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AS SEEN THROUGH THE EYE OF THE CAMERA: A PORTRAYAL OF HOW CULTURAL CHANGES, SOCIETAL SHIFTS, AND THE FIGHT FOR GENDER EQUALITY TRANSFORMED THE LAW OF DIVORCE

*Taylor Simpson-Wood**

I. INTRODUCTION: THE SYMBIOTIC RELATIONSHIP BETWEEN LAW & CULTURE

"Law must be stable and yet it cannot stand still."—Roscoe Pound (1922)¹

For almost a century, the import of these words written by eminent legal scholar, educator, and then Dean of Harvard Law School, Roscoe Pound, has endured. According to Pound, while the law needs to provide a "fixed basis" to ensure "social order," it is equally important that it is flexible enough to be "overhauled continually and refitted continually to the changes in the actual life which it is to govern."² Extrapolating from this premise, as a "social institution," the law should be a dynamic, but fluid force, that changes with the times in order to balance competing interest of a diverse society, thereby

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¹ ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (Harold Dexter Hazeltine ed., 1923) [hereinafter INTERPRETATIONS OF LEGAL HISTORY].

² *Id.*; see ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 165 (1921) [hereinafter SPIRIT OF THE COMMON LAW] ("[T]hat for the greatest part law must always be found through application of reason to causes as they arise and the testing of principles in their actual operation; that laws are not like clothes to be thrown off and replaced at will, but, like language are so intimately a part of all we do that development of the traditional materials will always be the chief agency of growth."). For an excellent discussion of the legal philosophy expounded by Pound, see James A. Gardner, *The Sociological Jurisprudence of Roscoe Pound (Part I)*, 7 VILL. L. REV. 1, 9–19 (1961).

supporting its growth.³ Logically, then, as the social mores and accepted standards of behavior of a culture metamorphosize, so too should the law.

It is clear that the law and current cultural norms of a society are inextricably intertwined.⁴ The relationship between the two is certainly "dynamic, interactive, and dialectical" for "law is both a producer of culture and an object of culture."⁵ However, in contrast to Pound's view that it is the role of jurists to shape the law so that it adapts to cultural changes to effectively shape a better society,⁶ the position has also been maintained that the driving force behind legal change is "not legal philosophy, not doctrine, not lawyerly craft."⁷ Rather, instead of the law refashioning society, it is actually "social forces and ideas" which transform the law.⁸ In other words, the law is "socially and historically constructed."⁹ This is an important distinction. It is the premise of this article that changes in a particular cultural aspect of a society do reshape the relevant laws. This raises the attendant question of how can the social changes which have the power to transform the law be identified. One answer to this question is really quite simple: portrayals in popular culture.

While scholars have defined popular culture differently, there is a general consensus as to its strong influence on modern society.¹⁰ Broadly, it has

³ ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 98-99 (1930) [hereinafter INTRODUCTION TO THE PHILOSOPHY OF LAW] ("For the purpose of understanding the law of today, I am content with a picture of satisfying as much of the whole body of human wants as we may with the least sacrifice. I am content to think of law as a social institution to satisfy social wants - the claims and demands involved in the existence of civilized society - by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society.").

⁴ Emanuel Levy, *The American Dream of Family in Film: From Decline to Comeback*, 22 J. COMPAR. FAM. STUD. 187, 199 (1991) ("Cinema, like other social institutions, does not operate in a cultural or political void. Rather it is intermeshed with society's economic and political structures and with its dominant ideology. Hollywood is a commercial industry of mass products, but unlike other industries, it is also an ideological system which produces and transmits cultural symbols.").

⁵ Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 35-36, 46 (2001) (discussing "the complex entanglement of law and culture").

⁶ ROSCOE POUND, THE TASK OF LAW 62 (1944) [hereinafter THE TASK OF LAW] ("Law is experience organized and developed by reason, authoritatively promulgated by the lawmaking or law-declaring organs of a politically organized society and backed by the force of that society."); Gardner, *supra* note 2, at 19-26 (discussing the step to be taken to implement Pound's "program of social jurisprudence").

⁷ Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 650 (1984) [hereinafter *Rights of Passage*].

⁸ *Id.* The idea of "social dependence of law" was ignited in the 1950s by the publication of Willard Hurst's book, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950). Hurst's work was based on "the axiom of the social dependence of the law." *Rights of Passage*, *supra* note 7, at 650. The fulcrum of legal change was not within the legal system, but came from external, societal pressures. *Id.*

⁹ Lynn Mather, *Law and Society*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 681 (Keith E. Whittington, et al. eds., 2009).

¹⁰ Richard K. Sherwin, *Picturing Justice: Images of Law & Lawyers in the Visual Media*, 30 U.S.F. L. REV. 891, 897 (1996); James R. Elkins, *Popular Culture, Legal Films, and Legal Film Critics*, 40 LOY. L.A. L. REV. 745, 746 (2007) (setting forth a set of "basic propositions" which are "uncontested" and include "[t]he popularity thesis: television shows, movies, and books about the law are widely popular in America; the effects thesis: popular culture (film, TV, dramas, novels, and traditional and non-traditional

been described as consisting of "the aspects of attitudes, behaviors, beliefs, customs, and tastes that define the people of any society."¹¹ It has also been described more narrowly as "the body of cultural commodities and experiences" commercially produced by the "culture industries" to be consumed by the average person.¹²

Whichever definition one prefers, what is evident is that a close examination of the popular culture offerings and experiences of a particular society during a particular time period provides an incisive look into the history of how law is socially constructed. Such an examination is particularly valuable in pinpointing shifts in societal attitudes when it is possible to compare and contrast popular culture offerings that came both before and after those of a particular era. One component of popular culture which affords such a juxtaposition is the moving picture. Another is its younger sibling, television.

new sources) teach Americans about the civil justice system"; and "[t]he reality thesis: the depictions of law and lawyers we find in popular culture are sometimes at a variance with and at other times faithful representations of lawyers we find in the 'real world' (internal quotation marks omitted)); Victoria S. Salzmann, *Here's Hulu: How Popular Culture Helps Teach the New Generation of Lawyers*, 42 MCGEORGE L. REV. 297, 301 (2011) (noting that "legal scholars are starting to recognize the positive impact of using popular-culture references as a mechanism of communication in legal discourse" and that "popular culture has become a powerful force in many lawyers' practices"); David Ray Papke, *From Flat to Round: Changing Portrayals of the Judge in American Popular Culture* 31 J. LEGAL PROF. 127, 127 (2007).

¹¹ Ray B. Brown, *Folklore to Populore*, in POPULAR CULTURE STUDIES ACROSS THE CURRICULUM 24, 25 (Ray B. Brown ed., 2004).

¹² Papke, *supra* note 10, at 127–28. Various theories have been proposed as to the role played by popular culture in formulating public perception about the law, lawyers, and the legal system. For example, according to the Frankfort School, "the primary role of popular culture in our society is to communicate, promote and perpetuate the 'dominant ideology,'" in order to "provide[] a conceptual framework and foundation for a particular social order" thereby "serv[ing] the interests of the prevailing power structure." Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 95–96 (2005). The Frankfort School of thought has been found instructive when applied to television because "television images of law frequently do serve to reinforce the dominant ideology in a relatively crude way—providing consistently idealized and mythic images of law and government which support the status quo" *Id.* at 96. For film, however, it has been concluded that the Birmingham School is a more appropriate theory of assessment due to "many images of law in popular film" which "depict law in a way that calls into serious doubt the ability of law to be neutral and just." *Id.* In contrast to the Frankfort School, the Birmingham approach is a "more complex version of a legal ideology" which "understands that the law is fallible" due to either being "ineffective at reaching justice, or worse, standing in the way of it." *Id.* at 97. However, this more multi-faceted perspective of the role of popular culture "still understands the law as fundamentally legitimate and authoritative, situated within a coherent moral universe." *Id.* Professor Orit Kamir proposes an alternative methodology for the study of "law-and-film" which is "comprise[d] of three fundamental premises: that some films' modes of socio-cultural operation parallel that of the law; that some films perform viewer-engaging judgment; and that some films contain popular jurisprudence." Orit Kamir, *Anatomy of Hollywood's Honorable Hero-Lawyer: A Law-and-Film Study of the Western Motifs, Honor-Based Values and Gender Politics Underlying Anatomy of a Murder's Construction of the Lawyer Image*, in 35 STUDIES IN LAW, POLITICS & SOCIETY 67, 69 (Austin Sarat, ed., 2005).

Since their inception in the late 1800s, moving pictures have been one of the cornerstones of American popular culture.¹³ As an integral part of American popular culture, the cinema is much more than simply a medium which entertains.¹⁴ It is a powerful, ubiquitous art form which serves as a cultural narrative by mirroring and reflecting particular aspects of a society.¹⁵ More importantly, it also has the power to influence and educate.¹⁶ It holds a unique position which allows the art form to shape individual views and understandings of salient societal issues.¹⁷ Thus, the cinema it is a two-

¹³ ROBERT SKLAR, *MOVIE-MADE AMERICA: A CULTURAL HISTORY OF AMERICAN MOVIES 3* (2012) ("For the first half of the twentieth century—from 1896 to 1946, to be exact—movies were the most popular and influential medium of culture in the United States."); Levy, *supra* note 4, at 199 ("Cinema, like other social institutions, does not operate in a cultural or political void. Rather, it is intermeshed with society's economic and political structures and with its dominant ideology. Hollywood is a commercial industry of mass products, but unlike other industries, it is also an ideological system which produces and transmits cultural symbols."). Today, in addition to physically going to the cinema to watch a film, when the theatrical run of a film is over, it is viewed on home video (DVD), via a streaming service, such as on Netflix, Hulu, Amazon Prime or iTunes Movies, or can be seen on video-on-demand. See, e.g. Amy Watson, *Monthly Movie Streaming Volume in the United States 2018*, STATISTA (Mar. 19, 2019), <https://www.statista.com/statistics/815513/movies-watching-streaming-service-us/> (noting that according to a survey conducted on-line from February 15–19, 2018, "21 percent of respondents stated that they typically watched one to two movies through streaming services in an average month, whereas 57 percent said that they watched five or more movies per month through streaming services"); Dina Zipin, *How Exactly Do Movies Make Money?*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/093015/how-exactly-do-movies-make-money.asp> (last updated Apr. 9, 2020) ("According to the Motion Picture Association of America's Theatrical Market Statistics Report for 2019, the U.S. and Canadian box office came in at \$11.4 billion. Globally, the box office for films hit \$42.2 billion in 2019." In addition, "streaming video is a new source of revenue for Hollywood movies" and, after a few years, once the revenue from video-on-demand is no longer profitable, "movie studios can still make money from older films by licensing them to Netflix or Amazon Prime.").

¹⁴ Vikas Shah, *The Role of Film in Society*, THOUGHT-ECONOMICS (June 19, 2011), <https://thought-economics.com/the-role-of-film-in-society/> (discussing how "[c]inema has become a powerful vehicle for culture, education, leisure and propaganda"). This influence reaches far beyond the borders of the United States. It has a global impact. For example, "[i]n a 1963 report for the United Nations Education Scientific and Cultural Organization looking at Indian Cinema and Culture", "a speech by Prime Minister Nehru" was quoted in which the Prime Minister stated "the influence in India of films is greater than newspapers and books combined." *Id.*

¹⁵ *Id.* (discussing the "powerful ubiquity [of film] within human culture"). For example, in 2009, "there were over 6.8 billion cinema admissions . . . creating global box office revenues of over \$30 billion In the same year combined DVD and Blu-Ray sales in the United States, Canada and European Union alone were US\$32.5 billion." *Id.* In light of such "revenues and audience figures from those who consume digitally, via television, repeat view content they already own and view through highly illegal but vast black-market films, the figures become truly staggering." *Id.*

¹⁶ See Michelle C. Pautz, *Argo and Zero Dark Thirty: Film, Government, and Audiences*, 48 PS: POL. SCI. & POL. 120, 120 (2015) (discussing the results of a study conducted to explore how Hollywood portrayals of the intelligence community in film can shape opinions about the government, which concluded that about 25% of viewers of the two films, *Argo* and *Zero Dark Thirty*, changed their opinion about the government after watching one of the movies).

¹⁷ See Gurvinder Kalra, et al., *Film, Mental Health and Therapy*, in PSYCHOTHERAPY, LITERATURE AND THE VISUAL AND PERFORMING ARTS 53, 53–54 (Bruce Kirkcaldy, ed. 2018) (discussing the power of cinematic representations of mental illness to shape public attitudes, both positively and negatively, about such conditions and emphasizing the crucial role films play "in shaping the social, political, and cultural psyche of our world," and also noting that "films are not only a source of endless entertainment but have a potential educational . . . impact as well"). It is interesting to note that contemporary studies have also found that "attending the cinema can have decisively positive effects on mental health . . .

edged sword; it can enlighten or mislead. This dual ability is of great significance when the entertaining educator chooses to tackle legal issues.¹⁸ As immortalized on film, it becomes clear that the law is “not autonomous, standing outside of the social world, but is deeply embedded within” and constitutes a preeminent part of American culture.¹⁹ As the laws and the American legal system have transformed over time, they have not done so in a vacuum. In the main, the catalysts for such changes have been the advent of new societal forces and ideas.²⁰ Consequently, such changes do not evolve by building on what has come before. Instead, legal transfiguration is often the direct result of current societal response to the prior decade’s accepted mores and morals.

One of the most important areas of the American law which has been subject to numerous, and sometimes, radical restyling is that of marriage dissolution. In fact, “changing social custom” even led to what has been denominated the “silent” revolution in divorce law beginning in the 1960s.²¹

because visual stimulation can queue a range of emotions and the collective experience of these emotions through the cinema provides a safe environment in which to experience roles and emotions” that the viewer “might not otherwise be free to experience.” See Shah, *supra* note 14 (citing S.C. Noah Uhrig, *Cinema is Good for You: The Effects of Cinema Attendance on Self-Reported Anxiety or Depression and “Happiness”* 1 (Inst. Soc. & Econ. Res., Working Paper Nov. 14, 2005)).

¹⁸ An excellent example of the impact that watching films can have is illustrated by a 2013 U.S. academic study which concluded that having couples watch, and then discuss, films about relationships is a more effective treatment than counselling in terms of preventing marital discord and dissolution. Ronald D. Rogge, et al., *Is Skills Training Necessary for the Primary Prevention of Marital Distress and Dissolution? A 3-Year Experimental Study of Three Interventions*, 81 J. CONSULTING & CLINICAL PSYCH. 949, 953–54 (2013); see also Michael Asimow, *Bad Lawyers in the Movies*, 24 NOVA L. REV. 533, 553–556 (2000) [hereinafter *Bad Lawyers in Movies*]. The cultivation theory or “effect” holds that viewer “exposure to media” influences the consumer’s conception of social reality, including attitudes and beliefs. Asimow, *supra*, at 553. Although, the majority of “cultivation theory” research has related to television viewing, Prof. Asimow endorses the position that it is fair to assume that “the same psychological dynamics” are equally applicable to films. *Id.* at 555. Consequently, “the cultivation theory supports the hypothesis that frequent and recent exposure to vividly negative films about lawyers should increase the number of people who will make negative heuristic judgments about lawyers.” *Id.* at 556; see also Victoria Salzmann & Philip T. Dunwoody, *Prime-Time Lies: Do Portrayals of Lawyers Influence How People Think About the Legal Profession?*, 58 SMU L. REV. 411, 415 (2005) (“Under the pop-culture legal realists’ theory, the perception of what lawyers do is understood via television, film, and literature.”); Robin Paul Malloy, *Introduction to the Symposium on the Image of Law(yers) in Popular Culture*, 53 SYRACUSE L. REV. 1161, 1161 (2003).

¹⁹ Mather, *supra* note 9, at 681.

²⁰ *Rights of Passage*, *supra* note 7, at 650.

²¹ HERBERT JACOB, *SILENT REVOLUTION* 27 (1988) (discussing the radical changes of divorce law and methods of dispute resolution beginning the 1960s). That a “revolution” was required to effect changes in the laws of divorce is not surprising in light of the traditional views surrounding the institution of marriage. According to the U.S. Supreme Court, marriage is a coming together for better or for worse, hopefully enduring, and intimate to a degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965). Marriage and its dissolution have always fallen under the purview of individual state legislatures as structured by the Tenth Amendment to the United States Constitution. S. J. Bahr, *Impact of Recent Changes in Divorce Laws for Women*, 20 FAM.

Important vagaries in the law of divorce, however, have existed since the early 1900s. For over a century divorce has left a unique and interesting legal footprint as it has transformed in response to altered historical and cultural forces. This is not surprising. Divorce is multi-faceted legal occurrence. Certainly, it is first and foremost a legal act that changes the legal status of the former couple.²² In doing so, it also can have great economic consequences for the parties involved.²³ But it also crosses into the area of societal religious beliefs and cultural standards of what constitutes "right and wrong."²⁴ In 1906, speaking at the National Congress on Uniform Divorce Laws, the Rev. Charles Dickey described Marital Dissolution as "worse than any pestilence that can be brought in ships, or any calamities that can come from the clouds. For, let the foundations of our homes be meddled with, and we will have no foundation for our country."²⁵ In contrast, by the 1960s, divorce laws begins to reflect changes in the marital relationship in terms of the desire by women to achieve "greater autonomy with marriage and family."²⁶ However, marital breakups not only resonate with "moral and symbolic meaning."²⁷ Divorce is a fascinating area of the law because it enkindles debate and arouses emotions about the basic building blocks of human relationships: "sex, romance, family, children, love, and hate."²⁸

In exploring how changing societal forces and mores have configured and continue to mold the law of divorce, this piece will focus on the relevant issues affecting the law of divorce from the turn of the Twentieth Century though the enactment of the first no-fault divorce statute in 1969, and the ramifications of the divorce reform revolution as it swept the country during the 1970s and '80s. It will employ representative films for each covered time period to paint a picture of the cultural influences and forces that gave rise to that era's perspective about divorce as it strove to make a better society.

PERSPECTIVES 95-103 (1985); see *Maynard v. Hill*, 125 U.S. 190, 205 (1888) ("Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution."); see also F. E. Zimring, *Forward to DIVORCE REFORM AT THE CROSSROADS*, at vii (S.D. Sugarman & H.H. Kaye eds., 1990) ("[W]hen it occurs, divorce is a high-impact experience: its economic effects are more substantial than any other legal event in the life of the average citizen, and child custody matters are of surpassing importance to the adult litigants and their children Thus, no area of the state law is more important than the rules surrounding marriage and divorce, and no area of the law in the United States has changed more rapidly.").

²² *Rights of Passage*, *supra* note 7, at 649.

²³ *Id.*

²⁴ *Id.*

²⁵ Rev. Charles A. Dickey, Remarks at the National Congress on Uniform Divorce Laws (Feb. 19, 1906), in *PROCEEDINGS OF THE NATIONAL CONGRESS ON UNIFORM DIVORCE LAWS* 40, 41 (1906).

²⁶ C. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 168 (1980).

²⁷ *Rights of Passage*, *supra* note 7, at 651.

²⁸ *Id.*

Specifically, this article will trace the key components of film censorship implemented via the Hays Code in the 1930s and explore how divorce was transformed post-Code from being an anathema to an accepted, if not expected, part of mainstream American life. It will also recount the psychological shift of the 1960s that led to the birth of a new “divorce culture” premised on the idea that when a spouse is unfulfilled due to an unsatisfying the martial relationship, divorce is not only justified, but paves the road to self-realization.

As this article will illustrate, the rise of new social mores is often a counter-reaction to those of the immediately preceding time period. This was certainly the case in the 1960s, when a large portion of society explicitly rejected the values of the 1950s, which glorified the suburban nuclear family as it embraced traditional gender roles and honored marital stability.²⁹ Despite the continuing myth that the 1950s constituted the golden age of the American family, this article will demonstrate that the “ideal” family portrayed each evening on the television was not a documentary. Cinematic representations of life during the 1950s reflect that it was also time of great stress for both spouses. Husbands faced the specter of becoming an “organization man,” while many homemakers were suffering from “the problem that has no name.”³⁰ Just as the 1950s effected societal change in the 1960s, because the rise of the culture of the 1950s is inextricably linked to the unsettling wartime conditions stemming from WWII, changes in attitudes towards marriage and divorce in the 1940s will be addressed.

Sometimes, however, it almost seems that the social climate of an era is resurrected. This premise will be explored by comparing the world of the early 1920s, in which the first wave of feminism flourished, to that of the women’s movement of the 1960s and ’70s.

Finally, this article will highlight that, irrespective of the varying, contemporaneous views of divorce of different eras, there is one common theme which runs beneath and unites the six decades: gender inequality.

II. EARLY CINEMATIC REPRESENTATIONS OF DIVORCE PROCESS, FILM CENSORSHIP, THE STIFLING EFFECT OF THE HAYS CODE

A. Cinematic Portrayals of Divorce Unfettered

It has aptly been noted that “[m]ining drama from divorce in film is like shooting fish in a barrel.”³¹ The breakdown of a marital relationship is

²⁹ Levy, *supra* note 4, at 190.

³⁰ See WILLIAM H. WHYTE, *THE ORGANIZATION MAN* 7 (1956); BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 66 (1963) [hereinafter *THE FEMININE MYSTIQUE*].

inherently fraught with “angst, anger, and trauma.”³² Not only is the inherent nature of the divorce process adversarial, the topic also affords screenwriters and directors the opportunity to create a cinematic work of art in a milieu where the underlying causes of the disintegration of what was likely once viewed as an eternal bond are obfuscated by mists of uncertainty. Consequently, it is not surprising that modern writers and producers continue to gravitate toward the topic of divorce as the plot for a film.³³

By the 1930s, when talkies were all the rage, divorce had become part of American culture.³⁴ In fact, in the 1930 film *The Divorcee*, Norma Shearer won an Academy Award for her portrayal of a young wife who, fed up with her husband’s infidelity, decides to test the double standard by engaging in her own extramarital affair.³⁵

The picture begins with Jerry (Norma Shearer), a Manhattan ad writer, marrying Ted, a newspaperman, and they settle down to a life of marital bliss until the night of their third wedding anniversary, when their group of lively “in-crowd” New York friends show up with an extra partygoer, Janice, who is clearly attracted to Ted.³⁶ The audience then learns that a month or so ago, Ted and Janice had had a drunken one-night stand. When Jerry walks in and finds Janice and Ted embracing in the kitchen, she can tell that something has gone on between them from the way Janice is looking at her

³¹ Aoife Kelly, *Divorce on Film: Break-up Movies That Get to the Heart of the Matter*, IRISH INDEP. (Nov. 15, 2019, 2:30 AM), <https://www.independent.ie/entertainment/movies/divorce-on-film-break-up-movies-that-get-to-the-heart-of-the-matter-38693728.html>.

³² *Id.*

³³ In addition, film audiences have been captivated by stories dealing with premarital and extramarital sex, infidelity, marital breakdowns, and divorce since before talking pictures began. Ira Lurvey & Selise E. Eiseman, *Divorce Goes to the Movies*, 30 U.S.F. L. REV. 1209, 1210 (1996). In the early 1930s, on occasion, filmmakers even titillated audiences with graphic images that included nudity. Often such films cast no blame or shame upon a woman who uses her good looks and sex to get what she wants. A wonderful example of a film which runs the gambit of pre-marital sex, divorce, infidelity, and even attempted murder is the 1932 picture *Red-Headed Woman*. RED-HEADED WOMAN (Metro-Goldwyn-Mayer 1932). Jean Harlow stars as Lil Andrews, a woman who destroy marriages and has no problem with frequent promiscuity to achieve her goal of climbing to the top of society by catching a rich husband. After a first marriage doesn’t appear it will allow her to achieve her dreams, she leaves her husband and engages in dual affairs simultaneously with a new potential husband and a French chauffeur, played by a young Charles Boyer. In one scene, when she is changing, she is shown topless. Ultimately, neither divorce nor high society can stop her. The film ends at a racetrack in Paris where she is spotted by a former husband joining a French millionaire, much her senior, in a limousine driven by her handsome French chauffeur with whom one assumes she is also still involved. *Id.*; see also Benjamin Welton, *10 Shocking Films From the Early Days of Hollywood*, LISTVERSE (June 30, 2015), <https://listverse.com/2015/06/30/10-shocking-films-from-the-early-days-of-hollywood/>.

³⁴ Richard Corliss, *The First Talking Picture*, TIME (Mar. 31, 2003), http://content.time.com/time/specials/packages/article/0,28804,1977881_1977883_1977937,00.html.

³⁵ THE DIVORCEE (Metro-Goldwyn-Mayer 1930).

³⁶ *Id.*

husband.³⁷ Later, in their bedroom, Ted confirms her suspicions, then offers reassurances and advice:

TED: Please believe, me, darling. It doesn't mean a thing. Not a thing. Doesn't make the slightest difference. Come on, snap out of it. Now, pull yourself together.³⁸

Out of anger and hurt, and to teach Ted a lesson, Jerry has a one-night stand of her own while Ted is in Chicago for a week.³⁹ When Ted returns from his trip, Jerry admits the affair in a straight-forward manner, telling him:

JERRY: That I've balanced our accounts. That's all. I didn't really intend to, but that's how it is. I had to tell you. Don't look at me like that, Ted.

TED: You don't mean that Jerry.

JERRY: I'm telling you the truth.

TED: Who's the man?

JERRY: Oh, Ted, don't be conventional.

TED: Who's the man? I want to see him.

JERRY: Isn't it a rather good time to remember what you said? That it doesn't mean a thing?

TED: Shut up, you! It can't be true. Why, I always thought you were the most decent thing in the world. Can't be true.

JERRY: Well, it is.⁴⁰

While Ted expected Jerry to get over his infidelity, “snap out of it”, and “pull herself together,” his response when she engages in the same conduct is that her having an affair “isn't the same thing at all.”⁴¹ Shocked by Ted's hypocrisy, she tells him “[f]rom now on, you're the only man in the world that my door is closed to.”⁴² They obtain a collusive divorce,⁴³ which is followed by Ted falling into despair, losing his job, and having trouble with

³⁷ *Id.*; *The Divorcee (1930) Review with Norma Shearer, Chest Norris, Conrad Nagel, and Robert Montgomery*, PRE-CODE.COM (July 1, 2010), <http://pre-code.com/the-divorcee-1930-norma-shearer/> [hereinafter *The Divorcee Review*].

³⁸ Ursula Parrott, *The Divorcee*, SCRIPTS, https://www.scripts.com/script.php?id=the_divorcee_20097&p=10 (last visited Nov. 21, 2020).

³⁹ *THE DIVORCEE*, *supra* note 35; *The Divorcee Review*, *supra* note 37.

⁴⁰ Parrott, *supra* note 38.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *THE DIVORCEE*, *supra* note 35. At this point in time, the only ground for divorce in New York was adultery. Absent actual adultery by one of the spouses, to meet this strict standard, parties who desired to divorce obtained a default decree by engaging in a collusive divorce by the plaintiff spouse offering false testimony or presenting fraudulent photos to show the defendant's infidelity. In such case, the defendant simply failed to appear, and the decree was granted. However, if the defendant wished to challenge the petition for divorce, he or she could offer a defense, known as a recrimination, by proving that the plaintiff had been equally unfaithful. Because Jerry was granted a divorce, clearly there was no recrimination offered by Jerry. See *infra* Part III and accompanying notes for a detailed discussion of collusive divorce.

alcoholism. In contrast, Jerry engages in post-divorce affairs and is financially successful.⁴⁴ Although in a rather melodramatic ending they do reunite, *The Divorcee* is arguably one of the most important and scintillating films of early Hollywood, dealing with female sexuality, the double standard regarding sexual mores, and infidelity.⁴⁵ Then, in 1934, the landscape changed for portrayals of divorce when the film industry began to effectively implement a draconian self-censorship via the Hays Code (the "Code").⁴⁶

⁴⁴ THE DIVORCEE, *supra* note 35; *The Divorcee Review*, *supra* note 37.

⁴⁵ For a more thorough discussion of how divorce was handled in film during the late 1920s–early 1930s, see Michael Asimow, *Divorce in the Movies: From the Hays Code to Kramer vs. Kramer*, 24 LEGAL STUD. F. 221, 224–40 (2000) [hereinafter *Divorce in the Movies*].

⁴⁶ Arguably, the impetus for the creation of Hollywood codes was the portrayal of sex on screen, even more than that of violence. In pre-code Hollywood, between 1929 and 1934, female stars took lovers, had babies out of wedlock, got rid of cheating husbands, enjoyed their sexuality, led unabologetic careers They had fun. That's why the Code came in . . . to prevent women from having fun. It was designed to put the genie back in the bottle – the wife back into the Kitchen.

MICK LASALLE, *COMPLICATED WOMEN 1* (2001). Voluntary censorship efforts by the film industry began in 1927 when, endeavoring to clean up Hollywood's increasingly controversial output and assist the studios in avoiding avoid further confrontations with state and regional censorship boards, the first director of the Motion Picture Producers and Distributors of America, Will H. Hays, devised and published "The Don'ts and Be Carefuls", a list consisting of 11 things to be completely avoided in future movies (the "Don'ts"), and 25 things that required careful consideration before being included (the "Be Carefuls"). For example, "the Don'ts ranged from prohibitions on profanity to barring the showing of miscegenation, illegal drug trafficking, the sex organs of children," and "[a]ny licentious or suggestive nudity-in factor in silhouette; and any lecherous or licentious notice thereof by other characters in the picture." HOLLYWOOD'S AMERICA: TWENTIETH CENTURY AMERICA THROUGH FILM 118–19 (Steven Mentz & Randy W. Roberts eds., 4th ed. 2010) [hereinafter *HOLLYWOOD'S AMERICA*]. Regarding the "Be Carefuls," Hays admonished "[t]hat special care be exercised in the manner in which" certain "subjects are treated, to the end that vulgarity and suggestiveness be eliminated and that good taste may be emphasized" *Id.* These topics included:

[t]heft, robbery, safe-cracking, and dynamiting of trains, mines, building, etc. (having in mind the effect which a too-detailed description of these may have upon the moron); [t]echniques of committing murder by whatever method; [a]ctual hangings or electrocutions as legal punishment for crime; [t]he sale of women, or of a woman selling her virtue; [r]ape or attempted rape; [t]he institution of marriage; [e]xcessive or lustful kissing, particularly when one character or the other is a "heavy."

Id. (formatting altered). Ultimately, however, the 1927 proscriptions and warning went unheeded. MARK A. VIERA, *SIN IN SOFT FOCUS: PRE-CODE HOLLYWOOD* 12–13 (1999). The result was that the 1927 strictures were supplanted in 1930 by the Hays Code. It too was not initially effectively enforced. This is aptly illustrated by the release of the 1933 film, *THE STORY OF TEMPLE DRAKE* (Paramount Pictures 1933). Miriam Hopkins stars as Temple Drake who, although she is the spoiled daughter of a Judge and slated to marry an idealistic young lawyer, is a Southern belle who loves to lead men on, usually leaving them wanting more. One evening when she is out carousing with one of her many gentlemen friends, she is trapped with some bootleggers, kidnapped and raped. The problem is that she enjoyed the rape and initially stays with her attacker of her own free will. When she ultimately kills him, it is because she is afraid that if he remains alive, she will not be able to overcome her nature and will remain a sex slave. *Id.* *The Story of Temple Drake* is steamy, provocative and racy. It is often credited as the catalyst for the implementation of the Hays Code in full force. Geoffrey O'Brien, *The Story of Temple Drake: Notorious*, CRITERION (Dec. 3, 2019), <https://www.criterion.com/current/posts/6716-the-story-of-temple-drake-notorious>. In addition, in 1933, the year *Temple Drake* was released, the Payne Fund Studies were released. RICHARD B. JEWELL, *THE GOLDEN AGE OF CINEMA: HOLLYWOOD 1929–1945*, at 129 (2007). Although not fully supported by scientific evidence, these studies focused on the effect that films had on young people and concluded that "movies influenced attitudes, emotions behavior" regarding "crime and

B. The Public Hue & Cry for Censorship

The dawn of moving pictures at the turn of the twentieth century created a “moral panic” due to the perceived threat it posed to the moral values of the era which emphasized decorum, reserve, and correctness.⁴⁷ Moving pictures not only could circumvent the standards and rules set by the church, family, or civic groups, but they did so in a highly “public fashion” which affronted the Victorian demarcation between the public and private spheres.⁴⁸ A prime example is *The Kiss*, an 1896 film produced by Thomas Edison at Black Maria studios in West Orange, New Jersey, and one of the first films ever shown commercially to the public.⁴⁹ The short film runs around 20 seconds and depicts a re-enactment of the kiss between May Irwin and John Rice from the final scene of the stage musical *The Widow Jones*.⁵⁰ According to the Edison film catalogue, in the kiss, the couple “get ready to kiss, begin to kiss, and kiss and kiss and kiss in a way that brings down the house every time.”⁵¹ The film engendered public outcry and was reportedly “denounced in some parts of the country as illicit pornography.”⁵² One contemporary critic wrote: “[T]he spectacle of the prolonged pasturing on each other's lips” was “beastly” enough in life size on the stage “[b]ut . . . [m]agnified to gargantuan proportions and repeated three times over it is absolutely disgusting.”⁵³ The review concluded with the observation that “such things call for police interference.”⁵⁴ Irrespective of the controversy surrounding the film, a number of viewers of “the emerging art form were drawn to the film's provocative subject matter”⁵⁵ The early 1900s also witnessed the

delinquency” to arousing foreign “impulses and feelings.” GARTH S. JOWETT ET AL., *CHILDREN AND THE MOVIES: MEDIA INFLUENCE AND THE PAYNE FUND CONTROVERSY* 79–81 (1996). In the wake of the study, the Catholic Church founded the “Legion of Decency”, an organization to “combat immoral motion pictures.” JEWELL, *supra*, at 131. The Legion established its own ratings system and a majority of Catholics agreed not to view any film which the Legion deemed to be indecent or immoral. *Id.* Protestant and Jewish groups soon followed suit. *Id.* Faced with a serious threat to revenue from attendance, in order “to appease the Legion of Decency and regain the faith (and money) of the movie-going public,” the studios joined forces to form a new enforcement team, the Production Code Administration Office, preferring self-censorship to outside interference. Patrick Trey Brady, *The Celluloid Advocate: The Evolution of the Twentieth Century Cinematic Lawyer*, 27 S. CAL. INTERDISC. L.J. 165, 172 (2017).

⁴⁷ John Springhill, *Censoring Hollywood: Youth, Moral Panic and Crime/Gangster Movies of the 1930s*, 32 J. POPULAR CULTURE 135, 136 (1998).

⁴⁸ LAURA WITTERN-KELLER, *FREEDOM OF THE SCREEN: LEGAL CHALLENGES TO STATE FILM CENSORSHIP, 1915-1981*, at 17 (2008).

⁴⁹ *THE KISS* (Edison Mfg. Co. 1896).

⁵⁰ DANIEL EGAN, *The John C. Rice-May Irwin Kiss*, in *AMERICA'S FILM LEGACY: THE AUTHORITATIVE GUIDE TO THE LANDMARK MOTIVES IN THE NATIONAL FILM REGISTRY* 4, 5 (2009).

⁵¹ *Id.* at 5.

⁵² Nat'l Film Pres. Bd., *Brief Descriptions and Expanded Essays of National Film Registry Titles: The Kiss (1896)*, LIBR. CONG., <https://www.loc.gov/programs/national-film-preservation-board/film-registry/descriptions-and-essays/> (last visited Feb. 1, 2021).

⁵³ Pierre La Rose, *Notes*, 5 CHAP BOOK 145, 240 (1896).

⁵⁴ *Id.*

⁵⁵ Nat'l Film Pres. Bd., *supra* note 52. But see Ralph Dengler, *The First Screen Kiss and "The Cry of Censorship"*, 7 J. POPULAR FILM & TELEVISION 267, 267 (1979) (arguing that “the moral indignation

production of "vice films" which marked the beginning of movies with sexual themes.⁵⁶ These productions were "risqué, bawdy, and low life" entertainment.⁵⁷ For example, in Thomas Edison's 1902 movie, *How They Do Things on the Bowery*, the plot centered on "loose women" who "lure country rubes into saloons, drug their drinks and steal their money."⁵⁸ Often, films with "sexual innuendos" were comedies or had titillating titles to trick viewers into seeing them. Both produced in 1901, *What Happened On 23rd St., NYC*, contained nothing more than "a strong wind that blew up skirt[s]," and in *What Demoralized the Barbershop*, the great expose was nothing more than a "raised skirt."⁵⁹ In 1902, another such offering included *The Pouting Model*, which showed only the back of a nude little girl, and *Water Nymphs* which, while it did feature a fountain, only showed small infants playing in the water.⁶⁰ Other films, however, came closer to delivering what the title promised. In the early twentieth century, urban audiences, composed mostly of bachelors, were treated to women stripping down to a leotard in the 1901 film, *Trapeze Disrobing Act*, and 1903's *Birth of a Pearl*.⁶¹ Some films did contain more "overt sexual activity" such as *The Typewriter*, which, in 1902, portrayed a wife discovering her husband and his secretary engaged in a passionate kiss.⁶² In 1903, two films, *Be Good* and *The Girl at the Window*, neither of which contained any real plot, were apparently produced simply to treat audiences to portrayals of caresses and kissing.⁶³ By 1913, a magazine cover declared that "[t]he clock had struck 'sex o'clock in America' and a number of moral citizens were afraid that the cover presaged a continuing decline in the morals of young women."⁶⁴

The condemnation of pictures like the *Kiss* or the vice films was only the beginning. Civic and religious groups began to put pressure on states and municipalities, demanding actual censorship.⁶⁵ In 1907, Chicago became the

ascribed to audiences of the time was an anachronism introduced by commentators whose movie world was that of the Hollywood of the 20s and 30s, of the Motion Picture Producers and Distributors Association, the Hays Office and Production code").

⁵⁶ SKLAR, *supra* note 13, at 23.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* Other films produced in 1903 which featured "women in various stages of undress" include THE CORSET MODEL (American Mutoscope & Biograph 1903), THE PAJAMA GIRL (American Mutoscope & Biograph 1903), THE PHYSICAL CULTURE GIRL (Edison Mfg. Co. 1903), AT THE DRESSMAKER'S (American Mutoscope & Biograph 1903), AND FROM SHOWGIRL TO BURLESQUE QUEEN (American Mutoscope & Biograph 1903). *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN LIFE 111-12 (1988).

⁶⁵ WITTERN-KELLER, *supra* note 48, at 19-21; see also Francis G. Couvares, *So This is Censorship: Race, Sex, and Censorship in Movies of the 1920s and 1930s*, 45 J. AM. STUD. 581, 592-597 (2011).

first city to enact a moving picture ordinance which empowered the police commissioner to select movie censors to control what was shown on the screen.⁶⁶ Continued lobbying by religious and civic organizations was rewarded.⁶⁷ Between 1907 and 1926, seven states, along with 100 cities, answered the call, placing restraints on films in one way or another.⁶⁸ It has been estimated that in 1929, films were being censored by as many as 300 municipalities.⁶⁹

In many ways, the culprit, or at least the catalyst, for joining the bandwagon for censorship can be placed at the feet of the Justices of the U.S. Supreme Court. In a unanimous 1915 opinion, the U.S. Supreme decided the landmark case *Mutual Film Corp. v. Industrial Commission of Ohio*, which denied First Amendment protections of free speech to motion pictures.⁷⁰ In rendering its decision, the Court reasoned that the showing of films was “a business, pure and simple, originated and conducted for profit” and “like other spectacles” should not be viewed as “part of the press of the country, or as an organs of public opinion.”⁷¹ By defining motion pictures as simply entertainment spectacles for profit and not legitimate art, the Court legally sanctioned and judicially approved public censorship of the industry.⁷²

Pressure continued to mount on the studios in the 1930s, with numerous groups now seeking federal censorship of the industry.⁷³ The threat of boycotts against immoral movies by the Catholic League of Decency culminated in 1934 when the film industry’s trade association, the Motion Picture Producers and Distributors of American, entered into an agreement with the hierarchy of the Roman Catholic Church pursuant to which the industry agreed to fully implement the tenets of the Production Code.⁷⁴ The resulting

⁶⁶ WITTERN-KELLER, *supra* note 48, at 22.

⁶⁷ For example, by 1925, the Woman’s Christian Temperance Union was focusing all of its censoring efforts on moving pictures, convinced that the new medium was the leading cause of moral decay. ALISON M. PARKER, *PURIFYING AMERICA: WOMEN, CULTURAL REFORM AND PRO-CENSORSHIP ACTIVISM, 1873-1933*, at 143–45 (1997).

⁶⁸ WITTERN-KELLER, *supra* note 48, at 26 (The states were Pennsylvania, Ohio, Kansas, Maryland, New York, Virginia, and Massachusetts.).

⁶⁹ FRANK WALSH, *SIN AND CENSORSHIP: THE CATHOLIC CHURCH AND THE MOTION PICTURE INDUSTRY* 57 (1996).

⁷⁰ *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 243–44 (1915).

⁷¹ *Id.* at 244.

⁷² PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS* 311–341 (2004).

⁷³ TINO BALIO, *GRAND DESIGN: HOLLYWOOD AS A MODERN BUSINESS ENTERPRISE, 1930-1939*, at 56 (1993). In 1933, after the Payne Fund Studies were released, the Catholic Church founded the “Legion of Decency,” an organization to “combat immoral motion pictures.” JEWELL, *supra* note 46, at 129. For further discussion on the Payne Fund Studies and the subsequent reaction by the Catholic Church and other religious institutions, see *supra* note 46.

⁷⁴ BALIO, *supra* note 73, at 39. Faced with a serious threat to revenue from attendance, in order “to appease the Legion of Decency and regain the faith (and money) of the movie-going public,” the studios

draconian enforcement of its provisions fettered probing cinematic portrayals of the issues surrounding sexuality and divorce for the next 34 years.⁷⁵

While there was no clear prohibition relating directly to the topic of divorce in the Code, according to its strictures, filmmakers were required to uphold “[t]he sanctity of the institution of marriage and the home.”⁷⁶ Such restrictions certainly hampered any realistic portrayals of divorce on the screen.⁷⁷ As for placing the home on a pedestal, the 1944 film, *Since You Went Away*, opens with a prologue that genuinely advises viewers: “This is the story of an unconquerable fortress, the American home . . . 1943.”⁷⁸ In addition, under the Code, films were not allowed to “infer that low forms of sex relationship are the accepted or common thing.”⁷⁹ In the rare instance when divorce was portrayed, it was only to occur for “sound reasons”, be undertaken “as a last resort”, and could never be the subject of comedy or be taken “lightly”.⁸⁰

The power of the Code began to wane with the U.S. Supreme Court’s 1952 decision, *Burstyn v. Wilson*, in which the Court finally overruled *Mutual Film Corp.*, and held that films did fall within the umbrella of First and Fourteenth Amendment free speech protections.⁸¹ Moving pictures were no longer viewed as spectacles or comparable to a circus, whose only purpose was to entertain for profit. Instead, film was now recognized as “a significant medium for the communication of ideas” which “might affect public attitudes and behaviors in a variety of ways, ranging from direct espousal of a

joined forces to form a new enforcement team, the Production Code Administration Office, preferring self-censorship to outside interference. Brady, *supra* note 46, at 172.

⁷⁵ Laura Smith, *Hollywood Was Exploring Sexuality, Gender, and Feminism in the 1930s - but One Man Stopped It*, *TIMELINE* (Aug. 17, 2017), <https://timeline.com/hollywood-hays-code-breen-5f7872604f7b> (discussing films such as *DESIGN FOR LIVING* (Paramount Pictures 1933), in which “the heroine had two lovers and chose to keep them both,” *QUEEN CHRISTINA* (Merto-Goldwyn-Mayer 1933), in which the Great Garbo starred as “a cross-dressing bisexual monarch,” *TORCH SINGER* (Paramount Pictures 1933) which included an unwed mother, *MEN IN WHITE* (Metro-Goldwyn-Mayer 1934) which addresses the subject of illegal abortion, and *MURDER AT THE VANITIES* (Paramount Pictures 1934) which has a heroine that “croon[s] an ode to marijuana”); see also Richard M. Mosk, *Motion Picture Ratings in the United States*, 15 *CARDOZO ARTS & ENT. L. J.* 135, 135–36 (1997); Douglas Ayers et al., *Self-Censorship in the Movie Industry: An Historical Perspective on Law and Social Change*, 1970 *WIS. L. REV.* 791, 794 (1970).

⁷⁶ Complete copies of the 1927 “The Don’ts and Be Carefuls” and The Motion Picture Code of 1930 can be found in *HOLLYWOOD’S AMERICA*, *supra* note 46, at 118–28. For an interesting discussion about the Hays Code, see David Denby, *Sex and Sexier, the Hays Code Wasn’t All Bad*, *NEW YORKER* (Apr. 25, 2016), <https://www.newyorker.com/magazine/2016/05/02/what-the-hays-code-did-for-women>.

⁷⁷ See *infra* notes 113–17 and accompanying text.

⁷⁸ *SINCE YOU WENT AWAY* (Selznick Int’l Pictures 1944). The movie then recounts the brave story of a housewife, the sole head of “an idealized suburban family living in a sparkling clean world,” and her admirable struggles to raise her two daughters alone and protect the home front while he husband is away fighting in WWII. *Id.*; see also Levy, *supra* note 4, at 200–01.

⁷⁹ *The Motion Picture Production Code of 1930 (Hays Code)*, JOSEPH SMITH FOUND., <https://josephsmithfoundation.org/docs/the-motion-picture-production-code-of-1930-hays-code/> (last visited Nov. 21, 2020) [hereinafter *Hays Code*].

⁸⁰ RAYMOND MOLEY, *THE HAYS OFFICE* 107 (1945).

⁸¹ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.”⁸² Though the film industry was not quite ready to dismantle self-censorship entirely in the 1950s, by the 1960s, censorship was viewed as not only old-fashioned and out of touch, but as repressive.⁸³ As the well-respected reporter for *The New York Times*’ West Coast movie beat, Murray Schumach so aptly observed in 1964, censors had become “the elite among nincompoops.”⁸⁴

III. COLLUSIVE DIVORCE

A divorce action is an adversarial proceeding. Prior to the recognition of no-fault divorce, in order to obtain a divorce, one spouse had to show marital fault on the part of the other.⁸⁵ Such laws were premised on the view that the institution of marriage was sacrosanct and should only be put asunder to protect the innocent plaintiff, husband or wife, from the defendant

⁸² *Id.* at 501. The Code was strictly enforced for pictures produced by the studios until 1959, when *Some Like It Hot* hit the theaters. *SOME LIKE IT HOT* (Ashton Productions 1959). The film stars Jack Lemmon as Jerry and Tony Curtis as Joe, musicians who have to get out of town fast and away from Spats Colombo, a gangster, after accidentally witnessing the Valentine’s Day massacre. The only gig immediately available is with an all a girl’s band, so they dress in drag and get the jobs as Josephine (actually Joe) and Daphne (actually Jerry). The plot of the film is “a veritable catalog of once-forbidden topics — gambling and racketeering to get the plot going, a booze-swilling Marilyn Monroe to keep it going.” Bob Mondello, *Remembering Hollywood’s Hays Code, 40 Years On*, NPR: ALL THINGS CONSIDERED (Aug. 8, 2008, 5:58 PM), <https://www.npr.org/templates/story/story.php?storyId=93301189>. Arguably, in the scene where Monroe’s character, Sugar Kane Kowalczyk, climbs into a small berth in a train sleeping car with Jack Lemmon’s “Daphne,” which in a few seconds is overcrowded with beautiful girls mixing Manhattan-drinks in their hot-water bottles while Jack Lemmon is desperately trying to remind himself that—just then—he is a girl, the Code was for all intents and purposes dead. *Id.* A year later, it was suggested “that some sort of classification system might work better than a censorship system” which was basically being ignored. *Id.* The Hays Code was in effect until 1968, when the legendary Czar of the Motion Picture Association for America, Jack Valenti, replaced the industry’s self-censorship Code with the Voluntary Movie Rating System which remains in force today, with some alterations. See generally JACK VALENTI, *THE VOLUNTARY MOVIE RATING SYSTEM: HOW IT BEGAN, ITS PURPOSE, THE PUBLIC REACTION* (1991). The original rating system consisted of “‘G’ for ‘general audiences’; ‘M’ for ‘mature audiences’; ‘R’ for ‘restricted’ and ‘X’ for ‘adults only.’” Tim Durham, *Censorship in American Filmmaking*, SATURDAY EVENING POST (Apr. 17, 2014), <https://www.saturdayeveningpost.com/2014/04/censorship-in-american-filmmaking/>. As of 1970, “‘M’ was changed to ‘GP’ which meant ‘all ages admitted, but parental guidance suggested.’” This category was changed again in 1972 to “PG”. *Id.* In 1984, at the suggestion of director Stephen Spielberg, an additional rating of “PG-13” was added. *Id.* The purpose of this rating was to “shield young children from gore and violence.” Matthew Dessem, *Happy Birthday to the PG-13 Rating! To Celebrate, Here Are Some PG-Rated Scenes*, SLATE, (July 1, 2018, 10:08 PM), <https://slate.com/culture/2018/07/happy-birthday-to-the-pg-13-rating-to-celebrate-here-are-some-pg-rated-scenes.html>. Prior to the introduction of this new category, films such as Spielberg’s *INDIANA JONES AND THE TEMPLE OF DOOM* (Paramount Pictures 1984), which contained a graphic scene where a priest pulls a beating heart out of a man’s chest and then lowers him into a burning lava pit, were simply rated PG. Dessem, *supra*.

⁸³ Couvares, *supra* note 65, at 597.

⁸⁴ MURRAY SCHUMACH, *THE FACE ON THE CUTTING ROOM FLOOR: THE STORY OF MOVIE AND TELEVISION CENSORSHIP* 185 (1954).

⁸⁵ Herma Hill Kay, *An Appraisal of California’s No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 297 (1987) [hereinafter *California’s Divorce Law*].

after he or she had irretrievably broken the marriage contract.⁸⁶ While the grounds for obtaining a fault-based divorce varied from state to state, every state required that one of the legally recognized fault grounds in the relevant statute be shown or no divorce could be granted. For example, in 1851, California enacted its first divorce law which set out the following grounds for divorce: impotence, adultery, extreme cruelty, desertion or neglect, habitual intemperance, fraud, and conviction for a felony.⁸⁷ Some states had unique grounds. For example, leprosy was a ground for divorce in Hawaii, and a husband could divorce his wife in Virginia if it turned out she was a former prostitute.⁸⁸

By the turn of the twentieth century, there was a serious problem. Despite the ever-present anti-divorce position taken by many influential people and organizations based upon moral objections,⁸⁹ over time, cultural and social views of divorce changed. A major transformation had occurred; couples who mutually wanted to end their union wanted the option of a consensual divorce. However, the strict, fault-based grounds remained steadfastly in place, irrespective of a growing demand for divorce.⁹⁰ The staid laws on the books were incapable of recognizing that such grounds could be legally feasible.⁹¹ The upshot was that in order to comply with statutory requirements, many couples resorted to deception to get the marital dissolution they desired.⁹² In the parlance of divorce law, the couple was engaging in "collusion," which entailed creating either fictional grounds for a divorce when none existed or, if a reason did exist to divorce, to make sure that the reason matched one of the recognized statutory grounds for divorce.⁹³ It appears

⁸⁶ *Id.* at 292 (noting that "the ideal of marriage" was viewed as "indissoluble except for specific acts of marital misconduct . . .").

⁸⁷ DONNA S. HERSHKOWITZ & DREW R. LIEBERT, ASSEMB. JUD. COMM. CAL. STATE LEG., THE DIRECTION OF DIVORCE REFORM IN CALIFORNIA: FROM FAULT TO NO-FAULT... AND BACK AGAIN 2-3 (1997), <https://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/reports/1197%20divorcereform97.pdf>; see also Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1501-02 (2000) [hereinafter *A Dead Language*] (noting that the "typical grounds" for divorce prior to no-fault "included adultery, desertion, and some form of cruelty," and that additionally, a number of states also included "habitual drunkenness" and "impotence" and non-support and conviction of a felony were also common grounds).

⁸⁸ *A Dead Language*, *supra* note 87, at 1502.

⁸⁹ *Rights of Passage*, *supra* note 7, at 657 ("Many voices fulminated against divorce on moral grounds" which became "more strident over time. The Catholic Church was adamantly opposed to divorce" and the majority of "Protestant churches . . . treated divorce as evil Divorce was at best a stigma; at worst a mortal sin.").

⁹⁰ *A Dead Language*, *supra* note 87, at 1502 (dismissing the substantial increase in the demand for divorce "during the last part of the nineteenth century" and noting that "[t]he divorce rate in 1870 was 1.5 per 1000 marriages; in 1900 it was 4 per 1000 marriages").

⁹¹ *Rights of Passage*, *supra* note 7, at 659 ("[T]he basic change was the rise of consensual divorce - no fault divorce, if you will, in the teeth of statutes that refused to admit that such a thing was legally possible.").

⁹² *Id.* at 660.

⁹³ *Id.* at 659.

that that there was little change in the law of divorce from the late nineteenth century until 1970, and that the majority of divorces during this period were “collusive” shams.⁹⁴ The common scenario went something like this: a couple mutually wanted a divorce, so one spouse, usually the wife, filed suit and accused the other of having violated one of the statutory grounds. The defendant simply did not appear in court to offer any defense, and the court granted the divorce.⁹⁵ In states with extremely strict statutes, however, this resulted in “drastic and distasteful” actions being taken.⁹⁶

An excellent example to use to illustrate the consequences of the problem that arises when the law on the books does not match law in reality is the development of collusive actions in New York. Prior to 1966, under New York law, the sole ground for divorce was adultery.⁹⁷ This rigid standard created a new business opportunity to assist couples who wanted to divorce in producing the evidence need to support a claim of adultery. The favorite ploy was to catch the husband in a hotel room with another woman on camera and then use the incriminating photographs in court to establish adulterous grounds for the divorce.⁹⁸ On February 25, 1934, the *New York Mirror* created a sensation when it ran an article entitled, *I Was the ‘Unknown Blonde’ in 100 New York Divorces!*. The story was based on an interview with a young woman, Dorothy Jarvis, a professional co-respondent, who said she earned as much as \$100 a job.⁹⁹ In the article, Ms. Jarvis revealed the “the strategies, tactics, and schemes” used to stage and capture the infidelity on camera.¹⁰⁰ Some of the vignettes to be employed even had names, such as “‘the push and raid’, the ‘Shanghai shadow,’ and the ‘dance and dope.’”¹⁰¹ Of course, the husband and “the unknown blonde (or brunette)” would have to be caught in a state of dishabille and then caught by a photographer. Usually, the supposed affair took place at a hotel and, after a certain amount of disrobing, there would be a knock at the door. Thinking that it might be room service, or a “maid with towels, or a bellboy with a telegram”, the door was opened and, to their surprise, “a photographer would burst into the room and take picture.”¹⁰²

⁹⁴ *A Dead Language*, *supra* note 87, at 1504.

⁹⁵ *Id.*

⁹⁶ *Rights of Passage*, *supra* note 7, at 659.

⁹⁷ JACOB, *supra* note 21, at 30 (The prior law in effect was actually written by Alexander Hamilton in 1787.).

⁹⁸ *Rights of Passage*, *supra* note 7, at 659.

⁹⁹ Tamar Willis, *Unmaking Marriage*, NASSAU WEEKLY (Apr. 24, 2016), <http://nassau-weekly.com/unmaking-marriage/>; Ilyon Woo, *Breaking Up Is Hard to Do*, WALL ST. J. (Aug. 13, 2010 12:01 AM), <https://www.wsj.com/articles/SB10001424052748704901104575423341295531582>.

¹⁰⁰ Willis, *supra* note 99.

¹⁰¹ *Id.*

¹⁰² *A Dead Language*, *supra* note 87, at 1512.

A 1936 study was performed to highlight the evils of collusive divorce.¹⁰³ To point out the absurdity of opening the hotel door when half naked, the clothing worn, or not worn, in fabricated adultery cases was studied. Examining photos presented as evidence in 483 cases concerning the attire of the husbands and in 488 cases as to how the unknown female was dressed, the following information was revealed: the husband was totally nude in the photos 21 times, he was wrapped in a towel 2 times, he wore a wrapper once, a nightgown 8 times, he was in B.V.D. or underwear 119 times, wore a bathrobe or dressing gown 101 times, sported pajamas 227 times, and was photographed in a kimono 4 times.¹⁰⁴ As part of the charade, the women in the photos were totally nude 55 times, wore a brassiere 2 times, had on bloomers in 2 instances, wore a negligee 67 times, a slip 5 times, a wrapper once, a chemise 24 times, was photographed in her underwear 26 times, wore lingerie 5 times, nightgowns 126 times, sported pajamas 73 times, was garbed in a bathrobe or dressing gown 32 times, and was dressed in a kimono in 68 instances.¹⁰⁵

It is important to recognize, however that as couples engaged in collusive divorce, the attorney representing the plaintiff and the judges entering the divorce decrees were also complicit in in suborning or condoning perjury.¹⁰⁶ Plus, the fraud being committed was an affront to the dignity of the court constituting contempt.¹⁰⁷ Despite periodic crack downs on "divorce rings" who hired and coached the co-respondents, the practice of collusive divorce persevered into the 1960s.¹⁰⁸

This article has already touched upon one cinematic representations of collusive divorce in its discussion of the pre-Code 1930s film, *The Divorcee*.¹⁰⁹ Another cinematic representation is found in the *Gay Divorcee*, a marvelous spoof of the collusive divorce process, in addition to being a glorious opportunity for Fred Astaire and Ginger Rodgers "to trip the light fantastic".¹¹⁰ The divorce aspect of the film centers on the attempts of Mimi

¹⁰³ Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUMBIA L. REV. 1121, 1130-31 (1936).

¹⁰⁴ *Id.* at 1131.

¹⁰⁵ *Id.*; see SHEILA ROWBOTHAM, WOMAN'S CONSCIOUSNESS, MAN'S WORLD 76 (1973); see also John S. Bradway, *Collusion and the Public Interest in the Law of Divorce*, 47 CORNELL L. REV. 374, n.1 (1962) (listing U.S. scholarship between January 1926 to August 1960 which addressed the issue of collusive divorce).

¹⁰⁶ *Rights of Passage*, *supra* note 7, at 659.

¹⁰⁷ HUBERT J. O'GORMAN, LAWYERS AND MATRIMONIAL CASES 29 (1963). In the early 1960s, a New York divorce attorney observed "the amount of perjury is terrible. I know it; the judges know it; we all know it." *Id.*

¹⁰⁸ *Rights of Passage*, *supra* note 7, at 660.

¹⁰⁹ See *supra* notes 35-44 and accompanying text.

¹¹⁰ THE GAY DIVORCEE (RKO Radio Pictures 1934). The film was nominated for three Academy Awards and won the Oscar for Best Song: "The Continental", a twenty-two-minute production number. *The Gay Divorcee* (1934), AFI CATALOG, <http://catalog.afi.com/Catalog/MovieDetails/7108> (last visited Nov. 16, 2020).

Glossop, played by Ginger Rogers, to obtain a divorce from her deadbeat husband, Cyril. The problem is that Cyril won't cooperate.¹¹¹ The film is set in England, and under English law, the only reliable way to get a divorce is on the grounds of adultery, which requires citing a co-respondent who was required to have been discovered in flagrante delicto with the marriage partner. This was usually delegated to a professional co-respondent. So, Mimi retains the services of an incompetent English lawyer, whose own father doesn't trust to run the family firm, to engineer a collusive divorce by hiring a co-respondent and arranging for Mimi to be caught in flagrante delicto. Things go awry when Mimi mistakes Guy Holden, played by Fred Astaire, for the hired co-respondent.¹¹²

Although released in 1943, the same year that the Code began to be strictly administered, *The Gay Divorcee* was released before the Production Code Administration, the organization formed to enforce the Code, was formed.¹¹³ Consequently, it avoided the rigorous implementation of Code directives. Under the Code, the topic of collusive divorce was basically taboo.¹¹⁴ Even though *The Gay Divorcee* employed a satirical approach to the issue of collusive divorce in a humorous way, it highlighted the problem that stemmed from no-fault divorce. Additionally, it was one of the last films to

¹¹¹ THE GAY DIVORCEE, supra note 110.

¹¹² *Id.*

¹¹³ Gregory D. Black, *Hollywood Censored: The Production Code Administration and the Hollywood Film Industry, 1930-1940*, 3 FILM HIST. 167, 167 (1989). After movie czar Will Hays, head of the Motion Picture Producers and Distributors of America, agreed to the demands of the Catholic Church to strictly enforce a censorship Code, he also agreed to their demand that a Production Code Administration (PCA) be created to enforce the Code. In addition, Hays also had to agree to appoint Joseph I. Breen, a staunch Catholic, to head the PCA. *Id.*

¹¹⁴ *Divorce in the Movies*, supra note 45, at 242 n.90 (citing letter from Joseph I. Breen which opined that "collusive divorce is an extremely dangerous subject"). Breen also requested that "any suggestion in the Gay Divorcee that collusive divorce is regularly employed" be avoided. *Id.*

Another 1934 film about collusive divorce that was released before the PCA came into being is the little-known picture, *UNKNOWN BLONDE* (Larry Darmour Productions 1934). This "B" melodrama recounts the tale of an attorney of high moral character, Frank Rodie, who, due to debts from his wife's extravagant spending habits, is forced to take a lucrative divorce case in which a professional co-respondent will be used. When the co-respondent is unable to make it, Frank reluctantly takes his place at the insistence of the client. When his wife learns of Frank's unwitting collusion, she divorces him and turns his only child, Judith, against him. Embittered by his experience, Frank becomes the city's most successful collusive divorce lawyer, employing co-respondents with no hesitation. Years later, Frank is hired by a well-to-do couple to trap their son's virtuous but poor young wife in a "compromising situation." Frank takes the job unaware that the wife involved is actually his daughter, Judith. At the divorce trial, Frank pressures Judith into admitting that it was all a set up designed by Frank. In doing so, Frank saves his daughter's reputation at the expense of his own. Grateful for his noble sacrifice, Judith finally forgives her father and they are reconciled. *UNKNOWN BLONDE*, supra; see also Mordaunt Hall, *Collusion*, N.Y. TIMES (Apr. 24, 1934), <https://www.nytimes.com/1934/04/24/archives/collusion.html>. The film is based on the book by Theodore D. Irwin, *COLLUSION: THE TRUE STORY OF A DIVORCE DETECTIVE* (1932). On the back of the jacket cover of the novel are the following words: "Although the nature of this material is intrinsically provocative, *Collusion* is a sincere plea for more liberal divorce laws."

have the freedom to tackle relevant issues surrounding divorce for several decades.¹¹⁵

IV. THE MIGRATORY DIVORCE: "WELCOME TO RENO THE BIGGEST LITTLE TOWN IN THE WORLD"

Rather than falsify an adulterous relationship and deal with the strict grounds for fault-based divorce, couples that could afford to do so often took advantage of migratory divorce.¹¹⁶ If their state had draconian divorce laws, they simply travelled elsewhere to break the knot that bound them.¹¹⁷ Certain states became "divorce mills" by having short residency requirements and providing more expansive and less extreme grounds for divorce.¹¹⁸ While a number of states competed for the lucrative migratory divorce trade,¹¹⁹ by

¹¹⁵ A modern film in which collusive divorce plays a role is *THE TWO JAKES* (Paramount Pictures 1990). The film is set in post-war California in the late 1940s when the state still had fault-based divorce. It stars Jack Nicholson, who plays a private detective hired by a real estate developer to prove the infidelity of his wife. Once he establishes that she is unfaithful, Nicholson's character sets up a way for her to be caught in the act. The plan is for the outraged husband to burst into the motel room and finds his wife locked in the arms of an adulterer, and then the investigator will leap in with a camera and take photos that will look bad in divorce court. Nicholson tutors the husband on how to act and what to say when he bursts in through the door. They then stake out a motel where the evil act is confidently expected to take place. *THE TWO JAKES*, *supra*. This portion of the film effectively illustrates for the modern audiences what it took to get a divorce under a strictly fault-based system of divorce.

¹¹⁶ George W. Stumberg, *The Migratory Divorce*, 33 WASH. L. REV. 331, 339 (1958).

¹¹⁷ *Id.* at 332.

¹¹⁸ *Id.* at 335. See generally Rollo Bergeson, *The Divorce Mill Advertises*, 2 L. & CONTEMP. PROBS. 348 (1935).

¹¹⁹ Val Nolan Jr., *Indiana: The Birthplace of Migratory Divorce*, 26 IND. L.J. 515, 515 (1951) ("[F]ew are aware that for some twenty years following its statutory revision of 1852 Indiana occupied in the national mind the place now held by Nevada." Its "easy statutory causes and lax procedures exerted" a force "upon the disappointed spouse of the nations" which made Indiana "the first divorce mill in our history."). In addition, the territory of Utah was a "divorce bureau" between 1875 and 1878. GEORGE ELLIOT HOWARD, *A HISTORY OF MATRIMONY INSTITUTIONS* 132-33 (1904), <https://www.gutenberg.org/files/49276/49276-h/49276-h.htm> ("Through their skillful plans and the connivance of local [Utah] judges, the courts of several [Utah] counties were converted into veritable 'divorce bureaus,' so that between 1875 and 1877 there was a surprising increase in the annual crop of divorce decrees.") The resulted from legislation passed in 1852. It was:

[A]n act so faulty that its consequences have become notorious in the divorce annals of the United States. A vicious residence clause, coupled with a loose requirement regarding notice and an "omnibus" provision among the enumerated grounds of complaint, became in effect a standing temptation to clandestine divorce seekers from outside the territory. It is formally declared that the court of probate of the county of the plaintiff shall have jurisdiction in all petitions, and these are to be made in writing upon oath or affirmation setting forth the grounds of action. "If the court is satisfied," continues the statute, "that the person so applying is a resident of the Territory, or wishes to become one; and that the application is made in sincerity and of the plaintiff's own free will and choice, and for the purpose set forth in the petition; then the court may decree a divorce from the bonds of matrimony" against the defendant "for any of the following causes, to wit": (1) impotence at the time of the marriage; (2) adultery; (3) willful desertion or absence without reasonable cause for more than one year; (4) habitual drunkenness subsequent to the marriage; (5) inhuman treatment endangering life; (6) "when it shall be made to appear to the satisfaction and conviction of the court, that the parties cannot live in peace and union together, and that their welfare requires a separation.

1909, Reno, Nevada, became the divorce capital of the country.¹²⁰ In its desire to remain the “Mecca” of divorce, in 1931, the Nevada legislature reduced the residency requirement to obtain a divorce from three months to six weeks, thereby becoming the state with the most lenient divorce laws in the nation.¹²¹ It remained the place to untie the knot until the end of the 1930s, when a city closer to Hollywood, Las Vegas, rose electrically from the desert by being one of the first cities to purchase power from the new Hoover Dam.¹²² It soon supplanted Reno as the new preferred destination for those seeking a divorce.¹²³

Cinematic portrayals of the “quickie” Reno divorce range from *Mexican Spitfire Out West*,¹²⁴ a lively farce about a wife who decides to get a Reno divorce because she feels she is being ignored by her husband, to the aptly titled, *The Road to Reno*,¹²⁵ a screwball comedy with a western twist in which a temperamental opera star travels to Reno from New York in order to divorce her rancher husband, played by Randolph Scott, so she can marry a wealthy New York stockbroker, to the film version of the 1936 smash Broadway hit written by Clare Boothe Luce, *The Women*,¹²⁶ which enshrines the image of high society women who, while waiting for their divorce, while away the six-week residency requirement at a luxurious Nevada dude ranch.¹²⁷ *The Women*, a fast-paced comedy/drama, also has a script that is wickedly, though mercilessly, funny, and contains one of the best cat fights ever filmed. The all-star cast includes Joan Crawford, Joan Fontaine, Rosalind Russell, Norma Shearer, and Paulette Goddard.¹²⁸ Interestingly, there are no male actors on screen, though it is clear that men are the root of the problems faced by the women.¹²⁹

Id. at 131–32.

¹²⁰ Mella Harmon, *Reno: Twentieth-Century Divorce Capital*, NEV. HUMANITIES (Sept. 17, 2009), <http://www.onlinenevada.org/articles/reno-twentieth-century-divorce-capital> (“By the early 1900s, Arkansas, Wyoming, Idaho, and Nevada vied for the migratory divorce trade by lowering their residency requirements.” However, “[b]y 1909, Reno had become the country’s ‘new divorce headquarters.’”); *Rights of Passage*, *supra* note 7, at 661–62 (“In the twentieth century, Nevada came to the rescue on a long-term basis. Indeed to ‘go to Reno’ virtually came to mean ‘get a divorce.’ Nevada’s popularity apparently began in 1906, had its ups and downs, and reached its high-water mark in the 1920s and 1930s.”).

¹²¹ Harmon, *supra* note 120.

¹²² Ben Marks, *What’s the Reno Cure for Valentines Gone Wrong? D-I-V-O-R-C-E*, COLLECTORS WKLY. (Feb. 10, 2014), <https://www.collectorsweekly.com/articles/the-reno-cure-for-valentines-gone-wrong-divorce/>.

¹²³ *Id.*

¹²⁴ MEXICAN SPITFIRE OUT WEST (RKO Radio Pictures 1940).

¹²⁵ THE ROAD TO RENO (Universal Pictures 1938).

¹²⁶ THE WOMEN (Metro-Goldwyn-Mayer 1939).

¹²⁷ *Id.*

¹²⁸ Nat’l Film Pres. Bd., *supra* note 52.

¹²⁹ *Id.*

The script for a Reno divorce also often required perjury.¹³⁰ While residency requirements were lenient and the grounds for divorce more expansive, perjury was still de rigueur, even when the divorce was uncontested.¹³¹ This is illustrated in a more modern offering about the Reno divorce mill. In *The Misfits*, Roslyn Tabor, a beautiful ex-stripper portrayed by Marilyn Monroe, travels to Reno and files for a quickie six-week Nevada divorce from her inattentive husband, Raymond.¹³² The film has a wonderful scene where Roslyn's best friend and landlord, Isabel, is testing her to see if she has learned "the lines" she will need to say in court that morning to be granted her divorce.¹³³ The final line is quite telling.

ROSLYN: Will you go over my answers again?

ISABEL: Sure, dear. But don't worry, you'll do wonderfully. Let's see. "Did your husband, Mr. Raymond Taber act toward you with cruelty?"

[Roslyn, looking uncomfortable, doesn't respond.]

ISABEL: Darlin'?

ROSLYN: Well, yes.

ISABEL: Just say yes.

ROSLYN: Yes.

ISABEL: "In what way did this cruelty manifest itself?"

ROSLYN: He persistently ... How does that go again?

ISABEL: "He persistently and cruelly ignored my personal wishes and my rights and resorted on several occasions to physical violence against me."

ROSLYN: He persistently ... Oh, do I have to say that? Why can't I just say he wasn't there? He ... You could touch him, but he wasn't there.

ISABEL: If that was grounds for divorce there'd only be about two marriages left in the US. Now just repeat after me.

ROSLYN: I can't memorize this. It's not the way it was.

ISABEL: Just say it. It doesn't have to be true. This isn't a quiz show, it's only a court.¹³⁴

¹³⁰ Ben Marks, *What's the Reno Cure for Valentines Gone Wrong? D-I-V-O-R-C-E*, COLLECTORS WKLY. (Feb. 10, 2014), <https://www.collectorsweekly.com/articles/the-reno-cure-for-valentines-gone-wrong-divorce/>.

¹³¹ *Id.*

¹³² *THE MISFITS* (Seven Arts Productions 1961).

¹³³ *Id.*

¹³⁴ *The Misfits Script – Dialogue Transcript*, DREW'S SCRIPT-O-RAMA, http://www.script-orama.com/movie_scripts/m/misfits-script-transcript-marilyn-monroe.html (last visited Nov. 22, 2020).

V. THE TRANSFORMATION OF DIVORCE: FROM ANATHEMA TO ACCEPTED TO EXPECTED.

A. The Justified Divorce: A Road to Self-Realization

Historically, divorce was not a prevalent part of mainstream American life.¹³⁵ While not unheard of even during the Colonial period,¹³⁶ it was only during the last third of the twentieth century that American society moved from a traditional view of marriage as a life-long commitment to share one's life with another, which often including rearing children together, to one of a relationship that should bring fulfillment to the individual.¹³⁷ This change in cultural attitudes can be linked to the growing popularity of the therapist.¹³⁸

By the 1960s, according to recent clinical and therapeutic findings, marital failure was no longer viewed as flowing from sin, but "as a symptom of psychological incompatibility and maladjustment"¹³⁹ This led to a growing perception that the institution should not interfere with personal growth, exploring one's own feelings, or expressing individual needs.¹⁴⁰ In 1969, psychotherapist and founder of the Gestalt Method, Fritz Perls, ably expressed these new sentiments when he wrote the following lines as a way of life model:

I do my thing and you do your thing.
I am not in this world to live up to your expectations,
and you are not in this world to live up to mine.
You are you, and I am I,
and if by chance we find each other, it's beautiful.
If not, it can't be helped.¹⁴¹

¹³⁵ BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* 3 (1998).

¹³⁶ On January 5, 1643, the first recorded divorce in the American colonies was granted by the Quarter Court in the Massachusetts Bay Colony to Anne Clarke as a result of abandonment and adultery on the part of her husband. *First Divorce in the Colonies*, HIST. (Jan. 3, 2020), <https://www.history.com/this-day-in-history/first-divorce-in-the-colonies>.

¹³⁷ ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND* 9 (2010); see also WHITEHEAD, *supra* note 135, at 3 ("For most of the nation's history, divorce was a rare occurrence and an insignificant feature of family and social relationships. In the first sixty years of the twentieth century, divorce became more common, but it was hardly commonplace. In 1960, the divorce rate stood at a relatively modest level of nine per one thousand married couples. After 1960, however, the rate accelerated at a dazzling pace. It doubled roughly a decade and continued its upward climb until the early 1980s, when it stabilized at the highest level among advanced Western societies.").

¹³⁸ WHITEHEAD, *supra* note 135, at 48.

¹³⁹ JACOB, *supra* note 21, at 45.

¹⁴⁰ WHITEHEAD, *supra* note 135, at 4 ("Beginning in the late 1950s, Americans began to change their ideas about the individual's obligations to family and society. Broadly described, this change was from an ethic of obligation to others and toward an obligation to self.").

¹⁴¹ FREDERICK S. PERLS, *GESTALT THERAPY VERBATIM* 4 (1969). Known as the "Gestalt Prayer", this invocation is a classic expression of Gestalt therapy which centers on assisting clients in gaining

It has been surmised that the change in the interpretation of the marital relationship is attributable to the conflict between the traditional concept of marriage in American culture and the new, important role played by "expressive individualism."¹⁴² Divorce started to be almost glorified as a path to pursuing and achieving personal fulfillment, experiencing new opportunities, and attaining growth as an individual.¹⁴³ In addition, in the early 1970s, critics of the traditional union began to undermine the position of the time-honored institution.¹⁴⁴ One of the main voices of influence was that of the well-respected feminist scholar, Jessie Bernard, who pioneered the area of sociological research on marriage with the 1972 publication of her book, *The Future of Marriage*.¹⁴⁵ This provocative work captured the attention of the public and grew in influence. Bernard challenged the traditional view of marriage as one union between a man and a woman, arguing that rather than being unitary, such a relationship consisted of two separate and unequal "his" and "hers" marriages.¹⁴⁶ Bernard maintained that a traditional marriage could be equated to the Chinese custom of foot-binding—both deformed those it was imposed upon.¹⁴⁷ "We do not clip wings or bind feet, but we do make girls sick. For to be happy in a relationship which imposes so many impediments on her, as traditional marriage does, a woman must be slightly mentally ill."¹⁴⁸ With these new shifts in attitudes, the once almost unassailable institution of marriage was recast as a "life-style"

self-awareness, embracing freedom, and accepting the responsibility of self-direction. Gary Yontef & Lynne Jacobs, *Gestalt Therapy*, in CURRENT PSYCHOTHERAPIES 299 (Raymond J. Corsini & Danny Wedding eds., 9th ed., 2010). The new therapy approach was the result of the integration of assorted intellectual and cultural theories of the 1940s and 1950s. *Id.* Gestalt therapy is but one example of a growing emphasis on the importance of the individual in American society between the late 1950s through the 1970s. *Id.*

¹⁴² CHERLIN, *supra* note 137, at 9.

¹⁴³ WHITEHEAD, *supra* note 135, at 5 (noting that while that divorce was "[o]nce regarded mainly as a social, legal, and family event in which there were other stakeholders" beginning in the late 1950s, divorce "became an event closely linked to the pursuit of individual satisfactions, opportunities, and growth").

¹⁴⁴ Christina Hoff Sommers, *Philosophers Against the Family*, in PERSON TO PERSON 83, 82–105 (George Graham & Hugh La Follette eds., 1989); see also CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED 1 (1977); PHILLIP ABBOTT, THE FAMILY ON TRIAL: SPECIAL RELATIONSHIPS IN MODERN POLITICAL THOUGHT 1 (1981).

¹⁴⁵ JESSIE BERNARD, *THE FUTURE OF MARRIAGE* (2d ed., 1982).

¹⁴⁶ LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE* 162 (2000).

¹⁴⁷ BERNARD, *supra* note 145, at 56.

¹⁴⁸ *Id.* at 215–16. Bernard's views have not gone unchallenged. See Norval D. Glenn, *The Contribution of Marriage to the Psychological Well-Being of Males and Females*, 37 J. MARRIAGE & FAM. 594, 594 (1975). For more recent discussions of the issue, see Daniel Goleman, *Two Views of Marriage Explored: His and Hers*, N.Y. TIMES (Apr. 1, 1986), <https://www.nytimes.com/1986/04/01/science/two-views-of-marriage-explored-his-and-hers.html>; Natalie Angier, *Men. Are Women Better Off with Them, or Without Them?*, N.Y. TIMES (June 21, 1998), <https://archive.nytimes.com/www.nytimes.com/specials/women/nyt98/21angi.html>.

choice.¹⁴⁹ Consequently, it became not only acceptable, but almost mandated, that an individual, especially a woman, who was personally unhappy, dissatisfied, or unfulfilled as result of their marital relationship was justified in ending it.¹⁵⁰ These two perspectives of divorce, (1) as an opportunity to achieve personal fulfillment and (2) justified where the current union was stifling the individual, formed the basis for a new divorce culture in the United States.

An excellent example of a film endeavoring to balance the traditional view of divorce as a heartbreaking tragedy with the new culture recognizing the justified divorce is *Divorce American Style*.¹⁵¹ Although this picture would likely seem dated to present day viewers, at the time of its release in 1967, it was a biting, comic satire that dealt quite frankly with the issues surrounding divorce. By the late 1960s, the restraints of the Code were diminishing, so the film is able to provide a critical and honest portrayal of the unflattering side of married life as it explores the pressures faced by a suburban couple in the 1960s which lead them into the pitfall of divorce.

Richard Harmon, played by Dick Van Dyke, and his wife, Barbara, played by Debbie Reynolds, are a once happily married couple who have struggled for 17 years to achieve the American dream for themselves and their two children.¹⁵² Now that they have the luxurious home in the suburbs and an expensive car, a vague sense of discontent begins to fill their lives. It seems they have nothing to talk about. Richard cannot understand why Barbara isn't happy. In his mind, he has slaved for years to finally to become a business success and good breadwinner. Barbara feels Richard doesn't talk to her anymore or understand her emotional needs. She finds that he has changed since achieving success and that his job is now more important to him than the family or their relationship.¹⁵³

With the assistance of well-meaning of friends, they become more and more discontented, and when marriage counseling proves fruitless, they file for divorce.¹⁵⁴ At this point, Richard is completely fed up with Barbara, and

¹⁴⁹ Barbara Dafoe Whitehead, *The Experts' Story of Marriage 2* (Inst. for Am. Values, Working Paper No. 14, 1992), <http://americanvalues.org/catalog/pdfs/wp-14.pdf> [hereinafter *The Experts' Story of Marriage*].

¹⁵⁰ CHERLIN, *supra* note 137, at 31. According to Cherlin, the current U.S. "model of individualism" encompasses the following tenets:

- One's primary obligation is to oneself rather than to one's partner and children.
- Individuals must make choices over the life course about the kinds of intimate lives they wish to lead. . . .
- People who are personally dissatisfied with marriages and other intimate partnerships are justified in ending them.

Id.

¹⁵¹ *DIVORCE AMERICAN STYLE* (Columbia Pictures 1967).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

she can no longer stand him either. As they go through the divorce process, they discover that between negotiating child custody and alimony issues, Richard having to find a new place to live that he can afford, and reentering the dating scene, getting a divorce isn't much easier than being married.¹⁵⁵ In fact, it may be harder. The film is a time capsule that dexterously captures the conflict between the still entrenched view that the break-up of a marriage is a legitimate catastrophe and the new divorce culture which is taking hold.

This tension is effectively illustrated by comparing the reviews of the film authored by two well respected movie critics of the era. The critic for the *New York Times*, Bosley Crowther, found *Divorce American Style*, to constitute a "jab at a social procedure that disrupts a lot of American homes" and wrote that the film "is not as funny or trenchant as it tries very hard to be."¹⁵⁶ "Indeed, it is rather depressing, saddening, and annoying, largely because it does labor to turn a solemn subject into a great big American-boob joke."¹⁵⁷ In contrast, Chicago critic Roger Ebert apparently applauded the film the very same reason.¹⁵⁸ He found *Divorce American Style* to be "a sly, sympathetic examination of divorce in the subculture of upper middle-class suburbanites—why it is funny and why, in the end, it is not funny at all."¹⁵⁹

Of course, in the end, the couple must reunite. On the evening before their divorce will be final, Richard and Barbara, each accompanied by the current person they are now dating, meet friends at a nightclub.¹⁶⁰ During a performance by a hypnotist, Barbara permits herself to be mesmerized.¹⁶¹ After performing an uninhibited striptease on stage, the hypnotist instructs Barbara to go into the audience and kiss her true love. Predictably, she chooses Richard. After the kiss, it is as if the pending divorce never happened.¹⁶²

A trailblazing cinematic example of popular culture epitomizing the recast view of divorce as a gateway to personal realization is the 1978 film, *An Unmarried Woman*.¹⁶³ Directed by Paul Mazursky, this bittersweet comedy tells the tale of Erica, a woman whose comfortable domestic life is thrown into turmoil when her husband of almost 20 years confesses over lunch that he is in love with another, younger woman he met while buying a shirt in

¹⁵⁵ *Id.*

¹⁵⁶ Bosley Crowther, *The Screen: 'Divorce American Style': Solemn Topic Treated Too Much as Joke*, N.Y. TIMES (July 20, 1969), <https://www.nytimes.com/1967/07/20/archives/the-screen-divorce-american-stylesolemn-topic-treated-too-much-as.html>.

¹⁵⁷ *Id.*

¹⁵⁸ Roger Ebert, *Review of Divorce American Style*, ROGEREBERT.COM (June 21, 1967), <https://www.rogerebert.com/reviews/divorce-american-style-1967>.

¹⁵⁹ *Id.*

¹⁶⁰ *DIVORCE AMERICAN STYLE*, *supra* note 151.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *AN UNMARRIED WOMAN* (Twentieth Century Fox 1978).

Bloomington's and that he is leaving her.¹⁶⁴ The film then chronicles Erica's acceptance of the break-up, her struggles with her new freedom, the challenges of being thrust back in to the dating world, and ultimately, with the help of a good therapist, learning how to live by and for herself.¹⁶⁵ Actress Jill Clayburgh gives a memorable, Oscar-nominated performance as Erica, an ordinary woman who, after she is thrust into a divorce which results in her experiencing a midlife crisis, emerges as an independent, unmarried woman who now defines herself in her own right and not as simply an extension of somebody else's personality.¹⁶⁶

The underpinnings of the new divorce culture continue to permeate more recent popular culture offerings with a number of films that reveal how the end of a marriage is justified where only one spouse is unfulfilled and how divorce can create opportunities leading to a more enriched life. It is interesting to note that the majority of films centering around the divorcée fall into the genre known as rom-com (romantic comedies), and might be aptly described in the vernacular as "chick flicks." An excellent example is the 2003 film, *Under the Tuscan Sun*, which stars Diane Lane as a recently divorced writer who buys a crumbling villa in Tuscany on a whim, hoping it will lead to a change in her life.¹⁶⁷ As she restores her new home, she eventually finds the fulfillment she was seeking, including, of course, a new romance.¹⁶⁸ Similarly, *Eat Pray Love* tells the tale of Liz Gilbert, a forty-something year old woman who, after experiencing an existential crisis, abruptly leaves her husband and then sets out on a yearlong quest to "find herself".¹⁶⁹ On her journey of personal discovery, Liz travels to Italy where she delights in food, to India where she experiences the power of prayer, and finally to Bali where she achieves inner peace and, of course, finds true love.¹⁷⁰ According to the moral of such films, "[d]ivorce is the pathway to your next best life."¹⁷¹ Films such as *An Unmarried Woman*, *Under the Tuscan Sun*, and *Eat Pray Love* embedded the new divorce culture into the consciousness of viewers.¹⁷² It then became a fixture of the divorce film sub-genre and, by

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Vincent Canby, 'An Unmarried Woman,' *Film with Jill Clayburgh: The Cast*, N.Y. TIMES (Mar. 5, 1978), https://timesmachine.nytimes.com/timesmachine/1978/03/05/110789794.pdf?pdf_redirect=true&ip=0.

¹⁶⁷ UNDER THE TUSCAN SUN (Touchstone Pictures 2003).

¹⁶⁸ *Id.*

¹⁶⁹ EAT PRAY LOVE (Columbia Pictures 2010).

¹⁷⁰ *Id.*

¹⁷¹ Heidi Stevens, *Rethinking Divorce: It Could be Your Ticket to a Better Life*, CHI. TRIB. (Oct. 7, 2014, 12:22 PM), <https://www.chicagotribune.com/lifestyles/ct-positive-divorce-experience-balancing-20141007-column.html> (quoting Angie Hallier, an Arizona-based family law attorney and author of the book THE WISER DIVORCE (2014)).

¹⁷² Thomas Deegan, *No-Fault Divorce Films: Hollywood's Changing Morality*, 15 CINEASTE 24, 24 (1986).

the end of the twentieth century, the new divorce culture had become a part of mainstream American life.¹⁷³ Filmmakers enthusiastically embraced the new concept of divorce as a justified venue to self-fulfillment despite the frequent ramifications of divisiveness between spouses and potential harm to offspring.

B. How the Law of Divorce Was a Product of Newton's Third Law

"For every action, there is an equal and opposite reaction."—Sir Isaac Newton (1687)¹⁷⁴

The new culture of divorce which arose in the 1960s was a backlash to the 1950s where marriage was viewed "as a relationship stressing respect, obedience, authority and duty."¹⁷⁵ In turn, the institution's transformation in the 1950s was a response to what occurred in the 1940s.

1. The 1940s

With entrance into World War II, the marriage rate in the United States skyrocketed.¹⁷⁶ It became the rage for couples to rush to marry before the men went marching off to war. The rise in marriage rates makes it seem as if marrying your man who might not return from battle was almost viewed as a young girl's patriotic duty. One ring company, J.R. Woods and Sons, reported that the number of marriages increased 250% after the enactment of the Selective Service Act, and only continued to mount.¹⁷⁷ Once men began to be drafted, the marriage rate grew by another 25%, and it is estimated that the rate rose 60% higher than the month the prior year after the bombing of Pearl Harbor.¹⁷⁸ Such hasty nuptials, however, were often entered into by couples who really didn't know each other well. Often, the union didn't survive until the end of the war.¹⁷⁹ If a couple did manage to stay married for the duration, reality and the realization that they weren't really compatible set in once the man returned from the front.¹⁸⁰ Not surprisingly, these

¹⁷³ *Id.*

¹⁷⁴ ISSAC NEWTON, *PHILOSOPHIAE NATURALIS PRINCIPIA MATHEMATICA* 76 (Andrew Motte trans., Global Grey 2016) (1687) ("To every action there is always opposed an equal reaction: or the mutual actions of two bodies upon each other are always equal, and directed to contrary parts.").

¹⁷⁵ BERNARD, *supra* note 145, at 126 (quoting ERNEST W. BURGESS & HARVEY J. LOCKE, *THE FAMILY: FROM INSTITUTION TO COMPANIONSHIP* (1945)).

¹⁷⁶ MINTZ & KELLOGG, *supra* note 64, at 153–154; *see also* Lisa Fogarty, *What Getting a Divorce Was Like Every Decade Since the 1900s*, REDBOOK (Apr. 11, 2017), <https://www.redbookmag.com/love-sex/relationships/g4275/divorce-throughout-history/>.

¹⁷⁷ MINTZ & KELLOGG, *supra* note 64, at 153.

¹⁷⁸ *Id.*

¹⁷⁹ Fogarty, *supra* note 176.

¹⁸⁰ MINTZ & KELLOGG, *supra* note 64, at 171 (noting that the factors contributing to the dramatic rise in divorce "include the haste with which [the] couple had wed; the strains of wartime separation; and the shock of strangeness and disillusionment on being reunited"); *see also* Fogarty, *supra* note 176. The

quick marriages resulted in a spike in divorce rates. Between 1940 and 1944, divorce rates increased from “sixteen per hundred marriages to twenty-seven per hundred”, with 1 out of 6 marriages ending in divorce in 1940 increasing to 1 in every 4 marriages ending in divorce in 1946.¹⁸¹ It is estimated that by the end of the 1940s, “a million GIs were divorced.”¹⁸² When the divorce numbers of those who had gone to war were combined with those of American couples who had stayed on the home front, the result was an epidemic of broken marriages culminating in an historically unprecedented divorce rate in the United States.¹⁸³

Despite the reality of the number of divorcing couples in the 1940s, the studios were hamstrung by the rigidity of the Code which, although it did not specifically address divorce, required that both the marriage and the home were treated with reverence.¹⁸⁴ The practical result of the admonition was that divorce was a suspect topic that could only be treated in a certain manner.¹⁸⁵ Consequently, filmmakers were prevented from making a serious, well-balanced film about the topic. During the 1940s, and up until the 1960s when the draconian enforcement of the Code began to wane,¹⁸⁶ the most popular type of divorce film was the screwball comedy, which generally fell within what has been denominated as “remarriage genre.”¹⁸⁷ The plot of

failure of such hasty, war time marriages is one of the themes addressed in the romantic drama, *A WALK IN THE CLOUDS* (Twentieth Century Fox 1995). The film is set in 1945, when United States Army Sgt. Paul Sutton (Keanu Reeves) returns from World War II to San Francisco to reunite with his wife, Betty, whom he married following a one-day whirlwind courtship before he shipped out for the Pacific. The horrors of war have left him with emotional scars, and he regularly experiences flashbacks. Paul's reunion with Betty is strained, especially after he discovers that, although he wrote to her almost every day while he was away, she stopped reading his letters after the first few, and keeps the hundreds of unopened letters in a footlocker. *Id.* He is determined to make a go of the marriage, however, and although he would like to start a farm, he agrees to her demand that he become a traveling, door-to-door chocolate salesman. Toward the end of the film, still attempting to salvage his marriage, he returns home after being on the road to discover that Betty is intimately involved with another man. She has applied for an annulment, to which he agrees feeling nothing but relief. He never really knew her, she does not understand him, and faced with the realities of post-war life, it is clear they have nothing in common. *A WALK IN THE CLOUDS*, *supra*.

¹⁸¹ MINTZ & KELLOGG, *supra* note 64, at 171.

¹⁸² *Id.*

¹⁸³ *Id.*; see also RONALD H. BAILEY, *WORLD WAR II: VOLUME 08: THE HOME FRONT: U.S.A 147* (1978); ELIZA K. PAVALKO & GLEN H. ELDER JR., *World War II and Divorce: A Life-Course Perspective*, 95 AM. J. SOCIO. 1213, 1214 (1990).

¹⁸⁴ See *supra* note 76 (while there was no clear prohibition relating directly to the topic of divorce in the Code, according to its strictures, filmmakers were required to uphold “[t]he sanctity of the institution of marriage and the home”).

¹⁸⁵ See *supra* notes 76–80 and accompanying text.

¹⁸⁶ See *supra* notes 81–84 and accompanying text.

¹⁸⁷ *Divorce in the Movies*, *supra* note 45, at 243 (citing STANLEY CAVELL, *PURSUITS OF HAPPINESS: THE HOLLYWOOD COMEDY OF REMARRIAGE* (1981)); see also Ren Zelen, *The Joy of Screwball Comedies*, MOVIE WAFFLER, <http://www.themoviewaffler.com/2018/02/the-joy-of-screwball-comedies.html> (last visited Jan. 11, 2021). Films first “gained the label ‘Screwball’ around 1936, when a publicist used the word to describe Gregory La Cava’s film *My Man Godfrey* and it’s crazy, fast-talking heroine, energetically played by Carole Lombard, and has its roots in the game of baseball.” It refers to “an erratic pitch which is produced in a deliberate way by the pitcher, who throws the ball

such films usually centered on a wealthy couple with no children who experience a falling out over some silly issue, get a divorce, recognize the error of their ways, and get remarried by the end of the picture, thereby observing the Code's mandate that "the sanctity of marriage" be upheld.¹⁸⁸ The films were funny, irreverent, and provided viewers with "lighthearted escapism" while they enjoyed a "farical battle of the sexes", often replete with "fast-talking, witty repartee."¹⁸⁹

An outstanding example of the remarriage themed screwball comedy is *His Girl Friday*.¹⁹⁰ Starring Rosalind Russel and Cary Grant, the film opens with star reporter Hildy Johnson walking into the offices of *The Morning Star* to tell the chief editor, Walter Burns, her former boss and ex-husband, to stop bombarding her with telegrams, because she won't come back to work or to him. Hildy, brilliantly played by Rosalind Russel, has been gone for several months. During that time, she took a trip to Reno for a quickie divorce and now she plans to wed insurance agent Bruce Baldwin the next day. Walter, impeccably played by Cary Grant, doesn't want to lose Hildy as either a reporter or his wife. Plus, in his opinion, Bruce clearly isn't good enough for her. So, he quickly starts a series of clever schemes to get Bruce out of the way and Hildy back to reporting. The one thing Hildy cannot resist is the lure of a "scoop", so he tempts her with a big story. Hildy takes the bait, and soon she and Walter are working side by side again and her fiancé is just an annoyance. The film ends with Hildy and Walter planning to marry again and take a two-week honeymoon in Niagara Falls—which quickly changes to a working trip to Albany, because there's a strike to be covered.¹⁹¹

In contrast to the screwball comedy, the other type of divorce films during these two decades were often didactic, either explicitly or implicitly, about the evils of divorce and how those who engaged in such an action would be punished. An excellent example of the explicit treatment of divorce in the 1940s is the aptly titled film *Divorce*.¹⁹²

very fast, turning his wrist and letting the ball fly off his middle finger. It confuses the batter who doesn't know what to expect." *Screwball Comedy*, CINECOLLAGE, <http://cinecollage.net/screwball-comedy.html> (last visited Jan. 11, 2021) [hereinafter *Screwball Comedy*]. While "[t]he pitch was 'invented' by Christy Mathewson of the New York Giants in the early 1900s, [] it was not until around 1930 when another New York Giants player, Carl Hubbell, gave the pitch its name. The word 'screwball' entered the language in the 1930s meaning 'insane' or eccentric." *Id.* For an excellent overview of this subgenre of films, see DUANE BYRGE & ROBERT MILTON MILLER, *SCREWBALL COMEDY FILMS: A HISTORY AND FILMOGRAPHY, 1935-1942* (2004).

¹⁸⁸ *Screwball Comedy*, *supra* note 187. Other outstanding films in this category include *THE PALM BEACH STORY* (Paramount Pictures 1942), *PHILADELPHIA STORY* (Metro-Goldwyn-Mayer 1940), and *THE AWFUL TRUTH* (Columbia Pictures 1937).

¹⁸⁹ *Screwball Comedy*, *supra* note 187.

¹⁹⁰ *HIS GIRL FRIDAY* (Columbia Pictures 1940).

¹⁹¹ *Id.*

¹⁹² *DIVORCE* (Monogram Pictures 1945).

Divorce directly confronts issues of marriage dissolution, taking a strong position about the problem of divorce. At the time of its release, the film was a vehicle for the studio, Monogram Pictures, to present its perspective of the divorce issue, which was in complete accord with the directives of the Code. Consequently, while the film concerns an extremely relevant issue in the post-war period, it does not present a realistic or balanced portrayal of the problem of divorce faced by many returning GIs. Rather, it is basically agitprop promulgating the censors' anti-divorce dogma.

The picture opens with a scene in family court in which the judge refuses to grant a divorce to a couple who are clearly unsuited to stay together. In refusing to grant the divorce, he castigates and blames the wife using the "wrong" discipline on her son, and for complaining when her husband locked her up in her room.¹⁹³ A second proceeding follows, in which the judge reluctantly grants a divorce to a couple despite the fact that the legal grounds for the divorce are clearly the result of collusion. The wife, now ex-wife, involved in this second divorce proceeding is Diane Carter, a Chicago socialite who has been divorced several times and clearly collects trophy husbands.¹⁹⁴

After her most recent divorce is finalized, she decides to return to her hometown of Hillsboro, Illinois, looking to add a husband to her collection. She set her sights on a previous childhood flame, veteran Bob Phillips, who has just returned home to his loving wife, Martha, and his two adoring children. In fact, Diane arrives in Hillsboro on the day of Bob and Martha's wedding anniversary.¹⁹⁵

As a first-class homewrecker, Diane has the perfect plan. First, she retains Bob's services as a real estate agent to find her an apartment. Then, to insinuate herself further into Bob's life, she asks Martha to help furnish her new apartment.¹⁹⁶ She quickly ensnares Bob by offering him a more exciting relationship than a home with two kids; plus, her wealth and business connections make it possible for her to provide him with unlimited investment money for his struggling real estate business. Ultimately, the two form a highly lucrative partnership in real estate development and speculation. With little effort, she successfully disrupts his happy marriage. Realizing she may be losing her husband, Martha confronts Bob and forces him to admit how he feels about Diane. She then seeks a divorce and once it is final, refuses to accept any support, preferring to work at a department store as a lowly clerk to support herself and the children, who are desolate at the loss

¹⁹³ *Divorce (1945)*, KAY FRANCIS FILMS (Dec. 30, 2008), <https://kayfrancisfilms.com/divorce-1945/>.

¹⁹⁴ *Id.*; see also *Divorce (1945): Synopsis*, AFI CATALOG, <https://catalog.afi.com/Catalog/movie-details/24386> (last visited Nov. 22, 2020).

¹⁹⁵ *Divorce (1945): Synopsis*, *supra* note 194.

¹⁹⁶ *Id.*

of their father.¹⁹⁷ Providing the audience with a perfect Code ending, Bob ultimately realizes what he has lost and returns to his family.¹⁹⁸ Traveling on the train back to Chicago, Diane has an epiphany and realizes what a despicable person she has become.¹⁹⁹ The moral of the film is that what truly matters is not money or excitement, but appreciating the value of a loving husband-wife relationship, with children and home.

2. The 1950s and Early 1960s: The Cult of Domesticity

"Youngsters want to grasp what little security they can in a world gone frighteningly insecure. The Youngsters feel they will cultivate the one security that's possible-their own garden, their own . . . home and families."—Mildred Gilman (1958)²⁰⁰

The rapid rise in the divorce rate in the 1940s led to a growing concern by experts and the media in the 1950s that although divorce was generally more prevalent among those of the lower and working classes, the changing perception of marriage dissolution might bode a wide-spread acceptance of the phenomenon by the middle class.²⁰¹ Divorce was a "slippery slope" which could result in a number of other societal ills, including a rejection by women of "their assigned gender roles", which could disrupt the stability and prosperity of the nation both at home and internationally.²⁰² The threat of the rejection by women of the 1950s of their assigned gender roles was taken very seriously, especially in light of the fact that during the 1940s, women entered the work force out of necessity.²⁰³ In doing so, they experienced independence and freedom, and some realized they didn't need a man to depend on for security.²⁰⁴ As a result, by 1947, many women faced a conundrum resulting from "the conflict" they experienced between "the traditional ideas of a woman's place and the increasing reality of female involvement

¹⁹⁷ *Id.*

¹⁹⁸ *Divorce (1945)*, *supra* note 193.

¹⁹⁹ *Id.*

²⁰⁰ Elaine Tyler May, *Containment at Home: Cold War, Warm Hearth*, in AMERICAN IDENTITIES: AN INTRODUCTORY TEXTBOOK 65, 66 (Lois P. Rudnick et al. eds., 2006) [hereinafter *Containment at Home*] (quoting Mildred Gilman, *Why They Can't Wait to Wed*, PARENTS MAG., Nov. 1958, at 46).

²⁰¹ MINTZ & KELLOGG, *supra* note 64, at 161–62; KRISTIN CELELLO, MAKING MARRIAGE WORK: A HISTORY OF MARRIAGE AND DIVORCE IN THE TWENTIETH-CENTURY UNITED STATES 85 (2012).

²⁰² CELELLO, *supra* note 201, at 85.

²⁰³ Henry L. Zucker, *Working Parents and Latchkey Children*, 236 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 45 (1944). Zucker predicted that irrespective of the reasons a woman worked the result of working mothers whose children were often left alone to fend for themselves would be "a war-bred generation of problem adolescents-to-be in the 1950s and of mal-adjusted parents-to-be in the 1960s." *Id.* at 43.

²⁰⁴ Wini Breines, *The 1950s: Gender and Some Social Science*, 56 SOCIO. INQUIRY 69, 76 (1986) ("Recent historical scholarship demonstrates both the empowering wartime experience of women who entered the labor force and/or had to survive as wives and mothers alone, and the concern on the part of government, industry, and men in general that women would become too independent, undomestic, and unfeminine."); see also KAREN ANDERSON, WARTIME WOMEN: SEX ROLES, FAMILY RELATIONS AND THE STATUS OF WOMEN DURING WORLD WAR II 1 (1981).

in activities outside of the home.”²⁰⁵ Because the culture of the time “made little provision for females who were not homemakers,” women, who not only wanted to marry and have children but to also have a life beyond that sphere, were troubled over how to define their identity.²⁰⁶ This identity crises was so prevalent,²⁰⁷ that in 1947, *Life Magazine* ran a special thirteen page article entitled the “American Woman’s Dilemma.”²⁰⁸ The subheading of the article summed up the woman’s plight: “She wants a husband and she wants children. Should she go on working? Full time? Part time? Will housework bore her? What will she do when her children are grown?”²⁰⁹ The quandary faced by females of the late 1940s raises the question of how did the women of the 1950s become the “happy little homemaker”? Certainly, the renewed emphasis placed on the family could have been a natural response to the hard times experienced during the Depression and the upheavals of World War II. In addition, however, there are four other salient explanations for this transformation: one pragmatic, one grounded in psychiatry, one based on propaganda, and one based on environment.

First, by the end of World War II, there was a genuine fear on the part of single women that there was a shortage of eligible bachelors.²¹⁰ In addition, the average age at which both men and women married dropped, with the result that young women of twenty and twenty-one were viewed as “old maids.”²¹¹ Consequently, society placed great pressure on a single woman to “catch” a husband. It was up to the woman to persuade the male to enter into marriage because it was understood that the marital relationship was much more beneficial for the female than the male.²¹² As the author of one of the self-help books of the 1950s admonished “[i]t is up to you to earn the proposal – by waging a dignified, common-sense campaign designed to help

²⁰⁵ WILLIAM H. CHAFE, *THE AMERICAN WOMAN: HER CHANGING SOCIAL, ECONOMIC, AND POLITICAL ROLE, 1920-1970*, at 199 (1974).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 199–200 (“Although the editors of *Life* undoubtedly exaggerated the scope of the problem, the evidence indicated that many women were disturbed by the absence of an up-to-date definition of their place. . . . The extent to which many women were dissatisfied with their social identity was dramatically revealed in a 1946 *Fortune* poll,” where, when asked “whether they would prefer to be born again as women or men, a startling 25 per cent declared they would prefer to be men.”) (citing *Fortune Survey: Women in America*, *FORTUNE*, Aug. 1946, at 5–6). In 1949, the *New York Times Magazine* reported that “a third of the 1934 graduates of the best women’s colleges confessed to a feeling of stagnation and frustration in their lives.” *Id.* at 200 (citing John Willig, *Class of ’34 (Female) Fifteen Years Later*, N.Y. TIMES MAG., June 12, 1949, at 10).

²⁰⁸ Bill Syken, *The Woman’s Work-Home Dilemma, 1947*, LIFE MAG., <https://www.life.com/life-style/the-womens-work-home-dilemma-1947/> (last visited Nov. 21, 2020).

²⁰⁹ Carole Nagger, *The Women of ‘Life’ Magazine*, N.Y. REV. BOOKS (Aug. 24, 2019), <https://www.nybooks.com/daily/2019/08/24/the-women-of-life-magazine/>.

²¹⁰ CELELLO, *supra* note 201, at 77.

²¹¹ *Id.*

²¹² *Id.*

him see for himself that matrimony rather than bachelorhood is the keystone of a full and happy life.”²¹³

Second, the same year that Life Magazine featured the article about the woman's dilemma, the book *Modern Women: The Lost Sex* was published. Written by journalist Ferdinand Lundberg and psychiatrist Marynia Farnham, this book presented a sophisticated, influential, anti-feminist perspective of what it deemed the “woman problem.”²¹⁴ According to the authors, the conflict women were experiencing could be attributed to their loss of femininity due to pursuing a career, which was “essentially masculine because [it was] exploitive.”²¹⁵ This “masculinization” of women was having “enormously dangerous consequences to the home, the children (if any) dependent on it, and to the ability of the woman, as well as the husband, to obtain sexual gratification.”²¹⁶ Their “ubiquitous unhappiness” was the result of “[d]ivorce, childlessness” and “neurosis” which had begun with the Industrial Revolution.²¹⁷ Since that time, women “ha[d] progressed through feminism and sexual revolution” and “ha[d] lost much more than [they] has gained.”²¹⁸ By pursuing this course of action, women had “destroyed the home, devaluated the position of the child she bears (when she is willing to do so)” and “undermined the male.”²¹⁹ Lundberg and Farnham were particularly critical of the women's rights movement, which they contended “represented a neurotic reaction to male dominance, a ‘deep illness’ which encouraged females to reject their natural, sex-based instinct in a futile attempt to become imitation men.”²²⁰ In so doing, “the feminists had attempted to persuade women to seize a share of masculine power, to beat men at their own game. The result was to obliterate the distinctions between the sexes, to

²¹³ *Id.* (internal quotation marks omitted) (footnote omitted). It was also the duty of a woman to improve herself as set forth in *How to be Marriageable*, four-part magazine series published in 1954 by *Ladies' Home Journal*. *Id.* at 77–78; see also Giovanna Boldrini, 9 *Absolutely Horrifying Marriage Tips from the 1950s*, LITTLE THINGS, <https://www.littlethings.com/marriage-tips-from-the-1950s> (last visited Nov. 21, 2020). The tips included the following:

1. A Smile Goes A Long Way.
2. Keep Quiet.
3. Wear Pink Underwear.
4. Don't Let the Kids Be Too Much Trouble.
5. Expert Cooking Will Keep Your Man Loyal.
6. Put as Much Care into Your Appearance as Dinner.
7. Don't Be Too Sexual or Too Prude.
8. Don't Be Mad If He Goes Astray.
9. Remember That the Man Is In Charge.

Boldrini, *supra*.

²¹⁴ FERDINAND LUNDBERG & MARYNIA FARNHAM, *MODERN WOMAN: THE LOST SEX I* (1947).

²¹⁵ *Id.* at 235.

²¹⁶ *Id.*

²¹⁷ Anthony F. Merrill, *Modern Woman: The Lost Sex*, KIRKUS, <https://www.kirkusreviews.com/book-reviews/a/anthony-f-merrill-3/modern-woman-the-lost-sex/> (last visited Jan. 31, 2021).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ CHAFE, *supra* note 205, at 203.

cast women adrift from their biological and psychological moorings”²²¹ The theme extolled by the authors was soon endorsed by others, particularly women’s magazines of the time period, including *McCall’s*, the *Ladies Home Journal*, and *Atlantic*, which argued that although women “had many careers, they had only one vocation – motherhood.”²²² This perspective was epitomized in 1952 by an ad for Gimbel’s department store which answered the query of “What’s college?” by explaining that college is “where girls who are above cooking and sewing go to meet a man so they can spend their lives cooking and sewing.”²²³

The reach of the book’s attack on feminism even affected the way in which women were educated. The president of Mills College in California, Lynn White, challenged other “women’s schools shake off their subservience to masculine values and create a distinctly feminine curriculum.”²²⁴ White proposed that in addition to classes geared toward preparing them for their futures of homemaking and motherhood, the course of study for women should comport with their “instincts” and therefore include subjects “such as ceramics, textiles, weaving, leatherwork, and flower arrangement.”²²⁵ Other like-minded educators picked up the gauntlet thrown by White. For example, Sweetbriar College in Virginia proposed that “the task of creating a good home and raising good children” should be viewed as a true profession and be “the primary purpose of women’s colleges.”²²⁶ And at Stephens College in Columbia, Missouri, the president, James Wood, “entered a blanket indictment” against America’s system for educating women, noting “its inability to prepare the mothers of future generations to meet the problems in their own lives and to instruct their children how to live a rounded and useful existence.”²²⁷ Wood’s new approach to educating women included dance instruction, fashion, hair and make-up, instruction, and elocution lessons, in addition to “an elaborate program of home economics, interior decoration, and family study.”²²⁸

The tenet of Lundberg and Farnham’s book continued to be upheld throughout the 1950s, as evidenced by a 1958 article written by sociocultural anthropologist, Ashley Montague, for the *Saturday Review*, in which he

²²¹ *Id.*

²²² *Id.* at 206 (quoting Agnes Meyer, *Women Aren’t Men*, ATLANTIC, Aug. 1950, at 32–36).

²²³ MINTZ & KELLOGG, *supra* note 64, at 181.

²²⁴ CHAFE, *supra* note 205, at 207 (internal quotation marks omitted) (citing LYNN TOWNSEND WHITE, EDUCATING OUR DAUGHTERS: A CHALLENGE TO THE COLLEGES 18 (1950)).

²²⁵ *Id.* at 208 (footnote omitted) (citing WHITE, *supra* note 224, at 47, 66, 72, 86).

²²⁶ *Id.* (citing Anne G. Parnell, *A Nation’s Strength Begins in the Home*, VITAL SPEECHES, Dec. 15, 1951, at 145–47).

²²⁷ *Education Is Seen Neglecting Women*, N.Y. TIMES (Oct. 1, 1941), <https://www.ny-times.com/1941/10/01/archives/education-is-seen-neglecting-women-system-fails-to-prepare-the.html?searchResultPosition=1>.

²²⁸ CHAFE, *supra* note 205, at 309–10, n.16.

opined “[b]eing a good wife, a good mother, in short a good homemaker . . . is the most important of all the occupations in the world . . . I put it down as an axiom that no woman with a husband and small children can hold a full-time job and be a good homemaker at one and the same time.”²²⁹

The next explanation for how the woman of the 1940s became domesticated is the influence of propaganda. Post-World War II America was the time of the “cold war”, an ideological struggle between the United States and the Soviet Union where the two superpowers vied with each other to become more powerful and assert greater global influence.²³⁰ Consequently, it was the time of the “the terrors of the atomic age.”²³¹ It was also a time when women were being bombarded by propaganda that protecting the suburban, nuclear family was what made Americans superior to the Communists.²³² An article in *U.S. News and World Report* entitled “Setting Russia Straight” clearly contrasted the ideal American woman with her Communist counterpart, describing Moscow as

a city of women—hard-working women who show few of the physical charms of the women of the West. Most Moscow women seem unconcerned about their looks . . . Young couples stroll together in the parks after dark, but you see many more young women [stride] along the street purposefully, as though marching to a Communist Party meeting.²³³

The women of the Soviet Union “were shown in gunnysacks, as they toiled in drab factories while their children were placed in cold, anonymous day-care centers.”²³⁴ The comparison was clear: an American women fought the evils of Communism by not involving herself in male affairs, such as politics, but by being a sexually attractive housewife who cared about her hairdos and fashionable dresses and who “tend[ed] to the hearth and home” while “enjoy[ing] the fruits of capitalism, democracy, and freedom.”²³⁵

Finally, the cult of domestication was also a product of environment, in particular the rise of suburbia. A hallmark of the post-war era was an

²²⁹ *Id.* at 206–07 (quoting Ashley Montagu, *The Triumph and Tragedy of the American Woman*, SATURDAY REV., Sept. 27, 1958, at 14).

²³⁰ ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* 8 (3d ed. 2008).

²³¹ *Id.* at 26.

²³² *Id.* at 8 (“In propaganda battles that permeated the cold war era, American leaders promoted the American way of life . . . characterized by affluence, located in suburbia, and epitomized by white middle-class nuclear families.”). It is important to note that not all Americans had equal access to this domestic ideal. While “Americans of all backgrounds rushed into marriage and childbearing,” many, particularly Americans of color, “were excluded from suburbia, the site of the “American way of life.” Although Post-War America may have globally “presented itself as a unified nation,” underneath this façade, at home the “leader of the free world” was rife with “racial and class division.” *Id.*

²³³ *Id.* at 21–22 (alteration in original) (footnote omitted).

²³⁴ *Mrs. America: Women's Roles in the 1950s*, PBS: WOMEN AM. HIST., <https://www.pbs.org/wgbh/americanexperience/features/pill-mrs-america-womens-roles-1950s> (last visited Jan. 31, 2021).

²³⁵ *Id.*

economic boom which made it possible for newly married young couples to set up a home of their own.²³⁶ In contrast to pre-World War II society, where the majority of well-educated, prosperous Americans lived in cities, in the postwar era, the nation saw the growth of the suburbs.²³⁷ This “profound social change” shaped “the patterns and rhythms of American families.”²³⁸

The new world of suburbia is one where the father, as the breadwinner, commutes each day to work, forcing the mother to assume a dual parental role. She is now responsible not only for “playing with her children, but also for “disciplining them.”²³⁹ In addition, “she also has to chauffeur them to and from school, friend’s homes, piano and dancing lessons, and the doctor.”²⁴⁰ And, as she is “[d]eprived of stimulating contacts with other adults,” her life as a suburban housewife becomes one of “isolation, boredom, and loneliness.”²⁴¹ In essence, the suburban way of life is robbing her of any “sense of personal freedom” and at times, when “her self-esteem” is “at low ebb . . . the ‘we’ feeling” can “threaten[] to overwhelm her.”²⁴² Her days are “spotted” with “blessed moments of relief or dark thoughts of escape.”²⁴³ Each night, “she paints her face for her husband’s return before she wrestles with dinner.”²⁴⁴ When it is “family time” and she gathers around the television with her husband and children to watch their weekly favorite family T.V. sitcoms, such as *Father Knows Best*²⁴⁵ or *The Donna Reed Show*,²⁴⁶ she must secretly wonder what is wrong with her. However, she is

²³⁶ MINTZ & KELLOGG, *supra* note 64, at 182 (“As late as 1940, half of the young adults between the ages of twenty and twenty-four lived with their parents. After the war these young people married and increasingly moved to homes of their own.”).

²³⁷ *Id.* at 183 (“During the 1950s, suburbs accounted for 64 percent of the nation’s population growth.”).

²³⁸ *Id.*

²³⁹ *Id.* at 184.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² Anne Kelley, *Suburbia-Is It a Child’s Utopia?* N.Y. TIMES (Feb. 2, 1958), <https://www.ny-times.com/1958/02/02/archives/suburbia-is-it-a-childs-utopia-parents-who-heeded-the-experts.html>.

²⁴³ *Americana: The Roots of Home*, TIME (June 20, 1960), <http://content.time.com/time/subscriber/article/0,33009,826423-1,00.html>.

²⁴⁴ *Id.*

²⁴⁵ *Father Knows Best* (CBS 1954-55, NBC 1955-1958, & CBS 1958-1960) (original airings). Each week this popular show told a different story involving a family composed of a common-sense wife, Margaret, and a wise father, Jim Anderson, who always had an answer for his children Betty, Bud, and Kathy because he knew best. *Father Knows Best*, IMDB, <https://www.imdb.com/title/tt0046600/> (last visited Nov. 21, 2020).

²⁴⁶ *The Donna Reed Show* (ABC 1958-1966). This hit sitcom entertained viewers weekly by taking them into the world of the Stone family, which consisted of Donna, the loving homemaker who actually vacuumed in a dress, her pediatrician husband, Alex, and their two very attractive children, Mary and Jeff. Other examples include *The Danny Thomas Show* (ABC 1953-1965 & CBS 1957-1964 (original airings) (original title *Make Room for Daddy*)) and *The Adventures of Ozzie and Harriet* (ABC 1952-1966).

the linchpin of Suburbia, "the thread that weaves between family and community – the keeper of the suburban dream" ²⁴⁷ She will persevere.

The 1950s were also a time of great change and stress for middle-class males in American society due to the demise of smaller business enterprises and the rise of the large corporation. ²⁴⁸ In this new, impersonal, highly structured white-collar world, conformity was glorified and employees were expected to be cookie-cutter, "organization men." ²⁴⁹ This loss of autonomy, individuality, and personal satisfaction in one's job meant that many men felt the only places they could truly be free were in the personal aspects of their lives. ²⁵⁰

Wives also played an important role in the advancement of their husbands up the corporate ladder. As one journalist noted in 1953, "[t]here's a good deal more to being a good wife than just being a good housewife and mother." ²⁵¹ According to Dorothy Carnegie, wife of Dale Carnegie, the "famous self-help guru," it was also her duty to be a good "helpmate" and assist [her] husband up the ladder of success. ²⁵² While her suggestion that women should take an active role in the "business affairs" of their husbands was original, it can be directly traced to the corporate culture of the period. In the 1950s, "corporate wisdom" dictated "that when a company was making hiring and promotion decisions, it should consider not only the merits of the candidate but those of his wife." ²⁵³ As explained by "self-made millionaire" R. E. Dumas Milner:

We employers realize how often the wrong wife can break the right man. This doesn't mean the wife is necessarily wrong for the man but that she is wrong for

²⁴⁷ *Americana: The Roots of Home*, *supra* note 243.

²⁴⁸ MAY, *supra* note 230, at 24; *see* WHYTE, *supra* note 30, at 8; *see also* EXECUTIVE SUITE (Metro-Goldwyn-Mayer 1954) (a film about Big Business, intrigue in the corporate board room and a struggle for power among corporate vice presidents as they vie to replace the head of a large manufacturing firm who died from a stroke and left no successor).

²⁴⁹ MAY, *supra* note 230, at 24.

²⁵⁰ *Id.*; *see* Breines, *supra* note 204, at 71–72. *See generally* THE MAN IN THE GRAY FLANNEL SUIT (Twentieth Century Fox 1956). *The Man In The Grey Flannel Suit* provides an excellent filmic documentation of what it means to be an "organization man." Gregory Peck stars as Tom Rath, who commutes to work each day from his home in Connecticut to Manhattan. He's happily married and has a loving wife, played by Jennifer Jones, and three children. Facing some financial difficulties, when the opportunity arises, he applies for a public relations job at a major broadcasting network and is hired to write speeches for the network's president, played by Fredric March. Ultimately, Tom comes to realize that the president's corporate success has come at the expense of his personal happiness. Tom is ultimately faced with the choice of becoming a wholly dedicated organization man or of choosing to live a less "successful" life, but one where both work and family are important. THE MAN IN THE GRAY FLANNEL SUIT, *supra*.

²⁵¹ CELELLO, *supra* note 201, at 80 (citing Connie Dickman, *My Formula for Happiness*, COSMOPOLITAN, Apr. 1953, at 45).

²⁵² *Id.* (citing Mrs. Dale Carnegie, *How to Help Your Husband Get Ahead*, CORONET, Jan. 1954, at 65–74).

²⁵³ *Id.* at 81.

the job. On the other hand, more often than is realized the wife is the chief factor in the husband's success in his career.²⁵⁴

As a result of these varying factors and forces, the suburban, nuclear family became a bulwark against Communism, a bastion of safety, security and protection, a haven from the corporate world, and a place where dreams of success and of domestic happiness could be realized.²⁵⁵ "In pursuing their quest for the good life," couples "adhered to traditional gender roles," and highly "prized marital stability; few of them divorced."²⁵⁶ In fact, those who did not choose to marry were regarded with suspicion. A 1957 survey found that over fifty percent of the respondents believed that single adults were "'sick,' 'immoral', or 'neurotic.'"²⁵⁷

If divorce did occur, the popular perspective in the 1950s was that the event resulted from a failure on the part of the wife. It was her sole responsibility to keep the marriage together.²⁵⁸ Divorce was a tragedy which was avoidable as long as the wife took the right steps.²⁵⁹ The mantra of the marriage counselors of the period was that marriage alone was a fulfilling career. "To be a successful wife is a career in itself, requiring among other things, the qualities of a diplomat, a businesswoman, a good cook, a trained nurse, a schoolteacher, a politician and a glamour girl."²⁶⁰ An attorney, Samuel M. Starr, actually founded a group named Divorcees Anonymous (DA), which

²⁵⁴ *Id.* (citing R.E. Dumas Milner, *Before I Hire Your Husband, I Want to Meet You*, GOOD HOUSEKEEPING, Jan. 1956, 52-53, 98, 100); see Mintz & Kellogg, *supra* note 64 at 187 ("Corporations began to scrutinize closely the wives of job applicants to ensure they were sociable, contented, and willing to accept their husband's [job] transfers. Commented one sociologist: The socially retarded wife has become the greatest sorrow of the corporation, and partly its responsibility." (internal quotation marks omitted) (citing Geoffrey Perrett, A DREAM OF GREATNESS: THE AMERICAN PEOPLE, 1945-1963, at 294-95 (1979))). A film providing and excellent illustration of the 1950's corporate perspective of the role of the wife is WOMAN'S WORLD (Twentieth Century Fox 1954). Boasting an all-star cast, including Clifton Webb, Lauren Bacall, Van Heflin, June Allyson, Cornel Wild and Arlene Dahl, the film tells the story of three couples who are brought to New York by auto industry mogul, Ernest Gifford. Gifford needs to fill the top job of general manager of his luxury car manufacturing company. So, he orders his top three regional salesmen, along with their wives, to the Big Apple. Unbeknownst to the couples, Gifford believes that an executive's wife is crucial to her husband's success. Consequently, the final decision as to who is awarded the coveted promotion will be based not only on how well the men stand up to his inspection, but also on whether the wives can pass muster. WOMAN'S WORLD, *supra*.

²⁵⁵ May, *supra* note 230, at 26 ("In secure postwar homes with plenty of children, American men and women might be able to ward off their nightmares and live out their dreams. The family seemed to be the one place where people could control their destinies and perhaps even shape their future.").

²⁵⁶ *Id.* at 15; see Dorothy Barclay, *Creative Work Can Unite the Family*, N.Y. Times, Apr. 4, 1954, at SM 54, <https://www.nytimes.com/1954/04/04/archives/creative-work-can-unite-the-family.html>;

²⁵⁷ David Brooks, *The Nuclear Family Was a Mistake*, Atlantic (Mar. 2020), <https://www.theatlantic.com/magazine/archive/2020/03/the-nuclear-family-was-a-mistake/605536/>.

²⁵⁸ Cellelo, *supra* note 201, at 77.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 77 (quoting Emily Hartshorne Mudd, *Woman's Finest Role*, READER'S DIG., Aug. 1955, at 139); see also Sloan Wilson, *The Woman in the Gray Flannel Suit*, N.Y. TIMES, Jan. 15, 1956, at T8, <https://www.nytimes.com/1956/01/15/archives/the-woman-in-the-gray-flannel-suit-the-modern-career-girl-plays-the.html> (noting that "plenty of women who, as the wives of successful men, learn more about accounting and upper-bracket public relations than 99 per cent of the women in offices").

grew in popularity during the 1950s.²⁶¹ Its sole purpose was to advise women on how keep their marriage intact.²⁶² By the mid-1950s, the organization bragged it had preserved the marriages of several thousand couples.²⁶³

Still regulated by the Code, a prime example of how divorce was portrayed cinematically in the 1950s is the 1954 comedic offering, *PHFFFT!*:²⁶⁴

After several years of domestic squabbles, the marriage of Nina and Robert Tracy (Judy Holliday, Jack Lemmon) goes phffft! Upon receiving their divorce papers, Nina and Robert are certain that they'll remain friends, no matter how many new lovers they pick up along the way. Nina dallies briefly with bombastic Charlie Newton (Jack Carson), while Robert has a fling with the luscious Janis (Kim Novak).²⁶⁵

Of course, in line with the Code, "these romantic episodes only serve to make Nina and Robert realize how much they're still in love with each other."²⁶⁶

It is important to remember, however, the words of W. S. Gilbert which are gloriously sung in the operetta *H.M.S. Pinafore* that "things are seldom what they seem."²⁶⁷ In February 1953, *Housewife Magazine* ran an article that questioned the veracity of the 1950s image of the successful marital relationship usually celebrated in popular media.²⁶⁸ The piece, *Would You Choose Not to Be Married*, authored by psychologist Ethel Dukes, suggested that perhaps not "all was not well behind the closed doors of matrimony."²⁶⁹ Dr. Dukes aptly noted that "[w]hen the front door shuts behind the husband at 9 am, the wife faces hours of solitary confinement and hard physical work."²⁷⁰ Doctors identified a new female condition, The Intelligent-Housewife Syndrome.²⁷¹ According to this theory, women who suffer from the

²⁶¹ *Id.* at 85.

²⁶² *Id.*

²⁶³ *Id.* at 86.

²⁶⁴ *PHFFFT!* (Twentieth Century Fox 1954).

²⁶⁵ *PHFFFT! (1954)*, SHOWTIMES.COM, <https://www.showtimes.com/movies/phffft-1954-52958/> (last visited Jan. 31, 2020).

²⁶⁶ *Id.*

²⁶⁷ ARTHUR SULLIVAN & W.S. GILBERT, *Things Are Seldom What They Seem*, in *H.M.S. PINAFORE* (1878).

²⁶⁸ Olivia Lichtenstein, *My Week as a Mad Men Wife: Life as a 50s Spouse – With No Job, No Cleaner and Endless Cooking*, DAILY MAIL (Apr. 2009, 3:27 PM), <https://www.dailymail.co.uk/fe-mail/article-1166590/My-week-Mad-Men-wife-Life-50s-spouse--job-cleaner-endless-cooking.html>.

²⁶⁹ *Id.* In the article, the author describes a week of her life during which she lived as if she were a '50s' housewife. Her plan came after watching a scene between wife, Betty, and husband, Don Draper, from an episode of the television series *Mad Men* (AMC 2007-2015) which takes place "as the Fifties roll into the Sixties." The author observes that anyone watching the show would recognize that "Betty Draper is heading for a crisis" and she advises readers that before becoming too "enamored of a life of home baking and handy housekeeping hints and tips," it is prudent to recall the "malaise and depression" experienced by many women during the era "who trapped and lonely at home, relied on alcohol, purple hearts and 'mother's little helper' Valium to get them through the day." *Id.* See generally THE FEMININE MYSTIQUE, *supra* note 30, at 291–92; SCOTT DONALDSON, THE SUBURBAN MYTH 118 (2002).

²⁷⁰ Lichtenstein, *supra* note 268 (internal quotation marks omitted).

²⁷¹ M. Lattey, Letter to the Journal, *The Intelligent House Wife Syndrome*, 91 CAN. MED. ASS'N J. 717 (1964), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1927644/pdf/canmedaj01067-0044.pdf>; see

syndrome “are victims of the age-old conflict between the necessity for a woman to carry out her biological function and her need for intellectual fulfillment.”²⁷² The physical symptoms of a woman suffering from the syndrome are varied, but “[h]eadaches, nervousness, anxiety attacks, digestive upsets, and gynecological disturbances may all appear.”²⁷³ In addition, “[t]hey have depression with weeping spells and feelings of guilt, they complain of boredom and that life is passing them by while they are doing nothing worthwhile with it.”²⁷⁴ Frequently, they “express this guilt by saying by saying ‘I’ve got a good husband, and the loveliest children. There must be something very wrong and bad about me that I’m not happy.’”²⁷⁵ The medical conclusion was that it was futile to make such women “accept the role of being ‘only’ a housewife. They find housework, and the sole company of small children, lonely and boring. It also does not help them to palliate their problem with ‘busy’ work or hobbies”²⁷⁶ The treatment for such women is for them to be able to engage in “work to challenge their ability. They need to know that they are doing something worthwhile, and that they are using the brain they developed when younger.”²⁷⁷ It is not surprising that tranquilizers soon became the go-to treatment for this “house-wife’s syndrome.”²⁷⁸ In fact, consumption of ‘mother’s little helper’ pills soared from 462,000 pounds to 1.15 million pounds between 1958 and 1959.²⁷⁹ There was also “a sharp increase in women’s drinking during the decade . . . though many middle-class housewives kept their liquor stash hidden and thought no one knew they needed a couple of drinks to face an evening of family ‘togetherness.’”²⁸⁰

By 1960, the discontent being experienced by many women was almost palpable. For three seasons, from 1961-1963, NBC ran a series of summer replacement programs, the *Pyrex Specials for Women*, which focused exclusively on the problems of women.²⁸¹ The dramas “wrapped in documentary

also Stephanie Coontz, *Friedan Exposed 1950 Women’s Emotional Core*, WE NEWS (June 10, 2011), <https://womensenews.org/2011/06/friedan-exposed-1950s-womens-emotional-core/#> [hereinafter *Friedan Exposed Women’s Emotional Core*].

²⁷² Lattey, *supra* note 271, at 717.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*; see THE FEMININE MYSTIQUE, *supra* note 30, at 14 (noting that “a Cleveland doctor called it ‘the housewife syndrome’”).

²⁷⁸ STEPHANIE COONTZ, *THE WAY WE NEVER WERE* 36 (1992).

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 36-37; THE FEMININE MYSTIQUE, *supra* note 30, at 20 (“Many suburban housewives were taking tranquilizers like cough drops.” They would “wake up in the morning, and feel as if there’s no point in going on another day like this.” The answer was to take “a tranquilizer: so that they wouldn’t ‘care so much’ that it was all ‘pointless.’”).

²⁸¹ *Television: Tiddely-Pom*, TIME (Mar. 16, 1962), <http://content.time.com/time/magazine/article/0,9171,940662,00.html>.

sheathing" included such "enticing titles" as *The Cold Woman*, which addressed frigidity, to *The Trapped Housewife*.²⁸² In 1960, *Redbook* magazine ran an article, *Why Young Mothers Feel Trapped*, and asked readers to respond with examples they thought might be helpful to other housewives.²⁸³ The editors were overwhelmed when they received 24,000 responses.²⁸⁴ That same year, *Good Housekeeping* published an article written by Betty Friedan, *Women Are People, Too!*,²⁸⁵ which sent shockwaves across America. The piece offered a preview of the basic tenets from her history-altering book, *The Feminine Mystique*, in which she would later explore in greater depth what she denominated "the problem that has no name."²⁸⁶

In the *Good Housekeeping* article, Friedan clarifies that although it was quite prevalent, there was not yet a name for the "complex and elusive problem" or feeling that was "a strange stirring, a dissatisfied groping, a yearning, a search that is going on in the minds of women."²⁸⁷ She also recognizes that this problem was harder for women to talk about "than almost anything—including sex."²⁸⁸ Consequently, women who struggle with such feelings

struggle alone, afraid to admit that they are asking themselves the silent question "Is this all?" as they make the beds, shop for groceries and new curtains, eat peanut butter sandwiches with the children, chauffeur Cub Scouts and Brownies to and from meetings, or lie beside their husbands at night.²⁸⁹

²⁸² *Id.*

²⁸³ ROCHELLE GATLIN, *AMERICAN WOMEN SINCE 1945*, at 49 (1987).

²⁸⁴ *Id.* In addition, a book, *WHY YOUNG MOTHERS FEEL TRAPPED* (Robert Stein, ed., 1965) was based on the 1960 article in *Redbook*. Out of the approximately 1,000 manuscripts a month that the magazine received in response to its invitation to readers to submit short articles describing "some experience in your family, social or marital life that you feel may be particularly interesting or helpful to other young mothers," 32 were chosen for the book.

²⁸⁵ "*Women Are People, Too!*": *The Groundbreaking Article by Betty Friedan*, *GOOD HOUSEKEEPING* (Aug. 9, 2010), <https://www.goodhousekeeping.com/life/career/advice/a18890/1960-betty-friedan-article/> [hereinafter *Women are People, Too!*].

²⁸⁶ *THE FEMININE MYSTIQUE*, *supra* note 30, at 63. The first chapter in the book echoes portions of the article in *Good Housekeeping*. It reads:

The problem lay buried, unspoken, for many years in the minds of American women. It was a strange stirring, a sense of dissatisfaction, a yearning that women suffered in the middle of the twentieth century in the United States. Each suburban wife struggled with it alone. As she made the beds, shopped for groceries, matched slipcover material, ate peanut butter sandwiches with her children, chauffeured Cub Scouts and Brownies, lay beside her husband at night – she was afraid to ask even of herself the silent question – "Is this all?"

Id. at 15.

²⁸⁷ *Women Are People, Too!*, *supra* note 285. It is interesting to note that it wasn't only Friedan's middle-class women that were suffering from the nameless problem. GATLIN, *supra* note 283, at 49. In her study of working-class women, Mirra Komarovsky found that one-third of the blue-collar wives she spoke with wanted employment "simply to get out of the house." See MIRRA KOMAROVSKY, *BLUE-COLLAR MARRIAGE* 60 (1967).

²⁸⁸ *Women Are People, Too!*, *supra* note 285.

²⁸⁹ *Id.* In *The Feminine Mystique*, Friedan expands upon why women had to struggle alone. She writes:

If a woman had a problem in the 1950s or 1960s, she knew that something must be wrong with her marriage, or with herself . . . She was so ashamed to admit her dissatisfaction that

This was not surprising, Friedan notes. For the “past 20 years in columns, articles, and books by experts” women had been told that their role was “to seek fulfillment as wives and mothers. The voices of tradition and the voices of Freudian sophistication” told them that they could “desire no greater destiny than to glory in [their] role as women, in [their] own femininity.”²⁹⁰ Further, she writes, women have been led to believe by “psychologists and psychoanalysts and sociologists” that all their “frustrations were caused by education and emancipation, the striving for independence and equality with men, which made American women unfeminine.”²⁹¹ According to such experts, “the truly feminine woman turns her back on the careers, the higher education, the political rights, the opportunity to shape the major decisions of society for which old-fashioned feminists fought.”²⁹² Ultimately, “[f]or a woman to have such aspirations, interest, goals of her own . . . impairs not only her ability to love her husband and children but her ability to achieve her own sexual fulfillment.”²⁹³

Friedan then calls upon women to have the courage to listen to “the voice” inside of them and realize “that it is not enough to be a wife and mother, because she is a human being herself.”²⁹⁴ Consequently, “[s]he can’t live through her husband and children, they are separate selves. She has to find her own fulfillment first.”²⁹⁵ She closes her article on a positive note:

Who knows what women can be when they finally are free to become themselves? Who knows what women's intelligence will contribute when it can be nourished without denying love? Who knows what sons and daughters will become, when their mothers' fulfillment makes girls so sure they want to be feminine that they no longer have to look like Marilyn Monroe to prove it, and makes boys so unafraid of women they don't have to worry about their masculinity? Who knows of the possibilities of love, when men and women share not only children, home, and garden, not only the fulfillment of their biological role, but the separate, human knowledge of separate human beings?²⁹⁶

The fallacy of the cultural myth that the proscribed female domesticity of the 1950s always led to domestic tranquility and bliss is tragically exemplified in the film, *Revolutionary Road*.²⁹⁷ This 2008 film focuses on the

she never knew how many other women shared it. If she tried to tell her husband, he didn't understand what she was taking about. She really didn't understand it herself.

THE FEMININE MYSTIQUE, *supra* note 30, at 1.

²⁹⁰ THE FEMININE MYSTIQUE, *supra* note 30, at 85.

²⁹¹ *Women Are People, Too!*, *supra* note 285.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ REVOLUTIONARY ROAD (Dreamworks 2008). For her performance as April, Kate Winslet won a Golden Globe award for Best Actress in a Motion Picture – Drama and the film was also nominated for 3 Academy Awards. *Revolutionary Road* (2008): Awards, IMDB, <https://www.imdb.com/title/tt0959337/awards> (last visited Nov. 21, 2020).

story of April Wheeler, played by Kate Winslet, an aspiring New York actress who struggles with her traditional, but limited, role of housewife and mother after her husband, Frank, portrayed by Leonardo DiCaprio, moves her from New York City to the suburbs of Connecticut when she becomes pregnant.²⁹⁸ Set in the 1950s, it's an utterly bleak portrayal of a marriage rotting from within as a result of Frank's apathy and April's disillusionment with her unfulfilling life. Divorce seems inevitable, but this is the 1950s and that route just wouldn't be acceptable. For a short time, it seems as if the couple might find happiness. In order to escape the "hopeless emptiness" of their never changing life, they actually plan to sell everything and move to Paris, a dream they had when they met long ago.²⁹⁹ But when Frank is offered a promotion, as a good "organization man"³⁰⁰, he has no choice but to accept. Then, April learns she is pregnant again. Frank believes all is fine and the family dynamic has returned to what is the acceptable norm. However, knowing divorce is out of the question, April ultimately succumbs to her quiet desperation and aborts the child herself, which ultimately results in her death.³⁰¹

C. The Lineage of the Companionate Marriage

Traditionally, there were three alternative reasons as to why a couple might choose to marry: the goal of having and raising offspring, the view of the family as an economic unit formed for mutual welfare, and to provide companionship and love.³⁰² During the 1960s and '70s, another cornerstone of the new divorce culture was laid with the rise as the dominate view that the "companionate marriage" was the true purpose of the institution.³⁰³ It is important to note that the concept and endorsement of the purpose of marriage as a vehicle for romantic and emotional contentment was not a completely novel idea.

At the turn of the twentieth century, a new kind of family had emerged which was expected not only "economic security and a stable environment for children", but "romance, sexual fulfillment, companionship, and emotional satisfaction."³⁰⁴ Between 1900 and throughout the "roaring 20s", the

²⁹⁸ REVOLUTIONARY ROAD, *supra* note 297.

²⁹⁹ *Id.*

³⁰⁰ See generally WHYTE, *supra* note 30, at 3.

³⁰¹ REVOLUTIONARY ROAD, *supra* note 297.

³⁰² JACOB, *supra* note 21, at 24.

³⁰³ *Id.* at 24–26. There are numerous reasons for the rise of companionate marriage style. Key factors include: a longer life-span during which partners had to remain married and where they were often "empty nesters"; without children on which to jointly focus; the modern work day meant that couples had more free time; and the new suburban life style meant that couples spent more time together alone, usually watching the television. *Id.* at 25–26. "In these circumstances, marriages which are not companionate quickly become intolerable ... and frequently lead to divorce." *Id.* at 26; see also BERNARD, *supra* note 145, at 141–42.

³⁰⁴ MINTZ & KELLOGG, *supra* note 64, at 108.

middle class family of was transformed by a number of forces, in particular the discontent of young women balking at being limited to the traditional role of homemaker and mother.³⁰⁵ In contrast to their mothers, this generation of the “New Woman” rejected traditional gender roles by “pursuing higher education, joining organizations, and working outside the home.”³⁰⁶ It was the era of the rise of the “flapper” who embodied the “revolution in morals and manners” of the 1920s as “[y]oung women danced the fox trot, smoked cigarettes openly and defiantly, read sex and confession magazines, watched lurid motion pictures, and, to an unprecedented extent, engaged in premarital sex.”³⁰⁷

Most importantly, however, it was the era of the first wave of feminism,³⁰⁸ which commenced with the 1848 Seneca Falls Convention and lasted until 1920, with the passage of the Nineteenth Amendment³⁰⁹ which granted women the right to vote.³¹⁰ Emanating from the momentous

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 108, 111; see also James R. McGovern, *The American Woman's Pre-World War I Freedom in Manners and Morals*, 55 J. AM. HIST. 315–333 (1968) (discussing and providing a number of entertaining examples of how the “revolution in manners and morals” of the 1920s actually began earlier, after the turn of the century, but before the rise of the flapper; for instance, in contrast to the Gibson girl of 1900, the unmarried woman of 1916 “was celebrated in song as ‘A Dangerous Girl’,” the lyrics of which read: “You dare me, you scare me, and still I like you more each day. But you’re the kind that will charm; and then do harm; you got a dangerous way”). It is interesting to note that while traditionally, the majority of historians have described the 1920s as a time of “unparalleled economic emancipation for women” this consensus has been challenged. Arguably, such “[p]opular misconceptions about the 1920s can be traced in large part to the belief that World War I dramatically transformed the status of the woman worker.” CHAFE, *supra* note 205, at 50–51. While this is true, the “positive impact” of the war on opportunities for women to become part of the work force “was short-lived.” *Id.* at 52. Consequently, “if a revolution had taken place in women’s work, it occurred at the beginning of the century, not after 1920.” *Id.* at 55.

³⁰⁷ MINTZ & KELLOGG, *supra* note 64, at 108, 111; see also McGovern, *supra* note 306, at 315–33.

³⁰⁸ This article uses the term feminism to describe “political, cultural, and economic movements that aim to establish equal rights and legal protections for women.” Sally Ann Drucker, *Betty Friedan: The Three Waves of Feminism*, OHIO HUMANS. (Apr. 27, 2018), <http://www.ohiohumanities.org/betty-friedan-the-three-waves-of-feminism/>. Feminism is referred to as occurring in waves as a result of an article published in *The New York Times* in 1968 and written by Martha Weinman Lear, which ran under the headline “The Second Feminist Wave”. See generally Martha Weinman Lear, *The Second Feminist Wave*, N.Y. TIMES (Mar. 10, 1968), <https://www.nytimes.com/1968/03/10/archives/the-second-feminist-wave.html>.

³⁰⁹ U.S CONST. amend. XIX (providing that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex”).

³¹⁰ Drucker, *supra* note 308; see also JUDITH WELLMAN, *THE ROAD TO SENECA FALLS: ELIZABETH CADY STANTON AND THE FIRST WOMAN’S RIGHTS CONVENTION* 152 (Anne Firor Scott et al. eds., 2004). The first wave of feminism began to wane after 1920 and had the movement had all but disappeared by 1930. Estelle B. Freedman, *The New Woman: Changing Views of Women in the 1920s*, 61 J. AM. HIST. 372, 392 (1974) (noting that it is usually maintained that the first wave of feminism declined and eventually died out by 1930 after suffrage was attained). There have many been reasons offered for the decline of feminism. These range from the view that the chief “ailment” causing the movement to “expire in the twenties . . . was the feminists’ inability to see that equal suffrage was almost the only issue holding the disparate elements of the woman movement together”, WILLIAM O’NEILL, *EVERYONE WAS BRAVE: THE RISE AND FALL OF FEMINISM IN AMERICA* 264 (1969), to the recognition that while women gained an increased amount of sexual equality during the era of the first wave, after suffrage, women failed to achieve political unity. CHAFE, *supra* note 205, at 25–31. “With the passage of time . . . it became

gathering at Seneca Falls was the *Declaration of Sentiments*, authored by Elizabeth Cady Stanton, which set forth a “panoptic philosophy for the ultimate equality and empowerment of women.”³¹¹ Contained within this document were “attacks on the patriarchal marriage relationship and calls for divorce reform so that women could escape unharmonious marriages.”³¹² Although divorce was among the laws originally indicted as ones which oppressed women, Stanton’s efforts to make divorce part of the women’s rights agenda failed.³¹³ Divorce was a “complicated and divisive issue for feminists throughout the century.”³¹⁴ During this period, a social stigma still attached to divorce. In addition, a number of feminists feared that if they attempted to liberalize divorce laws they would be “branded as anti-marriage or anti-family,” or failing to believe “in the permanency of marriage.”³¹⁵ The result was that the first women’s movement never employed its “formidable skills to launch a full-scale assault on laws restricting the dissolution of marriage.”³¹⁶ Instead, the ballot became the central principle around which women rallied as they campaigned for political and legal reform.³¹⁷

The battle over the restrictions on woman suffrage in the world of the nineteenth century involved far more than simply the right to vote.³¹⁸ The struggle for enfranchisement struck at the heart of gender roles and preservation of the traditional, patriarchal family.³¹⁹ To allow women to vote

increasingly clear that no female [voting] bloc existed, that women in general voted like their husbands if they voted at all, and that enthusiasm among females for reform was limited at best.” *Id.* at 30. Once the main goal of suffrage was attained, individual groups of feminists did continue to fight “for reproductive freedom, for equality in education and employment, for voting rights for black women” but the “movement as a whole began to splinter. It no longer has a unified goal with a strong cultural momentum behind it and would not find another until the second wave began to take off in the 1960s.” Jone Johnson Lewis, *Feminist Waves: First and Second*, THOUGHTCO (Apr. 26, 2017), <https://www.thoughtco.com/feminist-waves-first-and-second-3528995>.

³¹¹ Tracy A. Thomas, Commentary, *Elizabeth Cady Stanton on the Federal Marriage Amendment: A Letter to the President*, 22 CONST. COMMENT. 137, 139 (2005).

³¹² *Id.*; see Abigail Bush et al., *Report of the Woman’s Rights Convention, Held at Seneca Falls, N.Y.* (1848), reprinted in SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY 79–81 (Ann D. Gordon ed., 1997).

³¹³ Thomas, *supra* note 311, at 140.

³¹⁴ Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 L. & HIST. R. 25 (1990).

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 977 (2002) [hereinafter *She the People*].

³¹⁹ *Id.* at 977–86. Further,

[o]pponents of woman suffrage frequently invoked the family as they described the ways that women voting would violate gender roles. Gender norms of the Industrial era identified women with the family and men with the domains of market and politics. The prospect of women voting this threatened femininity and the family both.

Id. at 979; see also AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT* 15 (1965) (“Close to the heart of all antisuffragist orators, particularly congressmen, was a sentimental vision of Home and Mother, equal in sanctity to God and the Constitution. Although all four entities regularly

would undermine the “unity of the marriage relation” and be an affront to the male who was the sole head of the household.³²⁰ Further, and of more import to the suffragists, the right to vote was reserved for citizens of higher social status who could responsibly exercise the franchise on behalf of the polity.³²¹ If viewed from this perspective, the Nineteenth Amendment did far more than allow women to cast a ballot. It freed them from their prior “inferior social status” in both the home and in society.³²² By “emancipat[ing] them from the historic forms of subordination in the family,”³²³ it appeared that women were now free to begin the fight for economic equality in the workplace.

Regretfully, this was not the interpretation embraced by the federal or state courts, Congress, or state legislatures. Although these institutions had the power to give the Nineteenth Amendment a “robust or ‘thick’ constitutional meaning,” instead they elected to “implement the Nineteenth in a narrow or ‘thin’” fashion.³²⁴ Consequently, the current and the dominant understanding of the Amendment is that it was enacted simply to address the narrow question of woman’s suffrage and therefore, its scope governs nothing more than the right of women to vote.³²⁵ While the Nineteenth Amendment might have been interpreted so that it played an important part in the development of gender equality and equal rights for women, instead “it became a constitutional orphan, rarely cited after 1939.”³²⁶

In addition to achieving suffrage, during the first wave of feminism there was a dramatic shift in time-honored sex roles.³²⁷ A key marker of this change was a steep decrease in the birthrate of “native-born, old-stock whites” which caused serious alarm among conservatives who worried that the radical conduct being exhibited by women would tarnish the “cherished ideal of the family.”³²⁸ For the first time, the women of the 1920s had the

appeared in various combinations in antisuffragist propaganda, it was the link of woman to home that underlay the entire ideology.”).

³²⁰ *She the People*, *supra* note 318, at 993.

³²¹ *Id.* at 980.

³²² Neil S. Siegel, *Why the Nineteenth Amendment Matters Today: A Guide for the Centennial*, 27 DUKE J. GENDER L. & POL’Y 235, 251–52 (2020).

³²³ *She the People*, *supra* note 318, at 1031.

³²⁴ Paula A. Monopoli, *The Constitutional Development of the Nineteenth Amendment in the Decade Following Ratification*, 11 CONLAWNOW 61, 63 (2020).

³²⁵ See Siegel, *supra* note 322, at 261–62.

³²⁶ Monopoli, *supra* note 324, at 64 & n.5 (“Even though the quest for the vote spanned generations and provoked the most sustained dialogue about women’s position in the constitutional community that the nation ever conducted, the Nineteenth Amendment has been utterly excluded from constitutional canon.” (quoting *She the People*, *supra* note 318 at 950)).

³²⁷ Drucker, *supra* note 308.

³²⁸ MINTZ & KELLOGG, *supra* note 64, at 108; see also DAVID KENNEDY, BIRTH CONTROL IN AMERICA: THE CAREER OF MARGARET SANGER, 42–44 (1971) (discussing the shrinking middle-class birth rate). Although Native-born whites, which constituted “the educated classes[,] were failing to reproduce themselves,” the birthrate “among immigrant women was nearly twice that of native-born

power to prevent an unwanted pregnancy via "birth control", a term coined by public health nurse and birth control advocate, Margaret Sanger, in 1914.³²⁹

Attitudes about birth control had altered along with society's "changing conception of womanhood."³³⁰ Irrespective of the fact that birth control was illegal at the time,³³¹ as the "driving force behind the legaliz[ation] and disseminat[ion] of" family planning in the United States, Sanger expressed her manifesto in the first issue of her newspaper, *The Woman Rebel*, when she wrote that women should "look the whole world in the face with a go-to-hell look in the eyes; to have an ideal; to speak and act in defiance of convention."³³² Her goal was to empower women to be able to take control of their reproductive lives so that they could plan on when to have children in order

women." In 1903, this state of affairs caused Theodore Roosevelt to express his concern "that the old-stock middle class was committing 'race suicide.'" MINTZ & KELLOGG, *supra* note 64, at 108.

³²⁹ Margaret Sanger (1879-1966), PBS: AM. EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/pill-margaret-sanger-1879-1966/#:~:text=Margaret%20Sanger%20devoted%20her%20life,law%20was%20to%20break%20it> (last visited Nov. 21, 2020). At this time, birth control methods consisted of 6 methods: the withdrawal method, condoms or 'cots,' the sponge, the pessary (aka the diaphragm), suppositories, and douches. MARGARET H. SANGER, *FAMILY LIMITATIONS* (1914); see also Peter Dreier, *From Margaret Sanger to Mike Pence: A Century of Progress – and Backsliding for Planned Parenthood and the Right to Choose*, SALON (Jan. 29, 2017, 8:00 PM), <https://www.salon.com/2017/01/29/margaret-sanger-stood-trial-100-years-ago-for-giving-out-birth-control-women-today-are-still-fighting-for-this-right/>; Lakshmeeramya Malladi, "Family Limitations" (1914), by Margaret Higgins Sanger, EMBRYO PROJECT ENCYCLOPEDIA (July 4, 2018, 4:40 PM), <https://embryo.asu.edu/pages/family-limitations-1914-margaret-higgins-sanger>.

³³⁰ KENNEDY, *supra* note 328, at 138.

³³¹ Margaret Sanger, *The Status of Birth Control: 1938*, NEW REPUBLIC (Apr. 20, 1938), <https://newrepublic.com/article/100850/the-status-birth-control-1938> [hereinafter *The Status of Birth Control*]. In 1873, Congress enacted An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use (Comstock Act), ch. 258, 17 Stat. 598 (1873). Popularly known as the *Comstock Law*, the statute's avowed purpose was "to prevent the mails from being used to corrupt the public morals." *Id.* § 2; see *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 70 (1983). The Act criminalized the selling or distribution of materials that could be used for contraception or abortion, to send such materials or information about such materials through the U.S. mail, or to import such materials from abroad. Violators could be punished by fines ranging from \$2,000 to \$5,000, or face "imprisonment for five years, or both." *The Status of Birth Control, supra*. Sanger slowly chipped away at the proscriptions of the Act and supplementary laws on the dissemination of information about and the distribution of contraceptive devices. See, e.g., *People v. Sanger*, 118 N.E. 637, 637 (1918).

In 1965, the U.S. Supreme Court decided *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), holding that the use of birth control by married couples was a privacy protected by the Constitution. Then, in 1972, in *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972), the Court legalized the use of birth control for all Americans, irrespective of marital status. However, it was not until 1983 that the U.S. Supreme Court finally overturned the provisions barring from the mails any unsolicited advertisement for contraceptives, as applied to circulars and flyers promoting prophylactics or containing information discussing the desirability and availability of prophylactics, holding that such strictures violate the free speech clause of the First Amendment. *Bolger*, 463 U.S. at 474.

³³² Margaret Sanger, *A Woman's Duty*, 1 WOMAN REBEL 8 (1914), <https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=420071.xml> [hereinafter *A Woman's Duty*].

to achieve other life goals.³³³ In her view, "[n]o woman can call herself free who does not own and control her body. No woman can call herself free until she can choose consciously whether she will or will not be a mother."³³⁴ Sanger's successful crusade for birth control changed the dynamics of the relationship between men and women, allowed women to more fully participate in the workforce, and ultimately contributed to changing the unequal status of the wife and mother in the American family.³³⁵

Despite attaining the right to vote and advancements in achieving reproductive freedom, the plight of women between 1900 and 1929 was still fraught with oppression and discrimination, both in the home and on the work front.³³⁶ The limited interpretation given to the scope of the Nineteenth Amendment failed to free women from the patriarchal view of the female as subordinate to the male whose place is in the home.³³⁷ While the vote set women's feet upon the path to equality, it is a long road to travel, and the end is still not yet in sight.

IV. 1969: THE YEAR DIVORCE LAW OVERCAME ITS CULTURAL LAG

The advent of no-fault divorce has been characterized as being revolutionary.³³⁸ Arguably, however, it was simply the law finally coming into accord with what had been happening in the courtroom for many years. In 1933, it was observed that anyone "who believes divorce law to function in practice . . . as it reads in the law books is a proverbial ostrich."³³⁹

It is interesting to note that the social context which facilitated the reform of divorce laws in the 1960s is remarkably similar to that of the 1920s in a number of striking ways. The two eras echo one another in that they each gave birth to a "wave" of feminism.³⁴⁰ The first wave began with the Convention in Seneca Falls when women met for the first time to discuss the advancement of women's rights, and which were then set forth in *The Declaration of Sentiments* authored by Elizabeth Cady Stanton.³⁴¹ The

³³³ Cathy Moran Haju, *The Sanger Paper Project Celebrates Women's History Month*, MARGARET SANGER PAPERS PROJECT (Mar. 4, 2014), <https://sangerpapers.wordpress.com/2014/03/04/the-sanger-paper-project-celebrates-womens-history-month/>.

³³⁴ Margaret Sanger, *A Parents' Problem or Woman's?*, BIRTH CONTROL REV. (Mar. 1919), <https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=226268.xml> [hereinafter *A Parents' Problem or Woman's?*]. From the publication of her 1914 radical monthly, *The Woman Rebel*, through her leadership of the International Planned Parenthood Federation in the 1950s, Margaret Sanger dedicated herself to making birth control legal, affordable, safe and respectable.

³³⁵ Dreier, *supra* note 329.

³³⁶ CHAFE, *supra* note 205, at 45–46, 89–91.

³³⁷ *Id.* at 45–46.

³³⁸ See generally JACOB, *supra* note 21.

³³⁹ *A Dead Language*, *supra* note 87, at 1506 (quoting 2 LEON C. MARSHALL & GEOFFREY MAY, THE DIVORCE COURT: OHIO 23 (1933)).

³⁴⁰ Lewis, *supra* note 310.

³⁴¹ Thomas, *supra* note 311, at 139.

publication of *The Feminine Mystique* is often credited as sparking the second wave of feminism.³⁴² Although not published until 1963, the book was written during the late 1950s.³⁴³ It was premised upon the answers Friedan received from former classmates at Smith College, with whom she had graduated fifteen years earlier, to a questionnaire she had created.³⁴⁴ The responses led her to realize that “[t]here was a strange discrepancy between the reality of our lives of women and the image to which we were trying to conform”³⁴⁵

In the 1920s, women primarily fought to win suffrage, won the franchise and then, in 1923, began efforts to have an Equal Rights Amendment (ERA) added to the Constitution.³⁴⁶ Following in the footsteps of the earlier feminists, in the 1960s, the woman’s movement engaged in a battle with two main fronts: the reform of abortion laws and the renewed fight for the enactment of the ERA.³⁴⁷ In each wave however, the goal was to reshape society’s perception that women primarily belonged in the sphere of the home and, in instances where women had entered the work force by choice or out of necessity, to attain economic equality.³⁴⁸ Ironically, in neither era was divorce an integral part of the feminist platform.³⁴⁹ What differentiates the two eras is the different responses of legislatures and the legal profession to divorce in an age of the companionate marriage.³⁵⁰

In the 1920s, legislatures gave little credence to the recommendations of reformers, who advocated for changes in the divorce process including expanding the ground to include “mental cruelty and incompatibility.”³⁵¹ Instead, the overall response to the revolutionary idea of a companionate

³⁴² Margalit Fox, *Betty Friedan, Who Ignited a Movement With ‘The Feminine Mystique’, Dies at 85*, N.Y. TIMES (Feb. 6, 2006), <https://www.nytimes.com/2006/02/06/obituaries/us/betty-friedan-who-ignited-a-movement-with-the-feminine.html> (noting that Betty Friedan’s “searing first book, ‘The Feminine Mystique,’ ignited the contemporary women’s movement in 1963 and as a result permanently transformed the social fabric of the United States and countries around the world”); COONTZ, *supra* note 278, at 165–66 (“The reemergence of the women’s right movement occurred sometime between the publication of *The Feminist Mystique* in 1963 and the founding of the National Organization for Women in 1966.”).

³⁴³ *Betty Friedan*, NAT’L WOMEN’S HIST. MUSEUM, <https://www.womenshistory.org/education-resources/biographies/betty-friedan> (last visited Nov. 21, 2020).

³⁴⁴ THE FEMININE MYSTIQUE, *supra* note 30, at xxi–ii.

³⁴⁵ *Id.* at xxii.

³⁴⁶ Fabiola Cineas, *The Equal Rights Amendment May Have Found Its Moment*, NEW REPUBLIC (Jan. 26, 2020), <https://newrepublic.com/article/156238/equal-rights-amendment-may-found-moment>.

³⁴⁷ Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2057–62 (2000).

³⁴⁸ See Drucker, *supra* note 308; Constance Grady, *The Waves of Feminism, and Why People Keep Fighting Over Them, Explained*, VOX (July 20, 2018, 9:57 AM), <https://www.vox.com/2018/3/20/16955588/feminism-waves-explained-first-second-third-fourth>.

³⁴⁹ See Kay, *supra* note 347, at 2048–50, 2073–76, 2086–87.

³⁵⁰ MINTZ & KELLOGG, *supra* note 64, at 126–27; LYNNE CAROL HALEM, *DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES* 134–36 (1980).

³⁵¹ MINTZ & KELLOGG, *supra* note 64, at 126–27.

marriage was to make divorce law more stringent.³⁵² To deter divorce, many states lengthened both the time period of residency needed before a petition for a divorce could be filed and, “to encourage reconciliation” and “discourage hasty remarriage,” longer waiting periods were imposed before ex-spouses were permitted to marry again.³⁵³

In practice, however, the courts were inclined to ameliorate the stringent requirements for divorce when appropriate.³⁵⁴ Even in jurisdictions which did not recognize the ground of mental cruelty, judges would often broadly interpret the ground of physical cruelty as encompassing “conduct such as nagging, humiliating language, unfounded and false accusations, insults, and excessive sexual demands.”³⁵⁵

When couples of the 1960s began to glorify a romanticized view of marriage, it became obvious to the majority of society that the current perception of marriage as a companionate relationship required a revamping of the historically accepted legal assumption that a marriage could only be dissolved for a serious transgression committed by one of the spouses.³⁵⁶ A new, more modern legal process was needed which would permit marital dissolution when a relationship premised on idea of the “soul mate” model simply soured.³⁵⁷ In contrast to the 1920s, when it was up to the judiciary to use interpretation to combat the harsh effects of fault based divorced, in the 1960s, basically the entire legal profession took up the banner for reformation of this area of family law. This action was not so much altruistic as it was a response to the deplorable state of affairs resulting from collusive divorce.³⁵⁸ The tactics of fraud and perjury, which often had to be utilized to procure a divorce, particularly in strict fault-based states such as New York,³⁵⁹ and the tacit approval of such conduct by the judiciary in granting a divorce in such case, had become more than just an embarrassment.³⁶⁰ They were undermining trust in the entire American legal system.³⁶¹ “The most dangerous possibility is that these [divorce] practices will cause disrespect for the law in general, disrespect for the priests of the law, and a very real danger of corruption of the bar.”³⁶²

³⁵² *Id.*

³⁵³ *Id.* at 127.

³⁵⁴ MINTZ & KELLOGG, *supra* note 64, at 127; see HALEM, *supra* note 350, at 134.

³⁵⁵ MINTZ & KELLOGG, *supra* note 64, at 127.

³⁵⁶ Deegan, *supra* note 172, at 24.

³⁵⁷ W. Brad Wilcox, *The Evolution of Divorce*, 45 NAT’L AFFS. (2020), <https://www.nationalaffairs.com/publications/detail/the-evolution-of-divorce>.

³⁵⁸ *Rights of Passage*, *supra* note 7, at 659.

³⁵⁹ See *supra* Part III and accompanying notes discussing collusive divorce under New York’s strict fault-based divorce law.

³⁶⁰ See Kay, *supra* note 347, at 2047.

³⁶¹ *Id.*

³⁶² Max Rheinstein, *Our Dual Law of Divorce: The Law in Action Versus the Law of the Books*, 9 U. CHI. L. SCH. CONF. SERIES 39, 41 (1952).

The concern of the legal profession over a divorce system premised on fraud had been growing for quite some time. Over twenty years before the initial implementation of no-fault divorce by the State of California, a Committee of the American Bar Association prepared a 34-page report for the National Conference on Family Life and its Legal Section, which was held in Washington D.C. at the White House in early May of 1948.³⁶³ The report, which focused “particularly as to the abuses in divorce laws and practices,” received “much approval and commendation” and was “featured as front-page news in the afternoon papers” upon its release by the Conference.³⁶⁴ Representing “the considered judgment of the authorized Committee,” it was prepared after obtaining “the opinions and judgment of many judges, lawyers, social workers, church authorities, and the like” before and recommendations were drafted.³⁶⁵ The report declared the following:

Our divorce laws are thoroughly bad . . . they are universally condemned. They constitute a threat to the stability of the home. They are based on a false premise Divorce proceedings today are a farce. The truth is not in them. Hypocrisy is the order of the day. Nine divorces out of ten are secured by agreement of the parties. Everybody must pretend that it is not so, but it is so.³⁶⁶

The report went on to point out that “the divorce trial, in 90 percent of the cases, becomes in reality a sham battle against the little man who isn’t there.”³⁶⁷ In addition, “[t]he practice of ‘collusion’ was . . . unsparingly condemned.”³⁶⁸

By the 1960s, in light of changing social forces and cultural mores, it was clearly time to replace the archaic legal approach to divorce of implementing strict laws to preserve the family unit and “prevent immorality and sin.”³⁶⁹ The patriarchal model of marriage had been replaced by one which focused on companionship.³⁷⁰ The women’s movement had reemerged in the wake of the publication of *The Feminist Mystique*, and the National

³⁶³ *Report on Divorce Laws Acclaimed at National Conference on Family Life*, 34 A.B.A. J. 448, 448 (1948) [hereinafter *Report on Divorce Laws*]; Kay, *supra* note 347, at 2041 (“In May 1948, the American Bar Association joined with 125 private organizations and five Federal Government Agencies in sponsoring a National conference on Family Life, convened by President Harry S. Truman at the White House.” (citing REP. OF INTER-AGENCY COMM. ON BACKGROUND MATERIALS, THE AMERICAN FAMILY: A FACTUAL BACKGROUND, at iv (May 1948))).

³⁶⁴ *Report on Divorce Laws*, *supra* note 363, at 448.

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.* (internal quotation marks omitted).

³⁶⁸ *Id.* In the 1950s, the National Association of Women Lawyers also “undertook what it considered its greatest, “most ambitious” project when it drafted “a model uniform no-fault divorce law. . . .” Laura Oren, *No-Fault Divorce Reform in the 1950s: The Lost History of the “Greatest Project” of the National Association of Women Lawyer*, 36 L. & HIST. R. 847, 863 (2018). The organization took this bold step in an era when women were considered to be both “domestic” and “quiescent.” *Id.* at 880.

³⁶⁹ *Rights of Passage*, *supra* note 7, at 663.

³⁷⁰ Kay, *supra* note 347, at 2019.

Organization for Women had been founded.³⁷¹ The moment was coming when action would be taken to ensure that the laws on the books finally comported with law in practice. It took another two decades, but finally, California achieved this symmetry by becoming the first state to embrace the concept of no-fault divorce, which then swept through the states during the 1970s and '80s.³⁷² As of 2010, when New York finally brought its divorce law into the twenty-first century, all states have adopted some form of no-fault divorce.³⁷³

Prior to no-fault divorce laws, the plots of many divorce films hinged on collusion between the spouses³⁷⁴ or retribution and meting out the appropriate punishment against a party who dared to divorce.³⁷⁵ In contrast, popular films produced after the adoption of no-fault divorce laws initially grappled with "the emotional trauma of the marital break-up."³⁷⁶ Not quite able to completely let go of the concept of blame, the spouse which caused the marital break-up in such films was clearly at fault, even if the divorce was procured on no-fault grounds.³⁷⁷ This hesitation is an indicia of "the societal confusion about the radically new conceptions of marriage and divorce."³⁷⁸ An example of a film which epitomizes the "blame game" of the 1970s is *An Unmarried Woman*, which in addition to representing divorce as a gateway to self-realization, portrays the scorned wife, Erica, as a "mature and courageous" woman, while the unfaithful husband is portrayed as selfish, irresponsible and immature.³⁷⁹

³⁷¹ *Id.* at 2049–50.

³⁷² *Id.* at 2050; Denese Ashbaugh Vlosky & Pamela A. Monroe, *The Effective Date of No-Fault Divorce Laws in the 50 States*, 51 FAM. REL. 317, 320 (2002).

³⁷³ Ira Mark Ellman, *The Place of Fault in a Modern Divorce*, 28 ARIZ. ST. L. J. 773, 781–82 (1996); A. L. Kennedy, *Which States Have No Fault Divorce?*, LEGAL BEAGLE (Feb. 5, 2019), <https://legalbeagle.com/100998-states-fault-divorce.html>. For a discussion of criticisms of unilateral no-fault divorce and proposed reforms, see generally Lynn D. Wardle, *Divorce Reform at the Turn of the Millennium: Certainties and Possibilities*, 33 FAM. L. Q. 783 (1999); Heather Flory, "I Promise to Love, Honor, Obey . . . and Not Divorce You": *Covenant Marriage and the Backlash Against No-Fault Divorce*, 34 FAM. L. Q. 133 (2000); Laura Gatland, *Putting the Blame on No-Fault*, 83 A.B.A. J. 50 (1997); Beverly Willett, *What Fifty Years of No-Fault Divorce Has Gotten Us*, WASH. EXAM'R. (Aug. 13, 2019, 12:00 AM), <https://www.washingtonexaminer.com/opinion/op-eds/what-fifty-years-of-no-fault-divorce-has-gotten-us>.

³⁷⁴ See, e.g., *supra* note 110 and accompanying discussion on THE GAY DIVORCEE.

³⁷⁵ See, e.g., DODSWORTH (The Samuel Goldwyn Co. 1936) (the wife who instigated the divorce ends up lonely and disgraced); I WANT A DIVORCE (Paramount Pictures 1940) (the wife who sought the divorce is so miserable and lonely that she kills herself when her ex-husband remarries.); STELLA DALLAS (The Samuel Goldwyn Co. 1937) (to give her daughter the most promising future she can by letting her go live with her socially prominent father, a working-class mother, whose rough ways can sometimes be an embarrassment to her child, agrees to divorce her husband so he can remarry, and to never see her daughter again).

³⁷⁶ Deegan, *supra* note 172, at 24.

³⁷⁷ See *id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.* See *supra* notes 163–69 and accompanying text for a more thorough discussion of the film. Additional films which represent this period include: BLUME IN LOVE (Warner Brothers 1973), KRAMER VS. KRAMER (Columbia Pictures 1979), and SHOOT THE MOON (Metro-Goldwyn-Mayer 1982).

In the 1980s, the genre seemed to adjust, mirroring changing cultural views as more of society absorbed the no-fault legislation.³⁸⁰ It reaffirmed the new divorce culture of the 1960s and embraced the concept of no-fault divorce where neither party is blamed when a marriage ends.³⁸¹ Two prime examples are *Falling in Love*³⁸² and *Twice in a Lifetime*.³⁸³ These divorce films are groundbreaking in that for the first time, the new divorce culture is portrayed on screen.³⁸⁴ In each of these films, instead of concentrating on blaming the spouse who destroyed the marriage by engaging in an extramarital affair, the plot centers on the wayward spouse having the courage to leave a “failed marriage that was suffocating both partners.”³⁸⁵ Each reaffirms the cultural change that came to the fore in the 1960s, that marriage is not a lifetime commitment based on family and duty, but a meeting of soul mates.³⁸⁶ As such, marriage is a temporary union that should only be continued as long as it enables “both partners get what they want from life.”³⁸⁷ Each film tells the tale of an unexpected romance that “just happened”; it wasn’t by design or plan.³⁸⁸ But the current marriages of the parties involved in these new relationships cannot stand up to attraction and the ultimate love that results from these chance encounters.³⁸⁹ The films then focus on the healing process that occurs after the breakup, not on assigning guilt.³⁹⁰

³⁸⁰ By 1977, all states except Pennsylvania and New York had adopted no-fault divorce. It went into effect in Pennsylvania in 1980. Daniel Patrick Sheehan, *New Pa. Law Reduces No-Fault Divorce Waiting Period to One Year*, MORNING CALL (Oct. 7, 2016, 11:18 PM), <https://www.mcall.com/news/pennsylvania/mc-wolf-no-fault-divorce-20161007-story.html> (noting that “Pennsylvania introduced no-fault divorce in 1980 when it reformed its 1785 divorce code after years of debate”). However, it wasn’t until 2010 that New York finally recognized a no-fault ground for divorce “[bringing] its divorce laws into the 21st century.” Lindsay Robertson, *New York Finally Gets No-Fault Divorce*, N.Y. MAG.: INTELLIGENCER (Aug. 16, 2010), https://nymag.com/intelligencer/2010/08/new_york_finally_gets_no-fault.html; see also Vlosky & Monroe *supra* note 372, at 320.

³⁸¹ Deegan, *supra* note 172, at 24.

³⁸² *FALLING IN LOVE* (Paramount Pictures 1984).

³⁸³ *TWICE IN A LIFETIME* (Bud Yorkin Productions 1985).

³⁸⁴ See *supra* Part IV(a) and accompanying notes. For example, *Falling in Love* is a portrait of two very different marriages, each of which has slowly faded into nothing more than a comfortable habit. Everything changes when the wife in one of the couples, Molly, played by Meryl Streep, meets the husband in the other couple, Frank, played by Robert De Niro. Molly is a housewife married to a doctor who lives in upstate New York. Frank is an architect who also lives upstate. The two happen to run into each other one day while Christmas shopping when their holiday packages becoming mixed up in a Manhattan bookstore. They then see each other a few months later on the train to upstate New York. Because they take the same weekly route most days, they strike up a friendship which eventually deepens and leads to a romance that highlights the emptiness of their current marriages and ultimately destroys them. They are justified in leaving their respective marriages because they have the right to seek something more. Deegan, *supra* note 172, at 25–27.

³⁸⁵ Deegan, *supra* note 172, at 24.

³⁸⁶ *Id.* at 25.

³⁸⁷ *Id.* at 24.

³⁸⁸ *Id.* at 26.

³⁸⁹ *Id.* at 24, 26.

³⁹⁰ *Id.* at 26.

Arguably, although films such *Falling in Love* and *Twice in a Lifetime* are moving, they lack the intense drama of the divorce films produced prior to the implementation of the no-fault divorce laws. By focusing on the healing process after the break-up, the divorce is no longer combative. However, creative filmmakers have still managed to characterize marital dissolution on the screen as a war, even unto the death, between the spouses. The ultimate example is the black comedy, *The War of the Roses*.³⁹¹

While entertaining, this cautionary tale conveys deep truths about the dangers of how divorcing spouses can destroy one another. The film begins with attorney Gavin D'Amato, played by Danny Devito, meeting with a prospective client who is seeking advice about whether he should commence a divorce action.³⁹² D'Amato then narrates the film as he advises the client by sharing the story about the break-up of the marriage of his close friend and partner at the law firm, Oliver Rose, played by Michael Douglas, and his wife Barbara, played by Kathleen Turner. Throughout the film, D'Amato offers pithy comments about the Rose's situation, beginning with the observation that: "There are two dilemmas that rattle the human skull. How do you hold onto someone who won't stay? And how do you get rid of someone who won't go?"³⁹³ He makes the pointed observation that when it comes to divorce: "There is no winning! Only degrees of losing!"³⁹⁴ He "sums up all that Oliver stands to lose" when he observes: "'My father used to say there are four things that tell the world who a man is: his house, his car, his wife and his shoes.' This battle between husband and wife will center on material things, most notably house, car and shoes."³⁹⁵ And the tale told in *The War of the Roses* perfectly illustrates of D'Amato's observation.³⁹⁶

The film begins with young love and marriage, and the audience watches as the Roses build a life together, have two children, acquire a cat and a dog, and then purchase Barbara's dream home, which she spends hours on renovating and which, together, they furnish to make perfect. During this time, Oliver has become a successful lawyer. Barbara, on the other hand, has been a housewife and mother throughout the relationship. Only recently, when the children are off to college, has she branched out by starting a catering business. Barbara begins to wonder what her life would be like without Oliver. Instead of realizing her life would be empty without him, she finds the idea of freedom attractive. Things about him which used to make her feel

³⁹¹ THE WAR OF THE ROSES (Twentieth Century Fox 1989).

³⁹² *Id.*

³⁹³ *The War of the Roses Script*, SCRIPTS, <https://www.scripts.com/script-pdf/23058> (last visited Jan. 17, 2021).

³⁹⁴ *Id.*

³⁹⁵ *Movie Review: The War of the Roses*, Three Movie Buffs (Oct. 6, 2011), <http://www.threemoviebuffs.com/review/war-of-the-roses.html> (quoting THE WAR OF THE ROSES, *supra* note 391).

³⁹⁶ THE WAR OF THE ROSES, *supra* note 391.

safe or which she found endearing, now drive her crazy. In fact, at times she can barely tolerate him.³⁹⁷

The first skirmish between the couple begins after Oliver has been rushed from his office to the Emergency Room, sure he is suffering a heart attack and is going to die. While it turns out it is only a hiatal hernia, Barbara fails to appear at the hospital after receiving an urgent call when Oliver is first admitted.³⁹⁸ The following scene occurs when Oliver arrives home that evening:

BARBARA: Oliver! You don't know how happy I am to see you!

OLIVER: You didn't come to the hospital.

BARBARA: No. No. Well, I called and ... well, everything seemed to be under control. I just ... I didn't want to disturb you.

OLIVER: Disturb me? Well, I wasn't doing much. Just dying.

BARBARA: Oliver! You weren't dying.

OLIVER: You didn't even call.

BARBARA: Of course, I did. I talked to someone.

OLIVER: Not to me.

BARBARA: Well, I talked to a nurse and she said that you weren't dying.

OLIVER: Well, I thought I was dying! I wrote you a note in case you didn't get there in time.

BARBARA: I can't read your handwriting.

OLIVER: I was on a gurney being rushed to Intensive Care in excruciating pain. It says:

“My love, by the time you receive this, I may be gone.

My life was fun, full, beyond my dreams.

All I have... and all I am, I owe to you.

You gave me courage to surpass what I know I am the strength to...”

Oh, this is where I had a spasm. Uh... I can't read it, but the next line says:

"I lie here, feeling my life ebb away.

I cling to your image.

I will take you with me to eternity.

I cherish you.

I thank merciful God for you."

I didn't have the strength to sign it.

BARBARA: I'm... I'm sure they, um...they would've told me who it was from.

³⁹⁷ *Id.*

³⁹⁸ *Id.*

[Later that night, in bed, BARBARA shares her realization about why she didn't come to the hospital.]

BARBARA: I wasn't sure why I didn't go to the hospital, but now I think I know.

OLIVER: I'd just like to put today behind us, OK?

BARBARA: OK.

[Continuing anyway]

BARBARA: I was gonna [sic] drive to the hospital, but I knew you were OK. Cos [sic] I never think that anything really terrible could happen to me or the kids or you. And I was getting on the expressway, and suddenly I had this very strong feeling that you were dead. And I knew what it would feel like to be alone in this house[,] to not have you in my life. And I got so scared, I had to pull over.

OLIVER: Oh. Well, you don't have to be scared any more [sic].

BARBARA: I got scared because I felt happy.

OLIVER: You were happy because I was dead?

BARBARA: I was happy to be free. Like a weight had been lifted.

OLIVER: Like a weight had been lifted?

BARBARA: Yeah.

OLIVER: So, how am I supposed to respond? You tell me you wished I was dead?

BARBARA: I thought it was important.

[The next day, feeling wronged, OLIVER is expecting an apology. When one isn't voluntarily forthcoming, he confronts BARBARA and the battle lines are drawn.]

OLIVER: I think you owe me an apology, Barbara. If you have something to say, I'd like to hear it.

BARBARA: *[pause]* I want a divorce.

[This should seem just as abrupt to OLIVER as it does to us.]

OLIVER: You do not. You can't have one.

BARBARA: It isn't like marriage; it doesn't require mutual consent. I gave it a lot of thought and I really don't want to be married to you anymore.

OLIVER: One day? You thought about it for a day?

BARBARA: A little longer than that.

OLIVER: Is there someone else? Another man?

BARBARA: No.

OLIVER: A woman?

BARBARA: You wish.

[BARBARA begins gathering the ingredients for new cakes. OLIVER slams an opera cupboard; it bounces open defying his anger.]

OLIVER: If anyone should be asking for a divorce it should be me! I was the one rushed to the-hospital. My wife doesn't show up and then she tells me she wishes I had died-

BARBARA: Okay, okay, okay. Don't turn this into soap opera.

OLIVER: Why would you want a divorce? Did I do something? Did I not do something?

BARBARA: I can't give you specifics, Oliver.

[OLIVER makes a face, as if he can't believe her lack of logic and conciseness. BARBARA turns away, putting on an oven mitt to remove one more cake from the oven.]

OLIVER: Well, try-

BARBARA: I don't want to try. I don't want to be married to you. Can't you just accept that?

OLIVER: No, I think I need—I think you owe me, after this many pretty damn good years of marriage—a reason.

[BARBARA focuses on him; he stares at her, lips tight, head bobbing slightly.]

BARBARA: Because ... when I watch you eat ... when I see you asleep ... when I look at you ... lately ... I just want to smash your face in.

[OLIVER stands a moment as if he had been struck. Then suddenly he grabs the front of her shirt and pulls her nose to nose.]

OLIVER: Well go ahead then. Smash my face in. Go ahead! Go ah-

[Her mittened hand rockets from her side and catches him on the chin, lifting him and sending him reeling backward. OLIVER feels his front teeth, touches his lip. He takes a step toward her. BARBARA stands her ground.]

[He starts out.]

OLIVER: From now on I hit back. You better get yourself a good lawyer.

BARBARA: The best your money can buy.³⁹⁹

And Barbara keeps her word. She retains Harry Thurmont, the premier divorce attorney in the city. At their first meeting with Thurmont, Oliver is representing himself. It becomes clear that there is a problem over how to divide assets rather than simply getting a divorce.⁴⁰⁰ The couple soon declare war, and every issue becomes a battleground:

OLIVER: What does she want?

THURMONT: Child support.

OLIVER: I've always taken care of my kids.

THURMONT: And they will be 18 in one year, which makes it nice for you.

OLIVER: What about alimony?

THURMONT: Barbara, against my advice, waives alimony.

BARBARA: I'm making money with my business. I get a lot of referrals. I can support myself.

OLIVER: Well, I'm a lucky guy.

THURMONT: My client is being more than fair, Mr. Rose. She's waived alimony and she's willing to waive her rights against your law practice in exchange for the house and all of its contents, except your shaving gear and ... his clothing?

OLIVER: Everything I made went into that house.

BARBARA: I found that house. Every piece of furniture is where it is because I put it there. It is my house.

OLIVER: If your client has finished yammering, explain to her that a wife does not automatically get the house.

THURMONT: I thought you told her that she was entitled to anything and everything.

OLIVER: I told her what?

THURMONT: Yes. Here it is. I quote:

"My love by the time you ..."

Boy, what a handwriting.

"By the time you receive this, I may be gone."

Uh ... Blah, blah, blah ...

"All I am and all I have, I owe to you."

You wrote this, Mr. Rose?

³⁹⁹ *The War of the Roses Script*, *supra* note 393.

⁴⁰⁰ *THE WAR OF THE ROSES*, *supra* note 391.

OLIVER: Excuse me, Mr. Thurmont, you tiny, little, worm-like, infinitesimal prick, could I have a word with my wife, please?

THURMONT: Certainly.

OLIVER: If this is a who-can-sink-lowest-fastest contest, you won. By showing him my letter, you have sunk below the deepest layer of prehistoric frog shit at the bottom of a New Jersey scum swamp. I may have let you have the house, but now you'll never get it. You will never get that house. Do you understand? You will never get that house.

BARBARA: We'll see.

OLIVER: Yeah ... we'll see.⁴⁰¹

With the help of his attorney, Gavin D'Amato, Oliver is able to stay in the house during the divorce process⁴⁰²:

GAVIN: Here we go. You're gonna love this. Civil Code, Title 16-9-0-4, Section C. I used this once for a freebie divorce I did for my cousin, Paulie. Total loser. Read.

OLIVER: "For the purposes of subsections one and two of paragraphs..."

GAVIN: Here. Skip down to "Parties who have pursued separate lives..."

OLIVER: "Parties who have pursued separate lives sharing neither bed nor board shall be deemed to have lived apart even though they reside under the same roof..."

Even though they reside under the same roof?

GAVIN: Yeah. The law was put on the books for poor people folks who couldn't afford separate residences. But we can use it.

OLIVER: So I can move back in.

GAVIN: If your divorce is settled in court, it shows you're committed to the property. Plus, you can see she doesn't sell the assets.

OLIVER: I can work on her, get her to fold on the house.

GAVIN: No. No, Oliver, you don't even deal with her. You avoid her. Women can be a lot meaner than we think. Never underestimate her as an adversary. Don't talk to her.

OLIVER: No, no, no, I won't. Don't worry about me.⁴⁰³

But Oliver does not follow the advice of his attorney. Instead, he and Barbara escalate their battle in order to force their opponent out of the home. They fight to the bitter end over their mansion, every joint possession, and, by doing so, they single-mindedly inflict the maximum pain possible on each other. They literally destroy themselves when their final diabolical plot against each other results in them both being trapped on the immense, crystal

⁴⁰¹ *The War of the Roses Script*, *supra* note 393 (emphasis added).

⁴⁰² THE WAR OF THE ROSES, *supra* note 391.

⁴⁰³ *The War of the Roses Script*, *supra* note 393.

chandelier, hanging far above the terrazzo floor of the entry way to what once was their happy home⁴⁰⁴:

INT. ENTRY

[OLIVER and BARBARA are both clinging to the crystal chandelier. OLIVER has managed to move almost next to BARBARA.]

OLIVER: There's no reason to be anything but absolutely honest. Through all that's happened I always loved you.

BARBARA: I know.

OLIVER: And through all this, you loved me too, didn't you?

[BARBARA blows a strand of hair out of her eyes. She turns and looks at him more directly than she has in years. She can do nothing but tell him the pure and absolute truth.]

BARBARA: No.

*[Oliver twitches involuntarily. The chandelier turns one more degree.]*⁴⁰⁵

Because Barbara has previously loosened the bolts holding the lighting piece into the ceiling, planning to drop it on Oliver, it breaks free of the ceiling and they fall together⁴⁰⁶:

[The bolt turns past one last thread. BARBARA looks up as the bolt pulls free of the ceiling. The chandelier heads for the floor with its two passengers.]

[The chandelier hits the quarry tiles and explodes into shards of crystal. Glittering crystal settles on OLIVER and BARBARA, sticking to their bodies, clothing them in brilliance.]

[OLIVER and BARBARA lie motionless, light pouring through the fan window. Then-]

[Their bodies sparkle in the light pouring through the fan window. A very long moment passes.]

[Even at the end, when they are dying, there is no compromise or forgiveness between the two. Instead, they both die happy, thinking they have won the final battle of the war: OLIVER with his last vestige of life, opens his eyes, reaches out his hand, and places it gently on BARBARA'S shoulder. He smiles. His eyes close. Dead.]

[A very long moment passes. Then-]

⁴⁰⁴ THE WAR OF THE ROSES, *supra* note 391.

⁴⁰⁵ *The War of the Roses Script*, *supra* note 393.

⁴⁰⁶ THE WAR OF THE ROSES, *supra* note 391.

[BARBARA opens her eyes, and, slowly, with great effort, places her hand atop Oliver's. A moment. Then, with her last breath, with her last vestige of strength, she throws his hand off her shoulder. Now she smiles. Her eyes close. She doesn't move. Ever again.]

[OLIVER and BARBARA lie as close as is possible without touching. Both are smiling, pleased with themselves. A happy ending.]

[FADE OUT.]

THE END.⁴⁰⁷

As Gavin observes to the prospective client at the end of telling his tale of the Roses, there really is no moral to the story unless it is this: "a civilized divorce is a contradiction in terms."⁴⁰⁸ *The War of the Roses* is a true poster child for the destructiveness of the divorce process.

While the film takes the theme of destruction to its extremes, it does reflect actual cases where the mistrust and combativeness of the parties, if not tempered by counsel, can lead to devastating outcomes. In 1991, the *Chicago Tribune* published a story about "[m]illionaires Stanley and Dorothy Diller" who, after twenty-eight year of marriage, became "the antagonists in an epic divorce case of almost Dickensian length, complexity and acrimony."⁴⁰⁹ During this bitter divorce action, the parties "disputed virtually every major and minor issue" in this seven-year-long Los Angeles "court war."⁴¹⁰ According to the trial judge, the wife was "a frightened bitter woman . . . obsessed by her belief that her husband was concealing community property."⁴¹¹ Mr. Diller was "an avaricious, covetous, stubborn man" who consistently argued with his attorneys.⁴¹² In addition, he was "evasive, uncooperative, distrustful, discourteous, unyielding, and self-righteous."⁴¹³ The trial lawyer for Mrs. Diller referenced the *War of the Roses* and its depiction of "a violent divorce battle," observing that the Dillers had "acted out in the courtroom their own 'War of the Roses.'"⁴¹⁴ The battling spouses "could not agree on anything, not even the missing silver tea set that each said stole. The husband even sued his son and the wife sued her daughter and son-in-law, all over property they said was being concealed."⁴¹⁵ What might be christened "The War of the Dillers" was a marital dissolution action that

⁴⁰⁷ *The War of the Roses Script*, *supra* note 393.

⁴⁰⁸ *Id.*

⁴⁰⁹ Aaron Epstein, *In Real-Life 'War of Roses,' The Lawyers Win*, CHI. TRIB. (Dec. 18, 1991), <https://www.chicagotribune.com/news/ct-xpm-1991-12-18-9104230582-story.html> ("[I]n all, the couple hired almost six sets of lawyers – one lawyer made two appearances- to handle the pretrial, trial and appeals phases of the case." At the end of the day, they had incurred almost "\$3 million" in lawyer fees.).

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

epitomized the truth of Gavin D'Amato's final words of wisdom in the film "that civilized divorce is a contradiction in terms."⁴¹⁶

V. CONCLUSION

A motion picture is worth a thousand words in action. This maxim stems from "the synergistic impact of moving-image, sound" and "narrative" which imbue films with the power to trigger strong viewer emotional responses and engagement.⁴¹⁷ Consequently, legal films allow the audience to "explore the past, the present and the future"⁴¹⁸ of legal developments. For well over a hundred years, film audiences have watched radically different depictions of the complex issue of divorce, which reflected societal forces and cultural mores of the era. From the actions of the liberated wife in the pre-Code film, *The Divorcee*, to the Code-approved remarriage theme found in the screwball comedy *His Girl Friday*, to the didactic diatribes against marital dissolution in the divorce films of the 1940s and 50s, to the cautionary warning of *The War of the Roses* that if war is hell, divorce is worse, the cinema has been instrumental in allowing society to explore the symbiotic relationship between culture and the changing face of divorce law. One of the most productive approaches to understanding the trials and tribulations of those who have been subject to gender inequality is to view them against the backdrop of the evolution of the laws of divorce as seen through the eye of the camera.⁴¹⁹

⁴¹⁶ *The War of the Roses Script*, *supra* note 393.

⁴¹⁷ See Shah, *supra* note 14.

⁴¹⁸ *Id.*

⁴¹⁹ While this article focused almost exclusively on movies, the television camera can also play a vital part in illuminating the legacy of feminism. A prime example is the 2020 limited TV series, *Mrs. America* (FX Productions Apr. 15, 2020–May 27, 2020). Told through the eyes of the key women figures of the era, the series brings to life to the battle fought over forty years ago over the ratification of the ERA. *Mrs. America* begins in 1972 when the ERA has passed Congress and is gaining momentum towards being ratified by the 38 states needed. Prahlad Srihari, *Mrs. America Review: Cate Blanchett and the Anti-Feminist Mystique of FX-Hulu's ERA-Defining Drama*, FIRSTPOST (Apr. 17, 2020), <https://www.msn.com/en-in/news/other/mrs-america-review-cate-blanchett-and-the-anti-feminist-mystique-of-fx-hulu-e2-80-99s-era-defining-drama/ar-BB12KLN8>. The dream of feminists since 1923 is almost a reality until it is threatened by one woman, Phyllis Schlafly. Schlafly is a nuclear strategy expert, a fierce anti-communist, a proud Republican housewife in Illinois, and the devoted mother of six. She starts a grass-roots campaign which unites and empowers conservative housewives across the U.S. against the ERA. Their position is that ERA "will disadvantage housewives, strip mothers of custody of their children and their right to alimony, and even forcibly draft their daughters for military duty." *Id.* On the other side of the debate, the audience witnesses the valiant efforts of key figures in the woman's movement of the era, including Gloria Steinem, Betty Friedan, Shirley Chisholm, Bella Abzug, and Jill Ruckelshau, the sole Republican feminist in a sea of blue, as they fight for the Amendment's ratification. The series succeeds in portraying Schlafly as a cunning adversary with a will of steel and illustrates how the culture wars of the '70s, which she led, can be linked to the rise to the Moral Majority, which has forever shifted the political landscape of the United States. First and foremost, however, *Mrs. America* is a tribute to the women's movement of the past and, ultimately, "an urgent call to arms to the next wave." *Id.*; see also James Poniewozik, *Mrs. America Review: The Voice of an E.R.A.*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/arts/television/mrs-america-review.html>;

Ultimately, what can be gleaned from the camera's reflection of the social forces and cultural changes that have molded and shaped the marital dissolution process over the past century and a quarter is that the underlying gender politics of divorce have not been eradicated. Rather, during a divorce, the existing inequalities between the spouses which have been cloaked by the companionate marriage are revealed.⁴²⁰ Supposedly, in a companionate marriage, men and women are equal partners. Often, this ideology is no truer today than it was for the "new" women of the 1920s or the trapped housewives of the 1950s.

Although current laws may appear to be gender neutral, a plethora of legal and feminist works over the years have revealed the "illusion of legal neutrality."⁴²¹ The law, like film, most often mirrors and "perpetuates existing social biases and rankings."⁴²² The answer then is deeper than simply evaluating the pros and cons of no-fault divorce. It is a question of refuting the premise that in American society, gender is "the basis of a hierarchical system of male dominance and female subordination."⁴²³ To neutralize gender politics in the area of divorce, the gender belief system that men are superior to women which continues to insidiously permeate American society must be transformed. This will allow a balance of power to be struck between the sexes which will permit men and women "to cooperate from positions of mutual respect" regarding the role each partner will play as breadwinner, in terms of household responsibilities, and, where applicable, parenting duties.⁴²⁴

Despite the failed efforts to date to achieve ratification of the Equal Rights Amendment, important gains have been made over the past sixty years in attaining greater equality in "the workplace," in gaining "reproductive freedom," and opening more educational opportunities for women.⁴²⁵

Karen DeWitt, *Rights Plan Foes Celebrate Its Difficulties With a Gala*, N.Y. TIMES, Mar. 23, 1979, at A18.

⁴²⁰ Terry Arendell, *Divorce: It's a Gender Issue*, 17 FAM. ADVOC. 30, 34 (1994).

⁴²¹ *Id.* at 32.

⁴²² *Id.* (citing DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 111-12 (1989)).

⁴²³ *Id.* at 30.

⁴²⁴ *Id.* at 34.

⁴²⁵ See Kay, *supra* note 347, at 2048-50, 2073-76, 2086-87. For example, in 1963, the Equal Pay Act became law, which forbids employers from paying unequal wages or providing unequal benefits to men and women working jobs that require "equal skill, effort, and responsibility, and which are performed under similar working conditions." Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. §206(d)). The next year, Congress passed Title VII of the Civil Rights Act of 1964, which bars employers from discriminating on the basis of "race, color, religion, sex, or national origin." Civil Rights Act of 1964 § 7, 42 U.S.C. §§ 2000e-2000e-17 (1964).

There has recently been a renewed interest in advocating for the ratification of the ERA to ensure Constitutional protection against "sexual discrimination." In light of the political climate resulting from the #MeToo movement, the controversy over Brett Kavanaugh's appointment as an Associate Justice on the United States Supreme Court, and the conviction of Harvey Weinstein, who was accused by numerous women of "rape, sexual assault, and harassment," the need for the "issue of gender equality" to fall within

But there is still a long road to travel. As suffragist Crystal Eastman so eloquently stated after the ratification of the Nineteenth Amendment, “Now We can Begin Again” because she knew that new Amendment would not receive the broad interpretation envisioned by suffragists.⁴²⁶ While the quest for

the protections afforded by the U.S. Constitution “has never been more obvious . . .” Nicole Gaudiano, *‘Me Too’ Movement Renews Equal Rights Amendment Push*, USA TODAY (Nov. 18, 2017, 7:12 AM), <https://www.usatoday.com/story/news/politics/2017/11/18/me-too-movement-renews-equal-rights-amendment-push/875903001/>; see Cineas, *supra* note 346 (noting that irrespective of the recent ratification of the ERA by Virginia, because the deadline for ratification expired long ago, the Justice Department has taken the position that the proposed amendment cannot be revived by Congress, and that consequently, while the “idea of equality is still alive,” millions of American women are still waiting for their “constitutional equality”); Mary Raffalli & Robbyn McFadden, *‘Mrs. America’ and the Battle Over the Equal Rights Amendment*, CBS NEWS (Apr. 19, 2020, 10:05 AM), <https://www.cbsnews.com/news/mrs-america-and-the-battle-over-the-equal-rights-amendment/>.

⁴²⁶ Siegel, *supra* note 322, at 252 n.65. As Crystal Eastman predicted, once the Nineteenth Amendment was ratified, the numerous issues that had swirled around the Amendment were “recast” and its scope was narrowed as being relevant only to voting rights. Recently, the movement for the ratification of the ERA has gained new momentum. In January 2020, Virginia became the 38th state to ratify the ERA “marking a watershed moment in the nearly century-long effort to add protections for women to the U.S. Constitution.” Gregory S. Schneider et al., *‘A Long Time to Wait’: Virginia Passes Equal Rights Amendment in Historic Vote*, WASH. POST (Jan. 15, 2020, 4:34 PM), https://www.washingtonpost.com/local/virginia-politics/2020/01/15/0475d51a-36f1-11ea-9541-9107303481a4_story.html. The chief House sponsor of the resolution called the balloting that was to take place “the vote of a lifetime” and asked the lawmakers: “Which side of history do you want to be on? . . . The world is watching—your mothers, your sisters, your daughters.” *Id.* Additionally, ss previously mentioned, the #MeToo movement has continued to make gains. See Ivana Kottasová, *While the #MeToo Backlash Raged in 2019, the Movement Notched Up Big Gains*, CNN (Dec. 29, 2019, 6:02 PM), <https://www.cnn.com/2019/12/24/world/metoo-movement-gains-2019-intl/index.html>. The controversy over Brett Kavanaugh’s appointment as Associate Justice of the United States Supreme Court when he was accused of sexual assault by Dr. Christine Blasey Ford also impacted the country. As noted on PBS NewsHour, “[w]hile the outcome of today’s hearing may not change the result of the Senate’s vote, it will likely have a lasting effect on U.S. culture for years to come.” Joshua Barajas & Daniel Bush, *Ford Testified. Kavanaugh Testified. What Did We Learn?*, PBS NEWSHOUR (Sept. 27, 2018, 10:09 PM), <https://www.pbs.org/newshour/nation/ford-testified-kavanaugh-testified-what-did-we-learn>; see also Eric Bradner & MJ Lee, *Ford ‘100%’ Certain of Assault Claim; Kavanaugh says ‘I am Innocent’*, CNN (Sept. 28, 2018, 12:51 AM), <https://www.cnn.com/2018/09/27/politics/brett-kavanaugh-hearing/index.html>. Finally, the conviction of Harvey Weinstein, who was accused by numerous women of “rape, sexual assault, and harassment,” highlighted that the need for the “issue of gender equality” to fall within the protections afforded by the U.S. Constitution “has never been more obvious . . .” Gaudiano, *supra* note 425. The Weinstein sentencing was “the culmination of a case that fueled the #MeToo movement and encourages women to speak out against sexual abuse.” Eric Levenson et al., *Harvey Weinstein Sentenced to 23 Years in Prison After Addressing his Accusers in Court*, CNN (Mar. 11, 2020, 4:26 PM), <https://www.cnn.com/2020/03/11/us/harvey-weinstein-sentence/index.html>. Just as with the Nineteenth Amendment, there is much controversy over the ERA. Irrespective of whether one is for or against its ratification, what is a given is that the current parameters of the current battle lines will change if the bill is eventually approved. Siegel, *supra* note 322, at 262. Conservative opponents to the Amendment currently argue that ratification “will eliminate protections for women, force them to serve in combat, ban single-sex bathrooms and institutions and outlaw abortion restrictions.” 30 LISA RABASCA ROEPE, CQ RESEARCHER, THE EQUAL RIGHTS AMENDMENT (2020) <http://library.cqpress.com/cqresearcher/document.php?id=cqresrrr2020040300>. Other critics of the Amendment point to the current success of women in politics and other professions that were once male dominated as evidence that women don’t really need such constitutional protection; they have been able to succeed in society without it. Their mantra is that “[t]he so-called Equal Rights Amendment will not give women any more rights than they have today.” Schneider et al., *supra* note 425. If the ERA is ratified, these opponents will engage in “damage control” by construing the law as “narrowly” as possible. Siegel, *supra* note 322, at 262. This

gender equality continues, the mantra for all who support the vision must be let us "begin again." Until the journey is ended, as the gender issues underlying the laws of divorce and of child custody are re-shaped on the potter's wheel of social and cultural changes, filmmakers will continue to reflect these seminal transformations through the eye of the camera.

was the fate of the Nineteenth Amendment. The Amendment's disappointing history sends a message to those who strive for equal rights for all to be wary and vigilant to ensure that the story of the ERA does not become that of the Nineteenth Amendment. *Id.*