"The Peculiar Anomaly": Same-Sex Infidelity in Postwar Divorce Courts

ALISON LEFKOVITZ

It was a simple tale of betrayal. In 1950, a Pennsylvania husband returned home from a business trip to find his wife—known to us today only by her initials CD—having sex with the female athletic director of a local school.[1] This wife was only one of many women caught having sex with other women in the era following World War II. Although many closeted men and women enjoyed vibrant sexual and social lives in gay and lesbian communities, sometimes commanding officers, bosses, and police officers caught and punished men and women engaging in "deviant" sexual activity. Punishments ranged from arrests during a bar raid to a dismissal from a job.[2] A double life in the public sphere was fragile. Scholars have paid less

1. *AB v. CD*, 74 Pa. D. & C. 83 (1950).

2. John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940–1970* (Chicago: University of Chicago Press, 1998); Allan Bérubé, *Coming Out Under Fire: The History of Gay Men and Women in World War Two* (New York: Free Press, 1990); Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* (New York: Columbia University Press, 1991); Leisa D. Meyer, "Creating G.I. Jane: The Regulation of

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attention, however, to the insecure closeted lives of husbands and wives such as CD.[3] Although certainly not all men and women who engaged in same-sex encounters entered traditional heterosexual marriages, many did. Their motivations for marrying ranged from the hope that marriage would cure same-sex desire to financial concerns. Sometimes, a husband or wife discovered his or her spouse's homosexual infidelity. A potential punitive outcome for this encounter was not an arrest, pink slip, or a dishonorable discharge; instead a spouse could end up in divorce court. Like the federal government, the military, the local police, and private

Sexuality and Sexual Behavior in the Women's Army Corps," *Feminist Studies* 18 (1992): 581–602; Elizabeth Lapovsky Kennedy and Madeline D. Davis, *Boots of Leather, Slippers of Gold: The History of a Lesbian Community* (New York: Routledge, 1993); George Chauncey, *Gay New York: Gender, Urban Culture, and the Makings of the Gay Male World, 1890–1940* (New York: Basic Books, 1994); Kevin J Mumford, *Interzones: Black/White Sex Districts in Chicago and New York in the Early Twentieth Century* (New York: Columbia University Press, 1997); John D'Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* (Chicago: University of Chicago Press, 1997); Beth L Bailey, *Sex in the Heartland* (Cambridge, MA: Harvard University Press, 1999); John Howard, *Men Like That: A Southern Queer History* (Chicago: University of Chicago Press, 1999); Nan Alamilla Boyd, *Wide Open Town: A History of Queer San Francisco to 1965* (Berkeley: University of California Press, 2003); David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2004); Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton, N.J.: Princeton University Press, 2009); Nayan Shah, *Stranger Intimacy: Contesting Race, Sexuality, and Law in the North American West* (Berkeley: University of California Press, 2012); and Christina Hanhardt, *Safe Space: Gay Neighborhood History and the Politics of Violence* (Durham: Duke University Press, 2013).

3. The major exception to this is Lauren Gutterman's work. See, in particular, Lauren Jae Gutterman, "'The House on the Borderland': Lesbian Desire, Marriage, and the Household," *Journal of Social History* (2012): 1–22. Gutterman also chronicles allusions to depictions of married women who came out via the feminist movement in Faderman, *Odd Girls and Twilight Lovers*, 207–9; D'Emilio and Freedman, *Intimate Matters*, 316; Alrene Stein, *Sex and Sensibility: Stories of a Lesbian Generation* (Berkeley: University of California Press, 1997), 40; and Ruth Rosen, *The World Split Open: How the Modern Women's Movement Changed America* (New York: Penguin Books, 2000), 170–71. Daniel Rivers also necessarily deals with a related issue—one that often could and did result from the process I relate here. He recounts gay men and lesbians' relationships as parents. See Daniel Rivers, *Radical Relations: Lesbian Mothers, Gay Fathers and Their Children in the United States since World War II* (Chapel Hill: University of North Carolina Press, 2013). Another related exception to this is studies that show that many young men and lesbians were forced out of their homes as daughters and sons once their homosexuality was discovered. For more on gay men, lesbians, and the families they were born into, see Heather Murray, *Not in This Family: Gays and the Meaning of Kinship in Postwar North America* (Philadelphia: University of Pennsylvania Press, 2010).

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employers, then, divorce courts also had to devise strategies and philosophies with which to deal with the problem of homosexuality.

Given the punitive way in which the federal government, military, local police, and private employers dealt with these homosexual encounters, a similarly unforgiving response from divorce courts could be expected. A few scholars have shown that in cases against wives who had engaged in homosexual activity, judges proved very willing to grant their husbands generous fault divorces.[4] Only Rhonda Rivera, however, has dealt with the more puzzling handful of judicial appellate decisions from wives' suits against their homosexually philandering husbands. Although Rivera adeptly illustrates the ways that these decisions were part of a broader system that discriminated against gay men and lesbians, these divorce cases should also be examined as outliers in government officials' approach to sexuality. Judges at the appellate level nearly universally ruled that husbands' homosexual activity *did not* merit a fault divorce for their wives.[5] The uniformity of these decisions expressed something important about marriage in the postwar period; although few cases like these made it to upper level courts, those that did came from a variety of states.

Implied in these judges' unusual rulings was a belief that marriage itself could contain or cure men's deviant sexuality. This claim was in itself old-fashioned. Until the late nineteenth and early twentieth century, having sexual relations with someone of the same sex was simply a behavior, albeit an illicit, immoral, or sinful behavior. Like other behaviors, it could be corrected, possibly via marriage. But this idea had not been in circulation in government circles since well before World War II; most government actors had long before begun to embrace the hetero–homosexual binary that we are familiar with today. For husbands alone, divorce court judges situated themselves in "the unrationalized coexistence of different [historical] models" of sexuality.[6] These judges decided cases according to the hetero–homosexual binary when wives had sex with women, but treated men who had sex with men as indulging in deviant behaviors rather than being homosexual. Or perhaps instead, judges offered men what Eve Sedgwick has described as the silences or open secrets of the closet. These appellate courts exploited, used, and even depended on the "double life" to encourage marriage, at least for men. In brief, judges used divorce

4. Gutterman, "The House on the Borderland," and Rhonda R. Rivera, "Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States," *Hastings Law Journal* 50 (1999): 1179–98.

5. There was seemingly more variation at the lower court level, which I will allude to in sections 2 and 3.

6. Eve Kosofsky Sedgwick, "Axiomatic," in *Epistemology of the Closet* (Berkeley: University of California Press, 2008), 47.

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law to construct and then welcome gay men into a marriage closet that they kept closed to lesbians.[7] The question is why judges treated men with more tolerance than they did women. Judges did not explicitly articulate a reason for their differential treatment between men and women who cheated with members of the same sex. Perhaps they did not notice that they did so. Nonetheless, their actions conformed with the political, economic, and cultural logic of marriage in the postwar period.

I argue that government agents treated husbands leniently because such forbearance was useful in shoring up the patriarchal family. Marriage was not only a private relationship after World War II; it also had political and economic functions. Although marriage could "contain" unruly or potentially dependent women, government authorities focused even more on containing men.[8] Government officials believed that veterans threatened to become violent if they remained unemployed and unattached. Men seemed less likely to disrupt the social order through violence if they had wives and children.[9] Wives at home made husbands more content workers in the new white-collar world by providing a refuge in an alienating political economy.[10] Moreover, the financial obligation to their wives ensured that husbands would remain in the labor market.[11] Marriage

7. Notably, the federal state had only recently used the GI Bill to create a closet for gay men to enter. Canaday has shown that the invisibility of gay soldiers was critical because "it drove deeper the wedge separating homosexuality and citizenship by enabling military and VA officials to pretend that homosexual soldiers had not defended their country, and that they could not meet the obligations of good citizens" in Canaday, *Straight State,* 170.

8. For examples of containing women, see, for example, Linda Gordon, *Pitied but Not Entitled: Single Mothers and the History of Welfare, 1890–1935* (New York: Free Press, 1994); Elaine Tyler May, *Homeward Bound: American Families in the Cold War Era* (New York: Basic Books, 2008); Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2002); and Laura A. Belmonte, *Selling the American Way: U.S. Propaganda and the Cold War* (Philadelphia: University of Pennsylvania Press, 2010).

9. See for example, Barbara Ehrenreich, *The Hearts of Men: American Dreams and the Flight from Commitment* (Garden City, NY: Anchor Press/Doubleday, 1983); James Gilbert, *A Cycle of Outrage: America's Reaction to the Juvenile Delinquent in the 1950s* (Oxford: Oxford University Press, 1988); and Andrea Friedman, "Sadists and Sissies: Anti-Pornography Campaigns in Cold War America," *Gender & History* 15 (2005): 201–27.

10. See, for example, Gordon, *Pitied but Not Entitled;* May, *Homeward Bound*; Cott, *Public Vows*; Belmonte, *Selling the American Way.*

11. See for example, Canaday, *Straight State*; Cott, *Public Vows*; Alice Kessler–Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (New York: Oxford University Press, 2001); and Nancy MacLean, "Postwar Women's History: The 'Second Wave' or the End of the Family Wage?" in *A Companion to Post-1945 America*, eds., Jean-Christophe Agnew and Roy Rosenzweig (Malden, MA: Blackwell Pub, 2006), 235–59.

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could do this work for potentially gay men as well; as Margot Canaday has suggested, it not only transitioned men from the homosocial world of war to the postwar domestic order but also ensured that men played their proper breadwinning role.[12] But unlike women, men seemed increasingly willing to do without marriage. Such fears were behind the anxiety surrounding Playboy bachelors and beatniks alike, and extended even to federal policy.[13] After World War II, government officials implemented policies that made certain that significantly more American men remained patriarchs and breadwinners; above all they designed the GI Bill to ensure that men would become husbands.[14]

In other words, I suggest that this leniency on men in divorce courts arose because it was considered both difficult and necessary to keep men married. A gay ex-husband might not go on to remarry, especially if he faced a heavy alimony burden. By denying fault divorces, or at least alimony, to the wives of men who had cheated with men, judges kept potentially gay men in the marriage market on the assumption that marriage itself could cure them. Appellate judges thereby preserved individual families and a social order based on marriage. Through divorce law, gay men became husbands; wives became lesbians. In doing so, appellate courts diverged sharply from the system of punishment that characterized every other government reaction to homosexuality.

Gay Men and Lesbians Get Married

To reach a divorce court, of course, men and women with same-sex or bisexual desire first had to marry. This practice drew the attention of medical experts, who considered marriages between "gay men" or "lesbians" and "straight" spouses a common practice. Most famously Alfred Kinsey weighed in on the phenomenon of same-sex infidelity in the immediate postwar in *Sexual Behavior in the Human Male*, albeit in a comparatively

12. Canaday, *Straight State*, 15, 142. See also Margot Canaday, "Heterosexuality as a Legal Regime," in *The Cambridge History of Law in America*, eds. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 459.

13. Ehrenreich, *Hearts of Men*.

14. Canaday, *Straight State*, 143. Gordon, *Pitied but Not Entitled*; Michael Willrich, "Home Slackers: Men, the State, and Welfare in Modern America," *The Journal of American History* 87 (2000): 460–89; Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (Cambridge: Cambridge University Press, 2003); and Erica Ryan, *Red War on the Family: Sex, Gender, and Americanism in the First Red Scare* (Philadelphia: Temple University Press, 2014). Similar fears about men's failures had inspired policymakers to enforce men's obligations toward their families after World War I and during the Depression as well.

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cursory way. Alfred Kinsey argued that married men had much lower rates of homosexual contact than unmarried men, but still found that 10.6% of married men between the ages of 21 and 25 engaged in homosexual activity.[15] For married men older than 25, the incidence of homosexual activity seemed to decline, but Kinsey distrusted this shrinking number over the course of the life cycle. He noted that married men who had much to lose probably avoided contributing histories to the research study, leading to a conspicuous under-representation.[16] To Kinsey, other evidence seemed more telling, including "hundreds of younger individuals in the histories who report homosexual contacts with these older, socially established, married males, and the post-marital histories of males who are widowered or divorced."[17] Kinsey believed that married men simply did not report their homosexual encounters.

Kinsey identified significantly fewer married women engaged in same-sex relationships just 5 years later in 1953's *Sexual Behavior in the Human Female*. Fewer women than men engaged in same-sex contacts overall; only 19% of women had ever had a same-sex contact by the age of 40. Although Kinsey maintained that some married women engaged in same-sex contacts as often as a couple times a week, he saw these particular women as unusual. He suggested that it was marriage itself that reduced this number to only 3%. He saw the rate jump once he shifted his attention from married women to previously married women. Women who had been married but were now widowed, divorced, or separated engaged in same-sex relationships at a rate of 9%.[18] Kinsey saw men and women alike as marrying despite same-sex desire, although with significant variations.

Donald Webster Cory supplemented Kinsey's marriage numbers with his own in *The Homosexual in America*, an infamous investigation into gay life at midcentury. Cory assumed the spouses engaged in same-sex affairs were homosexual no matter how they identified themselves. Cory identified marriage among gay men as the most hidden aspect of gay life, but saw such marriages as so prolific that it was "common practice, when an acquaintanceship is made between two homosexuals, for one of them to ask the other (especially if the latter is past the age of thirty),

15. Alfred C. Kinsey, Wardell B. Pomeroy, and Clyde E. Martin, *Sexual Behavior in the Human Male* (Bloomington: Indiana University Press, 1998), 285.

16. Ibid., 289.

17. Ibid.

18. Alfred C. Kinsey, Wardell B. Pomeroy, and Clyde E. Martin, *Sexual Behavior in the Human Female* (Philadelphia: Saunders, 1953), 453.

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'Married?"[19] In 1955, Dr. George W. Henry contributed another study of "homosexual" men and women who engaged in traditional marriage within a larger study of 250 patients with a history of "psychosexual maladjustments."[20] Twenty-five percent, or as Henry put it "only twenty-five percent," of the homosexual patients had been married. Unlike in Kinsey's study, in Henry's smaller group, lesbians were more likely than homosexual men to marry: seventeen out of forty lesbians had married, but only five of forty gay men had married.[21] Not only did these men and women marry; Henry showed that some of them did so repeatedly.

Members of the gay community themselves took marriage between homosexuals and straight spouses as a matter of course just as medical experts had. This practice seemed so common in postwar America that it necessitated the gay community—not necessarily its opponents—to distinguish between "gay marriage" and "marriage" in casual conversation during the late postwar period. Colloquially in gay circles, marriage could refer either to a committed gay couple or to a gay person married to a person of the opposite sex. As Marcel Martin complained, "we have no other word and so we continue to use the word 'marriage' which we must then qualify with the word 'homosexual.' Even among ourselves this is necessary for homosexuals do make heterosexual marriages. Do we not invariably have to ask, when told that someone we know or think to be gay is married, whether the speaker means it to a man or to a woman?"[22]

Within the broader context of a society that highly valued marriage, the reasons these men and women married varied.[23] Some men and women

19. Donald Webster Cory, *The Homosexual in America; a Subjective Approach* (New York: Greenberg, 1951), 200–201.

20. Henry had no doubt that he should identify these men and women as gay or lesbian; therefore, in this section, I am reproducing his language rather than his subjects' self-identification.

21. George W. Henry, *Masculinity and Femininity* (New York: Collier Books, 1966), 100–103. The book was originally published as George W. Henry, *All the Sexes; a Study of Masculinity and Femininity* (Toronto: Rinehart, 1955).

22. Marcel Martin, "A Matter of Language," *ONE,* November 1961, 7.

23. Historians have laid out many of these reasons in other contexts. Most states reserved sexual intercourse as a privilege for married couples. Any other sort of sex—even that between straight couples—still posed a legal and social burden to the couple and to any potential offspring. Nancy D Polikoff, *Beyond Straight and Gay Marriage: Valuing All Families Under the Law* (Boston: Beacon Press, 2008). Marriage also gave its participants respectability. The state distributed many of its most precious entitlements, such as Social Security, military allotments, citizenship status, and tax incentives more generously to married couples. Gordon, *Pitied but Not Entitled*; Kessler-Harris, *In Pursuit of Equity*; and Canaday, *Straight State.* The private sector offered its own set of entitlements to married couples, including pensions and life and health insurance. Michael Katz, *The Price of Citizenship: Redefining the American Welfare State* (Philadelphia: University of Pennsylvania Press, 2008), 171–94 and 257–92; Jennifer Klein, *For All These Rights: Business, Labor, and*

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seemed to marry in genuine attempts to overcome homosexual desire. Cory found that some married because they were "simultaneously frightened by fly-by-night, unstable relationships and attracted by the seeming permanence of marriage as a family institution."[24] Cory believed that older men in particular married for this reason, hoping marriage would help them change their habits.[25] Although Cory posited this theory of marriage-as-cure, its real domain was in postwar fiction. Novels and screenplays certainly communicated the existence of these complicated relationships to a fiction-reading audience. Charles Jackson, who more famously wrote the novel and screenplay for *The Lost Weekend,* tempted the main married character of his novel *The Fall of Valor* with a handsome young Marine. The main character, however, remains true to his wife.[26] Most other authors played this storyline out as a tragedy. In *A Streetcar Named Desire*, Blanche has a brief but unsuccessful marriage to Allan Grey, who commits suicide following a homosexual affair.[27] In the Allen Drury novel *Advise and Consent* and the movie subsequently based on it, the young family-man character Brigham Anderson is introduced as the chair of the Senate Foreign Relations Subcommittee responsible for evaluating a nominee for secretary of state. Soon it becomes clear, however, that Anderson had an affair with a fellow soldier during World War II. Whereas the fellow soldier entered the gay world exclusively, Anderson had married. When political opponents called his wife threatening to unmask him, it was not only Anderson's political career that was at stake; his marriage was as well. Anderson, too, committed suicide to avoid exposure.[28]

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the Shaping of America's Public–Private Welfare State (Princeton: Princeton University Press, 2003), 204–57; and George Chauncey, *Why Marriage: The History Shaping Today's Debate over Gay Equality* (Cambridge, MA: Basic Books, 2004), 59–86. Men and women alike profited from the benefits spouses offered each other, including household labor for husbands and financial support for wives. And choosing an openly homosexual lifestyle subjected citizens to a host of punishments; therefore, marriage also offered freedom from punitive action. Most obviously to critics at the time, single adults immediately caught the attention of government bodies seeking to identify gay men and lesbians. The easiest way to enter the closet, to avoid the scorn of postwar society, was to marry. This was particularly true when significant benefits such as the GI Bill or veterans' employment benefits were at stake. At least at the beginning of the postwar period, if the state suspected a soldier of homosexuality, marrying was one way he or she could try to change the administrative state's mind. Canaday, *The Straight State,* 174–213.

24. Cory, *Homosexual in America*, 201.

25. Ibid., 202.

26. Charles Jackson, *The Fall of Valor* (New York: Rinehart & Co., 1946).

27. Tennessee Williams, *A Streetcar Named Desire* (New York: New Directions,1947).

28. Allen Drury, *Advise and Consent* (Garden City, NY: Doubleday, 1959). *Advise and Consent,* directed by Otto Preminger (1962; Burbank, CA: Warner Home Video, 2005), DVD.

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Even novelists who ended their narratives less tragically expressed skepticism about marriage as a cure. For example, author Jill Stern, although more sympathetic than some of the aforementioned novelists, nonetheless portrayed her gay character's decision to marry as a desperate attempt to cure himself. A prominent character in the ensemble novel *Not in Our Stars,* Louis Travers, was a Hollywood designer who had ended a committed relationship with a man named Nick to marry an older woman. Louis's attempt to "go normal" failed, and therefore he had to travel to Reno as the guilty party in a fault divorce.[29] Louis's own interpretation of the marriage was that it was a vain attempt to cure himself. Nick more cruelly described the marriage as Louis's "childish" plan "to get married and settle down forever in a rose-covered ranch-type cottage with that fat, middle-aged bore."[30] Nick refused to take Louis back, prompting Louis to attempt suicide. Stern, unlike Tennessee Williams or Drury, more generously granted Louis a happy ending. Louis survived his suicide attempt, allowing him to make peace with his identity as a gay man.

Real people more often evoked other explanations for marrying, including that marriage deflected the suspicions of all sorts of observers from the federal state to family and friends. Such an instrumental decision to marry was well understood. *Time Magazine* noted in passing in a larger article on homosexuality in the United States that "homosexuals are present in every walk of life, on any social level, often anxiously camouflaged; the camouflage will sometimes even include a wife and children, and psychoanalysts are busy treating wives who have suddenly discovered a husband's homosexuality."[31] Gore Vidal's novel *The City and the Pillar* fictionalizes the practice, when one of its characters marries to circumvent Hollywood gossip about his bachelorhood.[32] Although fiction made use of this rationale, real men and women evoked the utility of the closet much more often than they had the concept of a cure.

Married men and women with homosexual behavior in their pasts frequently conjured these stories of respectability in their own life histories. According to one woman named Ruth, interviewed by the *New York Times* about her experiences, she was aware of her same-sex interest prior to her marriage. She had participated in an affair with a woman while her fiancée was in the military,[33] but she married her fiancé when he returned anyway because of pressure from her family and because

29. Jill Stern, *Not in Our Stars* (New York: David McKay Company, Inc., 1957).

30. Ibid., 146.

31. "The Homosexual in America," *Time*, January 21, 1966, 52–56.

32. Gore Vidal, *The City and the Pillar* (New York: E.P. Dutton, 1948).

33. Enid Nemy, "The Woman Homosexual: More Assertive, Less Willing to Hide," *New York Times* (hereafter *NYT*), November 17, 1969, 62.

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she "'felt, too, that with marriage would come respectability.'"[34] Nonetheless, she did not break off the affair until a year after her marriage.[35] When Ruth did end things, her former partner told Ruth's husband. Despite his anger over the revelation, her husband did not divorce her. Later, Ruth began a relationship with another woman that lasted 13 years.[36] Nor was this affair distinct from the domestic practice of her straight marriage. Ruth explained that she and her partner both worked early in their marriages. When Ruth became pregnant, she persuaded her partner to get pregnant too so they could stay home with the children together.[37] Ruth's marriage had not yielded a cure, but it did seem to bestow the respectability she desired.

Similarly, some of the women in Henry's study married to avoid the stigma of abnormality. For example, a woman called Virginia consented to marry a man after her mother read of her same-sex relationships in Virginia's private mail.[38] A woman named Constance, who was not attracted to men, forced the man who raped her to marry her. She explained that she married in order to retain her respectability, even if today we find this explanation deeply troubling.[39] Some women in Henry's study rejected the traditional gender roles of husband and wife but embraced the respectability of marriage itself. Several women reported relationships with their husbands that reversed the traditional power dynamic of husbands over wives. Rowena married an effeminate man and cheated with an abusive woman, and Irene found power in being "contemptuous of" her husband.[40] Frieda married a man whom she knew to be impotent.[41] These women had the social status of being married without the everyday experience of domination by a husband.

Although men and women alike married to avoid scrutiny or in attempts to cure themselves, some of the more complicated reasons for marrying reflected the gender differences that would haunt men and women in divorce courts. Even though Dr. Henry's study of psychosexual maladjustment recounted complicated motives in his account of "9,000 intimate case histories," the multiple motivations and identities often reflected the different social benefits marriage offered to men and women. Once they were married, all men and women faced social and legal pressure to perform distinct

34. Ibid.
35. Ibid.
36. Ibid.
37. Ibid.
38. Henry, *Masculinity and Femininity,* 293.
39. Ibid., 258–59.
40. Ibid., 301, 304.
41. Ibid., 295.

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breadwinning and homemaking roles. Wives provided their husbands all their household labor from childcare to work in a family business to any improvements they made to household property. Wives also provided husbands with unlimited and exclusive sexual access; a woman had no legal recourse if her husband raped her, and women who cheated on their husbands faced harsh penalties.

Men had their own legal roles within marriage, characterized above all by their obligation to provide financially for their wives and children. The vast array of ways in which the state enforced this obligation showed its importance in the postwar world. As of January 1965, only a few years before California passed no-fault divorce, the majority of states included nonsupport by husbands as one of the grounds for absolute divorce.[42] Of course, official grounds for failure to support were not the only means of enforcing this mandate. Wives could and did file for failure to support on grounds such as physical or mental cruelty. In the divorce of Eileen C. Steggall and Joseph E. Steggall, Eileen Steggall won a divorce on the basis that her husband was "guilty of extreme and repeated mental cruelty in that he refused to properly support plaintiff, and refused to pay the rent or pay for a television set purchased by the parties during the marriage."[43] Especially in the postwar period, men faced a serious obligation to provide financially. Even after divorce it was still a husband's duty to support his blameless wife, and that blameless wife's privilege to be dependent on her husband. In complaints for divorce, wives often used the trope that "the plaintiff is without any means to support herself or to pay attorney's fees or costs necessary to conduct this legal proceeding; that the defendant, is a strong, able-bodied man, earning a substantial income from his employment and is well able to support the plaintiff herein and the minor children of the parties hereto."[44] As of 1968, most states allowed alimony only for wives.[45]

42. As of January 1965, just a few years before California passed no-fault divorce, Alabama, Alaska, Arizona, California, Colorado, Delaware, Hawaii, Idaho, Indiana, Kansas, Maine, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming all included nonsupport by husbands as one of the grounds for absolute divorce. United States, *American Women: The Report of the President's Commission on the Status of Women and Other Publications of the Commission* (New York: Scribner, 1965).

43. *Eileen C. Steggall v. Joseph E. Steggall*, January 16, 1975, Judgment for Divorce, 74 D 12626, Archives Department, Clerk of the Circuit Court Records and Archives, Cook County, Illinois (hereafter CCCRA), Chicago, IL.

44. *Anna Sanders v. Earving Sanders*, May 25, 1964, Complaint for Divorce, 63 S 10814, CCCRA.

45. Alabama, Arizona, Arkansas, Connecticut, DC, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi,

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Moreover, alimony could not be misunderstood as compensation; it was support. A legal body instructed to study divorce law concluded that, with the exception of courts in the eight community property states, judges had little power to grant spouses property in addition to a lump sum payment or alimony payments because "alimony is awarded not as a payment of a debt or as a penalty, but in substitution for the marital duty of support."[46] Postwar judges were skeptical of women who tried to waive this support. For example, in 1946, one woman who had entered into a hasty war marriage just 2 years earlier filed for divorce. This now-pregnant WAC had to convince a judge that he should not order alimony despite her wishes. Only her lawyer's reassurance that someone would care for the child while the woman stayed in the army convinced the judge to order only child support.[47] Not all women waived alimony, however, and husbands who failed to fulfill these duties could face harsh ramifications. For example, in Cook County in Illinois, men could be imprisoned in special "alimony rows" for failing to pay their alimony or child support. As late as the 1960s, hundreds of men were imprisoned every week.[48] Of course, courts did not enforce these breadwinning and homemaking duties against all couples equally.[49] Nonetheless the legal and cultural principles of breadwinning shaped not only the public system that designated husband's duties but also how men and women privately negotiated a husband's obligations.

Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming allowed alimony only for wives. Robert J. Levy, *Uniform Marriage and Divorce Legislation: A Preliminary Analysis* (National Conference of Commissioners on Uniform State Laws, 1968), 135.

46. "Transfer of the Separate Property of One Spouse to Another in Lieu of or In Addition to Permanent Alimony 1," A Survey Prepared for the New York County Lawyers Association, Special Committee on Matrimonial Law (mimeo. 1966). Quoted in Levy, *Uniform Marriage and Divorce*, 135.

47. *Lorraine Kowalski v. Stephen Kowalski,* April 30, 1946, Case 46S 6864, Box 3a-15-c-33, CCCRA.

48. Elaine Markoutsas, "'Good Old Days' of Alimony Row Fade," *Chicago Tribune* (June 6, 1976), 28.

49. Although women held the vast responsibility for housework no matter what their class status, many wives worked outside the home. Although these wives often performed all the homemaking tasks, their status as homemakers was suspect in culture and in courts. Therefore, the status of homemaker was reserved for only more elite women. In particular, public policy had historically discouraged black women from being homemakers. The enforcement of wives' homemaking duties was informal and inconsistent across race and class. Similarly, not all men had to live up to their breadwinning duties. Wealthy white women could access this ground more easily than the wife of a laborer, black or white, who had to resort to cruelty or desertion grounds.

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For some men with same-sex desire, the obligation of breadwinning became a disincentive to marry or stay married, despite their desires for respectability. For example, a man referred to as Donald in Henry's account of 9,000 case histories only cheated on his first wife with other men. This was a provision she was aware of. But despite the cozy arrangement, Donald ended his marriage when his wife stopped using birth control.[50] At that point in his life, Donald had no desire to provide for children even if he wanted the safety that marriage provided him. He went on to marry another woman who also knew of his affairs with men and had her own affairs with women. More strikingly, another figure from Henry's account, Oliver, had proposed to a young woman despite his own same-sex desire. Oliver broke off the engagement only when she began pressuring him to quit his job and get a better one: to win bread more effectively. He opted out of marriage once he realized that "it was going to be a big change—a big responsibility." It is also worth noting that he cited his fiancé's inability to cook, in other words her failings at homemaking, in his decision to end the engagement.[51]

On the other hand, unlike many men, women with same-sex desire had traditional incentives to marry; many women married for financial reasons. An African American woman Henry referred to as Marian married for the financial support she could not procure for herself. For Marian, sex and support had long been intermingled. When she was young, her mother had left Marian's alcoholic father to live with a clergyman who provided financially, in contrast to Marian's father. This clergyman seduced Marian at the age of 14, but Marian did not reveal her situation because he was her family's sole means of support. Marian extricated herself from the relationship at the age of 15 and began dating both men and women. She eventually married "in the hope that she might thereby obtain support for her mother."[52] Similarly, a woman referred to as Rose spent a great deal of her adolescence bouncing from societies for wayward girls to foster homes to a home for unwed mothers. She ran away at 18 to the city and married a man 26 years older than she was. She explained that she had "no money." Soon thereafter, she began an affair with a married woman.[53] Another subject, Mae, had hoped to marry the father of her child so that he would support her. Instead, he refused to marry her and took custody of the child. From then on, with her hopes of support thwarted, Mae slept only

50. Henry, *Masculinity and Femininity*, 247.
51. Ibid., 240, 238, 247.
52. Ibid., 280.
53. Ibid., 284.

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with women.[54] Hester married to escape her foster mother's household without becoming destitute.[55] She remained unhappily married for 20 years.

Marian, Rose, Mae, and Hester all attempted to take advantage of a husband's duty to support his wife, because marriage was still the most accessible means of financial "independence" for many women during this era. Scholars as varied as Margot Canaday, Lauren Gutterman, and Barbara Ehrenreich have shown the ways in which wives faced more financial incentives to marry than men in the postwar period. Henry's qualitative evidence also suggests that many women with same-sex desire faced this pressure. In other words, women faced a financial pressure to marry, in spite of same-sex desire, which men simply did not face. Instead, the men in Henry's account saw marriage and its attendant obligation of breadwinning as a disincentive.

Perhaps judges believed they could allow divorces to the husbands of women who cheated with women because women faced financial incentives to return to homemaking roles. And equally, judges perhaps saw reasons to encourage men with same-sex desire to stay married. Judges' faith in the ability to maintain a marriage between a man with same-sex desire and his wife were possibly misplaced; clearly many of the husbands and wives who had indulged in homosexual sexual activity found themselves on the wrong end of a fault divorce.[56] Nonetheless, the judicial authorities who heard divorce cases involving these marriages in court believed these men could—and should—change with the help of their wives. They were not so worried about wives.

54. Ibid., 299.

55. Ibid., 288.

56. Medical researchers and homophile journalists had little faith in the efficacy of marriage. Although sex researcher Cory felt cautiously optimistic that such marriages could produce bonds commensurate with those of any other marriage if homosexuals did not fully abstain from gay sex, most experts disagreed. Cory, *Homosexual in America*, 200, 218–19. Henry reported that his patients faced unconsummated marriages, impotency, continued homosexual relations, quarrels over transvestitism, and promiscuity with both sexes. Of the total number of marriages in Henry's study, three fourths had ended in separation, divorce, or annulment, which made Henry skeptical of anyone with same-sex desire marrying. Henry, *Masculinity and Femininity*, 13–16, 100–103. In a 1962 edition of *ONE*, journalist Paul Britton asked his readers if they had ever met a homosexual who had managed to get married. He explained "if you have, I'm sure I don't have to tell you here you have the true sick homosexual—and for real! Especially if this happens to be the falling in love bit for him. The anguish and the soul tearing that now ensues is something to behold." Paul Britton, "Should a Homosexual be Advised to Marry?" *ONE*, September 1962), 18. Another *ONE* columnist argued 4 years later that marriage led at best to nervous breakdowns. Didgeon, "Reflexions on Love and Marriage," *ONE*, July 1966, 10.

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Lesbian Wives and Gay Husbands Go to Divorce Court

During the postwar era, courts in a range of states had to confront divorce petitions from husbands and wives who accused their spouses of homosexual infidelity. Whereas judges quickly allotted divorces to men whose wives had cheated with other women, judges in a range of states greeted the petitions from wives much more skeptically. Some judges ruled that a wife's unfounded accusation that her husband had cheated on her with a man made her the offender of the marriage contract. These women divorced but lost any chance of alimony and marital property. In other cases, judges ordered wives to stay married to husbands who had cheated with other men. In both sets of cases, the judge's decision preserved the traditional household. This analysis draws on twenty appellate level cases in thirteen states from 1944 to 1978, plus three prewar cases that allow comparison to the previous era.[57] This array of cases suggests contradictory conclusions about how representative such cases may be. First, wronged spouses seemingly rarely appealed these sorts of cases, indicating that this was not a widespread legal issue of the day. But at the same time, these cases nonetheless reflect a larger structure: later, I will suggest both that many divorce cases that dealt with this issue never reached an appellate court and that additional states also followed the principles I will lay out in regard to the appellate courts in the trial courts.

Courts at this time operated within the bounds of a very specific divorce regime, defined above all by the requirement to find fault with one party or the other. This legal system dated back to the common law era. During the early history of the United States, a spouse accused his or her husband or wife of violating the marriage vows under a few grounds for divorce. The most common ground until the late nineteenth century was adultery, although some states also allowed divorce in the case of desertion or cruelty. Kin, friends, and other community members would rally to one side or the other in order to provide witness to those grounds. If the accusing spouse

57. These cases were difficult to find, and I used a few different methods to discover them. First, some were mentioned in Rivera's important article. Rivera, "Our Straight-Laced Judges," 1179–98. Second, I found the vast majority of the rest of these cases by searching for appealed divorces that used the terms *homosexual* and its variants, *lesbian, gay, pederasty,* and *sodomy*. Third, I found some because other cases cited them or were cited by them. I excluded two cases that did not fit the framework of the article, including the 1982 Louisiana case *Alphonso v. Alphonso* because it takes place in 1982, long after most states have switched over to a no-fault model. *Alphonso v. Alphonso*, 422 So. 2d 210 (1982). The other, *Steinke v. Steinke*, involves a spouse who was transsexual, which suggests an even more complicated set of evaluations than the one I lay out here. *Steinke v. Steinke,* 238 Pa. Super. 74; 357 A.2d 674; (1975). Only appellate cases are included here.

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did not make a convincing case, the judge could deny a divorce entirely. Moreover, if both spouses were found guilty of violating their vows, judges could deny the divorce. If judges discovered that the couple had colluded to manufacture fault on the part of one of the spouses, they again could order that the marriage remain intact.[58] Once a judge determined that one spouse, and one spouse alone, had violated the marriage contract, the judge issued a divorce. In the early history of the nation, the judge could impose penalties on the guilty spouse in the form of fines, whippings, incarceration in the stocks, or, in extreme cases, banishment. Both spouses could lose custody of their children and, until 1840, the right to remarry.[59]

Committing adultery in particular had different ramifications for husbands than it did wives, beginning with the colonial period. For example, in early America, an adulterous woman faced the aforementioned fines and whippings, being forced to wear the letter A for adulteress, being branded on the head or forehead, or being put to death.[60] Colonial and early republic courts much less frequently granted divorces to wives for husbands' adultery, although being cruel or deserting one's wife alongside infidelity increased a wife's likelihood of winning a divorce. Moreover, men found guilty of violating their marriage vows with infidelity faced additional punishment only if they committed adultery with a married woman. The more extreme penalties became less and less common even for women as the colonial period transitioned into the nineteenth century, but differences persisted.[61] Into the Victorian era, wives continued to face an enormous stigma if they were guilty of adultery, to the point that husbands used

58. J. Herbie DiFonzo, *Beneath the Fault Line: The Popular and Legal Culture of Divorce in Twentieth-Century America* (Charlottesville: The University Press of Virginia, 1997), 55.

59. Glenda Riley, *Divorce: An American Tradition* (Lincoln: University of Nebraska Press, 1997), 15.

60. Ibid., 13–14. See also Elaine Tyler May, *Great Expectations: Marriage and Divorce in Post–Victorian America* (Chicago: University of Chicago Press, 1980); Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca: Cornell University Press, 1982); Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985); Linda Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1997); Norma Basch, *Framing American Divorce: From the Revolutionary Generation to the Victorians* (Berkeley: University of California Press, 1999); Hendrik Hartog, *Man and Wife in America: A History* (Cambridge, MA: Harvard University Press, 2000).

61. For loss of custody because of adultery in the nineteenth century, see Basch, *Framing American Divorce,* 133–40.

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the threat of exposure or the invention of adultery to manipulate wives into better divorce settlements.[62]

Wives also lost their right to financial support if they were the guilty party well after the Victorian era.[63] This facet of the law did not cease even though fault divorce itself changed immensely over the course of the twentieth century. The grounds for divorce expanded until divorces for adultery were rare except in states such as New York where it remained the only ground. For example, in North Carolina in 1958, judges granted only 198 of 5,261 divorces on the grounds of adultery.[64] Women also overwhelmingly began to initiate divorce proceedings. By the twentieth century, women were granted two thirds of divorce decrees. Women had an easier time convincing a judge to grant a divorce on the grounds of cruelty than did men. In cases in which spouses colluded to win a divorce, women often negotiated to be the "innocent" party in order to get alimony.[65] But even mid-twentieth century fault divorce had little tolerance for cheating wives. One third of women continued to be on the losing end of a divorce, and for the most part, they continued to lose alimony or assets from the marriage as well as custody of their children in very extreme cases. Twenty-six states and Washington, DC barred any woman who had committed adultery from receiving alimony, and four other states allowed courts to bar alimony in extreme circumstances (such as when they had committed adultery).[66] Although the other states did not make women's adultery the specific object of state law, judges in these other states still could and often did rule that women would not receive alimony. Fault divorce itself remained after World War II, and so did the double standard between cheating husbands and wives.

Such a double standard particularly emerged in divorces in which one spouse accused the other of a homosexual affair. In these cases, as in any other fault divorce case, judges had to determine whether the

62. For loss of custody and alimony because of adultery in the twentieth century, see May, *Great Expectations,* 150–55, 160.

63. Ibid.

64. DiFonzo, *Beneath the Fault Line*, 81.

65. Ibid., 45–46.

66. As of 1968, California, Colorado, Florida, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maine, Michigan, Missouri, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, South Carolina, South Dakota, and Tennessee all barred alimony if a wife had committed adultery. Alabama, the District of Columbia, Idaho, Oklahoma, North Carolina, West Virginia all allowed it at the court's discretion. Georgia, Kentucky, New Mexico, and Oregon sometimes allowed courts to bar alimony in cases of adultery. Robert J. Levy, *Uniform Marriage and Divorce Legislation: A Preliminary Analysis* (Chicago: Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws, 1968?), B–21.

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accusation was true, whether it met one of the fault grounds, and whether the other spouse was innocent. In the postwar period, courts usually granted husbands divorces in cases in which their wives had engaged in homosexual activity, just as they did in cases when wives had heterosexual affairs. The case that opens this article ended in a fault divorce for the husband. The husband easily painted himself as an aggrieved spouse. After walking in on his wife and the athletic director in flagrante delicto, the husband asked the female athletic director to leave. His wife left with her. The couple then set up housekeeping in a nearby cottage owned by the wife's mother. Although this divorce ruling mentioned that the wife's "sodomy" alone might not have been sufficient to constitute a divorceable fault, the court believed that the husband deserved a divorce based on the "disdain" indicated by the wife's actions after she was caught.[67] Similarly, in the 1959 New Jersey case *H v. H*, a husband won his divorce suit on the basis of cruelty. His wife had "lesies" over to the house and lived with a woman who dressed like a man after her separation from her husband.[68] In the 1964 Pennsylvania *Benkowski v. Benkowski* case, a husband accused his wife of not only socializing with lesbians but also of engaging in sexual relations with a woman in public.[69] A witness confirmed the public incident, and the husband easily won his case against his wife.

Even somewhat complicated sexual encounters could yield a fault divorce for a husband. In a 1955 divorce case in California, Dixie Gilmore contested the divorce granted to her husband Don Gilmore on the basis of Dixie's cruelty. The court listed her heavy drinking, name-calling, and withholding of sexual intercourse in its ruling. Dixie tried to refute the charge of withholding sexual intercourse by accusing Don of constantly making "revolting" sexual suggestions to her, but her husband testified that in fact, the abnormal sexual behavior could all be attributed to Dixie. According to Don, Dixie had "been a willing participant in abnormal sex acts with another woman and that he had been a 'glorified observer.'"[70] The other woman's testimony on Don's behalf sealed

67. *AB v. CD,* 74 Pa. D. & C. 83 (1950).

68. *H v. H.*, 59 N.J. Super. 227 at 231; 157 A.2d 721 at 723 (1959).

69. *Benkowski v. Benkowski,* 203 Pa. Super. 347; 201 A.2d 444 (1964).

70. *Gilmore v. Gilmore,* 45 Cal. 2d 142; 287 P.2d 769 (1955). For states that retained fault divorce provisions, this pattern extended past the end of my study. In the 1978 *Adams v. Adams* case in Louisiana, the court ruled that Errol Adams' wife was undisputedly in a homosexual relationship despite her denial. She had initially sued her husband for divorce on the grounds of abandonment, and he countersued with an allegation of homosexuality. She denied it, but the court ruled "there were several incidents, which need not be detailed, each of which could be said to be so convincing that any other reasonable hypothesis but that the alleged act was committed must be excluded. In addition, there was a tape and letters from the co-respondent to the wife which *tend* to corroborate the lesbian relationship."

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Dixie's fate. Despite Don seeming to condone and even enjoy Dixie's same-sex encounter, Don received the divorce on the basis of Dixie's cruelty. He explicitly did not have to pay Dixie alimony, which presumably left Don free to remarry and resume his breadwinning mantle. In this and other cases, the judges did not seriously challenge the husbands' allegations, nor did they consider whether sufficient homosexual activity had occurred. Any hint of wives' homosexual activity, even in the face of a denial, was enough.

These cases against women who may have engaged in homosexual activity do not necessarily violate our understanding of the status of women or of homosexuality in the postwar world. Many husbands received fault divorces based on women's heterosexual extramarital sexual activity just as they had in the centuries prior.[71] Sexual exclusivity continued to be crucial to women's roles as wives. Wives who cheated with women, like wives who cheated with men, could and did lose the privileges of wives in court: including the alimony, custody, and household financial assets that an innocent wife was entitled to. Moreover, lesbians could expect to face intolerance in the court given that the military, employers, police, and others discriminated against them in everyday life. These moments, then, indicate rather unsurprising evidence of beliefs about women's place in the family and homosexual activity. In fact, given that lesbians usually faced less policing makes the harsher penalties they encountered compared with men caught in same-sex relationships suggest most of all how differently men were being treated.[72]

Postwar judges used the discretion granted to all divorce court judges to punish women for sexual infidelity with other women but to give husbands who had engaged in homosexual affairs significant latitude. As I will describe, it became a legal question whether sodomy constituted cruelty or adultery. Some scholars have suggested that the conclusion that sodomy was not adultery was demanded by the legal rules during this time, but

Emphasis added. Errol also won on the basis of cruelty. *Adams v. Adams*, 357 So. 2d 881 (1978). For an exception to this trend of assuming homosexual accusations of women, see *Feuti v. Feuti,* 92 R.I. 219; 167 A.2d 757 (1961). In this case, the husband tried to allege that a witness for his wife was a lesbian, which the court disagreed with.

71. For the treatment of wives in divorce courts compared with the treatment of husbands, see Herbert Jacob, *Silent Revolution: The Transformation of Divorce Law in the United States* (Chicago: University of Chicago Press, 1988), particularly 113–14; and DiFonzo, *Beneath the Fault Line*.

72. For the comparative fear of gay men and lesbians in the postwar period, see, for example, George Chauncey, "The Postwar Sex Crime Panic," in *True Stories of the American Past,* ed., William Graebner (New York: McGraw Hill, 1993); Johnson, *Lavender Scare*; Canaday, *Straight State.*

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judges still had a great deal of discretion in determining what they saw as meeting the intention of the domestic laws of each state. In the end, I argue that judges could act quite punitively about same-sex infidelity if women had committed it and not punitively at all if men had. Sometimes these judges were in other states, but in Pennsylvania, for example, judges much more readily forgave a husband's same-sex infidelity than a wife's. The black letter of the law did not necessitate a reading that gave cuckolded husbands fault divorces and kept cuckolded wives married. Moreover, appellate judges did not simply cite legal statutes or cases to establish their rulings (although trial judges perhaps did in New York), but instead turned toward other rationales, such as the Kinsey report.

The harsher treatment of women engaged in same-sex affairs only emerged in the postwar period. Although prior to World War II very few wives filed for divorce or annulment on the basis of their spouse's homosexual activity, appellate courts readily agreed that a husband's actions in this situation met the statute's criteria for cruelty. In particular, in three appellate cases from before World War II, judges did interpret a same-sex affair by a man as meriting his wife a divorce. For example, in the Washington case *Poler v. Poler* in 1903, Edwin Poler challenged his wife's successful divorce bid by claiming that sodomy did not constitute adultery. The judge nonetheless granted this wife a divorce, averring that a trial court could grant a divorce on the basis of any sufficient cause according to Washington law.[73] In the 1905 Mississippi case *Crutcher v. Crutcher*, the wife was granted a divorce on the basis of her husband's pederasty, which the court defined as "improper intimacy by a man with the male sex." The wife's lawyer explicated further that "the crime committed or practiced by defendant is with his mouth, for which there is no other technical name than 'pederasty,' which sufficiently embraces it, as shown by the larger and latest dictionaries)." The wife's lawyer made the case that "if 'adultery' is deemed a sufficient cause for divorce, certainly the crime against nature charged here is infinitely more serious and greater cause and surely more destructive of the peace, happiness, and objects of the marital relation." The court confirmed that this kind of sexual activity and marriage were antithetical: "unnatural practices of the kind charged here are an infamous indignity to the wife, and which would make the marriage relation so revolting to her that it would become impossible for her to discharge the duties of wife, and would defeat the whole purpose of the relation."[74]

73. *Poler v. Poler*, 32 Wash. 400; 73 P. 372; (1903).
74. *Crutcher v. Crutcher*, 86 Miss. 231 at 235; 38 So. 337 (1905).

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This pattern continued into the Great Depression with the 1935 Florida case *Currie v. Currie.* Rivera shows that "the homosexual conduct of the husband was one of several factors that together constituted extreme cruelty to the wife and, therefore, provided grounds for divorce. In this case, the husband not only had refused to have sexual relations with his wife for over five years, but also took a young man into their home with whom he 'gave expression to unnatural love. . .even before his wife's eyes.'"[75] Prior to World War II, men's same-sex infidelity had led judges to grant wives fault divorces.

Judges treated postwar husbands caught in homosexual affairs much more gingerly than they did postwar women and husbands who had engaged in such infidelity prior to World War II. In the postwar period, wives found themselves the losers of divorce petitions in two different ways. First, a husband would sue his wife for divorce on the basis of cruelty because she had accused him of same-sex infidelity to friends or in public. Judges heeded husbands' claims and ruled that wives' accusations of homosexual infidelity constituted cruelty in states that identified cruelty as a ground for fault divorce. Falsely accusing one's husband of engaging in homosexual sex threatened a man's reputation so direly that judges could only deal with it by freeing a man from his marriage. Unsubstantiated accusations of homosexuality represented a significant slur that could do damage to a man's ability to remarry. Explaining the difficulty in getting divorces for wives whose husbands had had homosexual affairs, one self-described "divorce detective" in Washington, DC, explained, "a judge is reluctant to label someone a homosexual unless the evidence is overwhelming."[76] This was especially true coming from wives who behaved violently or drank or otherwise violated the postwar gender prescriptions that made women homemakers in the first place.[77]

Because the wife was now at fault, she also lost the right to alimony. This thereby freed her former husband from the obligation to support her until she died or remarried. Rewarding a husband a fault divorce for his wife's accusations of homosexual infidelity preserved a man's reputation, and it also left him the financial means to marry again. If there were fears that such men would in fact be tempted by homosexuality, not owing alimony would certainly encourage remarriage, because alimony was "so economically burdensome upon one partner that it prevents him from

75. See Rivera, "Our Straight-Laced Judges," 1099. See also *Currie v. Currie*, 120 Fla. 28; 162 So. 152 (1935).

76. William W. Pearce with William Hoffer, *Caught in the Act: The True Adventures of a Divorce Detective* (New York: Stein and Day, 1976), 147–48.

77. See also *Pearson v. Pearson*, 154 Pa. Super. 255; 35 A.2d 524 (1944); and *Smith v. Smith,* 206 Pa. Super. 310; 213 A.2d 94; (1965).

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developing a new life and from establishing new family relationships."[78] As Illinois Judge Harry G. Hershenson explained, burdening men with lifelong alimony payments could prevent even straight men from remarrying.[79] Judges may have granted the divorces these women desired, but they did so under conditions that ensured that men had the resources to remarry.

In other words, during the postwar period, courts punished many wives who accused their husbands of homosexual activity. In the 1944 Pennsylvania case *Barber v. Barber*, a husband claimed that his wife had harassed him for 10 years about his interest in other women. She suspected the employees at his office above all, to the extent that she showed up with a tear gas gun one day and forced her husband to dismiss the most offensive employees. From the wife's perspective, the husband's offenses were real, but her husband had not limited his attentions to other women. As she confided to her sister-in-law in a letter, Mrs. Barber asserted that she had "stronger competition and it does not always have to be a woman. . .Byron should never have married, he is not satisfied with a wife."[80] In other words, Mrs. Barber blatantly accused her husband Byron of conducting homosexual affairs in addition to the heterosexual affairs. The court granted the husband a divorce not only for his wife's violent actions toward the husband's employees but also for these "embarrass [ing] and mortif[ying]" homosexual slurs. The ruling emphasized not so much her other violations (a tear gas gun!), but instead, her crime of complaining "not only to him, but to others, of his being a sexual pervert" and "accusing him of being a 'pansy.'"[81] Finding in this husband's favor deprived this wife of any financial support following the divorce.

Sixteen years later, in 1960, a Wisconsin court similarly punished a wife with a fault divorce for making unsubstantiated homosexual smears against her husband. In *Vishnevsky v. Vishnevsky,* a husband won a divorce for cruel and inhuman treatment, which the court squarely based on the wife's accusations of homosexual conduct. The wife "stated to defendant

78. Testimony from Chicago Officers, Bernard Wolfe, Edward D. Rosenberg, and Mrs. Jewel LaFontant, Dr. Marvin Ziporyn, psychiatrist on February 7, 1969, folder Public Hearing Family Study Commission, box 2, Bernard Wolfe Papers (hereafter BWP), Manuscripts Division, Abraham Lincoln Presidential Library, Springfield, IL.

79. Judge Harry G. Hershenson, Remarks and Comments by Members of the Judiciary of the Circuit Court of Cook County, IL before the Members of the Committee on the Study of Divorce Laws of the Family Study Commission on Marriage, Divorce, Parental Responsibility of the State of Illinois, May 24, 1968 in Chicago, pages 10–11, folder Divorce Laws—Remarks, box 1, BWP.

80. *Barber v. Barber*, 156 Pa. Super. 241 at 243; 40 A.2d 120 at 124 (1944).

81. *Barber v. Barber*, 244; 124.

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and to some of his friends that defendant is a homosexual and had such relations with his father [and]. . .asked defendant to acknowledge in writing, for public record, that he is a homosexual."[82] In this case, the wife again stood by her accusations of her husband's homosexuality and even produced witnesses to corroborate her. The outcome here diverged sharply from the cases in which witnesses had testified that wives had engaged in same-sex affairs; in this case, the judge ruled that the testimony given by this husband's alleged lovers did not support the wife's claims.[83] To support this conclusion, the judge enlisted a psychiatrist who testified that Mr. Vishnevsky could not be a homosexual because he had passed a Rorschach test.[84] The husband won his case, also winning admission into the closet. He also gained custody of the couple's children, a striking departure from the normal course of custody cases. In a third case, near the end of the postwar period in 1969 in Maryland, a husband won a divorce on the basis of his wife's desertion. Here too, "where evidence supported finding that wife repeatedly accused her husband of being a homosexual, a cold fish and lacking in manhood, not only in expression to members of family but to others including friends and neighbors, the Court held that the Chancellor did not err in ruling that wife's constructive desertion had been established."[85] By humiliating her husband with such accusations, this wife had legally, if not physically, abandoned her husband.

The exception to these cases indicated how faithfully most courts followed this precept. In the 1952 California case *De Burgh v. De Burgh*, Daisy De Burgh sued her husband for divorce on the basis of cruelty for inflicting bodily injury on her, and for being frequently intoxicated since the commencement of their marriage. The husband countersued for cruelty because his wife had called him a homosexual to his business associates.[86] The lower court refused to issue a divorce after finding them both guilty of cruelty; like other wives who had made similar accusations, Daisy De Burgh had committed a crime against her husband equivalent to inflicting bodily injury on him. If the De Burghs had not appealed, Daisy and her husband might have remained married. When Daisy De Burgh did appeal, however, the Supreme Court of California reversed the decision, based mostly on evidence that Daisy De Burgh had only written the accusatory letters to her husband's business associates 2 or 3 days prior to their separation, well after the bodily injury had taken place. They ignored entirely

82. *Vishnevsky v. Vishnevsky*, 11 Wis. 2d 259 at 265; 105 N.W.2d 314 at 317 (1960).
83. Ibid.
84. *Vishnevsky v. Vishnevsky*, 268; 319.
85. *Liccini v. Liccini*, 255 Md. 462; 258 A.2d 198 (1969).
86. *De Burgh v. De Burgh*, 39 Cal. 2d 858; 250 P.2d 598 (1952).

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the possibility that such accusations might be true. Instead, the Supreme Court ruled that her husband's cruelty to her had prompted Daisy De Burgh's cruelty, and awarded Daisy De Burgh a divorce. The threat implied by this reversal was also clear, however. Had Daisy De Burgh circulated rumors about her husband's homosexual activity earlier in their marriage, the Supreme Court would have confirmed the lower court's ruling. These courts preserved a man's ability and incentive to remarry by preserving his reputation as a husband. Wives accusing their husbands of homosexual infidelity did not receive the same treatment from courts that husbands accusing wives of homosexual infidelity did. The marriage might be dead, but his reputation as a husband should not be.

Second, even more bafflingly, judges in appellate courts dismissed cases in which wives presented compelling evidence that their husbands had engaged in homosexual affairs. Legal scholar Rhonda Rivera has suggested that courts only considered "a pattern of conduct" of homosexuality as "sufficient to constitute grounds for divorce."[87] A single incident was not enough. But this reticence was strange; even a rumor of homosexual conduct was sufficient for the army or government to dismiss a man. Moreover, it is clear that for women engaged in homosexual affairs, a pattern of behavior was not legally necessary. Husbands had a much easier time proving a pattern of same-sex behavior against wives than wives did against husbands. In the cases I detail subsequently, courts acknowledged at least one incident of homosexual activity on the part of the husband and nonetheless denied a divorce to their wives.

Postwar courts denied wives' fault divorces even in the face of their husband's substantiated homosexual affairs. To do so, courts touted especially the belief that the marriage could be saved because the husband was capable of heterosexual intimacy. The ability to have sex with their wives, however infrequently or long ago in the past, suggested that these husbands could continue to fulfill their duties as breadwinning patriarchs. Philandering wives' past willingness to have sex with their husbands had not mattered in the face of their same-sex infidelity, but sexual exclusivity simply still did not carry the importance for men that it did for women. Instead, judges repeatedly emphasized a same-sex philandering husband's continued suitability for marriage based on his heterosexual past.

In these cases, husbands did not deny that they had participated in homosexual activity, but emphasized instead their continued interest in heterosexual marriage. Judges then considered whether the same-sex activity violated the marital relationship enough to grant the wife a divorce. The conclusion in several cases was that it did not. It was only here—in

87. Rivera, "Our Straight-Laced Judges," 1098.

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postwar wives' cases against their husbands for divorce—that courts introduced the demand that such activity constitute a pattern rather than an individual event. In addition to demanding a pattern of behavior, courts also claimed that homosexual affairs did not constitute adultery, ruled homosexual activity prior to marriage as inadmissible evidence of a pattern of behavior, and considered continued sexual activity between the wife and husband as evidence that the husband was not homosexual.

Such cases only occasionally made it to appeals courts, but judges consistently used one of the aforementioned strategies to deny a wife a fault divorce. In 1951, in Minnesota, Dorothy Luley initially won a divorce for cruel and inhuman treatment on the basis that her husband Frederick Luley forced her to assist him in depraved sex acts. Dorothy Luley claimed that Frederick Luley had "harassed plaintiff with improper requests for her assistance in acts of masturbation and fellation, with vulgar conversations and admissions of his participation in such acts of perversion with others, and by his declaration that he preferred the companionship of a certain male to that of his wife."[88] The lower court based their ruling in part on the testimony of a man who admitted the husband had attempted to perform a sex act on him 5 years prior to his marriage.

Frederick Luley appealed this judgment, and the Supreme Court of Minnesota reversed the divorce and ordered a new trial. Minnesota's highest court argued that the evidence of Frederick's homosexuality defied the rules of evidence by introducing previous behavior as a predictor of future behavior.[89] The court explained that the effect of allowing evidence of a prior offense to the trial "is to 'shut the gates of mercy on mankind,' so that if but once an individual suffers a lapse of virtue, thenceforward the law will pursue him with the vindictive zeal of a Javert, using a single accusation to wreak upon him the cumulative vengeance of a general inquisition."[90] Such judicial reasoning, although privileging some of our most sacred ideas about guilt, prejudice, and fair trials, directly contradicted the reasoning on sexuality established by local and federal government with regard to employment and military service during the postwar era.[91] Although some of these government agencies had taken more instrumental approaches in earlier eras, these same government agencies had fully entrenched their antihomosexual policies by the postwar period.[92] There,

88. *Luley v. Luley*, 234 Minn. 324 at 325; 48 N.W.2d 328 at 329 (1951).

89. Ibid.

90. *Luley v. Luley*, 327; 330.

91. Bérubé, *Coming Out Under Fire*; Canaday, *Straight State*; and Johnson, *Lavender Scare*.

92. For example, the United States Court of Military Appeals (USCMA) ruled that testimony about the homosexual encounters that a defendant had had between the ages of 12 and

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homosexual thoughts—much less homosexual acts—prior to service in the federal bureaucracy or military service could merit firing or dishonorable discharge.

The court justified this decision with another highly unusual move of highlighting Luley's continuing suitability for traditional marriage. It footnoted the above with the following statement: "The rule which excludes evidence of one wrongful act for the purpose of showing that the accused has a propensity to commit similar acts is one of long standing. As applied to the field of homosexual offenses, the continued application of the rule is justified by the results of recent scientific studies. See, Kinsey Pomeroy Martin, Sexual Behavior in the Human Male."[93] The Supreme Court of Minnesota's deference to Kinsey's assertion that the majority of "normal" sexually functioning adults had indulged in a host of "not normal" sexual activity ranging from extramarital affairs to homosexual encounters is striking. Most appellate fault divorce cases still did not cite any medical expert whatsoever. But those that did, much more frequently used science to show the potential threats any encouragement of homosexuality posed to society. The legal arena did not otherwise reflect the lack of a consensus among psychiatric practitioners or researchers about whether homosexuality was a psychiatric defect.[94]

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14 was admissible during his appeal of a conviction of assault with intent to commit sodomy. *US v. Kindler*, 14 USCMA 394 (1964). The military seemingly only made exceptions during, for example, manpower shortages. Bérubé shows that beginning in 1942, the military made several exceptions to its own rules. Bérubé, *Coming Out Under Fire,* 179–91.

93. *Luley v. Luley*, 327; 330.

94. Among others, Alfred Kinsey, Cleland Ford, Frank Beach, Evelyn Hooker, Thomas Szasz, and Judd Marmor had already begun challenging medical orthodoxy that labeled homosexual men and women as ill and in need of treatment. Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* (New York: Basic Books, 1981), 41–66. Such orthodoxies persisted in the court system until much later, even past the point that the American Psychiatric Association (APA) had definitively removed homosexuality from their diagnostic manual in the case of immigration. See Canaday, *The Straight State*, 214–54. *Berryman v. Oklahoma* and *U.S. v. Kindler*, for example, cited Kinsey in 1955 and 1964 to condemn criminal fellatio and an attempt at sodomy in an assault, respectively; both cases only used Kinsey's numbers to argue that the increasing frequency of homosexual activity posed a serious threat to American morality. In these cases, moreover, George Henry and Morris Ploscowe were cited more definitively than Kinsey. See *Berryman v. State of Oklahoma,* 283 P.2d 558 (1955) and; *U.S. v. Kindler*, 14 USCMA 394 (1964). See also *H v. H,* 59 N.J. Super. 227; 157 A.2d 721 (1959). Ploscowe also appears as a character in the miscegenation story. See Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (Oxford: Oxford University Press, 2009). It was only later in cases such as *Boutlier v. INS* (1967), *Harris v. Alaska* (1969), *Morrison v. State Board of Education* (1969), and *Norton v. Macy* (1969) that Kinsey was even cited as defending homosexuality, whether the court affirmed that interpretation in its ruling

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Therefore, the judge's use of Kinsey in 1951 is a striking discrepancy if we think about this in terms of the history of sexuality rather than the history of marriage. But within the context of family history, this case makes much more sense. The court believed that Kinsey offered the possibility that marriage had cured Luley. He still married after his experimentation with homosexual activity, and his challenge of the divorce suggested that he wanted to remain a husband in at least some form. Divorced with alimony obligations and a tarnished reputation, Frederick Luley threatened to forego his role as a patriarch. The Minnesota Supreme Court opted to keep Luley on the marriage market. In the context of divorce, the Minnesota Supreme Court could treat Luley's homosexual activity as a single incident of criminal behavior rather than as evidence of generalized gender perversion. Relieving Dorothy of her wifely duties also would have relieved Frederick Luley of his husbandly duties. Frederick Luley, with his self-professed preference for another man and a monthly alimony payment of $100 a month, might not remarry at all.[95]

Judges in other states joined Minnesota courts in awkward machinations to keep men with homosexual tendencies in heterosexual marriages. In 1951, Louis Cohen was convicted of "the crime of sodomy upon a male person" and sentenced to jail in New Jersey for not less than 7 years.[96] His wife Ruth Cohen filed for divorce in New York, a state that allowed for fault divorce only in case of adultery, on the basis that her husband's conviction clearly indicated he was also guilty of adultery. The court, however, ruled "the words 'sexual intercourse' do not include the acts of carnal knowledge coming within the scope of the definition of sodomy" and cited English, Alabama, and North Carolina law for categorizing sodomy as distinct from adultery as grounds for divorce.[97] The court ended the ruling by explaining that it was sympathetic to Mrs. Cohen but powerless to act on her behalf because of the law.[98] New York's strict interpretation of the meaning of adultery meant that Ruth Cohen remained married to her jailed husband. This case only partly reflected how difficult it could be to win a

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or not. For cases in which Kinsey was cited to defend unconventional but heterosexual activity, see, for example, *Carter v. US,* 407 F.2d 1238; 132 U.S. App. D.C. 303 (1968*), Dixon v. Indiana,* 256 Ind. 266; 268 N.E.2d 84 (1971), *Hawaii v. Silva,* 53 Haw. 232; 491 P.2d 1216 (1971), and *Pettit v. Board of Education,* 10 Cal. 3d 29; 513 P.2d 889; 109 Cal. Rptr. 665 (1973).

95. It is possible Dorothy Luley lost custody of their child because of this, although I can find no confirmation of it. Given the preference for women to retain custody during this era, I suspect this was not the case.

96. *Cohen v. Cohen,* 103 N.Y.S.2d 426 at 427 (1951).

97. Ibid.

98. *Cohen v. Cohen,* 428.

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divorce in New York, which certainly was the case.[99] It also reflected a consensus among many judges that such husbands should remain married. Eventually, Louis Cohen would leave the New Jersey prison; to the court, returning home perhaps seemed a better option than leaving the marriage market entirely.

In a third case in 1963, again in New York, Virginia Freitag filed for an annulment, a strategy many spouses took to get around those tough New York divorce laws. She and Joseph Freitag married and after a month of marriage, Joseph Freitag was struck with impotence. Two or three weeks later, in the words of the ruling, "the defendant, according to the plaintiff, confessed his history of prior homosexuality, and as to this revelation the plaintiff professes to be aghast."[100] Virginia also presented evidence that Joseph Freitag had consulted with a psychologist about his sexual identity and confessed his homosexual experiences prior to their marriage to his wife.[101] The court nonetheless denied Virginia Freitag her annulment, ruling in favor of Joseph Freitag.

The ruling in Joseph Freitag's favor was based on two facts of the case, both of which emphasized Joseph Freitag's continued suitability for marriage. First, Virginia Freitag had not left the marriage until a year after her husband's confession. The court saw Virginia as complicit in, and therefore responsible for, her husband's homosexual behavior. In a sense, Virginia, rather than Joseph, was at fault for the marriage's failure. Second, the court declared itself "unable to conclude either that we have here a true case of homosexuality or that the condition of the defendant is incurable. Both before and after marriage the couple admittedly did have a mutual heterosexual orientation, apparently satisfactory to the plaintiff."[102] For this court, as for the Minnesota Supreme Court, homosexual activity continued to represent a behavior, not an identity, and a behavior perhaps best confined to a marital home with what the court called "mutual heterosexual orientation."[103] At one time Joseph had interest in sex with his wife; such desire should be encouraged again. This ruling absolutely complicates the assumption that the transition to the homosexual–heterosexual binary occurred well before the 1960s. The reluctance to attribute these actions to "a true case of homosexuality" indicated that courts still occasionally saw marriage as a possible corrective in ways

99. For more on how difficult it was to win a divorce in New York, and also the ways in which they were nonetheless accessible to many, see Richard H. Wels, "New York: The Poor Man's Reno," *Cornell Law Quarterly* 35 (1950): 303–26.

100. *Freitag v. Freitag,* 40 Misc. 2d 163; 242 N.Y.S.2d 643 (1963).

101. Ibid.

102. 163; *Freitag v. Freitag,* 644.

103. Ibid.

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that scientific experts such as Kinsey and Henry and other government officials did not. Because Joseph Freitag had at one point successfully enjoyed heterosexual intimacy, the judge hoped that denying Virginia Freitag her annulment might lead to Joseph resuming marital relations with her.

These cases cannot be seen as exceptional even if they were unusual. The hesitance to grant wives divorces on the basis of their husband's homosexual activity was not limited to New York, a traditional stronghold for difficult divorces, or to the Minnesota Supreme Court's unique fondness for Kinsey. In Maryland in 1972, Norma Richardson filed for a divorce against her husband Jack Richardson on the grounds that his homosexual activity constituted desertion. Here too there was controversy about how much homosexual activity had actually occurred, even as the court tolerated a problematic blurring between homosexuality and child molestation. Norma Richardson testified that in 1970 neighbors had accused her husband of sexually molesting 14- and 16-year-old boys camping in the backyard. The court found the boys' testimony too vague to conclude that any sort of sexual activity had occurred.

The court did acknowledge the testimony of Norma Richardson's brother, who reported that Jack Richardson had "committed a sexual act on his person." According to Norma's brother, on a visit to a family cabin, "the two men stayed overnight in the house and, because there was no central heat, slept together in one bed. The appellee's brother testified that on that night the appellant tried to masturbate him."[104] The husband denied the accusations but agreed to be tested by a psychologist, whose report was inconclusive. The court denied Norma Richardson a divorce and even suggested that perhaps Jack Richardson merited the fault divorce because Norma Richardson had committed cruelty with her accusation. The court also noted that even if the brother's testimony was not in dispute, they still would deny Norma the divorce. Whereas the lower court had awarded Norma Richardson a divorce because Jack Richardson's behavior "constituted indignities which were injurious to [the wife's] … health, safety and self-respect," the Court of Special Appeals of Maryland disagreed.[105] The appellate court considered what it would take to rule that a husband had deserted his wife. They reasoned that *a pattern of homosexual activity* might justify a divorce, but Norma Richardson had failed to demonstrate one. The court identified instead only a "single homosexual action": the encounter with the brother-in-law. Whatever happened in the tent did not count.

104. *Richardson v. Richardson*, 17 Md. App. 665 at 674; 304 A.2d 1 at 7 (1973).
105. *Richardson v. Richardson,* 675; 7.

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The key was that the court saw the encounter in the boathouse as an exception within a larger pattern of 11 years of heterosexual marriage. Most important of all, it seemed, was the fact that Jack Richardson had never refused to have sexual intercourse with Norma Richardson. The judge also cited the fact that Jack Richardson had continually approached Norma Richardson for sex. In fact, it was *she* who had refused to have a sexual relationship with *him* after 1970, which she attributed to his behavior. To the court, this implied the possibility of a continually functioning heterosexual marriage. Norma Richardson's refusal to have sex with her willing husband was ruled the most significant factor in the case. The Maryland Court of Special Appeals granted Jack Richardson a divorce instead of his wife on the basis that she had deserted him sexually and then later on left him physically. In effect, this reversal also meant that her right to a $275 monthly alimony payment was "extinguished."[106] Jack Richardson divorced, but he also retained the resources to remarry.

The Maryland Court of Special Appeals did reference, however, one of the only cases in which an appellate court granted support to a wife (Mrs. Crissman in court documents) on the basis of her husband's homosexual actions.[107] This Pennsylvania case was a particularly painful one in which a husband had sexually accosted his 14-year-old stepson. After the boy told his mother, she ordered her husband to leave her son alone. When the husband repeated his actions a second time, the mother and son left. A few things distinguish this case from what we might expect, nonetheless. First, the wife had only made a claim for separation with support; *not* divorce. Even then, the trial court denied support on the basis that she had left the marital home without adequate legal justification. The Superior Court of Pennsylvania overturned the ruling, concluding that her husband's corroboration of the events described justified the wife's actions. Nonetheless, the court explicitly noted that for a separation "she need not establish facts which would entitle her to a divorce."[108] The burden of proof for divorce, the ruling stated, would be much higher. Effectively, the couple remained married although separated. This case again stands in striking contrast to cases that husbands won against their same-sex-philandering wives.

These appellate courts' rejection of divorces for Luley, Cohen, Freitag, Richardson, and Crissman in Minnesota, New York, Maryland, and Pennsylvania indicated that legally, a husband's homosexual actions failed

106. *Richardson v. Richardson*, 676; 8.
107. The couple was referred to only as Crissman and Crissman.
108. *Crissman v. Crissman,* 220 Pa. Super. 387 at 389; 281 A.2d 719 at 721 (1971).

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to violate the premise of marriage.[109] Practically all of these men either remained married or had the means to remarry. None of these cases were straightforward; they involved cases in notoriously strict New York, cases in which the courts' admission of evidence was troubling, and cases involving annulment long after the fact of marriage. Nonetheless, courts sidestepped men's homosexual activity; they focused instead on any continuing interest in heterosexuality. The effects of these cases trickled down. In a memoir by a Washington DC divorce detective, the detective reflected back on the most intriguing cases of his career. In one, he found himself frustrated by the case of a dog groomer husband who was frequenting gay bars and disappearing behind closed doors with a particular transvestite. He related that "we could not, *of course,* win a divorce for [the naïve little rich girl] on grounds of adultery. In order to prove cruelty we would have to establish a long and continuous pattern of homosexual activity."[110]

The seasoned detective's assumption that homosexuality would not merit a divorce indicated that such cases created a folk knowledge belied by their small number. Slighted women worked around the law. In this case, the detective continued to follow the husband until he witnessed the husband having sex, got interrupted witnessing this by the police on the basis of a peeping complaint, and only then had enough evidence for the wife's prominent attorney to pressure the husband to settle their property dispute out of court. This well-known treatment of same-sex infidelity by men forced cheated-on wives to work around the system or be stuck in their marriages. Several different courts' reluctance to grant divorces and annulments to wives stood in striking contrast to the court's willingness to grant husbands quick and easy divorces in cases in which wives had engaged in or accused their husbands of homosexual activity.

It does not seem as though courts did not find homosexuality troubling. Instead, various courts' contention that a husband's homosexuality was correctable or that it did not constitute adultery suggests that courts saw preserving a traditional marriage as more important than punishing a philandering husband. Judges seemed to see the traditional family as a refuge for men engaging in homosexual activity, just like the fiction and scriptwriters mentioned previously. Marriage itself could tame homosexuality, curing it of its most deviant aspects or even eliminating homosexuality entirely. But at the very worst, husbands would continue to live a double life. If an innocent wife suffered in this marriage, as was the understanding of

109. See also *Krause v. Krause*, 27 Pa. D. & C.2d 322 (1961), *Sophian vs. Von Linde*, 22 A.D.2d 34; 253 N.Y.S.2d 496 (1964); and *Crissman v. Crissman,* 220 Pa. Super. 387; 281 A.2d 719 (1971).

110. Emphasis added. Pearce with Hoffer, *Caught in the Act*, 147–48.

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marriage in the days of fault divorce, her loss was less significant than the danger posed by liberating potentially homosexual men from their marriages. On the other hand, women's homosexual activity had no place in the family. Marriage was not needed to control lesbians to the same degree it was needed for gay men. Such women, for the most part, did not disrupt the political role that marriage played.

Making Sodomy Adultery

This system of denying wives fault divorces for homosexual adultery was particular to the postwar period. It was only following World War II that a number of courts rejected a wife's application for divorce on the basis of her husband's homosexual activity. Dependence on marriage to tame gay men dealt with the problem that men, embodied by Playboy bachelors and beatniks alike, seemed to reject a range of social norms including marriage.[111] But the postwar period was succeeded by an era when individual freedom seemed increasingly more important than restraining individuals through family. The rise of an interest in women's rights (if not explicitly in feminism) particularly led to critiques of confining women to marriage to homosexual men. Therefore, this era of constraining wives to their philandering husbands ended not long after it began, as can be seen in a case study of 1960s divorce law in New York.

New York, the seeming bulwark for judges who ensured that cheating men remained married to their wives, exemplified the turn away from confining same-sex adulterer husbands and straight wives to their marriages. In 1966, members of the legislature opted to intervene in order to address what seemed to them to be a glaring contradiction. The Joint Legislative Committee on Marriage and Family Law, which would soon thereafter go on to tackle the issue of legalizing abortion, issued a report on New York divorce law in March of 1966.[112] The committee first reported that adultery had been the sole ground for fault divorce since 1787, and then issued a full-scale attack on the narrow parameters under which women and men could procure a divorce. In her introduction to the report,

111. Ehrenreich, *Hearts of Men.*

112. Senator Jerome L. Wilson, Chairman, Lawrence P. Murphy, John H. Hughes, William C. Thompson, Percy E. Sutton, L. Richard Marshall, Harrison J. Goldin, and James H. Tully, Jr., *1966 Report of the Joint Legislative Committee on Matrimonial and Family Laws to the Legislature of the State of New York, March 31, 1966* (Albany: The Committee, 1966). For an account of this committee's work on abortion law, see Stacie Taranto, "Defending 'Family Values': Women's Grassroots Politics and the Republican Right, 1970–1980" (PhD diss., Brown University, 2010).

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Mary B. Tarcher, the executive director of the New York Legal Aid Society, declared that "our present law implies that family life is protected when it does not permit a woman to divorce her husband, who may be in prison for a long time, who may have tried to kill her, who may be a hopeless and degraded drug addict, who may have abandoned her and refused any financial support or who may be a homosexual."[113] Tarcher railed against the impulse to confine women to marriages with men who may be gay as part of a larger problem of the overly protective divorce parameters in New York. Even on the broadest level, the Joint Legislative Committee suggested that the protection of the institution of marriage threatened the women within it.

In the prescriptive body of the report, the commission specifically recommended that the New York legislature address the omission of homosexuality from adultery in addition to other recommendations. It based its endorsement on expanding adultery to include homosexual infidelity in a few specific cases. First, it cited the infamous case *Cohen v. Cohen*, which was discussed above. Because *Cohen* had reached a national audience, the report considered it a significant embarrassment to the state of New York. The report also named another case, recounted to the committee by a legal aid clinic in Buffalo, in which a "Mrs. Burke" sought a divorce from her husband following his arrest for sodomy. Mrs. Burke expected that her husband's conviction would be reported in the local papers. She wanted to "terminate the marriage before her two children, age two and a half and one, became aware of this, and also before any unfortunate situations arose in her home."[114] The Buffalo Legal Aid Society, however, saw that there was little that they could do for Mrs. Burke, given the state of New York fault divorce law. They also reported that Mrs. Burke's was not their only case in which a wife could not secure a divorce from a husband convicted of sodomy. For example, the organization had another client whose husband had attempted an unnatural act on one of his children.[115] Similarly, the Council of Churches of Buffalo and Erie Counties also indicated to the Legislative Committee that the exclusion of homosexual adultery hurt women and children. They reported a case in which the husband of one of their clients had been sentenced to Attica State Prison after sodomizing his son.[116] The Council of Churches indicated that "if the man had committed a similar act of sexual

113. Wilson, et al. *1966 Report of the Joint Legislative Committee on Matrimonial and Family Laws to the Legislature of the State of New York,* v.

114. Ibid., 32.

115. Ibid.

116. Ibid., 33.

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activity upon a girl, his wife could have gotten a divorce. But because he committed it upon a boy, it is not possible for her to get a divorce.'"[117]

Such cases, along with the divorce detective's memoir, suggested that *Cohen* and *Freitag* were not exceptional cases, and that such appellate court decisions served as precedents at the trial court level. Like Cohen, some of these men went to jail, which meant both that their wives became solely responsible for their families and that their husbands' crimes were probably a matter of public knowledge. And like Jack Richardson's and Crissman's cases, legal experts conflated homosexuality and pedophilia, but excluded both as grounds for a divorce. These less high-profile cases clearly resembled the more notorious cases that earned New York its reputation. The members of the committee granted that it would be possible to abuse this ground for divorce, but nonetheless maintained that this would be unlikely, given the precision of the law.[118] In the end, the committee recommended that "the peculiar anomaly of granting divorce because of heterosexual adulterous activity and refusing it in cases of such activity when it is of homosexual nature, should be abolished."[119]

The full New York Legislature went about resolving this issue as part of the larger marital reform agenda that the committee recommended. Beginning in late 1965, legislators introduced several competing bills for reforming divorce law. The most prominent bill would add new grounds for divorce, including cruel and inhuman treatment in which cohabitation endangered one spouse, abandonment for a given period, willful nonsupport, imprisonment for a felony, and an immensely controversial mutual separation ground that would essentially function as no-fault divorce after a couple had lived apart for 2 years. The new divorce statute would also expand adultery to include "homosexuality and sodomy as well as natural adulterous relations with a member of the opposite sex."[120] The Catholic Church immediately called on the legislature not to introduce the provision that would have allowed for divorce by mutual agreement. To try to meet the church's concerns, the legislature added a Catholic sponsor to the bill and a provision for mandatory reconciliation procedures for a year following the 2 year separation. Eventually, they replaced the 2 year

117. Ibid.

118. Ibid., 174–75.

119. Ibid.

120. Eric Pace, "Panel on Divorce Weights 6 Reforms: 'Consent' Action Expected to Be Among Proposals to the Legislature," *NYT,* December 3, 1965, 1. Natalie Jaffe, "Divorce Reform Believed Gaining: Expected to Be Debated in Albany for the First Time," *NYT*, December 29, 1965, 1.

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separation with a 5 year separation. Nonetheless, the church continued to oppose the bill, and a rival bill eliminated the no-fault provision.[121]

What remained in both bills, seemingly without comment or controversy, was the expansion of adultery to include homosexuality and sodomy. In essence, both bills borrowed "the phrase 'deviate sexual intercourse' … from section 130.00 of the Revised Penal Law which says that the term 'means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva.'"[122] While the courts had faithfully defended the narrow interpretation of adultery in the postwar era as necessary for the preservation of families, the legislature found it fundamentally damaging to individual wives and children. Finally, the New York legislature passed the bill with the expansion of the meaning of adultery on April 28, 1966, and 4 hours later, Governor Nelson Rockefeller signed it.[123]

The newly expanded divorce bill went into effect with some publicity. The *New York Times* reported that "adultery under the new law in New York has been defined to include 'deviate sexual intercourse,' such as homosexuality or sodomy," but the paper also noted "it is not expected to be a widely invoked cause by applicants for dissolution of their marriage."[124] Nor seemingly was it. An exposé on the "female homosexual" claimed that the new divorce provision was rarely used even against women. This implied more of a stigma to the new provision than a lack of applicable cases: for example, a Long Island female couple with five children ranging in age from 8 to 20 from both of their previous marriages had both gotten divorced on other grounds, even though at least one of the former husbands knew of his wife's same-sex affair.[125] The change in the divorce law did not enact fundamental changes to the majority of New York divorces, although it presumably freed some of the women cited by the legal aid clinics from their marriages.

121. Sydney H. Schanberg, "Catholic Church Bids Legislature Delay on Divorce," *NYT,* February 2, 1966, 1. Sydney H. Schanberg, "Bill on Divorce Being Amended: Sponsors in Albany Seek to Assure Vote for Reform," *NYT,* March 8, 1966, 28.

122. Henry H. Foster, Jr., and Doris Jonas Freed, *The Divorce Reform Law; An Analysis* (Rochester, NY: The Lawyers Co-operative Publishing Company, 1970).

123. Sydney H. Schanberg, "Divorce Reforms, First in 179 Years, Enacted by State: Groups Widened," *NYT,* April 28, 1966, 1. For more on this law and its effects, see Riley, *Divorce,* 157.

124. Robert E. Tomasson, "New Divorce Law Becomes Effective in the State Today: Divorce-Reform," *NYT,* September 1, 1967, 40. The next year, Canada also expanded its fault divorce laws to include grounds of sodomy, bestiality, rape, homosexuality, physical and mental cruelty, and marriage breakdown. The law went into effect July 2, 1968. George Bain, "Trudeau on Morality," *NYT,* July 21, 1968, SM59.

125. Enid Nemy, "The Woman Homosexual," 62.

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New York's 1966 statutory change was not driven only by a legislature sympathetic to wives tangled in the hypocrisies of a regressive court system. Instead, the reversal indicated a change in how states were beginning to think about the goals of marriage and the dangers of homosexuality. Policy makers had become increasingly skeptical that wives should have to stay with homosexual husbands and, in New York's case, legislated specific exemptions for this. This change was inspired more broadly, however, by growing doubts about fault divorce in general. Such skepticism was visible in the competing no-fault bills in the New York legislature that failed when they ran up against the Catholic Church. But even the Catholic Church had its limits in 1970s America.

The system that confined wives in marriages with gay husbands ended in most states not with legislation explicitly including homosexual affairs as a fault violation as it had in New York, but instead with the institution of no-fault divorce. Ironically, New York's attempt to jump from 1787 to the late twentieth century by making homosexual adultery a grounds for divorce was outdated just 3 years later. Beginning with California in 1969, most states eliminated fault divorce over the course of the next decade. With the elimination of fault divorce, a judge also lost the ability to confine a wife to a marriage with a husband engaging in homosexual activity.[126] As the *Chicago Tribune* wrestled with the implications of California's transition from a fault to no-fault regime, it noted of the old California fault divorce regime that "adultery, for example, was a ground for divorce but only with a person of the opposite sex; homosexual activity on the part of either a husband or wife was not therefore considered adulterous."[127] In the postwar era, then, California law resembled New York law when it came to adultery. Wives could not necessarily win a divorce against a husband who had cheated with another man. Then no-fault divorce swept away the concept of fault entirely; nearly everywhere but New York. For most couples across the country, it no longer mattered that a husband had cheated on his wife with anyone of either sex.

In the postwar period, the state and the economy depended on marriage to corral men into being good citizens. This led divorce courts to treat men who had same-sex encounters in unexpected ways in the postwar period, including denying their wives fault divorces. But the overwhelming importance of keeping men married gave way at the end of the postwar period. By the 1970s, it no longer seemed necessary to confine gay men to marriage. In part, the distance from World War II and the waning of the Red Scare drained much of the urgency away from confining men to

126. See, in particular, DiFonzo, *Beneath the Fault Line.*

127. Joseph Epstein, "Divorce: Part Two," *Chicago Tribune*, November 12, 1972, 46, 48.

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their marriages. An emerging gay liberation movement helped eliminate the stigma of homosexuality and made sexual expression a more important factor in authentic individuality. The movement also, perhaps, decreased the number of gay men and lesbians marrying in the first place.[128] Beyond this, however, homosexual husbands were no longer dangerous threats to the social order or the political economy under the new no-fault regime; they were neoliberal individuals, as were all husbands. A growing skepticism about the traditional roles of husband and wife in the dawning of the neoliberal age clearly played a role.[129] In particular, men and women alike increasingly challenged the overall concept of a household with different roles for men and women within it. While feminists challenged the homemaking roles that they saw as restrictive of progress outside the home, husbands became equally dissatisfied with having to serve as breadwinners. Both groups lobbied state legislatures across the nation, most of which then stripped away nearly all of the traditional gendered obligations of marriage that had dictated the political economy since the nineteenth century.[130] In other words, the ways in which divorce court judges perceived the danger of a gay man outside the heteronormative family evolved alongside the gender norms, political economy, and international climate of the postwar period.

128. Although it certainly did not eliminate the practice or the fear of being discovered. See for example, Rebecca Nahas and Myra Turley, *The New Couple: Women and Gay Men* (New York: Seaview Books, 1978); W.S. Standeford, "The Bonds and Bondage of Wedlock: Gay Men in Straight Marriages," *The Advocate* August 23, 1978, 12; Name Withheld from Seattle, WA "Excellent 'Bonds,'" *The Advocate*, October 4, 1978, 22; "Opening Space," *The Advocate*, April 16, 1981, 6; P. Gregory Springer, "Alternative Lifestyles: Choosing to Marry," *The Advocate*, April 30, 1981, 21; and Thom Willenbecher, "The Trauma of Transition: How Gay Men in Straight Marriages Face Divorce," *The Advocate*, February 8, 1979, 14. Willenbecher notes that "Since many gay men seeking a divorce are professional people who have a lot to lose if their sexual preference becomes public knowledge via the court system, this too. . .puts the man at an enormous disadvantage in the negotiation process and may cause the man to allow the settlement to tilt in favor of his wife. Peter [M.] describes the process as 'a bit short of legalized blackmail.'" Thom Willenbecher, "A Look at the Legalities," *The Advocate*, February 22, 1979, 44. For the changes introduced by gay liberation, see D'Emilio and Freedman, *Intimate Matters.*

129. Ehrenreich, *Hearts of Men.*

130. For more on dismantling the breadwinner–homemaker model, see Alison Lefkovitz, "The Problem of Marriage in the Era of Women's Liberation" (PhD diss., University of Chicago, 2010).

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