends a great deal of time with Tony Croom who adores her. Tony is charming but has neither means nor a job. Gerald returns to win Claire back; when she spurns him, he rapes her. Gerald hires a detective who trails Claire and Tony and gathers a good deal of evidence that they spent a lot of time together under suspicious circumstances. Gerald then sues Claire for divorce, naming Tony as co-respondent.

Gerald and Claire square off in a crackling divorce trial--perhaps the best ever done in the movies. Strangely, Claire will not testify about the spousal abuse that drove her away from Gerald. She also declines to testify that Gerald raped her in London, even after he brings up the incident to show they were "reunited" in marriage. Evidently, Claire is constrained by her own shame as well as fear of bad publicity--very real concerns for prominent people enmeshed in divorce during the fault era. The jury finds Claire and Tony guilty of adultery and grants Gerald a divorce. At the end, it appears Claire

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<sup>86</sup> The 1923 reform in British divorce law left adultery as the sole ground, although it at least equalized the positions of men and women. Not until 1937 were the grounds extended to desertion, cruelty, and

and Tony will wed. In letters written both before and after the PCA scheme came into effect, Breen approved this film after requiring that the sadism element be greatly downplayed.<sup>87</sup> But the Catholic Legion of Decency condemned the film because of its explicit and thorough treatment of divorce. Breen apologized to Carl Laemmle about this result, since the *raison d'etre* of the PCA was to prevent either the Church or government censors from interfering with distribution of films that the PCA had certified.<sup>88</sup> After *One More River*, Breen never again made the mistake taking divorce lightly.

*The Gay Divorcee* examined and effectively spoofed fault-based divorce. Primarily a vehicle for the heavenly dancing of Fred Astaire and Ginger Rogers, the film involved an inept London solicitor trying to engineer a collusive divorce. Mimi Glossop fakes an adulterous liaison so she can shed her boring husband Cyril who won't agree to divorce.<sup>89</sup> The scheme gets hopelessly snarled, as Mimi mistakes Guy for a professional gigolo. The story does not meet the requirements of Breen's guideline: Mimi and Cyril's marriage was not bad enough to justify divorce. It involves collusive divorce, which was itself a forbidden subject.<sup>90</sup> Moreover, Mimi successfully ditches Cyril and becomes free to marry Guy. Contrary to the "compensating values" rule, nobody is punished for disregarding the sanctity of marriage.<sup>91</sup> *The Gay*

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insanity as well as rape, sodomy, or bestiality. See Phillips, note 4 at 191-93.

<sup>87</sup> Letters from Breen to Harry Zehner, April 10, 1934 and July 27, 1934.

<sup>88</sup> Letter from Breen to Carl Laemmle, August 17, 1934. See Vieira, note 15 at 193.

<sup>89</sup> Of course, this premise is absurd. To get a divorce, Mimi needs to show that Cyril was at fault, not be at fault herself.

<sup>90</sup> See correspondence relating to *Born to Love*, letter from Joseph I. Breen to Merian Cooper, April 26, 1934 (collusive divorce is an extremely dangerous subject). Breen asked that the producer tone down any suggestion in *The Gay Divorcee* that collusive divorce is regularly employed. He also objected to registration in hotels under fake names.

<sup>91</sup> In a letter to Pandro Berman, June 26, 1934, James Wingate wrote that he was very concerned over "the suitability of picturizing this story

*Divorcee* was released in October, 1934. According to various memoranda from the SRC to the producers, the censors were troubled by the story line of the film, but they lacked power to impose their will. The production of the film was essentially completed before the PCA came into existence in July, 1934. Evidently, it got in under the wire, although Hays persuaded the producers to change the title from *The Gay Divorce* (the name of the stage play from which it was derived) to *The Gay Divorcee*, based on some peculiar notion that divorce couldn't be gay even if the divorced spouse was.<sup>92</sup>

After *One More River* and *The Gay Divorcee*, the curtain came down on the candid treatment of divorce in the movies. Under PCA censorship, when marriages got into trouble, the problems were usually repaired short of divorce.<sup>93</sup> Divorced couples reunited through remarriage in the final reel, regardless of the bitterness of their divorce.<sup>94</sup> Indeed,

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at the present time... I am of the opinion that from the standpoint of industry policy, official censorship, and the criticism which is at present being levelled against the industry, that your company should give very careful consideration to this matter before committing yourselves to further considerable outlay of money." Nevertheless, the Office cleared the picture in September, 1934. Letter from Joseph I. Breen to B. B. Kahane, Sept. 22, 1934.

<sup>92</sup> See memorandum of Sept. 4, 1934 from J. Kelly to Joseph I. Breen.

<sup>93</sup> Unhappy couples considering divorce usually pulled back from the brink. This was true both in serious dramas like *Payment on Demand* (1951), *Penny Serenade* (1941), *Girl from Tenth Avenue* (1935), or *The Marrying Kind* (1952) or in comedies such as *Adam's Rib* (1949), *Two for the Road* (1967), *Love Crazy* (1941), *Lover Come Back* (1946), *I Love You Again* (1940), or *Our Little Girl* (1935). *Payment on Demand* contains very candid material about divorce; one older divorced woman (a minor character in the film) is condemned to a life of loneliness, having to pay young men to stay with her. The protagonists, however, get back together before their divorce becomes final despite the bitterness of the divorce--an ending that strikes a false note in an otherwise excellent picture. The PCA files suggest that the reconciliation ending was necessary to appease the censors. A plot summary submitted by the studio April 13, 1950, indicated no reconciliation, but the final version contains one.

<sup>94</sup> In *Mr. Skeffington* (1944), the marriage for convenience of Fanny Trellis and Job Skeffington breaks up after mutual infidelity. The Production Office required the adultery material to be downplayed. It did not object to Skeffington's divorce, but did object to the divorce of another character in the film. Letters from Breen to Jack L.

during the Code era, relatively few films even alluded to the subject of divorce.<sup>95</sup>

The most prominent films in the PCA era that touched on divorce were screwball romantic comedies (some of them true classics) in which wealthy, childless couples encounter some marital troubles and get divorced with nobody feeling too guilty about it. They always get back together at the end,<sup>96</sup> thus striking a blow for the "sanctity of marriage." These films wildly misrepresent the reality of divorce. Needless to say, most couples that get divorced have very serious marital troubles, do not remarry, encounter complex emotional and social problems before, during and after their divorce, are anything but wealthy, suffer economic troubles after divorce and have difficulty paying for their lawyers. They find the rules and institutions of family law perverse and frustrating. They have children who often get badly bruised before things sort themselves out.

The best and funniest example of the sort of divorce/remarriage story tolerated by the censors is *The Awful Truth* (1937). Lucy and Jerry Warriner decide to get divorced after each justifiably suspects the other of infidelity. We actually see a bit of the divorce proceedings which include a wonderful spoof on custody disputes--the

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Warner, June 2, 1943, June 28, 1943. The film includes a New York collusive divorce and an overgenerous marriage settlement. While the divorce themes were handled realistically in *Mr. Skeffington*, the filmmakers felt compelled to bring Fanny and Job back together in a bittersweet ending.

<sup>95</sup> According to the subject index to the AFI catalog, note 75, divorce was a subject in 34 American films per year from 1931 to 1934. The average fell to 21 per year in the years 1935-40 and 11 per year in the years 1941 to 1950. The index to the 1960's catalogue shows only 5 films per year in the years 1960-67, but that catalog appears to have a less inclusive index than the catalogs for the 1930's and 1940's. The AFI has yet to release catalogs for the 1950's and 1970's.

<sup>96</sup> Stanley Cavell aptly referred to these films as the genre of remarriage. *PURSUITS OF HAPPINESS: THE HOLLYWOOD COMEDY OF REMARRIAGE* (1981).

judge has to decide who gets custody of their dog, Mr. Smith.<sup>97</sup> Lucy and Jerry conduct some rather fitful romances during the 90-day waiting period before their divorce becomes final; each does a fine job of sabotaging the other's affairs. In the end, of course, they get back together just as midnight strikes on the 90th day.<sup>98</sup>

When a story absolutely required that a marriage be terminated for good, screenwriters sometimes turned to annulments rather than divorce. In the beloved classic *It Happened One Night* (1934), an annulment dispenses with a former spouse. In another great romantic comedy, *My Favorite Wife* (1940), Ellen Arden is shipwrecked and disappears for seven years. Her husband Nick finally has her declared dead and marries Bianca. On that very day, Ellen returns and starts her campaign to get Nick back. She succeeds, of course, and Nick and Bianca's marriage is annulled.<sup>99</sup>

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<sup>97</sup> Breen objected to any implication that the divorce was collusive. See letter from Breen to Harry Cohn, March 1, 1937. The Office did not object to the movie overall since it contained no reflection on the institution of marriage because of the good spirit of the picture. Memo of Karl Lischka, Sept. 27, 1937.

<sup>98</sup> Variations of the divorce-remarriage story line appear in *Break of Hearts* (1935), *Bluebeard's Eighth Wife* (1938), *The Philadelphia Story* (1940), *He Married His Wife* (1940), *His Girl Friday* (1940), *I Want a Divorce* (1940), *The Palm Beach Story* (1942), *Divorce* (1945), *Lover Come Back* (1946), *Let's Make It Legal* (1951), *Phffft!* (1954), and *The Parent Trap* (1961). *Divorce* is noteworthy for its preachiness. From the opening crawl to the end, everybody denounces divorce as an unmitigated evil. Needless to say, the PCA had no problems with this film.

<sup>99</sup> In *Trouble Along the Way* (1953), a marriage is terminated by annulment after the wife is caught having an affair--even though they've been married for years and have a child! The Production Office had objected to a divorce so the writers evidently substituted an annulment. Letter from Breen to J. L. Warner, May 7, 1952. Similarly, *The Divorce of Lady X*, a British product, manages to get a married woman together with a barrister who specializes in divorce cases because, it turns out, she was never married in the first place. In *The Great Lie* (1941), a man unwisely marries a bad woman whose divorce is not yet final; the way is cleared for him to marry the good woman when the first marriage is annulled.

Another alternative is to kill unwanted spouses or get them to commit suicide.<sup>100</sup> The censors had no problem with murdering a spouse, provided that compensating values were observed and the killers were suitably punished.<sup>101</sup> We find spousal murder in such classic tales as *Double Indemnity* (1944), *The Paradine Case* (1947), *Dangerous* (1935) or *The Postman Always Rings Twice* (1946). Bad marriages are terminated by death more often than by divorce.<sup>102</sup> In a few cases, where the storyline required it, characters were divorced in the past and do not remarry, but as little as possible is said about their divorces.<sup>103</sup>

*The Women* (1939) pushed the Code's constraints to the limit. In this wonderfully bitchy romantic comedy, Mary and Stephen get back together in the end, thus protecting the sanctity of marriage and apparently appeasing the censors. However, many divorce issues are treated candidly. A child has difficulties with her new stepmother, adultery abounds, and there are several divorces following which the spouses don't get back together. *The Women* has long scenes on a ranch in Reno where women from New York (who don't want to deal with fault-based divorce) travel to live for six weeks and get their divorces by consent. Mostly, life in Reno seems a pleasant vacation in which women

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<sup>100</sup> Suicide dispenses with unwanted spouses in *History Is Made at Night* (1937) and *A Star is Born* (1937). However, reflecting Catholic dogma, suicide itself became a suspect subject. See Leff & Simmons, note 25 at 179.

<sup>101</sup> See text at note 67 for discussion of compensating values.

<sup>102</sup> *Back Street* (1932, 1941, and 1961) was the oft-made other-woman soap in which it was necessary to kill the unhappily married couple rather than let them get divorced. In *Beyond the Forest* (1949), Rosa Moline frantically tries to escape her marriage to a stodgy small town doctor. Her infidelity, of course, is punished by death. Similarly, in *The Letter* (1940), Leslie Hammond suffers capital punishment for her infidelity.

<sup>103</sup> In *A Double Life* (1947), famous actor Tony John and actress Brita got divorced because his dark moods when playing tragedy became unbearable. The couple remain close friends and continue to act together. Similarly, *My Man Godfrey* (1936) involves a divorced and embittered character but we never get the details. *Gentleman's Agreement* (1947)

get over their marriage and sometimes hook up with new partners.<sup>104</sup>

Breen's guidelines allowed for divorce in extreme cases.<sup>105</sup> In a few films, couples with truly dysfunctional marriages were allowed to get divorced; in line with the theory of compensating values, the guilty party was condemned to loneliness and disgrace. Thus, in *Dodsworth* (1936), Sam and Fran go to Europe after Sam sells his business. Sam is the typical American abroad, full of boyish enthusiasm, and endlessly patient and protective of Fran. Fran, portrayed as a snobbish and superficial twit, is obsessed with growing old and suffers a midlife crisis. After a couple of affairs with dashing Europeans, Fran demands a divorce and Sam agrees. For such perfidious behavior, of course, Fran is condemned to a life of disgrace and loneliness, while Sam finds the woman of his dreams. The film was adapted from a novel by Sinclair Lewis and a successful stage play; the story just wouldn't work without the divorce.<sup>106</sup> In a modest number of other films, Breen's guidelines allowed couples to get a divorce, usually because one spouse was some sort of crook or shrewish

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is an exception. A prior divorce is treated candidly despite Breen's objection. See note 73, *supra*.

<sup>104</sup> The film had considerable difficulty in getting approved. Breen originally objected to the idea of adapting the stage play because it contained too much marital infidelity. Breen did not object to the divorce between Mary and Stephen since it occurred because of Stephen's adultery. It was essential that Crystal (Stephen's love interest) be punished for breaking up the marriage; Breen also insisted that Mary's mother (who advised her to go slow on the divorce) not appear to condone adultery. Letters from Breen to S. J. Briskin, January 8, 1937; to John Hammell, March 18, 1937; to Louis B. Mayer, October 11, 1938 and April 21, 1939.

<sup>105</sup> See text at note 72. Indeed, the only film I encountered which seems to violate Breen's guideline is the light-hearted musical *Alexander's Ragtime Band* (1938) which included a friendly divorce so that a singer could marry her long-time love. Exactly how this one got by Breen is unclear, but the file indicates that the PCA raised no objections to the divorce.

<sup>106</sup> The PCA approved *Dodsworth* but required that the adultery themes be muted. Letter from Breen to Samuel Goldwyn, May 23, 1936.

bitch<sup>107</sup> or because of adultery.<sup>108</sup> Normally, the guilty spouse suffered severe retribution.

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<sup>107</sup> *In Name Only* (1939) involves a loveless marriage between Alec Walker and his bitchy, incredibly manipulative wife Maida. Maida wins the early rounds, but Alec is finally allowed to dump her and find true love. Breen objected to the adultery themes in this film which, he felt, undermined the institution of marriage, but the film was finally approved after the adultery was toned down. See letter from Breen to Louis B. Mayer, March 12, 1936; Breen to J. R. McDonough, June 6, 1938; Production Office memo of July 7, 1938. Similarly, in *Craig's Wife* (1936), Walter is allowed to leave his ghastly wife Harriet, although the word divorce is never uttered. In *Mannequin* (1938), Jessica manages to divorce her husband Eddie, a complete heel, who is condemned to a life of wretchedness. The PCA had no problem with *Mannequin*, asking only for minor dialogue changes. In *The Goddess* (1958), a dysfunctional movie star ditches two husbands, but we never get the details. In *Our Wife* (1941), Jerry's divorce from Babe is allowed to become final so he can marry Susan, but Babe was a lying, manipulative bitch who had no friends. It took eight years of negotiations between the producers and the PCA before this borderline divorce film got made and the plot was radically changed along the way. Originally Breen nixed the film as a travesty of marriage. See letters from Breen to Harry Cohn, September 8, 1938, October 19, 1938, and July 17, 1940. In *I Want a Divorce* (1940), the protagonists divorce but get back together; another couple stays divorced but the wife who instigated it is miserable and lonely. She ultimately commits suicide when her ex remarries. This film (which contains a great deal of explicit preaching against divorce) had difficulty getting approved until the script was cleaned up. Letters from Breen to Melville Shyer (June 15, 1938) and Ben N. Judell (August 4, 1938).

<sup>108</sup> In *Daisy Kenyon* (1947), Dan, a decent fellow and conscientious lawyer stuck in a loveless marriage to Lucille, gets dumped for adultery. In the end, Dan loses both his girlfriend Daisy, his children, his marriage, and his law practice. Breen compelled the producers to downplay the adultery and also insisted that the ending hold out at least a dim hope that Dan and Lucille might reconcile. Letter from Breen to Jason Joy, March 12, 1947. In the noir classic *Mildred Pierce* (1945), Mildred and Bert get divorced as a consequence of adultery and incompatibility, but the end of the picture at least hints that they may get back together again. There was so much kinky sexual behavior in this film (adapted from a novel by James M. Cain) that the censors concentrated on other elements and the divorce slipped through unscathed. See letters from Breen to J. L. Warner, February 2, 1944 and February 22, 1944. In *Stella Dallas* (1937), the terribly mismatched and obviously unfaithful spouses finally get a divorce which Stella agrees to only because it's good for her daughter. She is left alone and never sees her daughter again. The Office ruled that the divorce was acceptably motivated. Memorandum from Karl Lischka, July 1, 1937. In *Child of Divorce* (1946), the marriage of Ray and Joan breaks up over Joan's adultery. Both spouses remarry. Their little girl Bobbi is crushed by these events and winds up in boarding school. Thus retribution for the sins of the parents was visited on the child. This film passed PCA screening with flying colors.

As the Code restraints finally loosened in the 1960's,<sup>109</sup> more candid treatment of divorce themes crept back on the screen. In 1967, Bud Yorkin and Norman Lear's path breaking comedy *Divorce American Style* probed numerous relevant themes relating to marriage breakdown and divorce.<sup>110</sup> The marriage of Richard and Barbara Harmon has disintegrated badly; they simply can't stand each other and bicker constantly. He pays no attention to her and is preoccupied with material things. She resents her subordinate role. Ultimately Richard leaves with disastrous consequences. He winds up with \$87 per week and none of the community property. Barbara stays in the house and maintains her comfortable life style without working. Richard winds up in a small apartment and drives a VW bug.<sup>111</sup> The movie has an excellent treatment of the sad plight of the non-custodial father grappling with his visitations. It also deals candidly with problems of post-marriage relationships and dating.

Another divorced couple, the Downs, who are in a similar situation, become entangled with the Harmons. Nelson Downs is frantically trying to marry off his ex-wife (hopefully to Richard) to get out from under his alimony. All ends happily, of course, as Richard and Barbara get back together seconds before their divorce becomes final. This traditional happy ending belied the comic reality of the rest of the film which effectively critiqued divorce lawyers and

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<sup>109</sup> See text at notes 61-62.

<sup>110</sup> The Production Office expressed no concern with the film except it found some dialogue too sexy. Letters from Geoffrey Shurlock to M. J. Frankovich, March 10 and 23, 1966. *Marriage on the Rocks* (1965), a lame divorce-remarriage comedy, was a precursor to *Divorce American Style*.

<sup>111</sup> Needless to say, this sort of result was the rare exception; far more often, divorce was and is ruinous for the woman who had been a stay-at-home wife.

family law and dealt honestly with the problems of marital breakdown and post-separation lifestyles.<sup>112</sup>

#### V. DIVORCE RETURNS TO THE SCREEN

When Valenti abandoned the Code in 1968, film makers were free for the first time since the silent era to deal with divorce in any way they chose. In the late 1960's and 1970's, divorce themes began appearing in American films, but it took ten years before the subject was treated seriously and in depth.<sup>113</sup> While American movies mostly steered clear of the subject, the Swedish film *Scenes from a Marriage* (1973) provided a probing look at divorce. This film, adapted by Ingmar Bergman from a six-hour television series, unsparingly examined the failed marriage of Marianne and Johan.<sup>114</sup> Marianne is a family lawyer, Johan an apparently successful academic scientist. Everyone thinks they are the ideal married couple until Johan announces his departure in a devastating and unforgettable scene. He has fallen in love with Paula, a much younger woman, and he is determined to cast aside all the boring routines and constraints of his passion-less marriage.

Marianne and Johan meet again and again, over the years, sometimes deciding to go to bed together, sometimes fighting bitterly.

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<sup>112</sup> The brilliant comedy *The Odd Couple* (1968) touched on the personal trauma of divorce. Felix is suicidal after his wife kicks him out. He is unable to deal with dating. Oscar is totally disorganized personally and economically; he can't keep up with his alimony and spousal support obligations despite being a highly paid sportswriter. Both men suffer from separation from their children (Oscar never sees his, Felix can't see his enough). And they do not get back together with their wives by the end of the film.

<sup>113</sup> A 1978 article about the use of film to counsel children whose parents had divorced could list no American full-length feature films available for rental involving divorce and children. Edward A. Mason, *The Children of Separation and Divorce*, 11 *Sightlines* 15 (Spring, 1978). Mason found only the Swedish film *Scenes from a Marriage* (1973), in which the children are referred to but never shown.

<sup>114</sup> The film won numerous best foreign film awards; Liv Ullmann, who is radiant in her portrayal of Marianne, won several best actress awards.

These scenes chronicle Marianne's depression and recovery and Johan's decline. Ultimately, they wind up as good friends. The couple has two daughters, whom Johan never sees, but the children are marginal; they never appear on camera. A few other characters appear, bringing into focus their own disastrous marriages, but Bergman concentrates heavily on Johan and Marianne. They are on the screen, mostly talking, for virtually the entire three-hour film. As a window into the psychology of marital breakdown and divorce, and the problems that follow in the wake of divorce, *Scenes from a Marriage* sets a standard that has yet to be met by any other film. It stands alone.

Some American post-Code films of the 1970's dealt with divorce-related subjects. While these films were more sexually explicit than their Hays Code predecessors, they mostly adhered to the remarriage in the end convention.<sup>115</sup> In *Network* (1976), Max Schumacher leaves his wife Caroline for the much younger and more glamorous Diana Christensen; Caroline falls into a deep depression. However, Schumacher sees the light and returns to Caroline in the end. Similarly, in *Blume in Love* (1973), family lawyer Stephen Blume has an affair and is kicked out by his wife Nina who divorces him. The rest of the movie concerns Blume's efforts to get rid of Nina's new boyfriend and get her back.<sup>116</sup> A few post-Code films actually involved divorces in which people got and stayed divorced. For example, a film geek in Woody Allen's *Play It*

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<sup>115</sup> Of course, this familiar plot line is also useful in terms of narrative and denouement entirely aside from censorship; it provides the happy ending that sends audiences away smiling.

<sup>116</sup> He succeeds after an extremely problematic scene in which he rapes her. Similarly, in *I Will I Will...for Now* (1976), a divorced couple gets back together, although they don't actually remarry (they are getting by on a long-term contract).

*Again, Sam* (1972) struggles with meeting women after his wife ditches him (although she tells him not to take it personally).<sup>117</sup>

In the late 1970's, filmmakers suddenly discovered the potential for serious stories centering on divorce. In addition to *Kramer vs. Kramer*, which is discussed in detail below,<sup>118</sup> numerous other memorable films premised their stories on marital breakups. In *An Unmarried Woman* (1978), the apparently happy marriage of Erica and Martin disintegrates when Martin announces his affair. After some false starts, Erica hooks up with Saul, an abstract artist. In a refreshing departure from the divorce/remarriage convention often demanded by the Code or by the need for a happy ending, Erica refuses to take Martin back. Erica and Martin's 15- year old daughter Patti struggles with her relationship to her father and to Saul. Erica remains in her gorgeous New York apartment despite holding a low-paying art gallery job; Martin seems to have plenty of money and happily uses it to support everyone in the style to which they've become accustomed. Nevertheless, Erica's struggle to find herself after the divorce is convincingly executed and the picture is fondly remembered.

Also noteworthy is Woody Allen's masterful comedy *Manhattan* (1978), in which Isaac Davis is dumped by Jill who has become a lesbian and writes a best-selling book about their relationship. Isaac is a mess; he quits his job without knowing what to do next. He's 42 and

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<sup>117</sup> In *Petulia* (1968), a divorced doctor struggles with relationships and what to do with the kids on weekends. Two nice but hopelessly mismatched people finally get divorced in *The Way We Were* (1972). In *Butley* (1974), a repellent college professor is dumped by his wife for good. David, the male lead in *Alice Doesn't Live Here Anymore* (1974), is divorced, has lost his kids, but moves on to a new and better relationship.

<sup>118</sup> See text at notes 124-77.

having an affair with Tracy who is 17 but far more practical and grounded than he is.<sup>119</sup>

These late-70's-early 80's films about divorce<sup>120</sup> usually involve people who remain as affluent after their divorces as they were before.<sup>121</sup> However, these films depict very well the hurt of the betrayed spouse and the children as well as the post-divorce life changes and new relationships that are the inevitable aftermath of divorce. At least some of the films take their cue from the no-fault divorce laws which were then sweeping the country; they treat both spouses sympathetically, not blaming the spouse whose affair or departure precipitated the end of a loveless marriage.<sup>122</sup>

#### VI. INGREDIENTS OF A CLASSIC DIVORCE MOVIE

When we've seen a good realistic film, we understand other people and our world a little better than we did before.<sup>123</sup> A classic realistic

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<sup>119</sup> One year before, in *Interiors* (1978), Woody Allen treated the divorce of two older adults in a memorable and deeply affecting manner. Arthur dumps his gloomy wife Eve who falls into an ultimately fatal depression. He manages to move on to a much better relationship. The film movingly explores the effect of the breakup on Arthur and Eve's adult children.

<sup>120</sup> A large numbers of films dealt candidly with divorce-related issues during this period. Some noteworthy examples are *Shoot the Moon* (1982); *The Seduction of Joe Tynan* (1979); *Starting Over* (1979); *Table for Five* (1983); *Author! Author!* (1982); *Twice in a Lifetime* (1985); *Rich Kids* (1979); *Falling in Love* (1984).

<sup>121</sup> Isaac Davis in *Manhattan* is definitely the exception.

<sup>122</sup> See Thomas Deegan, *No-Fault Divorce Films: Hollywood's Changing Morality*, 15 *Cineaste* 24 (1986).

<sup>123</sup> This essay takes a realistic critical stance toward film. In my view, a good dramatic film illuminates reality in an imaginative way. The more insight a dramatic film displays about human behavior, human relationships, and human institutions, the better the film. For discussion of realist film theory, see J. Dudley Andrew, *THE MAJOR FILM THEORIES* 104-78 (London: Oxford Univ. Press, 1976) (theories of Bazin and Kracauer); Anthony Chase, *Review Essay*, 9 *Cardozo Studies in Law & Lit.* 107, 116-17, 131-32 (Spr./Sum. 1997) (a good realistic film, viewed in its entirety and in an aesthetic context, shows things as they really are). Of course, feature films are intended as entertainment, not as tutorials or as documentaries; their stories always involve inventions and other divergence from historic accounts or from precise representations of reality. See, e.g., ROBERT A. ROSENSTONE, *VISIONS OF THE PAST: THE CHALLENGE OF FILM TO OUR IDEA OF HISTORY* ch. 1 and 2 (1995) (stressing

picture about the process of marital disintegration and divorce should, like any other picture, be based on a strong story and feature empathetic characters. It should treat both spouses with understanding and insight; neither should be perfect but neither should be demons. In addition, I believe the film should engage seriously most of the following issues:

- The reasons for the fundamental breakdown of the marital relationship, including treatment of gender issues.
- The economic aspects of splitting one household into two.
- The effect of the divorce on children.
- Single parenthood and non-custodial parenthood.
- Social and relationship problems encountered by newly-divorced spouses.
- Perverse and outdated family law doctrines.
- The legal process of divorce.
- The problems of lawyer-client relationships in family law.

*Kramer vs. Kramer--the Book and the Film.*

While several films of the post-Code era movingly described the emotional upheavals of divorce, particularly the post-divorce relationship problems of the spouses, only *Kramer vs. Kramer* tackled each of these issues. The film was a true breakthrough and deserves to be labelled as a classic. *Kramer* lit the way for many of films and television shows of the last twenty years that grapple forthrightly with the human drama of divorce as well as with the legal institutions and processes of family law.

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that a "film is not a book"); Alan K. Rostron, Book Review, 86 Calif. Rev. 211, 235 (1998). Nevertheless, I believe that a good film serves to illuminate human personality, relationships, and institutions--not,

*Kramer* was written and directed by Robert Benton, based on a low-key but deeply felt novel by Avery Corman.<sup>124</sup> It has superb photography, music<sup>125</sup> and acting, compelling characters, meticulous attention to detail, and an engaging story line. It deservedly won the Academy's Best Picture Award in 1979.<sup>126</sup>

Ted Kramer (Dustin Hoffman) works for an advertising agency and is deeply preoccupied with career advancement. He pays little attention to his wife Joanna (Meryl Streep) who stays at home raising their six-year old, Billy (Justin Henry).<sup>127</sup> Joanna wants to leave the home and work but Ted won't hear of it. After kissing the sleeping Billy goodbye, Joanna prepares to walk out. Glowing with pride over a big promotion at work, Ted returns before she makes her escape and tries to stop her. Joanna wrenches loose and flees terrified into the night.

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of course in a literal or documentary way, but in an imaginative and enlightening way.

<sup>124</sup> *KRAMER VERSUS KRAMER: A NOVEL* (1977). The Village Voice said of the book that "with its concern with revising traditional family roles, [it is] the most topical love story of the decade." Sept. 5, 1977, p. 43. Christopher Lehmann-Haupt wrote in the New York Times: "It poses a profoundly pathetic dilemma when Joanna tries to break them up, and I was torn to pieces by it, enjoying it every page of the way." Oct. 7, 1977, C29.

<sup>125</sup> Vivaldi's music is used throughout the film and somehow seems utterly appropriate.

<sup>126</sup> Dustin Hoffman received the Oscar for best actor, Robert Benton for best director, Meryl Streep for best supporting actress, and Robert Benton for best writing of a screenplay adapted from another medium. The film also received nominations for best cinematography (Nestor Almendros), best editing (Gerald B. Greenberg), best supporting actor (Justin Henry), and best supporting actress (Jane Alexander). The film received numerous other awards. See Internet Movie Data Base for *Kramer vs. Kramer* ([www.us.imdb.com](http://www.us.imdb.com)). The film grossed a highly respectable \$106 million. Ibid. In winning the best film accolade, *Kramer* defeated a group of excellent and memorable 1979 films: *All That Jazz*, *Apocalypse Now*, *Breaking Away*, and *Norma Rae*. *Manhattan* was not even nominated.

<sup>127</sup> Billy is younger in the book (he's 4 when Joanna leaves, 5 when the custody fight occurs). Thus in the book the issues of childcare are more severe; in the film, Billy goes to school. Making Billy a bit older was probably necessary for dramatic reasons; a much younger child

Ted must learn to become a single parent and after some humorous disasters in the kitchen, he gets pretty good at it. Indeed, Ted and Billy form a close and loving bond. Ted's priorities no longer are centered on the workplace; instead work becomes the means to support his little family. Ted forms a close and supportive friendship with Margaret (Jane Alexander), also a single parent and former friend of Joanna's. One day at the playground, Billy falls from the bars while holding a sharp toy and cuts himself badly; Ted has to rush him to the hospital.

A year and a half after her abrupt departure, Joanna surfaces and she wants Billy back. Ted and his lawyer decide to fight the custody issue. Meanwhile, the problems of single-parenthood conflict with the needs of Ted's employer; after a series of incidents in which he misses important meetings, Ted is fired. In utter desperation, the day before Christmas, he lands a new (and much less desirable) job.

The highly adversarial custody hearing is vicious. Joanna wins; Judge Atkins opts for motherhood, pure and simple. In a heartrending scene, Ted prepares Billy for the switch in custody but, at the very end, Joanna decides not to take Billy home. She says Billy is already home--with Ted. Exactly why Joanna has this epiphany after making such a huge emotional and financial investment in the litigation remains unclear.<sup>128</sup> The balance of this paper discusses the ways in which *Kramer vs. Kramer* addresses each of the elements that I claim are necessary for a film to be a classic treatment of divorce.

*Kramer vs. Kramer and the Elements of a Classic Divorce Film*

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actor could not have played the role with the range Justin Henry gave it.

<sup>128</sup> In the book, Joanna claims she just can't handle all the responsibility for raising Billy after learning about everything Ted has to do. Book, 229-31.

*The reasons for the fundamental breakdown of the marital relationship, including treatment of gender issues.* Divorce typically occurs after a lengthy process of marital disintegration in which one or both partners become progressively more estranged from their marriage. Unlike the couples who impulsively split up in the romantic comedies of the 1930's, the decision to get divorced is seldom impulsive. Before one or both parties decide to uproot their lives and start anew, there must be some pretty good reasons. In order to present a full picture of divorce, a film must explain why the breakdown occurred, showing empathy toward both spouses. In many cases, conflicting conceptions of appropriate gender roles are involved in the breakdown process and these must be addressed as well.

On this score, no film comes close to matching *Scenes from a Marriage* (1973), which was discussed earlier.<sup>129</sup> In Bergman's masterpiece, Johan drops his bomb and a tranquil marriage shatters. His reasons are clear, brutal and all too common: he's having a midlife crisis, he's in love with a student, he can't any longer tolerate the constraints of middle-class marriage and parenthood.

*Kramer vs. Kramer* deals adequately with this issue, but its true focus lies elsewhere. The film sketches the reasons for the breakup concisely but sufficiently.<sup>130</sup> Joanna feels suffocated in her marriage and in the household. Ted takes her for granted and is totally preoccupied with career advancement. He doesn't even know Billy's grade in school. Joanna was in the workplace when they got married; she wants to return but Ted will not even discuss the idea. His refusal is based on gender conceptions; he seems to think that a

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<sup>129</sup> See text at notes 113-14.

<sup>130</sup> Corman's novel treated the issue in much greater depth. Joanna is deathly bored and unfulfilled being home every day with Billy; her only

woman's place is in the home and a man's place is to earn a living. Joanna's frustration finally boils over and she can think of only one way to save herself--escape at all costs, without Billy.<sup>131</sup>

In many divorce movies, and in real life as well, the breakup occurs because of sexual infidelity. One spouse is having a clandestine affair; the other spouse discovers it and can't forgive. In other cases, the spouse or spouses having affairs can't tolerate living a double life anymore. Often, people have affairs because of sexual dissatisfaction in the marriage or because the relationship has broken down for other reasons.

For filmmakers, the extra-marital affair is a handy plot device. It allows them to put sexual content on the screen and it involves such highly marketable plot elements as concealment, passion, betrayal, and jealousy. *Kramer* deserves credit for not taking this easy road but instead relying on a less cinematic story line. Ted and Joanna break up because of Ted's careerism, inattention to Joanna, and his gender hangups, combined with Joanna's feelings of confinement in a passionless life defined only by household chores and caring for her husband and child. Neither spouse is unfaithful, cruel, abusive, or petty. These reasons for marital disintegration are not unlike those that break up many marriages.

Appropriately for its time, *Kramer* taps into themes of female role that were then and still are strongly articulated by the women's movement. It doesn't duck these gender issues, but whether it dealt with them fairly is less clear. To some critics, *Kramer* seems

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salvation is playing tennis. Book, 21-46. Joanna's love for tennis was an important theme in the book but was dropped in the movie.

<sup>131</sup> The scene in which Joanna flees is unforgettable. Terrified that she won't be able to go through with it if she stays another second, Joanna rips herself from Ted's grasp and flees the apartment leaving her suitcase behind.

misogynistic. They believe Joanna is vilified for selfishly abandoning her child, then selfishly trying to snatch him back. They see the tale as an attempt to assert paternal hegemony in the family and to take cheap shots at feminism.<sup>132</sup> In their view, the gender inversions inherent in this story are perverse and unfair. No doubt, fathers who abandon their children vastly outnumber mothers who do so. The same is true for the ratio of struggling single moms to struggling single dads. A film glorifying the rare abandoned father may seem a gross distortion of reality.<sup>133</sup> Similarly, they say, *Kramer* conveys a false impression of the family law system which more often works in favor of men and against women.<sup>134</sup>

I don't see *Kramer* that way. For one thing, Joanna's character is treated respectfully and sympathetically; her motivations are clear and understandable (except, perhaps, for the denouement). She handles herself well in court. She is never demonized. I don't believe audiences view the film as anything more than a story about one man, who was a lousy husband and father and who learned to be a good and

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<sup>132</sup> See Eileen Malloy, "Kramer vs. Kramer: A Fraudulent View," 26 *Jump Cut* 5 (1981). Malloy writes: "KRAMER VS. KRAMER is Hollywood's answer to contemporary questions of male parenting, the erosion of the family, and the women's movement. The film defines the problem as how to preserve the preponderant influence and authority of the male father figure as this figure makes its way from the public to the domestic sphere... Single mothers should be incensed by the injustice done to the difficulty of their position by the trivial way that Hoffman's single-parent problems are dealt with." Malloy is particularly critical of the role of Margaret (a "Benedict Arnold") who changes from Joanna's best friend to Ted's best friend and Joanna's worst enemy.

Similarly, Papke remarks: "*Kramer vs. Kramer* powerfully employs the perspective of the enlightened male in virtually all of its crucial legal scenes. That is, the gaze at legal process is almost always biased, and viewers are invited to adopt the male perspective." Papke, note 3 at 1204.

<sup>133</sup> The same can be said about sexual harassment movies. Even though male on female harassment vastly outnumbers female on male harassment, females are the harassers in the movies. See *Liar, Liar* (1997); *Disclosure* (1994). The Australian film *Brilliant Lies* (1996) involves a case of gross male on female harassment and is far more realistic.

loving father, at considerable cost to his personal and business life. Every story has to have conflict and has to have an antagonist; just because a particular film about families has a male protagonist and female antagonist doesn't make it anti-female, any more than a film like *An Unmarried Woman* is anti-male.<sup>135</sup>

*The economic aspects of splitting one household into two.* As previously remarked, most earlier films about divorce glossed over the economic consequences of marital breakups. This was true of the romantic comedies of the 1930's and many of the more candid pre-Code pictures, as well as most of the post-Code divorce pictures of the 1970's and 1980's. Typically, the couple is so wealthy that there is plenty of money for both partners to continue their affluent lifestyles.

*Kramer* wins high marks for a realistic treatment of the economic aspects of divorce. Ted and Joanna had enough money before the divorce (although their beautiful New York apartment might have been hard to swing on Ted's salary of about \$33,000 in 1977 dollars). Joanna's work in the home produced non-cash income that allowed Ted to pursue his career single-mindedly without concern for caring for his son or the household. Once Ted is on his own, however, economic issues become more pressing, even though Ted's salary far exceeded the national

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<sup>134</sup>See Karen Winner, *DIVORCED FROM JUSTICE* (1996); Weitzman, note 11 at 27-28 (no fault took away women's bargaining chips).

<sup>135</sup> The divorce-oriented films made around the time of *Kramer* seem fairly balanced in whether the man or the woman is the heavy. In *An Unmarried Woman* (1978), *Shoot the Moon* (1982), *Butley* (1974), *Heartburn* (1986), and *Twice in a Lifetime* (1985), our sympathies are with the woman. In *Starting Over* (1979) and *Author! Author!* (1982), and perhaps *Manhattan* (1979) and *Interiors* (1978), our sympathies are with the man. In films like *the War of the Roses* (1989), *Irreconcilable Differences* (1984), or *Divorce American Style* (1967), we hate both of them. In the romantic divorce/remarriage comedies of the 1930's, females are shown as richer, saner, and smarter than males. Heather Gilmour, *Different, Except in a Different Way: Marriage, Divorce and Gender in the Hollywood Comedy of Remarriage*, 50 J. FILM & VIDEO 31 (1998).

average.<sup>136</sup> Conflicts between Ted's job and parental role result in serious problems at work and ultimately get him fired. This is a catastrophe with the custody hearing looming. Using some high-pressure tactics, he lands another job which entails a pay cut and for which he's overqualified.<sup>137</sup> Meanwhile, Joanna has advanced well beyond her previous career level; she's a sportswear designer and is earning more money than Ted. Since she has no child to support, her standard of living is undoubtedly much higher than Ted's.

In fact, Ted's economic plight is typical of that of many, perhaps most, divorced single parents, the vast majority of whom are women. The custodial parent finds it difficult to get a job if she's been out of the labor market. She may well confront gender discrimination in finding a decent job. Certainly her child care responsibilities make her a less desirable employee. In fact, only low-wage jobs may be available. Many studies have documented the drastic downward mobility of women after divorce; it is often accompanied by upward mobility for men.<sup>138</sup> In theory, spousal and child support should equalize the life styles of the partners. The reality is that spousal support, if available at all, is usually awarded only for a brief period. While child support is now routinely awarded, the rates of delinquency in payment of both spousal and child support are extremely high. Public authorities tend to be slow and ineffective in collecting delinquent support. Thus *Kramer* gets credit for its dead-on treatment of the economic aspects of divorce, especially those confronted by the custodial spouse.

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<sup>136</sup> Interestingly, Ted never seems to consider trying to collect child support from Joanna. This may reflect still another of Ted's gender hangups.

<sup>137</sup> In the book, Ted loses his job because the firm folded. He endures a lengthy and difficult job search process during which he can't pay the bills. Book, 180-83.

*The effect of divorce on children.* Most divorcing couples have children and the children are nearly always affected negatively by the disintegration of their parents' marriage and ultimate divorce.<sup>139</sup> Typically, children become anxious when their parents quarrel, feel abandoned by the departure of the non-custodial parent, sense a need to take sides between the parents, find the process of visitation by the non-custodial parent to be painful, and have difficulty grappling with their parents' post-divorce relationships. Most movies about divorce ignore children entirely, although several of the movies of the late 1970's-early 1980's<sup>140</sup> did take the problems of children seriously.

*Kramer* confronts the impact of the divorce on little Billy in a candid and wholly convincing manner. He desperately misses his mother. The impact of her rejection (and her strangely cold letter of explanation) are terrible. He finds it hard to adjust to having his father care for him. Ultimately, Billy bonds closely with his father. Billy is mystified by the visitation process when Joanna surfaces and wants to see him. Ultimately, he is devastated by the imminent change in custody. I think almost anyone who sees this film empathizes with Billy and understands clearly the devastating effect of the breakup of his parents' marriage and of the custody dispute.

*Single parenthood and non-custodial parenthood.* As already mentioned, children are mostly ignored in films about divorce. As a result, the emotional problems of the parent-child relationship receive

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<sup>138</sup> See note 11.

<sup>139</sup> More than two million children are affected by divorce each year, a figure which has tripled since 1960. It is now projected that more than half of all the children in the United States will experience a parental divorce before they reach age 18. Weitzman, note 11 at 215.

<sup>140</sup> Such as *Shoot the Moon* (1982), *Rich Kids* (1979), *Author! Author!* (1982), and *Irreconcilable Differences* (1984). In *Scenes from a Marriage* (1973), we learn that Johan shuns his two daughters because his new wife is threatened by his having any contact with them; however, we never see the children.

little attention. Yet in real life, these relationships are often deeply problematic. A custodial parent tends to form an intense emotional bond with the child; indeed, the child may become the parent's best friend and confidante. The non-custodial parent may miss the child intensely, may suffer serious difficulties with visitation if the custodial spouse is non-cooperative, and may find it difficult to maintain an appropriate and loving relationship with the child.

All this appears in *Kramer*. Ted and Billy bond intensely and Ted's life revolves around his work and spending time with Billy.<sup>141</sup> There is little time to form new relationships. Losing custody of Billy might seem to be beneficial to Ted professionally and socially; certainly it would simplify his life and improve his financial situation.<sup>142</sup> Yet the thought that he might lose custody is unbearable, even though he would, no doubt, be granted generous visitation rights. Ted doesn't object to anything about Joanna and the way she would raise Billy; it is not as if he is jealous of another man in her life. He invests large emotional and financial resources in preserving his role as primary caretaker, knowing it will be an uphill struggle. This suggests an emotional overdependence on the custodial relationship.

Joanna, on the other hand, obviously suffers intensely from her status as a non-custodial parent. We are uncertain as to why she

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<sup>141</sup> One of the best aspects of *Kramer* is its powerful showing that a father can be an excellent and caring single parent. Many custodial males in the movies have been loving but flaky types who cannot provide a stable environment for their kids. See *The Champ* (1931), *Trouble Along the Way* (1953), *A Thousand Clowns* (1965), *Paper Moon* (1973), *Curly Sue* (1991), *Big Daddy* (1999). Caring and responsible single-parent fathers emerge in *Sleepless in Seattle* (1993); *My Girl* (1991); *Ghost Dad* (1990); *A Cool, Dry Place* (1998); *Jack and Sarah* (1995); *Author! Author!* (1982); *The Parent Trap* (1961); *The Courtship of Eddie's Father* (1963); *Mr. Skeffington* (1944).

<sup>142</sup> Ted's lawyer asks him to make a list of pros and cons; he quickly comes up with a long list of reasons for letting Joanna have custody. There are no good reasons for keeping Billy. Of course, Ted decides to fight to keep Billy anyway.

mounts the custody fight, as opposed to negotiating an acceptable visitation schedule which Ted would undoubtedly have agreed to. Perhaps Joanna is motivated by guilt at her previous irresponsible abandonment of Billy, perhaps she is lonely, perhaps she has rediscovered a belief that her role as a woman is to be primary caretaker of the child, or perhaps she genuinely believes that Billy would be better off living with her. Whatever the reason, it is apparent that Joanna is willing to bet big emotional and financial chips in what she knows will be a difficult and traumatic struggle to obtain custody. Again, it is not as though Joanna objects to anything in Ted's child care; in fact she admires the job he has done with Billy. There is no woman in Ted's life, for example, of whom Joanna is jealous. She simply cannot accept the role of non-custodial parent. While *Kramer* involves a gender role reversal (normally it is the man who is the non-custodial parent), it accurately portrays the extreme dissatisfaction that many non-custodial parents feel toward their role as secondary caretaker.

*Social and relationship problems encountered by newly-divorced spouses.* Divorced people often have social difficulties in the post-divorce period. Accustomed to their stable marital relationship, dating appears difficult and daunting. They may well find themselves lonely and alienated. Married couples who were former friends may shun newly single people (or may choose the other spouse as the continued friend). Potential partners tend to avoid recently separated or divorced people for good reason--they are often emotionally unstable and they sometimes reconcile with their former spouses. Single parents find that their responsibility for young children vastly complicates the dating process. Other recently divorced people go to the opposite extreme; they become oversocialized and experience promiscuous but

emotionally empty life styles. They may unwisely get married on the rebound. The late 1970's/early 1980's movies about divorce are strongest in detailing the post-divorce social and emotional ups and downs that divorced people often experience.<sup>143</sup>

*Kramer* is less strong in this department. Although Joanna testifies that she has a boyfriend, we learn little about her life. We do see Ted dating;<sup>144</sup> in one humorous scene, an overnight guest is heading for the bathroom stark naked when she runs into Billy. Billy handles it much better than the guest. We also see Ted's emotional dependence on his friendship with Margaret who becomes his confidante and partisan in the custody battle; she seems to be his only friend. He just doesn't have much of a social life; he doesn't have the time, energy, or money to conduct one. In this respect, Ted may be typical of most custodial parents who are balancing childcare and a job; there's little opportunity to socialize.

*Perverse and outdated family law doctrines.* Classic movies about law, like classic novels or stage plays about law, should deal forthrightly with the legal rules and procedures that apply to the situation. In particular, they should grapple with outdated or perverse legal doctrines, institutions, or procedures. Think, for example, of novels like *Bleak House*, *An American Tragedy*, *Billy Budd*, or *Les Misérables*, or films like *Inherit the Wind*, *I Want to Live*,

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<sup>143</sup> See text at notes 118-22. Here again, *Scenes from a Marriage* (1973) stands alone in its profound treatment of this issue. A large part of the three-hour film concerns the social and sexual ups and downs of Marianne and Johan as they struggle through the years after their divorce.

<sup>144</sup> The novel deals with Ted's social life in much greater detail. See Book 88-92 (Fire Island), 95-97 (men friends), 104-06 (rushed dates with other parents), 112-14 (men with younger women). We also meet Joanna's boyfriend who tries, unsuccessfully, to mediate Ted and Joanna's custody dispute. The film, by necessity, cut out most of this material.

*Paths of Glory, or To Kill a Mockingbird*--each an all-out assault on some venerable law or legal institution.

Relatively few movies relating to divorce focus on the perverse and antiquated doctrines of family law that divorcing couples used to endure. In the last three decades or so, an entirely new vision of marriage termination has swept away most of the old family law doctrine. Today the emphasis is on removing consideration of fault, mediating instead of litigating, and treating the ownership of marital property as a partnership. California sparked the no-fault revolution with its 1969 statute allowing divorce upon the petition of either spouse on a simple showing of irreconcilable differences. Fault was no longer considered in determining spousal or child support. Most of the states swiftly followed suit.<sup>145</sup> In addition, joint physical and legal custody of children has become the norm in many states instead of the earlier system which gave all custodial rights to one parent and considered fault in determining child custody.

Prior to these reforms, however, divorce law was heavily oriented towards determining which spouse was at fault.<sup>146</sup> Depending on the state, the petitioning spouse had to prove abandonment, adultery, or physical or mental cruelty in order to be awarded a divorce. Some states, like New York, permitted divorce only in cases of adultery. Of course, in the vast majority of cases arising under fault provisions, divorce actions were collusive default affairs based on perjured or rigged testimony. Judges knew this but waved the cases through.<sup>147</sup> Large numbers of spouses went to Nevada (or some other

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<sup>145</sup> See Weitzman, note 11 at 15-41 (summarizing California legislative process and implications of adopting no-fault); Phillips, note 4 at 215-17, characterizing no-fault as a system that allows the spouses to determine the grounds for divorce rather than the state.

<sup>146</sup> See Weitzman, note 11 at 6-14.

<sup>147</sup> DiFonzo, note 7, ch 2, 4.

divorce haven) where one could get divorced without proof of fault after six weeks of residence.<sup>148</sup>

Fault was important for reasons beyond establishing entitlement to divorce. Fault played an important role in determining the division of marital property and the award of alimony.<sup>149</sup> If the man was found to be at fault, the woman would get most of the marital property and might get considerable alimony; if the woman was at fault, she likely came away with little or nothing. Considerations of fault were often taken into account in child custody determinations as well; parents guilty of adultery were judged unfit custodians.

A few films zeroed in on the perversities of contemporary family law. In *Born to Love* (1931), the wife was found (erroneously) to have committed adultery; she was denied custody of her child and thrown out on the street with nothing.<sup>150</sup> At the end of the Hays era, in *Divorce American Style* (1967), the husband got none of the community property and had to pay such high alimony he was reduced to poverty.<sup>151</sup> Generally, however, films about divorce (whether before, during, or after the Hays era) ignored family law entirely or, if they referred to it at all, took it for granted. The story simply applied existing family law

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<sup>148</sup> Riley, note 5 at 135-39; Phillips, note 4 at 196-98.

<sup>149</sup> Weitzman, note 11 at 12-14.

<sup>150</sup> See text at notes 83-84. The same thing nearly happens in *Reno* (1930). The most effective single critique of fault divorce occurs in *One More River* (1934), discussed at notes 86-88. Fault divorce was effectively ridiculed in pictures like *The Divorce of Lady X* (1938) (barrister makes ridiculous fault-based arguments), *Child of Divorce* (1946) (child forced to testify against her father), *I Want a Divorce* (1940) (destructiveness of fault-based trials), and *The Gay Divorcee* (1934) (plans to stage fake adultery become hopelessly snarled). In pictures like *Back Street* (1961) or *In Name Only* (1939), evil wives cling to husbands who can't establish fault.

<sup>151</sup> It was unclear why the husband would be impoverished under pre-no-fault California law. If there was any fault involved, it was mental cruelty and that seemed equally shared between the spouses.

doctrine or got around it without seeming to mock or criticize it.<sup>152</sup> Maintaining a cautious silence on a controversial political issue (such as the perverse and antiquated fault doctrine in family law) was wholly typical of the PCA's approach to self-censorship; that body studiously avoided conflict with the Catholic hierarchy or with anyone else who might make trouble.<sup>153</sup>

In contrast, *Kramer* foregrounds family law doctrine by leveling a withering attack on the tender years presumption. This rule imposed an evidentiary presumption that maternal custody is in the best interest of young children. In some states, the father could rebut the presumption only by showing the mother is unfit (which often meant at fault); in others, the father could rebut the presumption by showing that paternal custody will better serve the child's developmental needs.<sup>154</sup>

The tender years presumption was universally applied in the United States from the middle of the nineteenth century through the 1960's.<sup>155</sup> By the late 1970's, the presumption was in decline but was still very much alive in a number of states.<sup>156</sup> It was occasionally

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<sup>152</sup> Indeed, Breen took care to mute such criticism by snipping out any suggestions that collusive divorces were common. See note 90. The pre-PCA film *The Divorcee* (1930) includes a typical collusive New York default divorce action brought by the wife. In *The Women* (1939), everybody has a good time on a ranch in Reno while waiting out the Nevada residency period. The film seems to take all that for granted but could be read as criticizing migratory divorce; after all, only the affluent could afford to escape the nasty fault-based divorce law at home while taking an extended Nevada vacation.

<sup>153</sup> See Maltby, note 21 at 570-79.

<sup>154</sup> Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CALIF. L. REV. 335 (1982).

<sup>155</sup> Prior to that time, the child was treated as the property of the father who normally received custody.

<sup>156</sup> Weitzman, note 11 at 221 (in 1978, the doctrine was applied in fourteen states; at least 12 others gave preference to fit mothers); Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423 (1976-77); Klaff, note 143 at 341; Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM.L.Q. 11-16 (1982) (7 states formally retained the presumption in

still employed in New York at the time *Kramer* was set, although seemingly contrary to a New York statute.<sup>157</sup> Today it has virtually disappeared, usually in favor of a vague "best interests of the child" standard.<sup>158</sup> In general, whatever the legal standard, mothers won a very high percentage of contested custody cases during the era in which *Kramer* took place.<sup>159</sup>

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1982; in other states numerous judges favor mothers while purporting to apply best interests standard). See, e.g., *Arends v. Arends*, 517 P.2d 1019, 1020 (Utah, 1974), cert. den. 419 U.S. 881 (1975) (father's attack on presumption "might have some merit...if the father was equally gifted in lactation as the mother").

<sup>157</sup> Section 240 of the New York Domestic Relations Law, enacted in 1962, provided that the criterion in custody cases was the best interests of the child "with no prima facie right to the custody of the child in either parent." Around the time *Kramer* was set, most New York courts rejected the tender years presumption and observed the statutory rule of neutrality. See *Barkley v. Barkley*, 402 N.Y.S.2d 228 (App. Div. 1978) (father retained custody of small child when both parents were equally fit); *In re Vincent*, 365 N.Y.S.2d 289 (App.Div. 1975) (affirming award of custody to father). However, a dissenting judge wrote in *Barkley*: "It is simply a matter of common every day experience that as a general proposition a 14-month old child should and would receive the tender loving care that only a mother ordinarily would give in the face of any adversity."

Apparently criticizing the statute, a judge wrote in *Sheil v. Sheil*, 289 N.Y.S.2d 86 (App. Div. 1968): "Generally children of tender years should be awarded to the mother...The welfare of the child is the primary consideration and although the 'mother may have been in fault and the father blameless...the age or condition of the child may require a mother's care.'" Despite the dictum, the decision upheld an award of custody to the father.

The New York Family Court held in 1973 that the tender years presumption violated the constitutional norm of equal protection. *Watts v. Watts*, 350 N.Y.S.2d 285 (Fam.Ct. 1973). To this day, the constitutionality of the tender years presumption remains unsettled. For earlier resounding applications of the tender years presumption by New York courts, see *Fischel v. Fischel*, 142 N.Y.S.2d 236 (App.Div. 1955); *Walker v. Walker*, 122 N.Y.S.2d 209 (App.Div. 1953); *Thiele v. Thiele*, 100 N.Y.S.2d 634 (App. Div. 1950).

<sup>158</sup> For criticism of the "best interests" standard on the grounds of indeterminacy and bias against women, see Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 SO. CALIF. REV. OF L. & WOMEN'S STUDIES 133, 172-83 (1992); Weitzman, note 11 at 237-43 (judges tend to favor fathers who have better financial resources and who have remarried over mothers who will be working outside the home).

<sup>159</sup> Around the time of *Kramer*, mothers apparently received custody in over 90% of cases in which custody was contested. See Klaff, note 154 at 335 (1982); Weitzman, note 11 at 222 (mothers win custody in 85% of cases in which custody is disputed, fathers in 10%, others in 5%).

The tender years presumption was and remains the subject of considerable scholarly dispute.<sup>160</sup> Feminist theoreticians who pursue the equal treatment approach tend to oppose the presumption, since they believe that the tender years doctrine is based on a stereotype that women are instinctive child rearers inherently unsuited for worldly pursuits. These writers tend to favor a gender-neutral primary caretaker standard rather than an unstructured best interests of the child standard.<sup>161</sup> However, feminist writers that pursue the difference approach tend to favor the presumption or some variation of it. Under the difference approach, laws that recognize actual differences between men and women are appropriate. In the view of a number of writers, mothers rather than fathers are likely to have a better ability to nurture small children.<sup>162</sup> Proponents of the tender years presumption also believe that it lessens opportunistic tactical behavior in divorce by fathers who don't really care about custody but who threaten to contest it unless mothers decrease their financial demands.<sup>163</sup>

The tender years doctrine doctrine was applied incorrectly in *Kramer*, because Ted effectively rebutted the presumption. In no event should the presumption be applicable to a *modification* of custody, as opposed to an initial determination of custody at the time of divorce.<sup>164</sup>

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<sup>160</sup> See Klaff, note 154 (defending presumption on the basis that the mother has usually been the primary caretaker as well as on the basis of psychological studies based on bonding behavior).

<sup>161</sup> See Rena K. Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S LAW J. 107, 108-12 (1978). Becker, who favors the presumption, cites numerous authors opposing it. Becker, note 158 at 138 n.16 (1992).

<sup>162</sup> Klaff, note 154 (supporting tender years presumption); Becker, note 158 (court should defer to fit mother's judgment of the best custodial arrangement); Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 23-27 (1990-91) (supporting tender years presumption); Uviller, note 156 (judges tend to look down on single working women).

<sup>163</sup> Mason, note 157 at 26-27; Uviller, note 161 at 127.

<sup>164</sup> See Atkinson, note 156 at 5-8 (1982) (custody should never be modified absent a substantial and material change of circumstances relating to the custodial parent or the child).

The most important point is that Ted, not Joanna, had been Billy's primary caretaker for a year and a half.<sup>165</sup> After all, Joanna had abandoned Billy. Ted had formed a close emotional bond with Billy and had been an excellent and caring parent. Changing custody could only be terribly disruptive to Billy. At a minimum, Billy would suffer short-term trauma; he might well suffer long-term damage. The court was impressed with none of this. As the judge saw it, assuming that a mother of a young child is not somehow unfit, she gets custody. Thus *Kramer* deserves credit for identifying a dubious family law doctrine, as well as judicial behavior that constitutes an abuse of discretion, and subjecting both to criticism. In this respect, *Kramer* blazed a path for future movies, such as *Losing Isaiah*,<sup>166</sup> that attack antiquated or unfair family law doctrines or family court judges that abuse their discretion.

*The family law process.* In order to get divorced in the fault era, and often in the no-fault era as well, a couple had to survive the family law process. That process often constitutes a horrible ordeal for the human beings enmeshed in it. In the fault era, family law doctrine required the disclosure of intimate details of one's private life. Each litigant tried to discredit the personality of his or her

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<sup>165</sup> Klaff, note 154 at 348-49. See, e.g., *Fountain v. Fountain*, 442 N.Y.S.2d 604 (App. Div. 1981) (where children aged 7 and 4 have been living with father for extended period, there is policy against shifting custody to the other parent; presumption of maternal superiority is outdated).

<sup>166</sup> *Losing Isaiah* (1995) is a hard hitting attack on racial preferences in adoption. Much in the style of *Kramer*, the issue of whether Isaiah should be returned to the black mother who abandoned him or the white family that raised him is thrashed out in the family court. Other recent films that take on important family law issues include *The Good Mother* (1988) (abuse of discretion by family court judge in changing custody of small child because of a trivial sexual indiscretion by mother's boyfriend); *It Could Happen to You* (1994) (erroneous treatment of division of winnings from the lottery); *Hollow Reed* (1996) (domestic violence and role of father's homosexuality). See Paul Bergman and

opponent; a judge had to decide who cheated on who, who was more cruel, who walked out on whom. The trial process became acrimonious and the testimony often vicious, intrusive, petty, and humiliating.<sup>167</sup>

Most fault-era divorces, of course, were collusive default judgments; the judges waved the litigants through after a phony (but still embarrassing) presentation of fictitious fault. In the no-fault era, details of personal conduct are blessedly off limits except when relevant in child custody disputes which can get very nasty. Moreover, the financial aspects of divorce often require lengthy and complex trials. For example, it may be necessary to value the goodwill of a law firm or a medical practice or to place a valuation on unvested pension benefits or stock options. While the vast majority of such disputes are negotiated or mediated to a conclusion, the fact remains that numerous divorce cases are still litigated. When one spouse or both spouse wants to fight, the process can be excruciatingly long and costly.

*Kramer* gets credit for showing what a miserable experience adversarial family law processes can be. The trial itself is marked by vicious mudslinging. Joanna's attorney smears Ted with the playground incident, implying he was a careless father,<sup>168</sup> and mercilessly explores Ted downward job mobility. Ted's attorney smears Joanna by asking whether she has been a failure at her marriage and at everything she has ever tried. He insists on asking her how many lovers she has had and whether she currently has a boyfriend. He uses a patronizing tone and at times yells at her.

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Michael Asimow, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES 276-79 (*It Could Happen To You*), 289-92 (*Losing Isaiah*) (1996).

<sup>167</sup> See Weitzman, note 11 at 9 (humiliating nature of trial process), 38-41 (concluding that there is less acrimony and hostility under no fault)

In its understandable zeal to expose the destructiveness of family court litigation, *Kramer* goes over the top. The question about whether Joanna has been a failure at everything she has tried is improper; it should have been objected to as argumentative or unduly vague. Whether Joanna has a boyfriend, or the number of her lovers, has nothing to do with the issues at the trial, absent a showing that she is indiscreet. Whether Ted has downward economic mobility counts for little, given that he lost his previous job because he put parenting ahead of job duties. The attorneys cut off witnesses, demanding yes or no answers. This seems unrealistic; in a trial to the judge, surely a witness would be allowed to give a complete answer to the question. Similarly, lawyers seem unable to use redirect examination to correct distortions arising in cross examination.

In the real world, Judge Atkins would never have decided the custody issue cold. He would consider reports of a social worker or other professional on Billy's family situation. He might well have gently interviewed Billy, asking him questions about his daily life with his dad. When Ted's lawyer Shaunessy tells Ted that in the event of an appeal he would have to put Billy on the stand, this is nonsense; an appeal is based on the written record, not on new evidence. Even if a new trial were ordered, seven-year old Billy surely would not be made to take the stand. The attorneys never discuss mediating the dispute rather than duking it out in court.<sup>169</sup> They also fail to consider joint custody solutions<sup>170</sup> or other ways of avoiding zero-sum results. Thus

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<sup>168</sup> Joanna apologizes to Ted in the hallway for raising this issue, claiming that she never imagined her attorney would use it.

<sup>169</sup> Many states now require mediation before custodial disputes are resolved in court. Becker, note 158 at 170.

<sup>170</sup> Around 1980, joint custody approaches came into vogue in many states, starting with California. See CALIF. FAMILY CODE §3040(b) (providing neither preference for or against joint custody); Becker, note 158 at 169-70, 184-88; Weitzman, note 11 at 247-60.

the actual courtroom battle in *Kramer* wasn't very realistic, but the film still gets good marks for showing how unpleasant and how costly family law litigation can become.<sup>171</sup> Since the film's goal is to criticize the process of adversarial custody litigation, such excess is permissible dramatic license. Besides, it's pretty entertaining.

*The problems of lawyer-client relationships in family law.* To get divorced or dispute support, property, or custody, parties who can afford it must hire lawyers. Family lawyers are very expensive.<sup>172</sup> Sometimes the lawyers exacerbate the problems, turning a relatively friendly divorce into a take-no-prisoners brawl.<sup>173</sup> Sometimes the lawyers wind up with most of the marital property.<sup>174</sup> *Kramer* gets credit for not overlooking the cost of legal services. The custody fight

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<sup>171</sup> Nasty trials occur in several subsequent family law films. In *Losing Isaiah* (1995), the hearing involves gratuitous character assassination. Still, *Isaiah's* hearing is more realistic than *Kramer's*. In *Isaiah*, the hearing sensitively explored the merits of both sides of the racial preference issue; testimony about whether the white parents had black friends or read from stories about black children were painful but appropriate and relevant. The film also included the testimony of a social worker. Highly unpleasant trials or pre-trial proceedings also occur in *Hollow Reed* (1996), *It Could Happen to You* (1994), *The Good Mother* (1988), *Liar Liar* (1997), and *Irreconcilable Differences* (1984).

<sup>172</sup> In most states, only limited and inadequate free legal services are available in family law matters. As a result, a large number of litigants represent themselves in court, a phenomenon which accounts for much of the congestion in the family court. If only one side is represented by counsel, a mismatch occurs and an unfair and unjust result is likely.

<sup>173</sup> In *Curly Sue* (1991), Gray Ellison, an ice-cold female family lawyer, tries to turn an amicable divorce into a war by threatening to disclose lurid photos of the husband, a local politico, unless he gives in to Ellison's exorbitant demands. The ultimate bad family lawyer in popular culture is Arnie Becker of *L.A. Law* (a television series that screened on NBC from 1986 to 1994). See Robert M. Jarvis and Paul R. Joseph, *PRIME TIME LAW* 21-32 (1998). Becker violates every ethical canon on the road to riches; he sleeps with his clients, turns friendly divorces into grudge matches, ignores conflicts of interest, abuses his secretary, and is, on the whole, an entirely hateful character.

<sup>174</sup> I recall seeing a cartoon showing a woman talking with a friend about her recent divorce. She recounts that her attorney wound up with the beach home and his attorney got the BMW.

costs Ted \$15,000<sup>175</sup> (not counting an appeal). In current dollars, the cost would easily be three or four times that amount and probably much more.

The vicious trial in *Kramer* reveals how family lawyers often must play harsh, destructive roles in the courtroom (regardless of whether they are nasty people in their private lives). As Ted's lawyer Shaunessy makes clear, the only hope is to destroy Joanna on the stand. Joanna's lawyer played the same game.<sup>176</sup> Yet these are good lawyers; they are doing their job in an ethical, competent, professional way. It is the system that is bad, not the lawyers.<sup>177</sup>

## VII. CONCLUSION

Marital breakdown and divorce are, unfortunately, critical and formative events in the lives of many adults and many children. Marital disintegration and divorce are typically accompanied by high emotion, feelings of hurt and betrayal, clashes of values, conflicts relating to sexual conduct, fights over money and property, and abrupt changes in lifestyle. All this is standard fare for movie stories

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<sup>175</sup> In the book, the custody fight cost \$5000 with the risk that Ted would have to pay Joanna's fees as well. Book, 193. Ted's earlier uncontested New York divorce cost \$2000. Book, 79.

<sup>176</sup> Stephen Blume in *Blume in Love* (1973) is an admirable family lawyer who tries to get his clients to reconcile; if they do, he charges no fees. But that was in the era in which lawyers were usually shown as decent human beings and excellent, competent ethical lawyers. See Michael Asimow, *Bad Lawyers in the Movies*, 24 Nova L. Rev. No. 2 (forthcoming 2000). Gavin D'Amato in *War of the Roses* (1989) is also a decent family lawyer. The framing device in the picture consists of D'Amato trying to dissuade a client from getting divorced (or to be generous to his wife if he does). He tells the horrible story of the divorce of Oliver and Barbara Rose as a cautionary tale to the new client. In the Roses' divorce also, D'Amato tried to restrain the self-destructive tactics of his client.

<sup>177</sup> One of the worst family law attorneys in film is Fletcher Reede in *Liar Liar* (1997). Reede is a pathological liar. He can't tell the truth either in court or in his personal life, until his little boy casts a spell that forces him to speak the truth. Reede finds himself representing a wife seeking to avoid a prenuptial agreement. The spell prevents him from putting on perjured testimony, as he had planned to do.

today, but it seems amazing to us now that the subject was nearly erased from the screen for over thirty years. During the Hays era, as little as possible was said about divorce and the little that was said was hopelessly inaccurate. This, I believe, was inappropriate. Censorship (whether from the government or from the industry) that blots out or distorts the presentation in popular culture of a widespread and legal form of human behavior is wrong. After the industry finally jettisoned the Hays Code, serious treatment of divorce finally returned to the screen. A batch of memorable and compassionate films told the stories of people who endure marital disintegration, divorce, and the transition to singlehood. Of these films, *Kramer vs. Kramer* took a good narrative to another level, dealing realistically with all of the elements of real life divorce and child custody. In its treatment of the consequences of divorce and custody disputes to adults and children, and its focus on legal institutions, process and doctrine, *Kramer v. Kramer* broke new ground. The film deserves an honored place in the pantheon of movies about the family as well as movies about law and the legal system.